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A Rule Old and New, Borrowed and Blue: Exxon Adapts State Punitive Liability Law to Craft New Interpretation in Admiralty

Erin L. Brooks
ebrooks6@slu.edu

A RULE OLD AND NEW, BORROWED AND BLUE: *EXXON* ADAPTS STATE PUNITIVE LIABILITY LAW TO CRAFT NEW INTERPRETATION IN ADMIRALTY

INTRODUCTION

Eleven million gallons of crude oil spilled, 1,500 shoreline miles contaminated, and nineteen years of litigation fought.[1] These are the well-known hallmarks of the cases collectively known as *Exxon*. Yet, landmark liability and damages issues from this 1989 catastrophe continue to create slippery scenarios for today's courts. Complex issues of liability and damages resulting from the 1989 Exxon Valdez incident, the largest oil spill in United States maritime history, have created intense litigation now spanning two decades.[2] Though the Supreme Court's June 2008 treatment of this case marked the nearing finale of *Exxon Shipping Co. v. Baker*,[3] the Court's decision will become a landmark decision in not only admiralty law, but in all American punitive damage law.

The Court's milestone decision in *Exxon* carries value for all American courts regardless of their posture as admiralty courts. The Court's brief discourse on due process certainly requires the attention of lower courts and courts sitting in admiralty with facts similar to *Exxon*'s limitation on punitive damages. A significant though less discussed strand will be that regarding common law limitation on nonadmiralty punitive damages.

Exxon was decided under admiralty law given the accident's occurrence on the seas; the precedent on which it must rely and for which it will stand is, strictly speaking, limited to admiralty.[4] But *Exxon*'s limited posture as an admiralty case will not limit the inevitable significance the decision will bear

1. Press Release, Defenders of Wildlife, Exxon Valdez Oil Spill: Fifteen Years Later (March 24, 2004), http://www.defenders.org/newsroom/press_releases_folder/2004/03_24_2004_exxon_valdez_oil_spill_fifteen_years_later; *Exxon Valdez Case Heads to Closure After 19 Years*, Feb. 27, 2008, http://www.wholetruth.net/downloads/pressReleases/02272008%20Red%20Orbit.pdf.

2. THE NAT'L RESPONSE TEAM, THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT ES-2 (1989), *available at* http://www.akrrt.org/Archives/Response_Reports/Exxon Valdez_NRT_1989.pdf.

3. 554 U.S. ___, 128 S. Ct. 2605 (2008) [hereinafter *Exxon*].

4. *See id.* at 2619 (discussing Exxon's reliance upon admiralty law in the context of punitive damages).

on general American common law in the future.[5] This note will establish the importance of the Exxon holding by drawing parallels to other cases of admiralty that have impacted the general common law. At the core of this issue is the dynamic—and under-studied—interplay between the narrow area of admiralty law and the larger arena of general common law.

In *Exxon*, the Supreme Court granted certiorari to determine whether punitive damages were appropriately awarded against Exxon for its liability in the 1989 oil spill and, if so, whether those damages were excessive.[6] At the time the Court heard the case, the punitive damage award stood at $2.5 billion, dwarfing compensatory damages, which remained at $507.5 million.[7] The issue of whether and how to limit excessive punitive damages arose under federal admiralty law and was an issue of first impression for the Court.[8] Monumentally, the Court drew a bright-line rule that limited punitive damages to the amount awarded in compensatory damages in maritime cases where reckless conduct resulted in injury.[9] Readers are best primed to understand the underlying rationale of this stringent bright-line rule by first appreciating the key facts and context of this case.

I. FACTS

The Exxon Valdez incident of 1989 has become *the* infamous oil spill in American history given its large size, traumatic environmental effect, and, most notably, the fact that it could have been prevented.[10] Just minutes after midnight on March 24, 1989, an Exxon Valdez bulk oil carrier collided into Bligh Reef, located off the coast of Alaska.[11] The vessel's cargo consisted of more than 53 million gallons of crude oil.[12] Within five hours, the vessel had spilled 10.1 million gallons of crude oil (20% of its total cargo) into the sea

5. For a discussion on the existence of a "general common law," see Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523 (2004).

6. *Exxon*, 128 S. Ct. at 2611.

7. *Id.* at 2611, 2634.

8. *Id.* at 2619.

9. *Id.* at 2633.

10. KARLENE H. ROBERTS & WILLIAM H. MOORE, MANAGEMENT OF HUMAN ERROR IN OPERATIONS OF MARINE SYSTEMS, A GORDIAN KNOT: INTO WHICH SAILED THE EXXON VALDEZ, REPORT NO. HOE-92-1, at 8, 10, 25 (Jan. 1992), *available at* http://www.mms.gov/tarprojects/167/167AC.pdf (detailing the large margin for human error in maritime technology and Exxon's policies and management which contributed to the risk and the compounding consequences); Edwin S. Rothschild, Letter to the Editor, *A Debate over Punitive Damages*, N.Y. TIMES, Jan. 22, 1995, at F12. For a detailed discussion regarding the National Response Team's report and prevention recommendations to the U.S. President, see generally NAT'L RESPONSE TEAM, *supra* note 2.

11. THE NAT'L RESPONSE TEAM, *supra* note 2, at ES–1.

12. *Id.* at 3, A–1 (further noting this oil was contained in 1.26 million barrels).

and surrounding coast line.[13] The oil enveloped 1,000 square miles by April 13, just weeks after the spill.[14]

The remote location of the spill confounded the already difficult cleanup efforts; it took clean-up personnel and their equipment two hours by boat to reach the spill site from Valdez, the nearest town.[15] Exxon organized 12,000 people and 1,500 boats to manually remove oil from the contaminated beaches.[16] Crews used various methods to clean the spill, some of which proved controversial because small animals vital to the ecosystem were killed in the process.[17] Oil was cleaned by burning it off, mechanically removing it from the water, and spraying it off with highly pressurized or heated water.[18]

The initial accident resulted from a collision of compounding factors. While docked at port, the crew consumed multiple alcoholic beverages before picking up pizza to bring back onboard.[19] While marine crew are not barred from drinking alcohol onshore, regulations provide for the amount of time that must pass between consumption and the continuation of responsibility onboard.[20] The fact garnering the most media attention was Captain Joe Hazelwood's conduct, who was not only a known recovering alcoholic, but also had a dangerously high blood-alcohol content following the accident.[21] Hazelwood abandoned the third mate, Gregory Cousins, on the bridge to complete navigational calculations (a violation of company policy that required

13. *Id.* at 12; *see also* R.T. Paine et al., *Trouble on Oiled Waters: Lessons from the* Exxon Valdez *Oil Spill*, 27 ANN. REV. ECOLOGY SYSTEMATICS 197, 198 (1996) (stating that, in sum, the vessel spilled 10.8 million gallons of oil).

14. THE NAT'L. RESPONSE TEAM, *supra* note 2, at 13.

15. *Id.* (noting Valdez is a small Alaskan town with a population of 4,000 and a small airstrip whose traffic jumped from ten flights a day to 1,000 during clean-up efforts).

16. Paine et al., *supra* note 13, at 202.

17. *See* EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, EXXON VALDEZ OIL SPILL RESTORATION PLAN: UPDATE ON INJURED RESOURCES AND SERVICES 10–11 (Nov. 2006) (noting that the productivity rates of the Black Oystercatcher decreased with the onset of clean-up efforts).

18. NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION, SUMMARIES OF SIGNIFICANT U.S. AND INTERNATIONAL SPILLS, 1967–1991, REPORT NO. HMRAD 92–11 (1992).

19. DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME 10–11 (The Free Press 1997).

20. *Id.* at 10.

21. Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2612 (2008) ("Its captain was one Joseph Hazelwood, who had completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed follow-up program and stopped going to Alcoholics Anonymous meetings."); *see also Investigator Testifies of Smelling Alcohol on Hazelwood's Breath*, N.Y. TIMES , Feb. 17, 1990, at 13; *but see Tanker's Captain Seemed Sober, Pilot Tells Court*, N.Y. TIMES, Feb. 7, 1990, at A17 (describing testimony that Hazelwood did not seem intoxicated). *See generally* LEBEDOFF, *supra* note 19, at 1–17 (providing an interesting narrative on the incident).

two officers on the bridge at any time).[22] Already fatigued from his first shift, Cousins began an unscheduled second shift at midnight and also retreated from the bridge to complete navigational calculations.[23] Just after midnight, only the helmsman was on the bridge—minutes later, when the vessel did not turn quickly enough, the vessel directly struck Bligh Reef.[24] The oil spilled rapidly, and Exxon's liability rapidly stacked up.

The National Transportation Safety Board conducted an official investigation of the disaster.[25] The agency concluded that several factors contributed to the probable cause:

> [T]he failure of the third mate [Cousins] to properly maneuver the vessel because of fatigue and excessive work load; the failure of the master [Hazelwood] to provide a proper navigation watch because of impairment from alcohol; the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for the *Exxon Valdez*; the lack of an effective Vessel Traffic Service because of inadequate equipment and manning levels, inadequate personnel training, and deficient management oversight; and a lack of pilotage services.[26]

Despite significant cleanup efforts, the incident's impact on the environment, wildlife, and commerce remains, even after almost twenty years.[27] Some beaches are still polluted with oil, showing little and slowing change over the past decade.[28] In addition to the hundreds of thousands of animals that died immediately following the spill, some entire species are still "not recovering."[29] Even the commercial fishing industry has not recovered,[30] an injury constituting many of the private legal claims against Exxon.[31]

22. LEBEDOFF, *supra* note 19, at 13–15.

23. *Id.* at 13–14.

24. *Id.* at 15.

25. Jim Hall, Chairman, Nat'l Transp. Safety Bd., Remarks at the Wash. Traffic Safety Comm'n Symposium on Driver Fatigue (Nov. 21, 1996), http://www.ntsb.gov/speeches/former/hall/jh961121.htm (discussing the National Transportation Safety Board's official findings). *See also* NAT'L TRANSP. SAFETY BD., MARINE ACCIDENT REPORT: GROUNDING OF THE U.S. TANKSHIP EXXON VALDEZ ON BLIGH REEF, PRINCE WILLIAM SOUND, NEAR VALDEZ, ALASKA, NTSB/MAR-90/04 (Mar. 24, 1989). The report is available for purchase through the National Technical Information Service at http://www.ntis.gov/search/product.aspx?ABBR=PB90916405.

26. Hall, *supra* note 25.

27. *See* EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, *supra* note 17, at 9. In fact, the impact on the environment has not significantly changed over the past decade. *See, e.g.*, Sam Howe Verhovek, *Across 10 Years, Exxon Valdez Casts a Shadow*, N.Y. TIMES, Mar. 6, 1999, at A1 (noting that in 1999 only two species affected by the accident had recovered).

28. Jeffrey W. Short et al., *Slightly Weathered* Exxon Valdez *Oil Persists in Gulf of Alaska Beach Sediments After 16 Years*, 41 ENVTL. SCI. & TECH. 1245, 1245 (2007) (noting that in 2001, an estimated 100 tons of oil remained on the beaches).

29. EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, *supra* note 17, at 6 tbl.1.

The extensive and diverse consequences of the accident gave rise to compound litigation. The United States government and private plaintiffs sued Exxon and particular employees in both criminal and civil contexts.[32] In sum, eighty plaintiff law firms litigated competing claims that required two hundred experts, one thousand depositions, almost twenty million documents, and $5.3 billion in verdicts and settlements.[33] The original 1994 civil judgment alone awarded $5 billion in punitive damages to 34,000 fishermen and other plaintiffs who claimed economic injury from the incident.[34] These facts illustrate the incident's magnitude and the intertwining interests which add color to the case's procedural posture.

II. HISTORICAL ANALYSIS

A. "Trial Phases": The District Court's Organization of Parties and Liabilities

Exxon's legal liability stemming from its 1989 incident touched both criminal and civil law.[35] Exxon was charged under several United States environmental laws, attaching a $25 million fine plus $150 million in restitution.[36] The U.S. also sought civil liability against Exxon, which entered a consent decree that Exxon would pay a minimum of $900 million toward the restoration of natural resources.[37] Additionally, Exxon's settlements with private parties such as fishermen totaled another $303 million.[38]

30. *Id.* at 35 ("[C]ommercial fishing, as a lost or reduced service, is in the process of recovering from the effects of the oil spill, but full recovery has not been achieved.").

31. In fact, Exxon had already fully compensated for the harm to the environment; the punitive damages at stake in *Exxon* were to be paid directly to commercial fishermen whose livelihoods suffered as a result of this incident. Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2611 (2008).

32. *See id.* at 2613. *See also* Keith Schneider, *Tenacious Lawyer Turns Exxon Spill Into Pollution Case for the Ages*, N.Y. TIMES, Sept. 9, 1994, at B7 ("About 15,000 fishermen and other Alaskan plaintiffs sued Exxon, asserting that the spill had destroyed their livelihoods.").

33. N. Robert Stoll, *Litigating and Managing a Mass Disaster Case: An Oregon Plaintiff Lawyer's Experience in the Exxon Valdez Oil Spill Litigation*, OR. ST. B. BULL., Oct. 1995, at 14, 15.

34. Keith Schneider, *Exxon is Ordered to Pay $5 Billion for Alaska Spill*, N.Y. TIMES, Sept. 17, 1994, at 1. For a discussion on the competing interests and injuries, see Laura Mansnerus, *Business and the Law; A Paper Spill Due in the Valdez Case*, N.Y. TIMES, Feb. 5, 1990, at D2.

35. Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2613 (2008).

36. *Id.* (noting Exxon pleaded guilty to violations of the Clean Water Act, Refuse Act of 1899, and the Migratory Bird Treaty Act).

37. *Id.*

38. *Id.*

But many of the civil cases failed to settle and continued through litigation.[39] The district court divided the remaining plaintiffs, all of whom sought compensatory damages, into three classes: (1) commercial fishermen; (2) Native Alaskans; and (3) landowners.[40] The same district court also certified a mandatory class of plaintiffs seeking punitive damages, collectively known as Baker, which totaled 32,000 individuals.[41] After Exxon stipulated its negligence and liability for compensatory damages, the ensuing trial was subsequently divided into three phases.[42]

The "trial phase" design allowed for clarity and organization of Exxon's liability given that plaintiffs suffered injury in varied degrees.[43] Phase I determined that the conduct of Exxon and Captain Hazelwood was reckless, for which the court attached punitive liability on both Exxon and Hazelwood.[44] Phase II focused on the compensatory damages owed to commercial fishermen and Native Alaskans.[45] While the jury award totaled $287 million in compensatory damages to commercial fishermen, this amount was drastically decreased to $19 million after the court deducted settlements and released claims.[46] Phase III triggered the actual calculation of punitive damages for which Exxon and Hazelwood would each be liable.[47] During Phase III, evidence was introduced regarding the relevant acts and omissions of Exxon's management demonstrating the degree to which punitive liability should be imposed on the defendants.[48] The jury returned punitive damage awards against both parties: an award of $5 billion against Exxon and $5,000 against Captain Hazelwood.[49]

39. *See id.* (noting that the "remaining civil cases were consolidated into" one case against Exxon, Hazelwood, and others).

40. *Exxon*, 128 S. Ct. at 2613.

41. *Id.*

42. *Id.*

43. Keith Schneider, *First Decision of Exxon Valdez Trial Is Expected in Days*, N.Y. TIMES, June 13, 1994, at B8.

44. *Exxon*, 128 S. Ct. at 2614. Additionally, Captain Hazelwood was sentenced to 1000 hours of community service divided over five years for his involvement in the accident. *Exxon Valdez Captain Starts Community Service*, N.Y. TIMES, June 22, 1999, at A23 (noting Hazelwood's community work involved collecting abandoned car parts from the roadside).

45. *Exxon*, 128 S. Ct. at 2614.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

B. Ninth Circuit Rejects Exxon's Multifaceted Appeal Regarding Punitive Liability

On appeal, Exxon objected not only to the amount of punitive damages the court awarded, but also to being held punitively liable at all.[50] Exxon waged its argument on several fronts, none of which was persuasive to the Ninth Circuit.[51] First, Exxon contested its punitive liability, arguing that expenses for the cleanup and criminal and civil sanctions already served as adequate punishment and deterrence from future conduct.[52] Exxon forcefully claimed that Exxon's payments for cleanup and sanctions already met the twin aims of punitive liability—to punish and deter—making it unnecessary to punish and deter further.[53] Yet the court disagreed and stated that, as a general rule, prior criminal sanctions do not bar punitive damages and, furthermore, that Exxon presented no precedent to substantiate its policy argument.[54]

Exxon also contended that, in any event, punitive damages were flatly prohibited in admiralty law.[55] Unfortunately for Exxon, it again failed to persuade the Ninth Circuit that punitive liability was barred because, as the court indicated, punitive damages are indeed appropriate in maritime under certain circumstances.[56] The court dismissed this argument with brevity, only impliedly indicating that any of these circumstances were applicable to Exxon in the present case.[57]

In sum, Exxon and Baker cross-appealed several times; a central concern was the amount of punitive damages, which were to vindicate "the public interest in punishing harm to the environment."[58] The punitive damages were reduced from the original $5 billion to $4 billion, increased from $4 billion to $4.5 billion, again reduced from $4.5 billion to $2.5 billion, and ultimately,

50. *In re* Exxon Valdez, 270 F.3d 1215, 1225 (9th Cir. 2001), *vacated*, 554 U.S. ___, 128 S. Ct. 2605 (2008).

51. *Id.* at 1246–47 (holding that punitive damages were appropriate but excessive).

52. *Id.* at 1225. *See* Joint Reply Brief and Joint Answering Brief of Exxon Corp. and Exxon Shipping Co. at 1, *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001), *vacated*, 554 U.S. ___, 128 S.Ct. 2605 (2008) (Nos. 97-35191 & 97-35193) ("Exxon's $3.5 billion in spill-related costs and expenses was enough to deter anyone from anything. And Exxon's post-spill changes in procedures demonstrate that deterrence was accomplished in fact").

53. *In re* Exxon Valdez, 270 F.3d at 1225.

54. *Id.* at 1226.

55. *Id.*

56. *Id.* at 1226 n.14 ("Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others.") (citation omitted).

57. *Id.* at 1226.

58. *In re* Exxon Valdez, 472 F.3d 600, 601 (9th Cir. 2006) (citation omitted), *amended by* 490 F.3d 1066 (9th Cir. 2007), *vacated*, 554 U.S. ___, 128 S.Ct. 2605 (2008).

drastically cut to $507.5 million by the Supreme Court.[59] Plaintiffs from all classes were naturally disappointed by each reduction, as these punitive damages were specifically earmarked to compensate them for their economic losses.[60] At the time of its final plea to the Supreme Court, Exxon posted its largest-ever quarterly income of $11.68 billion while it faced already-reduced punitive damages remaining at $2.5 billion.[61]

III. DIVIDED SUPREME COURT

A. Circuit Split Foreshadows Split Court on Exxon's Liability for Hazelwood's Actions

The first issue the Court addressed was whether the district court correctly instructed the jury that "a corporation 'is responsible for the reckless acts of . . . employees . . . in a managerial capacity while acting in the scope of their employment.'"[62] Exxon relied on maritime precedent from 200 years ago in asserting that a ship owner cannot be liable for punitive damages due to its shipmaster's recklessness.[63] It claimed that the jury instructions, as given, wrongfully operated "[to tell] the jury that Exxon must be deemed reckless solely on account of Hazelwood's reckless acts *whether or not* those acts violated properly enforced corporate policies."[64] As such, Exxon claimed that it was inappropriate to premise punitive damages on a theory of vicarious liability solely for the conduct of its agent.

The Court acknowledged that this form of vicarious liability is barred in *some* federal circuits and that the circuits are nonetheless split.[65] With shallow discussion on this issue, the Justices noted they were split, thus owing full deference to the Ninth Circuit's decision to *allow* punitive damages based on the corporate liability theory.[66] While this did not create precedent on the

59. Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2634 (2008); *In re* Exxon Valdez, 472 F.3d 600 at 602 (summarizing procedural history).

60. *Fishermen Express Dismay over Exxon Valdez Ruling*, N.Y. TIMES, Nov. 9, 2001, at A20.

61. Clifford Krauss, *Exxon's Second-Quarter Earnings Set a Record*, N.Y. TIMES, Aug. 1, 2008, at C2. This profit set other records as well—it was the "best quarterly profit ever for a corporation . . . ." *Id.*

62. *Exxon*, 128 S. Ct. 2605 at 2615 (citations omitted).

63. Brief for the Petitioners at 18, Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605 (2008) (No. 07-219).

64. *Id*. at 26.

65. *Exxon*, 128 S. Ct. at 2615. The Court noted that some circuits—but not all—have adopted the Restatement (Second) of Torts rule. *Id.* at 2615 n.4. *Compare In re* Exxon Valdez, 270 F.3d 1215, 1235 (9th Cir. 2001) (adopting the Restatement rule), *with* CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (finding the Restatement rule not applicable to the case).

66. *Exxon*, 128 S. Ct. at 2616.

Supreme Court's part, it did allow for the analysis to proceed through the remaining issues of punitive liability.

B. Exxon Again Argues Statutory Remedy Preemption . . . To No Avail

Throughout litigation, Exxon consistently used the Clean Water Act ("CWA") to argue that the CWA statutorily preempted the availability of punitive damages.[67] Exxon's argument, specifically, was that the CWA's provisions preempted any maritime punitive damages because it was a statute "not addressed to compensation for private harms, but instead prescribes a comprehensive, calibrated scheme of *public* enforcement . . . ."[68] This public enforcement, according to Exxon, was a remedy sufficient in itself, thereby precluding punitive damages for civil liability to private parties for conduct within this statute.[69]

The Court disagreed on the merits of this argument.[70] The CWA, it explained, did not preempt remedies—compensatory and punitive damages especially—to the degree Exxon argued: it was not "intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals."[71] If this were the case, the statute would directly or clearly express a congressional intent to preempt the field or destroy the common law duty.[72] In affirming the Ninth Circuit, the Court concluded that even if such preemption could be indirectly construed or implied, that alone was not enough to abridge a common-law principle such as punitive liability.[73] Having decided that punitive damages were appropriate in the instant maritime case, and not preempted by any federal statute, the Court proceeded to the main event: Exxon's outstanding punitive damages.

67. *Id.* at 2617 (citations omitted). The Clean Water Act is designed to protect waterways and prevent their pollution. 33 U.S.C. § 1251 (2006).

68. Brief for the Petitioners, *supra* note 63, at 40.

69. *Id.* at 40–41.

70. The Court noted that there were two interpretations of Exxon's argument. *Exxon*, 128 S. Ct. at 2618. The first was that any tort action premised on an oil spill is preempted unless it is saved by the statute and the second was that only punitive damages—but not compensatory damages—would be preempted. *Id.* at 2618–19. The Court indicated that congressional intent and statutory language disproved both theories. *Id.* at 2619.

71. *Id.* at 2619. In making this determination, the Court considered that the CWA "expressly" protects "water" and "shorelines" as a statute with these aims would not eliminate such duties of oil companies. *Id.* ("All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies.").

72. *Id.*

73. *Id.* The Ninth Circuit provided a thorough analysis on this preemption, though it is beyond the scope of this Note. *See In re* Exxon Valdez, 270 F.3d at 1228–31 (analyzing the statutory preemption of the common law punitive damages remedy).

C. Exxon *Majority Prescribes a Bright-Line Limitation on Punitive Damages*

The heart of Exxon's appeal was the arguably large size of the punitive damages award, standing at $2.5 billion after it had been twice reduced in the Ninth Circuit.[74] Exxon contested the Ninth Circuit's "evasion" of this issue, claiming that this award was inappropriate given that "plaintiffs . . . received full compensation [and] deterrence and punishment ha[d] been fully achieved."[75] Exxon asserted that substantive admiralty law limited the punitive damages above and beyond implicit constitutional limits.[76] This limitation should exist, Exxon argued, because the underlying policy rationale that tends to support punitive damages did not properly support the policies in the instant context:

> Such awards penalize maritime commerce rather than protect it; they expand rather than limit liability; they are unpredictable and inconsistent; they have nothing to do with compensation for actual injury; and they impede rather than promote settlement and judicial economy.[77]

Exxon alternatively contended that punitive damages were wholly unavailable because the public interest of awarding punitive damages for punishment and deterrence was "fully achieved" given the criminal and civil sanctions the previous courts imposed on Exxon.[78] Such sanctions were "enough to deter anyone from anything" and did not support the judicial aims of uniformity or predictability.[79]

As a traditional last resort, however, Exxon argued that even if punitive damages were not wholly inappropriate, the Court should alternatively adopt a standard for what qualifies as an appropriate award of punitive damages in admiralty law.[80] Exxon suggested to the Court several such standards that either existed in current maritime law or were otherwise consistent with it.[81] Among those alternatives identified: punitive damages should not exceed those prescribed by Congress;[82] punitive damages should not exceed substantial

74. *In re* Exxon Valdez, 270 F.3d at 1246–47 (order to remand from $5 billion); *In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004) (reducing punitive damages from $5 billion to $4.5 billion); *In re* Exxon Valdez, 490 F.3d 1066, 1073 (9th Cir. 2007) (reducing the award from $4.5 billion to $2.5 billion due to mitigating factors such as Exxon's "prompt action . . . to clean up the oil and to compensate the plaintiffs . . . .").

75. Brief for the Petitioners, *supra* note 63, at 44.

76. *Id.*

77. *Id.* at 46–47.

78. *Id.* at 48.

79. *Id.* at 49.

80. Brief for the Petitioners, *supra* note 63, at 50 (warning the Court of "game-show mentality" where juries award "whatever they will" absent such guideposts of appropriateness).

81. *Id.* at 51.

82. *Id.*

compensatory damages;[83] punitive damages should not exceed that which is required to remove any profit from wrongful conduct that is likely detected;[84] and juries may not consider the net worth of corporate defendants in awarding punitive damages.[85]

The *Exxon* Court dismissed the argument that punitive damages were wholly unavailable but agreed that a limitation on punitive damages in admiralty law would be reasonable.[86] After articulating a brief history and rationale for punitive damages,[87] the Court indicated the "real problem" with punitive damages was their "stark unpredictability."[88] The undesirable unpredictability of punitive damages guided the majority's discussion.[89] The Court dismissed several studies that examined the erratic character of jury-awarded punitive damages as insignificant; though these studies identified "reasonable" statistical means of the size of punitive damage awards, the means are the result of awards of extreme high and low amounts rather than amounts that hover near the statistical mean.[90] Encouraging predictability was the cornerstone of the Court's assessment of creating appropriate limitations.

Traditionally, the Court has given only constitutional treatment to "outlier" punitive damages.[91] Limiting punitive damages from a constitutional foundation requires assessment under the Due Process Clause and "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[92] This prohibition is squarely based on the notion that "a person receive fair notice . . . of the severity of the penalty that a State may impose."[93] Punitive damages that may be considered excessive or unreasonable become

83. *Id.* at 52.

84. *Id.* at 53.

85. Brief for the Petitioners, *supra* note 63, at 54.

86. *See* Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2629 (2008) (discussing possible limits on punitive damages in admiralty law).

87. *Id.* at 2620–25. Punitive damages are aimed primarily at retribution and deterrence, whereas compensatory damages compensate injured parties for actual harm. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) ("[Compensatory damages] are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. [Punitive damages], which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing.") (citations omitted).

88. *Exxon*, 128 S. Ct. at 2625.

89. *Id.* at 2625–26 (noting that the vast difference between low and high awards was most worrisome).

90. *Id.* The Court acknowledged that it was unaware of any study demonstrating that punitive damages are consistent across "similar claims and circumstances." *Id.* at 2626.

91. *Id.* at 2626. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.").

92. *State Farm Mut.*, 538 U.S. at 416.

93. BMW of N. America, Inc. v. Gore, 517 U.S. 559, 574 (1996).

unpredictable; this unpredictability deprives defendants of Fifth Amendment fair notice of consequences for unlawful behavior.

Exxon thus presented the Court with a novel question when it contested a punitive damages award in federal *maritime* law. Certainly, constitutional safeguards were entirely relevant (and mandatory), but in this instance the Court had the opportunity to go *beyond* a settled constitutional principle and create a more stringent law.[94] Flowing from the Court's previous evaluation of punitive damages awards as unpredictable, the Court aimed to have a penalty that was "reasonably predictable," allowing actors to make informed decisions when engaging in unlawful behavior and feel "threaten[ed]" by penalties imposed upon previous, similarly situated actors.[95]

To achieve a limitation that would engraft predictability into the punitive damage system of maritime law, the Justices considered pre-existing approaches in state law.[96] This posed a difficult and subjective task for the Court as there is great "difficulty in determining when the dollar amount of punitive damages crosses the line and becomes excessive."[97] *Exxon* considered three approaches—one that was qualitative (verbal) and two that were quantitative.[98] A qualitative limitation establishes a guideline premised upon factors from which the factfinder determines an appropriate amount of damages; there is no hard and fast monetary "cap."[99] In *Gore*, for instance, the Supreme Court identified three "guideposts" to aid the punitive damages determination: (1) "the degree of reprehensibility" of the conduct;[100] (2) the ratio between compensatory damages for actual harm and the punitive damages;[101] and (3) which typical sanctions exist for "comparable

94. *Exxon*, 128 S. Ct. at 2627 ("Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another.").

95. *Id.*

96. *Id.* at 2627–28 (surveying state policies toward limiting punitive damages).

97. Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 139 (2008).

98. *Exxon*, 128 S. Ct. at 2627.

99. *See, e.g.*, BMW of N. America, Inc. v. Gore, 517 U.S. 559, 574–75 (1996). *See also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993) (noting that the process juries use to determine punitive damages is qualitative because they must consider "a host of facts and circumstances unique to the particular case . . . ."); Michael A. Nelson, *Constitutional Limits on Punitive Damages: How Much Is Too Much?*, 23 ME. B.J. 42, 42–43 (2008) (claiming that the *TXO Prod. Corp.* qualitative test is an "I know it when I see it" test).

100. *BMW*, 517 U.S. at 575.

101. *Id.* at 580.

misconduct."[102] Conversely, a quantitative limitation imposes a monetary cap, generally existing as a ratio between punitive damages and actual damages or as an actual monetary amount that no punitive damage award can exceed.

The Court expressly favored a quantitative analyses over qualitative with the aim of crafting a rule that would generate consistency and predictability while operating efficiently toward retribution and deterrence.[103] A qualitative limitation, the Court indicated, was more likely to result in unpredictable application and outlier amounts.[104] In choosing between a quantitative standard that would establish a proportion and one that would enforce a monetary cap, the Court valued two factors: the nature of the claim—tort and contract—and the nature of judicial lawmaking.[105] There exists no "standard" injury in either contract or tort law because what may be an appropriate "maximum" penalty for one set of facts may be entirely inappropriate under another set.[106] Unlike a legislative body, which would have the opportunity to occasionally revisit a monetary cap to adjust it for inflation or other concerns, a court "cannot say when an issue will show up on the docket again."[107] To avoid establishing precedent that may not be revisited for some time to come, the Court opted for a proportional limitation which would effectively operate as a variable maximum with its amount bearing only on the compensatory damages awarded.

With those concerns in mind, the *Exxon* Court sifted through varying proportions to determine how to consistently limit punitive damages while accounting for the unique nature of every case. Because compensatory damages compensate for the actual harm, it is fair to tie retribution and deterrence to that amount.[108] The Court found support and validation for this approach in state law as well as in limited areas of federal legislation.[109]

102. *Id.* at 583. In his dissent, Justice Scalia complained that these "guideposts" were a "road to nowhere [and] they provide no real guidance at all." *Id.* at 605 (Scalia, J., dissenting). Several states use qualitative analyses of punitive damages as well. *See, e.g.*, U.S. Gypsum Co. v. Mayor of Baltimore, 647 A.2d 405, 424–25 (Md. 1994) (reflecting several factors for the jury to consider in determining punitive damages, such as deterrence and wrongfulness of conduct).

103. *Exxon*, 128 S. Ct. at 2628 (implying quantitative limits may not impose a standard any more rigorous than current due process).

104. *Id.*

105. *Id.* at 2629.

106. *Id.*

107. *Id.*

108. *Exxon*, 128 S. Ct. at 2629. The Court regarded the relevance of compensatory damages as inherent in the due process analysis. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003).

109. *Exxon*, 128 S. Ct. at 2629 (noting that treble damages in federal antitrust and patent are controlled by compensatory damage awards).

Absent federal maritime law on a single issue, it is not uncommon for courts sitting in admiralty to "borrow" from state law.[110]

While *Exxon* dismissed other studies that discussed the average *actual* awarded amount of punitive damages, for the purposes of dictating a proportion, it valued another study which assessed damage amounts juries and judges regarded as reasonable awards.[111] The median ratio of all circumstances (from conduct ranging from negligent to malicious) fell at below 1:1—that is, in most cases, punitive damages were generally regarded as reasonable when they were *less* than corresponding compensatory damages.[112] Cases such as *Exxon*, where intention, malice, or primary purpose of personal gain is lacking, have a statistical median ratio of 0.65:1 (punitive to compensatory).[113] The Court drew a more generous line at 1:1—punitive damages could no longer outweigh compensatory damages in federal maritime cases where intent is no more than reckless.[114]

Principles of admiralty law and constitutional law supported this 1:1 ratio. The Clean Water Act, for example, permitted a maximum daily penalty for polluting of $25,000 for negligent violations and $50,000 for polluting with knowledge.[115] Under the due process limitations on punitive damages, the Supreme Court had previously indicated that single-digit ratio maximums are almost always appropriate.[116] Because the Court found that in *Exxon* the punitive damages were appropriate but excessive, the Court swiftly remanded the case, imposing for the first time its 1:1 bright-line limitation on punitive damages.

D. Three Justices, Three Dissents: A Legislative—Not Judicial—Determination in Maritime Law

Justices Stevens, Ginsburg, and Breyer challenged both the present and future applicability of the *Exxon* rule in their respective dissents. Justice Stevens largely relied on principles of maritime law and the importance of legislative history; Justice Ginsburg discussed the limitation's unreliability; Justice Breyer advocated affirmation of the award, citing a number of district and appeals courts which had condoned the award's reasonableness.

110. Robert Force, *Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1374 (1999) ("[S]tate law has been influential in the development of federal maritime law . . . .").

111. *Exxon*, 128 S. Ct. at 2632–33.

112. *Id.* at 2633.

113. *Id.*

114. *Id.*

115. 33 U.S.C. § 1319(c)(1) (2006); *Exxon*, 128 S. Ct. at 2634.

116. *Exxon*, 128 S. Ct. at 2634 (2008). *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (noting that when compensatory damages are "substantial" a smaller ratio may be desirable).

1. Justice Stevens: Not Our Rule to Make

In his dissent, Justice Stevens did not outright rebut the limitation on punitive damages, but rather, took issue with its birth in the judiciary instead of in the legislature.[117] In articulating this, Justice Stevens distinguished federal maritime law from other law on the basis that "maritime tort law is now dominated by federal statute."[118] Given that Congress is the primary author of maritime law, its affirmative decision to not limit punitive damages requires "judicial restraint" in limiting remedies.[119] Justice Stevens relied on an important distinction that the majority opinion largely disregarded: the consequence of the lack of legislative restriction on maritime tort damages.[120] Justice Stevens cited other areas in which statutes have shielded ship owners from liability, indicating that Congress exercises its power in limiting remedies only when it sees fit, and absent this intent, it is not the Court's responsibility to supply it.[121] In fact, Justice Stevens criticized the majority for failing to identify any state court that has adopted an equally precise ratio.[122] He likewise noted that state *legislatures*, not courts, have adopted a limitation that resembles *Exxon*.[123] Justice Stevens thus advocated that Congress was the competent body to "assess the empirical data, and to balance competing policy interests . . . ."[124]

Justice Stevens further faulted the majority for failing to consider the unique nature of admiralty law and its remedial schemes by instead misplacing its reliance on empirical data from land-based legal remedies.[125] Unlike other bodies of law, he noted, compensatory damages are limited in general maritime law.[126] In their modernized form, punitive damages generally serve no compensatory function; but because compensatory damages are often limited under admiralty law, courts employ punitive damages to supplement compensatory damages.[127] So punitive damages may be awarded differently in maritime than in the land-tort context to account for those injuries which maritime law refuses to award compensatory damages (i.e. purely financial or

117. *Exxon*, 128 S. Ct. at 2634 (Stevens, J., dissenting).

118. *Id.* at 2635 (internal citations omitted).

119. *Id.*

120. *Id.*

121. *Id.* at 2635–36 (referring to the Limitation of Shipowners' Liability Act, which shields shipowners from liability when charged with wrongdoing committed without their knowledge).

122. *Exxon*, 128 S. Ct. at 2636 (Stevens, J., dissenting).

123. *Id.* at 2637.

124. *Id.*

125. *Id.* at 2636–37.

126. *Id.* at 2636. *See generally* Brandon T. Morris, *Oil, Money, and the Environment: Punitive Damages Under Due Process, Preemption, and Maritime Law in the Wake of the* Exxon Valdez *Litigation*, 33 TUL. MAR. L.J. 165 (2008).

127. *Exxon*, 128 S. Ct. at 2637 (2008).

emotional harm).[128] An underlying premise in the studies the majority relied on was that compensation had already accounted for actual harm, so punitive damages must only deter and punish. Naturally, whether injured parties have been compensated is a key consideration that will change what a judge or jury considers a "reasonable" award.

Justice Stevens concluded that the Court should have reviewed *Exxon* for "abuse of discretion" (the general standard) rather than applying a strict, quantitative value.[129] If the Court's primary concern was large outlier awards, he reasoned, reviewing them for an abuse of discretion would sufficiently eliminate such troublesome awards.[130] Under this standard, the award should have been affirmed:

> In light of Exxon's decision to permit a lapsed alcoholic to command a supertanker carrying tens of millions of gallons of crude oil through the treacherous waters of Prince William Sound, thereby endangering all of the individuals who depended upon the sound for their livelihoods, the jury could reasonably have given expression to its "moral condemnation" of Exxon's conduct in the form of this award.[131]

Justice Stevens believed that although the Court had the power to limit damages, "it errs in doing so."[132]

2. Justice Ginsburg: No Limiting the Limit's Application

Justice Ginsburg's reservation from joining the majority centered on the bright-line rule with lines that were too ambiguous.[133] It was unclear, she felt, whether this limitation on punitive damages would be applicable only in admiralty law or whether it signaled a broader constitutional limitation, as well.[134] The implication of this distinction is clear: Which courts will be bound to this rule? If the Supreme Court does not know, how will a lower court fearing appellate review know when it *must* limit available punitive damages? Compounding this issue was the majority's reliance on limiting damages based upon the degree of reprehensibility of the conduct (applying it only where conduct is reckless).[135] Justice Ginsburg noted that while the majority indicated that reprehensibility affected the limitation, it did not clearly

128. *Id.* ("[P]unitive damages may serve to compensate for certain sorts of intangible injuries not recoverable under the rubric of compensation.").

129. *Id.* at 2638.

130. *Id.*

131. *Id.*

132. *Exxon*, 128 S. Ct. at 2638 (2008).

133. *Id.* at 2639 (Ginsburg, J., dissenting).

134. *Id.* ("[I]s the Court holding *only* that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed 'the *constitutional* outer limit?'") (emphasis added) (internal citations omitted).

135. *Id.*

identify how it did so.[136] If courts must limit punitive damages to compensatory damages when the conduct was reckless, it is unclear how they should limit punitive damages when the conduct is intentional—or worse, malicious.

Justice Ginsburg lamented that not only was the majority's rule unclear and confusing, but it was also premature because it lacked "an urgent need."[137] She highlighted the majority's concession that traditional appellate review of punitive damages (a "reasonability" standard) had not yet resulted in "mass-produced runaway awards."[138] She thus laid her final argument on the point that absent an immediate problem the rule was excessive and premature. Justice Ginsburg predicts that the Court will likely return to this issue in the near future to determine just how far this limitation will reach and whether this is, in fact, a constitutional limitation.[139]

3. Justice Breyer: Deference Owed to the Many Lower Courts that Decided in Accord

Justice Breyer dissented on the basis that each of the district courts' awards was appropriate and adequately investigated.[140] He noted that the reprehensibility of Exxon's conduct indeed warranted severe punitive liability because "[t]he jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case."[141] Those facts, he explained, made it reasonable for the jury to have attached steep punitive damages to Exxon's conduct.[142] Reviewing courts, Justice Breyer noted, "engaged in an exacting review" multiple times, each with a "more penetrating inquiry" and even when confronted with the opportunity to conclude that the damages were unreasonable, the courts chose to maintain relatively similar amounts.[143] Despite the appellate remands to lower the award, every court below the Supreme Court still maintained a punitive damage award that was five times greater than the compensatory damages.[144]

Justice Breyer, along with Justices Ginsburg and Stevens, would have affirmed the Ninth Circuit given the unique nature of admiralty law, the

136. *Id.*

137. *Exxon*, 128 S. Ct. at 2639.

138. *Id.* (citations omitted).

139. *Id.* ("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?").

140. *Id.* at 2640 (Breyer, J., dissenting).

141. *Id.* (Breyer, J., dissenting).

142. *Exxon*, 128 S. Ct. at 2639.

143. *Id.* (citations omitted).

144. *Id.*

reprehensibility of Exxon's conduct, and the uncertain jurisprudential implications of the new bright line rule.[145]

IV. ANALYSIS OF OPINION

A. Admiralty Law's Circular Relationship with General Common Law

The interaction between admiralty and common law is an important concept to understand because of the unique way in which admiralty law derives its jurisdiction and authority. Admiralty law, which governs bodies of water, is a distinctive body of law—"an amalgam of traditional common-law rules, modifications of those rules, and newly created rules."[146] The jurisdiction of courts sitting in admiralty is generally "all waters, salt or fresh" which are "navigable in interstate or foreign water commerce . . . ."[147] Admiralty is also one of the few areas of "general" federal common law.[148] This is not to say that admiralty law exists as an island in the sea of law; in reality, there is a substantial relationship and dynamic interplay between the two bodies—though this relationship is arguably under-studied.

Admiralty law is "aimed at providing the shipping industry with a uniform body of law."[149] As such, federal admiralty law is mandatory authority over cases of admiralty law.[150] A frequent scenario subsequently arises when admiralty law is silent on an issue, as in *Exxon*. In those cases, federal courts may—and do— "borrow state law" as long as no applicable federal admiralty law exists.[151] It is therefore inevitable that state law is reinvented when federal courts sitting in admiralty borrow state law to resolve issues of first impression because federal courts reinterpret and reapply it in unprecedented manners. As those new interpretations become precedent, their value evolves from purely persuasive into mandatory to be readopted by the same state courts that loaned the law in the first place.

145. *Id.*

146. E. River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 864–65 (1986).

147. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 31–32 (Foundation Press 2d ed. 1975).

148. *Id.* at 45–47.

149. Orgulf Transport Co. v. Hill's Marine Enterprises, Inc., 188 F. Supp. 2d 1056, 1062 (S.D. Ill. 2002).

150. *Id.*

151. *Id. See also* Continental Casualty Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 519 (7th Cir. 1999) ("A federal court sitting in admiralty can, by analogy to the practice of the federal courts in regard to federal common law . . . , borrow the law of a state or a foreign country to resolve a dispute that had come into court under the admiralty jurisdiction, especially when dealing with a subject traditionally regulated by the states. . . .").

B. East River:[152] *Supreme Court Borrows from State Common Law, Returns New Law*

Prior cases provide the strongest indication that the *Exxon* decision will serve as authority in traditional common law, though strictly speaking, the decision only governs maritime law. This is best demonstrated through analogy by evaluating how general American courts have transposed Supreme Court precedent in admiralty into their decisions.

In *East River*, the Court granted certiorari to resolve a circuit split regarding products liability in admiralty law.[153] The Court determined as a threshold issue that products liability was an appropriate body of law under general maritime law.[154] The more specific—and interesting—subject was whether a claim could be sustained when the only injury was to the product itself, constituting a purely economic loss.[155] Without mandatory admiralty precedent to guide the Court's determination, the Court instead surveyed state, land-based common law.[156]

At one end was the majority rule that there can be no recovery for a purely economic injury because such recovery contradicts the public policy guiding products liability theory.[157] Products liability aims to protect consumers by encouraging manufacturers to fix defects which may cause bodily harm regardless of their intent or negligence; under this principle, if resulting harm is only economic and not bodily, the public policy to hold manufacturers liable diminishes.[158] But unlike the majority view, the minority approach extends the duty of manufacturers to produce non-defective products to all instances, even when the only resulting harm is purely economic or only to the product itself.[159] The *East River* Court found both approaches "unsatisfactory," because in reality, purely economic injuries resemble contract claims given that the purchaser is solely deprived the "benefit of its bargain."[160] Warranty law, not tort claims for negligence or strict liability, provided the appropriate and sufficient remedy.[161] Accordingly, the *East River* Court held that

152. E. River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858 (1986).

153. *Id.* at 863.

154. *Id.* at 865–66 (noting that strict liability has been long recognized relating to injuries of workers at sea).

155. *Id.* at 866.

156. *Id.* at 868–70.

157. *E. River*, 476 U.S. at 868.

158. *See* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 284–85 (3d Cir. 1980). For a discussion of the economic loss doctrine and *East River*, see Christopher Scott D'Angelo, *The Economic Loss Doctrine: Saving Contract Warranty Law from Drowning in a Sea of Torts*, 26 U. TOL. L. REV. 591 (1995).

159. *E. River*, 476 U.S. at 868–69.

160. *Id.* at 870.

161. *Id.* at 872–74.

commercial manufacturers do not have any duty to prevent products from harming themselves;[162] consumers may sue only under contract law when those products harm only themselves.[163]

Though *East River* was decided in the context of admiralty law, general courts took notice of the Supreme Court's decision. A minority of courts distinguished their cases from *East River*, citing differences arising from governing state law or factual distinctions.[164] Most notable was the overwhelming response by courts sitting in land law to adopt and follow the *East River* doctrine. As the Third Circuit noted a year after *East River*, "We now predict that Pennsylvania courts, although not bound to do so, would nevertheless adopt as state law the Supreme Court's reasoning in *East River*."[165] In fact, state courts eagerly adopted the reasoning espoused in *East River*.[166] The policy supporting the *East River* holding has largely been the reason that courts have adopted the rule, despite its firm context in admiralty law.[167] Simply put, when the Supreme Court's reasoning transcends one area of law, courts of all areas will take notice.

In sum, *East River* stands for the proposition that just as the common law of land influences admiralty law, so too will doctrines of admiralty law impact land law.[168] It is a valid presumption, then, that the *Exxon* rule will work its way into the general common law despite its original foundation in admiralty law.

162. *Id.* at 871.

163. *Id.* at 872.

164. *See* Alaskan Oil, Inc. v. Cent. Flying Serv., Inc., 975 F.2d 553, 555 (8th Cir. 1992) ("Arkansas law permits recovery under strict liability even when the only damages sustained are to the defective product itself.").

165. Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110, 111–12 (3d Cir. 1987) (holding that fire damage to a product was not recoverable and that warranty law provided the appropriate claim).

166. *See* Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc., 276 F.3d 845, 848 (6th Cir. 2002) ("A large majority of jurisdictions in this country have adopted the economic loss rule."); Winchester v. Lester's of Minnesota, Inc., 983 F.2d 992, 995 (10th Cir. 1993) (discussing two Kansas state appellate decisions following the reasoning of *East River*).

167. *See* Isla Nena Air Servs., Inc. v. Cessna Aircraft Co., 449 F.3d 85, 91 (1st Cir. 2006) ("Although *East River* is an admiralty case, and its decision is therefore not controlling in determining Puerto Rico law, we think the *policy rationales* explained by the Court logically apply to the decision we reach today.") (emphasis added).

168. It should be reinforced that the application of these doctrines between admiralty and land law is persuasive—practitioners still require an understanding of how such authority has been adopted in their jurisdiction. *See generally* Reeder R. Fox & Patrick J. Loftus, *Riding the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later*, 64 DEF. COUNS. J. 260 (1997).

C. Exxon *Will Change the Landscape of Limitations on Punitive Damage Awards*

Exxon's holding and related discourse will serve as precedent for American courts in varying ways. Whether the holding will serve as mandatory or persuasive authority bears upon whether a court is reviewing punitive damages through the lens of due process or whether it is sitting in admiralty.[169] As such, the holding's impact can be loosely grouped in three categories: (1) relevant upon any American court facing a punitive liability due process issue; (2) mandatory upon any court sitting in admiralty with a reckless defendant's punitive liability; and (3) persuasive upon common law courts reviewing excessive punitive damages.

1. *Exxon*'s Due Process Discourse Will Affect Punitive Liability's Constitutional Limits

Even though the Court did not ascribe its bright-line rule as an express due process limitation, there is an implied possibility that it nonetheless signals the constitutional outer edge of punitive liability. Justice Ginsburg was especially concerned with the uncertain application of this rule;[170] even if it is a stretch to construe the rule as a constitutional limit in and of itself, it is very plausible that it marks the first step in this direction. If in doubt, courts will be tempted to give the rule constitutional treatment even if they have not yet been called to do so.

In its analysis, the majority stated that under the due process analysis, compensatory damages bear an "indisputable" relationship with the award of punitive damages.[171] In its constitutional jurisprudence regarding punitive liability, this relationship has been a central consideration because the actual harm a defendant has caused is relevant to how the law should deter similar future conduct and punish that defendant.[172] When the Court hints at what the constitutional limit should be without prescribing a set amount, courts have been inclined to decide their cases so as to comport with these implied limitations. In cases predating *Exxon*, for example, a significant minority of

169. Courts that are not bound to the *Exxon* precedent may not consider the *Exxon* decision regardless of its persuasive value. *See* Line v. Ventura, No. 1070736, 2009 WL 1425993, at *11 (Ala. May 22, 2009) (declining to consider *Exxon* because of the Court's express limitation that *Exxon* was an admiralty case).

170. Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605 (2008) (Ginsburg, J., dissenting).

171. *Id.* at 2629.

172. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (noting that most punitive damages awards that satisfy due process generally bear a single-digit ratio with actual damages); BMW of N. America, Inc. v. Gore, 517 U.S. 559, 580–81 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree.").

courts still reduced punitive damages based upon Supreme Court guideposts even though such guidance was purely subjective.[173] Following *State Farm*, a notable number of courts even reduced punitive damages to match compensatory damages, though there was no mandate that punitive damages had to conform to compensatory damages.[174]

To prevent future judgments from improperly engrafting the *Exxon* bright-line rule into the constitutional analysis, the Court's own precedent may be the best safeguard it has. In *Gore*, for example, the Court detailed hypothetical situations in which punitive damages and compensatory damages should bear no relationship on one another; such a situation may arise when "a particularly egregious act has resulted in only a small amount of economic damages" such that a court should properly give punitive damages greater weight than compensatory damages.[175] In these opinions, the Court hints that punitive liability is best decided on a case-by-case basis, and that it cannot "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[176]

The Court's discourse in *Exxon* seems likely to create confusion. While the Court identified that its rule was not specifically "the outer limit allowed by due process" it later expressed that, regardless, "the constitutional outer limit may well be 1:1."[177] Does the Court intend this to become the constitutional outer limit? In January 2009, the Third Circuit had already identified this apparent contradiction upon its review of punitive damages that were three times greater than compensatory damages in a medical malpractice suit.[178] The *Jurinko* court indeed applied the 1:1 bright line rule after examining pre-*Exxon* cases where this limitation had already been imposed.[179] Though *Exxon*'s due process discourse was not dispositive in this opinion, it nonetheless had an apparent effect upon the court's analysis. Even more expressly, the Ninth Circuit identified a "constitutional framework" within

173. Michael A. Nelson, *Constitutional Limits on Punitive Damages: How Much is Too Much?*, 23 ME. B.J. 42, 44 (2008).

174. *Id.* at 46–47 (identifying circuit and district court cases where courts voluntarily limited punitive damages to compensatory damages). *See, e.g.*, Bach v. First Union Nat'l Bank, 486 F.3d 150, 153–54 (6th Cir. 2007) (reducing punitive damages for conduct that was not sufficiently reprehensible); Motorola Credit Corp. v. Uzan, 388 F.3d 29, 62–65 (2d Cir. 2004) (reducing punitive damages due to the total award's size).

175. *BMW*, 517 U.S. at 582 ("[The Court has] consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.").

176. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993) (citations omitted).

177. *Id.* at 2634 n.28.

178. Jurinko v. Medical Protective Co., Nos. 06-3519 & 06-3666, 2008 U.S. App. LEXIS 26263, at *40–41 (3d Cir. Dec. 24, 2008).

179. *Id.* at *48.

Exxon which it used to justify one district's court's limitation on awarded punitive damages.[180] Neither court felt bound to the *Exxon* rule or its due process discourse, but both valued *Exxon* as authority to premise a due process limitation upon punitive liability.[181]

Similarly, under a purely constitutional review of punitive liability, the Eighth Court noted that *Exxon* "did not *mandate* this ratio as a matter of constitutional law."[182] Still, the court upheld an approximate 1:1 ratio between compensatory damages and punitive damages on a claim for conversion by crediting *Exxon*.[183] On a separate claim for trespass, however, the court declined to enforce the *Exxon* rule given trespass's low actual damages but high reprehensibility.[184] The *JCB* court's distinction provides optimism that courts, when applying *Exxon* as a constitutional guidepost for punitive liability, will continue to also employ traditional guideposts for limiting punitive damages that take into account the nature of the injury and conduct.[185]

Given the Supreme Court's hesitation to articulate a constitutional limitation in *Exxon*—but its relative ease in articulating a limitation upon admiralty law—it is imperative that the Court, in the future, protect its thin discourse in *Exxon* that separates the two. In any event, as lower courts haphazardly cite to *Exxon* to limit punitive liability under due process, the inevitable issue presents itself: To what extent will courts unpredictably apply *Exxon* in pursuit of more predictable awards? Whether the Court intended to constitutionally limit punitive liability under due process, it must likely return an opinion in the future more express than *Exxon* to clarify how the 1:1 ratio *should* be used. In the meantime, the judicial system can achieve true predictability only if courts continue to apply the Court's due process limitations as espoused in *Gore* and *State Farm*, and forego *Exxon* when considering damages through the constitutional lens.[186]

180. Leavey v. Unum Provident Corp., Nos. 06-16285 & 06-16350, 2008 U.S. App. LEXIS 21144, at *8 nn.1–9 (9th Cir. Oct. 6, 2008).

181. *See id.*

182. JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 876 n.9 (8th Cir. 2008) (action for trespass and conversion) (emphasis added).

183. *Id.* at 876.

184. *Id.* at 876–77.

185. Other courts have noted the "importance of keeping these theories straight" between constitutional and conventional excessive damages claims. Kunz v. DeFelice, 538 F.3d 667, 678 (7th Cir. 2008). For a discussion on traditional guideposts regarding punitive liability, see State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).

186. For an example of a district court that has expressly identified this distinction, see Smith v. Xerox Corp., 584 F.Supp.2d 905, 915 n.18 (N.D. Tex. 2008) (indicating that *Exxon* was inapplicable as a maritime case); Valarie v. Mich. Dep't of Corr., No. 2:07-cv-5, 2008 U.S. Dist. LEXIS 93558, at *21–28 (W.D. Mich., Nov. 17, 2008) (offering a lengthy discourse on the limited nature of *Exxon*). *See also* Am. Family Mut. Ins. Co. v. Miell, 569 F.Supp.2d 841, 859

2. Which Maritime Defendants Will Benefit From *Exxon*'s Rule?

Admiralty law is unique because it exists as a limited exception to the general rule that there is no "federal general common law."[187] In this arena, courts have the authority to create what has been termed "the general maritime law."[188] The general maritime law is part statutory, part judge-made. Thus, the Court's decision in *Exxon* has become mandatory authority for any federal court sitting in maritime determining the limit of punitive liability.

Though few admiralty courts have determined an issue regarding excessive punitive damages since *Exxon* was decided in June 2008, one should presume that the 1:1 rule will not have the cleanest application (at least initially).[189] Courts can, of course, theoretically limit punitive damages to compensatory damages under circumstances they see fit when no contrary law exists, but precisely when they *must* limit punitive damages in this manner is not entirely clear. Under *Exxon*, punitive damages must only be limited in precise proportion to actual damages when the conduct is not exceptionally blameworthy (intentional, malicious, or driven for gain) or when it is without "modest economic harm or [low] odds of detection."[190] Arguably, this spans a diverse spectrum of conduct that falls within *Exxon*'s net. Though *Exxon* met each of these earmarks, it is partially unclear how courts should treat cases that meet only the majority of these factors. At what point should the fact-finder determine, for instance, that the odds of detecting reprehensible conduct were low enough to warrant higher punitive damages? At what point does economic harm warrant punitive damages in an amount three times the compensatory damages? Knowing only that the rule will apply in cases like *Exxon* is simply not knowing enough, if the true objective of this rule is predictability and consistency.

3. Application of *Exxon* Rationale Will Not Be Limited to Admiralty

It goes without saying that courts must apply the "law of the state" in issues not governed by the U.S. Constitution or acts of Congress because, as

(N.D. Iowa 2008) ("[T]he [*Exxon*] Court did *not* conclude that the Constitution prohibits a punitive damage award greater than the amount awarded for compensatory damages . . . .").

187. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

188. Force, *supra* note 110, at 1367 (noting "maritime law" is, in fact, the oldest area of federal common law). Though beyond the scope of this note, whether a "general" federal maritime law is constitutional remains a hotly debated issue among legal scholars. *See, e.g.*, Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 602–07 (2006).

189. *See* Norfolk & Portsmouth Belt Line R. Co v. M/V Marlin, No. 2:08cv134, 2009 WL 1974298, at *4–5 (E.D. Va. April 3, 2009). In *Norfolk*, the court rejected plaintiff's amended complaint for punitive damages pursuant to Virginia statute which provided for 3:1 punitive to actual damages on the grounds that it conflicted with *Exxon*. *Id.*

190. Exxon Shipping Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2633 (2008).

Justice Brandeis succinctly stated, "There is no federal general common law."[191] This is not to say, however, that when the Supreme Court speaks on an issue that it falls on deaf ears. Inherent in the status of the Supreme Court as the highest judiciary body in the United States is the inarguable persuasive value its discourse carries; the Court's status allows it to "set the agenda for the country's political and cultural debate . . . ."[192]

Damages and their judicially imposed restraints are not governed by the Constitution or Congress . . . yet. Accordingly, there is no general law that governs these restraints. And the 1:1 bright-line rule in *Exxon* was carefully crafted only for its exclusive application to admiralty law.[193] Yet just because lower federal and state courts are not *required* to apply *Exxon*'s holding does not mean they will not find solace within the rule or its rationale when they intend to limit punitive damages. This is a remarkable trend with a familiar situation: the Supreme Court looks to state law to guide its decision in a narrow area of law, and state courts then take notice of Supreme Court's revised law, under which they are not bound.[194]

The Supreme Court's doctrinal work in maritime law can have dual successes when it is well implemented. When the Court disseminates new law, it "not only solves problems in maritime law but may suggest worthy doctrine to advance the common law in non-maritime contexts."[195] Just as importantly, however, if future application of the *Exxon* rule does, as Justice Ginsburg has suspected, become unworkable, the Court "not only misses an opportunity to grow the common law but generally leaves some channel of admiralty law in turmoil."[196] As such, nonmaritime courts that implement *Exxon* or its rationale should use caution in maintaining the intent of *Exxon* to promote predictability.

Even if courts do not adopt *Exxon* for its discourse in due process, its rationale and objective of increasing predictable awards will nonetheless bear strongly upon future courts. The Ninth Circuit, in its discussion of traditional guideposts from *State Farm* additionally discussed *Exxon* by explaining that "our goal [under *Exxon*] is to determine whether the punitive damages achieved their ultimate objectives of deterrence and punishment, without being unreasonable or disproportionate."[197] In a different opinion, the Ninth Circuit

191. *Erie*, 304 U.S. at 78 (1938).

192. Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 313, 315 (2009) (noting that the "high-profile" cases the Court chooses "frame the broader cultural debate by pushing these issues to the forefront of political discourse.").

193. As the *Exxon* Court stressed, however, state courts and legislatures have heavily regulated punitive damage awards. *Exxon*, 128 U.S. at 2623.

194. *See supra* Part IV.B.

195. Joel K. Goldstein, *Towage*, 31 J. MAR. L. & COMM. 335, 335 (2000).

196. *Id.*

197. S. Union Co. v. Irvin, 563 F.3d 788, 791 (9th Cir. 2009).

again relied on the purpose of the *Exxon* rule as "the importance of notifying defendants of their potential punitive damage liability."[198] From these cases it is clear that the Court's well-articulated objective of predictability will influence the diligence with which courts will review punitive damages awards; even if these awards bear no conformity to one another across the board, the judiciary's cognizance of the importance of predictability will undoubtedly support that goal.

Courts will also apply *Exxon* to not only achieve the articulated objective of predictable punishment but also to ensure that defendants are appropriately reprimanded. This is particularly true given the Court's consideration of the reprehensibility of Exxon's conduct when limiting punitive damages so stringently. For example, one district court opined that punitive damages in a false arrest case were sufficient where the conduct was "outrageous" but resulted in "no significant harm."[199] Although this application was converse to *Exxon* (as the harm was less significant than the conduct itself), it illustrates the willingness of lower courts to justify awards based on *Exxon*'s rationale of reprehensibility. Still, other courts will apply *Exxon* to demonstrate that their awards comport with reasonability by employing the *Exxon* bright-line as a guidepost. Assessments premised upon this rationale will proceed from the theory that if a 1:1 ratio between punitive damages and compensatory damages was heralded as the *maximum* in one area, the courts are justified if they designate even lower ratios.[200]

Before the Court handed down its final decision in *Exxon*, some predicted the decision was "not likely to affect punitive damages in non-maritime cases."[201] But in the immediate months after *Exxon*, one court had already remarked that "it is clear that the Supreme Court intends that its holding have a much broader application."[202] While only the grace of time and patience of the judicial system will indicate exactly how *Exxon* will be applied outside of admiralty, its application is imminent.

CONCLUSION

For Exxon, one of the world's oil giants, *Exxon* was the grand finale of twenty years of litigation; for the plaintiff fishermen and Native Alaskans, it

198. Research Corp. v. Westport Ins. Corp., 289 Fed.Appx. 989, 993 (9th Cir. 2008).

199. Ellis v. La Vecchia, 567 F.Supp.2d 601, 611 (S.D.N.Y. 2008) (citations omitted).

200. *See, e.g.*, Glass v. Snellbaker, CA No. 05-1971, 2008 U.S. Dist. LEXIS 71241, at *39 (D.N.J. Sept. 17, 2008) (noting that the punitive damages awarded only half of what plaintiff would receive in back pay in adverse employment case).

201. Linda Greenhouse, *Justices Take Up Battle over Exxon Valdez Damages*, N.Y. TIMES, Feb. 28, 2008, at A19.

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

was a "knife in the gut" and a "giant cold slap in the face."[203] Without a doubt, a decision that removes $2 billion from damages and imposes a bright-line rule on remedies is a decision whose impact is not only substantial to the parties involved, but also to each future, similarly-situated litigant. It is the *Exxon* doctrine, and despite its faults, it is here to stay.

The discourse between the general common law and admiralty law will only continue to grow as federal courts continue to borrow, interpret, and articulate principles of state law to fill its voids. State courts will readopt these laws as "new takes" on their old laws regardless of the context in which these laws were changed; the rationale for one rule in one context is often, as it will be in *Exxon*, strong rationale for many rules in many contexts.

Exxon and its progeny will reinforce the discourse between general common law and admiralty law as state laws take note of *Exxon*'s broad scope and introduce it into their common law. *Exxon* is a rare composite of law old and new, borrowed and blue. *Exxon*'s original context in maritime and its adoption of state law will be distilled as courts work through its application in both the due process analysis and general limitation of punitive damages. The oil has been cleaned, yet the legacy of *Exxon* is one mess that will continue to impact the law for centuries to come.

ERIN L. BROOKS[*]

203. Christopher Maag, *In Alaska, Rage and Sorrow over Decision*, N.Y. TIMES, June 26, 2008, at A19.

[*] 2010 J.D. Candidate at Saint Louis University School of Law. A special thanks to Professor Joel K. Goldstein for his valuable insight in developing this note. My sincere gratitude also goes to my family and friends for their love and support.