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Punitive Damages after Exxon Shipping Company v. Baker: The Quest for Predictability and the Role of Juries

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ARTICLE

PUNISHMENT FOR ECOLOGICAL DISASTERS: PUNITIVE DAMAGES AND/OR CRIMINAL SANCTIONS

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INTRODUCTION

This article addresses the means of punishing conduct that causes serious environmental harm like the *Exxon Valdez* oil spill. In particular, it considers the appropriateness and effectiveness of both punitive damages and criminal sanctions as remedies in such cases in light of the U.S. Supreme Court's approaches to reviewing both punitive damages awards and criminal sentences for excessiveness. This article recommends, first, that state legislatures should authorize and regulate punitive damages so that appellate courts will not interfere with punitive damages awards, as happened in the *Exxon* case. Second, states should enforce criminal provisions in environmental statutes against both corporate and individual offenders in order to enhance the deterrent effect that such laws have on corporations and their policies, and to express the moral outrage occasioned by culpable conduct harming the environment.

Punitive damages as we have known them—based on culpable conduct, awarded by juries, with no limits, and subject to judicial review—remain available as a remedy for cases like the *Exxon Valdez* oil spill even after the United States Supreme Court's decision in *Exxon Shipping Co. v. Baker*.[2] However, the Supreme Court's decisions reviewing punitive dam-

1. Professor Emeritus, University of New Mexico School of Law. I wish to thank my colleagues at the University of New Mexico School of Law, Professors Erik Gerding and G. Emlen Hall, for their helpful comments on drafts of this article and Dean Kevin Washburn of the University of New Mexico for his support of this project. Eileen Cohen, reference librarian, deserves special thanks for her research assistance.

2. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008). The Court rejected an argument that punitive damages were unavailable in federal maritime cases. *Id.* at 2618. In a more recent case, *Atlantic Sounding Co. v. Townsend*, the Court affirmed the availability of punitive damages in maritime cases. 129 S. Ct. 2561, 2565 (2009) ("Historically, punitive damages have been available and awarded in general maritime actions, including some in maintenance and cure. We find that nothing . . . eliminates that availability."). In addition, most states permit punitive damages as

ages in the *Exxon* case and other cases like *BMW v. Gore*[3] and *State Farm v. Campbell*[4] make this civil remedy limited and uncertain. This remedy is limited by the proportionality concept in the Due Process Clause,[5] and it is uncertain because any jury award can be challenged and subjected to a proportionality review, especially if the punitive damages award exceeds the amount of compensatory damages, a 1:1 ratio cap of punitive damages to compensatory damages.[6] If punitive damages continue to be used to punish reprehensible conduct with some degree of confidence that awards will not be rejected as excessive in view of the Supreme Court's jurisprudence, the way in which punitive damages are currently imposed must change to make it closer to the system in place for the imposition of punishment in the criminal context.[7]

In order to use punitive damages, including large awards, to punish blameworthy conduct causing serious ecological harms, and to have such awards survive constitutional challenges, legislatures need to set limits[8] and regulate punitive damages similar to the way that legislatures have regulated criminal punishment.[9] If a legislature, using the criminal code model, ranks the reprehensibility of conduct, assigns different maxima according to the rankings, and specifies the punishment theory that justifies the amount of authorized punitive damages, the Supreme Court likely will defer to the legislative regulation of punitive damages. The Court will likely defer to

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a civil remedy. *See, e.g.*, DOUG RENDLEMAN, REMEDIES 15 (7th ed. 2006) (noting that all but five states have common-law punitive damages).

3. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

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

5. *See, e.g.*, *id.* at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

6. In *Exxon Shipping Co. v. Baker*, the Supreme Court adopted a limit on punitive damages equal to the amount of compensatory damages—a 1:1 ratio cap in the exercise of its common law authority to regulate federal damages in maritime cases. 128 S. Ct. at 2633. Although the decision in this case was not based on the Due Process Clause, the Court stated in a footnote, "In this case, then, the constitutional outer limit may well be 1:1." *Id.* at 2634 n.28.

7. Several commentators have proposed that punitive damages need to be regulated similar to the way that criminal punishment is regulated. *See, e.g.*, Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits,* 41 CONN. L. REV. 109 (2008) (proposing limits on the amount of punitive damages that juries can award); Jeffrey L. Fisher, *The* Exxon Valdez *Case and Regularizing Punishment*, 26 ALASKA L. REV. 1 (2009) (proposing that punitive damages be regulated by legislatures similar to the way that legislatures have regulated criminal sentencing); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction,* 94 CORNELL L. REV. 239 (2009) [hereinafter Markel, *Retributive Damages*] (proposing a restructuring of punitive damages as an intermediate sanction between compensatory damages and criminal fines, including many features borrowed from the system of criminal punishment). In a follow-up article, Professor Markel has proposed detailed suggestions for how a system of retributive punitive damages should work. Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009) [hereinafter Markel, *Punitive Damages*] (proposing procedural protections for punitive damages as a retributive sanction).

8. *See, e.g.*, Romero, *supra* note 7, at 113.

9. *See, e.g.*, Fisher, *supra* note 7, at 6; Markel, *Retributive Damages*, *supra* note 7, at 248; Markel, *Punitive Damages*, *supra* note 7, at 1435 (arguing procedural safeguards are necessary when punitive damages are used for retribution).

policy judgments of the legislature that certain conduct deserves to be punished by punitive damages up to the amount authorized by statute just as it now defers to legislative determinations of the proper punishment in criminal cases.[10] Legislatures can authorize and justify large punitive damages awards in appropriate cases, and courts would respect large awards under such a scheme.[11]

Criminal sanctions in lieu of, or in addition to, punitive damages[12] are also available to punish culpable defendants in cases where the misconduct was committed with a high degree of culpability—intentionally, knowingly, or with gross recklessness. For misconduct causing environmental injury, criminal prosecutions should be considered against the corporation as an entity, the offending actor, and responsible corporate individuals. Even though a corporation cannot be imprisoned and can only be fined, the stigma of a criminal conviction, combined with a criminal fine, may well have a greater deterrent effect than a punitive damages award limited to a ratio of 1:1 to compensatory damages. Likewise, for corporate officers, the threat of a criminal conviction and a prison sentence may operate as a greater deterrent than punitive damages against the corporation. Calculating corporate officers may well be able to assess the cost-benefit of certain conduct if the sanction is money, like punitive damages or a fine. Imprisonment, on the other hand, is not so easily reduced to an economic calculation.

The decision of the U.S. Supreme Court in *Exxon* limiting the amount of punitive damages to the amount of the compensatory damages raises the question whether punitive damages are effective and meaningful punishment for misconduct that causes serious ecological harm. Critics of the decision claim that the reduced punitive damages award of $507 million was inadequate punishment for Exxon—a multi-billion dollar corporation that made more than that amount in profit every week.[13]

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10. *See, e.g.*, Romero, *supra* note 7, at 158 (arguing that the legislative judgment about the proper amount of punishment would likely be respected by the courts); Fisher, *supra* note 7, at 30 ("Indeed, it appears that the Court should afford extreme deference to such legislative judgments.").

11. *See, e.g.*, Romero, *supra* note 7, at 158.

12. Because the Double Jeopardy Clause does not apply to litigation between private parties, a defendant could be punished criminally and through punitive damages for the same conduct. *See* Markel, *Punitive Damages*, *supra* note 7, at 1450–51. Nevertheless, double punishment for the same conduct raises concerns about excessive punishment. Professor Markel suggests that punitive damages, as a normative matter, should not be allowed following a criminal conviction for the same conduct. *Id.* at 1454–57. He would, however, permit a criminal prosecution to follow a punitive damages award. *Id.* at 1457–59. Any punitive damages award would be credited against any fine imposed according to his proposal. *Id.* at 1460.

13. *See, e.g.*, Tanya Paula de Sousa, Case Note, *Oil Over Troubled Waters:* Exxon Shipping Co. v. Baker *and the Supreme Court's Determination of Punitive Damages in Maritime Law*, 20 VILL. ENVTL. L.J. 247, 248 (2009) (noting that the award against Exxon represented less than a week's profit, just another cost of doing business); Chris Bergen, Note, Exxon Shipping Co. v.

This section will examine the argument that the punitive damages award of $507 million did not punish Exxon, or punish Exxon enough, for the harm it caused as a result of the oil spill. In particular, it will address the deterrence argument used to justify high awards without limitations like a ratio cap. This section concludes that a deterrence rationale for setting the amount of punitive damages is inadequate in view of the difficulty of predicting what amount is necessary to deter and prevent future misconduct.

This article proposes a different way of determining the proper amount of punitive damages. Instead of focusing on deterrence, the amount of punitive damages should be based on retributive principles that measure the gravity of the misconduct by taking into account the culpability of the wrongdoer and the harm caused.[14] Because the determination of the gravity of the misconduct should be made prospectively and in the context of other wrongful conduct, legislatures should make this determination and assign the maximum amount of punitive damages that can be awarded for different types of misconduct.[15] Legislatures need to address punitive damages in much the same way that they have dealt with criminal punishment and exercise the policy judgments that are inherent in determining what conduct should be punished and to what extent. By regulating punitive damages, legislatures can authorize punitive damages awards in excess of the ratio caps imposed by the Supreme Court, and the legislative policy choice as to the amount of deserved punishment will be respected and upheld by the Supreme Court.[16]

Background on Punitive Damages

The Supreme Court views punitive damages as serving only one function—punishment—with no compensatory aspect.[17] If compensatory damages are inadequate, punitive damages cannot be used to correct the

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Baker*: The Supreme Court Tightens the Purse Strings on Corporate Punitive Awards*, 22 TUL. ENVTL. L.J. 141, 157 (2008) ("Exxon dodged a colossal bullet.").

14. The Supreme Court has recognized that proportionality of punishment to conduct should be largely based on the reprehensibility of the defendant's misconduct and that reprehensibility should be assessed in view of the harm done and the recklessness or malice involved in the misconduct. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–76 (1996) (articulating five factors that it considered relevant in assessing reprehensibility). The Court, however, left it to juries in the first instance to determine in particular cases the degree of reprehensibility and the amount of a punitive award. *Id.* at 568. A jury's determination of reprehensibility is, of course, subject to review by courts under the Due Process Clause.

15. *See, e.g.*, Romero, *supra* note 7, at 157, 160; Fisher, *supra* note 7, at 41–42.

16. *See, e.g.*, Romero, *supra* note 7, at 158 (noting that legislative caps would likely be respected by the courts); Fisher, *supra* note 7, at 39 (stating that it is hard to imagine the Court overriding a legislative assessment of proper punitive damages).

17. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution."); Cooper Industries v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) (explaining that punitive damages are "intended to punish the defendant and to deter future wrongdoing").

inadequacy. Arguments for using punitive damages as a means of compensating for harms that compensatory damages do not cover[18] are no longer viable in view of the Supreme Court's conception of punitive damages as solely punishment-oriented. If the total harm to the environment in an oil spill cannot be correctly valued or compensated under tort law,[19] punitive damages can no longer be relied on to provide the missing compensation. Any changes in the law to permit recovery for losses that are not subject to compensation or that are difficult to calculate must be done by other means. For example, a legislature could make changes in tort law and expand the harms subject to compensation.[20] Likewise, a legislature could authorize extra-compensatory damages to serve societal interests other than punishment and deterrence.[21] In either case, the legislation would be pursuing interests deserving of deference from the courts. Such non-punitive interests, however, should not be packaged in punitive damages. Instead, these governmental interests should be articulated separately to avoid confusion with the purely punishment purpose of punitive damages.

Punishment in a civil lawsuit involving private parties has only recently drawn the attention of the Supreme Court.[22] Unlike European legal

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18. *See, e.g.*, Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83 (2007). Professor Klass argues that the harm is undervalued in environmental harm and intentional tort cases and sees punitive damages as a means of compensating those harms that are not valued or included in compensatory damages. *Id.* at 86–88. The single-digit ratio of punitive damages to compensatory damages, she claims, is too limiting in these cases, and she argues for double-digit or high single-digit ratios in environmental harm cases. *Id.* at 149.

19. For examples of harm that were not compensable under maritime tort law at the time of the *Exxon Valdez* oil spill, see Fisher, *supra* note 7, at 33 n.170 ((1) "Commercial fishermen . . . were unable to recover for the devaluation in their fishing permits." (2) "[F]ishermen were unable to recover for 'price diminishment in fisheries that were not oiled' or 'diminution of market value owing to fear or stigma.'" (3) Landowners whose land was not polluted could not recover for reductions in the market value of their land).

20. For types of harms that are not presently compensable that could be subject to recovery by legislative authorization, see Klass, *supra* note 18, at 86–88; Fisher, *supra* note 7, at 33 n.170.

21. I would classify "societal damages" as a separate category of damages payable by a defendant, not as a re-conceptualization of punitive damages as proposed in Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 401 (2003). Professor Sharkey sees punitive damages as furthering a societal compensation goal of redressing harms to others besides the plaintiff in a particular case, and proposes that this goal be recognized and furthered by using the additional damages above compensatory damages to create a pool of money to compensate other victims who are not before the court. *Id.* at 353–54, 389. Professor Fisher takes the position that a legislature could authorize societal damages as part of punitive damages. Fisher, *supra* note 7, at 32–34. He believes that states should be able to pursue a number of government interests through the vehicle of punitive damages as long as these interests have a legislative basis. *Id.* at 34. I agree with his position that the state can pursue these interests if legislatively authorized, but disagree with his position that they can be included within the concept of punitive damages.

22. The Supreme Court's venture into reviewing punitive damages awards began in 1989 in the case of *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 260 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution does not limit civil punitive damages, but hinting that the Due Process Clause might prohibit excessive punitive damages awards).

systems that confine punishment to the criminal law and reject punitive damages in private actions,[23] most American jurisdictions permit punitive damages for wrongful conduct.[24] The Court has approved the practice of awarding punitive damages in the civil context, but its approval has been accompanied by procedural and substantive conditions.[25]

Because punitive damages are viewed solely as punishment, they, like criminal sanctions, must satisfy the principles of just punishment.[26] One of these principles—that punishment must be proportional to the misconduct being punished—has a constitutional mandate. The Supreme Court has interpreted the Eighth Amendment's Cruel and Unusual Punishment Clause to require proportionality for criminal sanctions[27] and its Excessive Fines Clause to prohibit fines that are disproportional to the wrongful conduct.[28] The Supreme Court has said that the Due Process Clause of the Fourteenth and Fifth Amendments requires that punitive damages awards be proportional to the misconduct.[29]

The Supreme Court has taken different approaches to reviewing punishment for proportionality in criminal sanctions and punitive damages. In the criminal context, the Court gives almost complete deference to legislative penalties, even accepting a life sentence without parole for grand theft under the California three-strikes law.[30] In contrast, the Court accords little

23. *See* Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741, 748, 751 (2008). Some foreign courts, like those in Germany and Japan, decline to enforce punitive damages judgments from American courts. *See* Ronald A. Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far*, 24 J.L. & COM. 181, 191 (2005).

24. *See* DAN B. DOBBS, THE LAW OF TORTS 1062–66 (2000) (discussing the role of punitive damages in American tort law).

25. Procedural requirements include adequate jury instructions that inform the jury as to the factors to be taken into account in awarding punitive damages, *see, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991); post-verdict judicial review by both the trial judge and appellate courts to ensure that the award is reasonable, *id.* at 15; de novo review, rather than abuse of discretion review, by the appellate courts, Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 436 (2001); and safeguards to prevent a jury from basing a punitive damages award on injuries to third parties other than the plaintiff, Philip Morris USA v. Williams, 549 U.S. 346, 349, 357 (2007). The substantive condition requires that the punitive damages award be reasonable and not excessive or disproportionate. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 574 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 426 (2003).

26. *See, e.g.*, Romero, *supra* note 7, at 113 (applying the requirements for just punishment—notice, proportionality, and limits—to punitive damages).

27. U.S. CONST. amend. VIII; *see, e.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983) (noting that the Cruel and Unusual Punishment clause prohibits "sentences that are disproportionate to the crime committed.").

28. U.S. CONST. amend. VIII; United States v. Bajakajian, 524 U.S. 321, 334 (1998).

29. U.S. CONST. amends. V, XIV, § 1; *see, e.g.*, *State Farm*, 538 U.S. at 416 ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.") (citations omitted).

30. Ewing v. California, 538 U.S. 11, 30–31 (2003) (plurality opinion). The plurality deferred to the policy of isolating repeat offenders in California legislature's three-strikes law, stat-

or no deference to punitive damages awards and engages in an active proportionality review to determine if the award is excessive and violates due process.[31]

For evaluating punitive damages awards for excessiveness, the Supreme Court has adopted three guideposts.[32] Using these guideposts, the Court has rejected jury awards that it deems excessive, either under a due process analysis in cases coming from state courts[33] or by exercising its judgment in federal common law cases.[34] The punitive damages jurisprudence suggests that punitive damages awards, in the absence of a legislative maximum and without legislative standards, will be subject to strict proportionality review by the Court, and the Court will make an independent judgment about the reasonableness or excessiveness of a particular award.[35]

The Court's approach to criminal sanctions, on the other hand, reveals an almost complete deference to the legislatively authorized criminal sentence.[36] Apart from capital punishment cases, the Supreme Court has upheld all but one criminal sentence challenged as excessive.[37]

The difference in the way the Supreme Court treats its review of criminal punishment and punitive damages can be explained in large part by the presence or absence of legislative limits.[38] Criminal penalties have a maxi-

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ing that "selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." *Id.* at 25.

31. *See, e.g.*, Romero, *supra* note 7, at 114–15 ("In the area of criminal prison sentences, the Court for the most part defers to the legislative determinations regarding the proper amount of punishment." However, "[i]n the area of punitive damages, where there is no legislative limit on the size of awards, the Court has shown little deference to the jury's determination and instead has engaged in a search for guideposts to assess the proportionality of the award."); Fisher, *supra* note 7, at 6 ("[T]he Supreme Court defers almost completely to legislative and administrative bodies concerning the permissible length of prison sentences and even as to when capital punishment may be imposed. There is no reason to believe that punitive damages law could not follow a similar path."); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 920 (2004) (The Court's decisions "with respect to constitutional limits on sentences and damages seem at first in some tension with one another.").

32. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (adopting the following guideposts: degree of reprehensibility, ratio of punitive damages to compensatory damages, and sanctions for comparable conduct).

33. *See, e.g.*, *id.* (finding a punitive damages award of $2 million from Alabama to be excessive); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (concluding that a $145 million punitive damages award from Utah was excessive).

34. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626 (2008) (deciding that a $2.5 billion punitive damages award was excessive in the exercise of the Supreme Court's federal maritime common law authority, rather than on the basis of a constitutional due process review).

35. *See, e.g.*, Romero, *supra* note 7, at 139 (explaining that the Court makes its own judgment regarding the reprehensibility of the conduct and whether the award is proportional).

36. *See, e.g.*, Fisher, *supra* note 7, at 6; Romero, *supra* note 7, at 139.

37. Solem v. Helm, 463 U.S. 277, 303 (1983) (holding that a sentence of life imprisonment without eligibility for parole was disproportionate to his crime of uttering a bad check for $100 and was therefore excessive under the Eighth Amendment).

38. *See* Romero, *supra* note 7, at 152–54. For other explanations of the different approaches by the Supreme Court in reviewing criminal sentences and punitive damages awards, see Erwin

mum, whereas punitive damages are open-ended with no limits. The requirements for just punishment—notice, proportionality, limits, and the absence of wide disparities in punishment for similar misconduct—apply equally to criminal sentences and punitive damages.[39] Because punitive damages, for the most part, have not been regulated by legislatures or Congress, and because juries are given no limits[40] on the amount of punitive damages they can award, large punitive damages awards will always raise a constitutional question of proportionality.

In reviewing punitive damages awards under the Due Process Clause, the Supreme Court adopted three guideposts to help it determine whether the award was proportional or excessive: (1) the degree of reprehensibility of the misconduct, (2) the ratio of the award to compensatory damages, and (3) comparison of the award to criminal penalties for comparable misconduct.[41] Although it has stated that reprehensibility is the most important guidepost,[42] the Court relies primarily on the ratio to compensatory damages as the basis for determining whether the award is excessive.[43] Although the Court has refused to specify a ratio to mark the line between reasonable and excessive punitive damages, the Court has signaled that a 4:1 ratio is the presumptive limit,[44] that any ratio above 9:1 is constitutionally suspect,[45] and finally, that a 1:1 ratio is the appropriate ratio in a case with substantial compensatory damages.[46]

THE FACTS OF *EXXON SHIPPING CO. V. BAKER* (2008)

The Supreme Court adopted its 1:1 ratio in an oil spill case, exercising its common law jurisdiction under federal maritime law. In the majority opinion by Justice Souter, the Court reduced a punitive damages award

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Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1063 (noting that the differences in the proportionality analysis cannot be justified); Karlan, *supra* note 31, at 920 ("Differences between the two kinds of litigation may, however, explain why proportionality review is relatively more attractive in punitive damages cases.").

39. *See, e.g.*, Fisher, *supra* note 7, at 19 (arguing that the rule of law requires civil as well as criminal punishment to be regularized).

40. The Supreme Court found jury instructions inadequate to guide juries in determining the amount of punitive damages to award. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2628 ("skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers.").

41. BMW of N. Am., Inc. v. Gore, 517 U.S. 599, 565, 574–75 (1996).

42. *Id.* at 575.

43. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. at 2629 (noting that a more promising way to limit punitive damages awards is "by pegging punitive to compensatory damages using a ratio or maximum multiple"). For an explanation of why a ratio is most attractive, see Romero, *supra* note 7, at 133–34 (arguing that the ratio guidepost is the easiest to apply, the Court talks about allowable ratios, and lower courts focus on ratios in evaluating the constitutionality of punitive damages awards).

44. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

45. *Id.*

46. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2634.

against Exxon Shipping Co. for an oil spill of 11 million gallons into Prince William Sound. The jury had awarded $5 billion in punitive damages,[47] but the Ninth Circuit Court of Appeals had reduced the award to $2.5 billion.[48] The Supreme Court, applying a 1:1 ratio of punitive damages to compensatory damages, further reduced the award to $507 million, equal to the amount of compensatory damages.[49]

According to the facts as described by the Supreme Court,[50] on the night of March 23, 1989, the *Exxon Valdez* oil tanker ran into the Bligh Reef. The captain of the tanker, Joseph Hazelwood, before taking command of the tanker at 9:15 p.m., spent the day at waterfront bars drinking with the crew and consumed at least five double vodkas. Eleven hours after the oil spill, he had a blood alcohol reading of .061. Based on this level of alcohol in his blood after so long a period, experts testified that he must have had a blood alcohol level of around .241 at the time of the collision with the reef. Hazelwood was in his cabin at the time of the collision, having left the third mate in charge on the bridge.

Hazelwood was a relapsed alcoholic with two prior convictions for driving while intoxicated. His driver's license had been revoked or suspended three times and remained revoked on the night of the spill. Exxon executives knew that Hazelwood had a drinking problem. They knew that he had completed a treatment program, dropped out of a prescribed follow-up rehabilitation program, stopped attending Alcoholics Anonymous, and started drinking again. Hazelwood drank with Exxon officials, but Exxon did not monitor Hazelwood once he returned to work after completing his alcohol treatment program.

As a result of the *Exxon Valdez* oil spill, civil actions were brought seeking both compensatory and punitive damages. A civil action for environmental harms filed by the governments of the United States and Alaska resulted in a consent decree in which Exxon agreed to pay at least $900 million toward restoring natural resources damaged by the oil spill.[51] Some of the civil claims by private parties—fishermen, property owners, and others—were settled for $303 million.[52]

The other civil claims were litigated and consolidated into three classes of plaintiffs seeking compensatory damages—commercial fishermen, Native Alaskans, and landowners—and a mandatory class[53] of all plaintiffs (more than 32,000) seeking punitive damages.[54] In the compensatory dam-

47. *Id.* at 2614.
48. *Id.*
49. *Id.* at 2634.
50. *Id.* at 2611–13.
51. *Id.* at 2613.
52. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2613.
53. At the request of Exxon, the trial court certified a mandatory class of all plaintiffs seeking punitive damages and dealt with punitive damages as a class action. *Id.*
54. *Id.*

ages part of the jury trial, the commercial fishermen received $287 million.[55] The Native Alaskans class settled their claims for $20 million, and the Native Alaskans who opted out of the class settled for $2.6 million.[56]

In the punitive damages phase of the trial, the jury awarded punitive damages of $5,000 against Hazelwood and $5 billion against Exxon.[57] After several appeals, the United States Court of Appeals for the Ninth Circuit reduced the award against Exxon to $2.5 billion;[58] Exxon appealed to the United States Supreme Court. The Court reduced the punitive damages to $507.5 million, equal to the total compensatory damages as calculated by the District Court.[59]

Exxon Decision on Punitive Damages

The United States Supreme Court adopted a ratio of 1:1 as the outer limit of punitive damages in the *Exxon* case. Under this cap, punitive damages could not exceed the amount of the compensatory damages. Acting as a common law court because federal courts have the power to decide maritime cases in the manner of a common law court unless Congress has acted,[60] the Court determined what should be the proper amount of punitive damages in this case.[61] It did not engage in a due process review of the award.[62] Instead, the Court said it was regulating punitive damages in maritime cases as a common law remedy in the absence of a congressional statute on the subject.[63]

In arriving at the 1:1 ratio as the proper proportion of punitive damages for the reckless conduct of Exxon, the Supreme Court expressed concerns about the unpredictability of outlier high punitive damages awards.[64] Specifically, the Court expressed concerns about fairness, consistency, and equality due to the (1) unpredictability in the amount of awards, (2) the great spread between high and low awards due to outlier verdicts, (3) inconsistent awards for similar misconduct,[65] and (4) the inadequacy of jury in-

55. *Id.* at 2614.

56. *Id.*

57. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2614.

58. *Id.*

59. *Id.* at 2605, 2634 (relying on the calculation in *In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002)).

60. *Id.* at 2619 (punitive damages in maritime law falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result). The Court rejected Exxon's argument that the Clean Water Act preempted maritime common law on punitive damages. *Id.*

61. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2626.

62. *Id.*

63. *Id.* at 2626–27.

64. *Id.* at 2625 (the Court uses the term "outlier" to describe those awards that fall significantly above the normal distribution of awards).

65. The Court gave as an example of inconsistent results the $4 million punitive damages verdict by an Alabama jury in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) and a verdict rejecting punitive damages by a different jury in another Alabama case that involved similar facts

structions for preventing outlier awards. However, the Court did not see any evidence of a lot of runaway jury verdicts producing huge awards, or even a marked increase in the percentage of cases with punitive damages awards.[66] Nevertheless, the Court saw a need to regulate punitive damages to prevent outlier awards by limiting punitive damages awards to a ratio cap of 1:1.[67] It viewed excessive outlier verdicts as unfair because punishment should be reasonably predictable and reasonably equal for similar conduct.[68]

To address these concerns and prevent unpredictable outlier awards, the Supreme Court considered several options. It rejected more guidance in jury instructions as a meaningful way of constraining outlier awards,[69] preferring a quantified, more concrete approach to limiting outlier awards.[70] The Court considered and rejected a dollar cap because of the difficulty of picking a particular dollar figure appropriate for all punitive damages cases and because of the judiciary's inability to adjust a dollar cap for inflation.[71] The Court then decided that ratio caps tied to compensatory damages would be more promising because the effects of inflation would be left "to the jury or judge who assesses the value of actual loss."[72] For guidance on what the cap should be, it looked at states with caps of 1:1, 2:1, 3:1, and 5:1,[73] at federal caps like treble damages for antitrust violations,[74] and at empirical studies of jury awards that showed that the median ratio of punitive damages awards was 0.65:1 to compensatory damages.[75]

The Supreme Court found that the empirical studies provided the best guidance for determining a reasonable ratio of punitive to compensatory damages.[76] The Court concluded that the median ratio of 0.65:1 "probably

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and comparable compensatory damages. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2626; *see also* BMW v. Gore, 517 U.S. at 565 n.8.

66. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2624. A study in 2009 found that following the decision in *State Farm* there has been a statistically significant drop in the number of punitive damages awards of at least $100 million, their amount, and the ratio of punitive damages to compensatory damages. Alison F. Del Rossi & W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards* (Vanderbilt University Law Sch., Law and Economics, Working Paper No. 09-33, 2009).

67. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. at 2626–27. One study predicts that the 1:1 ratio would eliminate most of the blockbuster awards, those of at least $100 million. Rossi & Viscusi, *supra* note 66.

68. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2627.

69. *Id.* at 2628 (noting that examples of jury instructions "leave us skeptical that verbal formulations . . . are the best insurance against unpredictable outliers").

70. *Id.* ("[D]oubtful that anything but a quantified approach will work."). The Court referred to quantified limits used in sentencing guidelines and the approach taken by states that have imposed dollar or ratio caps. *Id.* at 2628–29.

71. *Id.* at 2629 (suggesting that courts would be unable to adjust for inflation unless the issue of a dollar cap was presented in a future case).

72. *Id.* at 2629.

73. *Id.* at 2631.

74. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2632.

75. *Id.* at 2633.

76. *Id.* at 2632.

marks the line near which cases like Exxon should be grouped"[77] and adopted a 1:1 ratio as the outer limit for such cases.[78] The Court found comfort in the 1:1 ratio in view of the Clean Water Act's scheme of fining negligent pollution at up to $25,000 per day and doubling the criminal fine up to $50,000 per day for a knowing violation.[79]

Critical to the Supreme Court's adoption of the 1:1 ratio was its assessment of the wrongfulness of Exxon in the oil spill and the degree of harm caused. The Court did not view Exxon as especially culpable, since its conduct was unintentional and yielded no profit.[80] With regard to the degree of harm, the Court considered the injury caused by the oil spill and the compensation awarded to be substantial.[81] The Court left open the possibility that it might choose a higher ratio if the conduct was intentional or done for profit.[82]

Effectiveness of Punitive Damages in Deterring Ecological Misconduct

The jury in the *Exxon* case, as well as the District Court, the Ninth Circuit, and the three dissenters in the United States Supreme Court, considered $2.5 billion or $5 billion as the appropriate punishment for Exxon's misconduct of letting Hazelwood drive an oil tanker with reckless culpability.[83] They thought that a higher award in the range of 5:1 or 10:1 to compensatory damages was justified in view of Exxon's recklessness based on

77. *Id.* at 2633. Authors of one of the studies cited by the Court state that their empirical studies do not support the 1:1 ratio across the broad range of compensatory awards. They state that the ratio is reasonably stable in high compensatory award cases but much more variable in low compensatory award cases. Theodore Eisenberg, Michael Heise & Martin T. Wells, *Variability in Punitive Damages: An Empirical Assessment of the U.S. Supreme Court's Decision in* Exxon Shipping Co. v. Baker, 2–3 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 09-011, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392438.

78. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2633–34.

79. *Id.* at 2634 (stating that a 1:1 ratio essentially results in total damages double the amount of compensatory damages).

80. *Id.* at 2631–33 ("We confront . . . a case of reckless action, profitless to the tortfeasor.").

81. *Id.* at 2631–32. Apparently the Court was concerned that applying a ratio above 1:1 to a large compensatory award would produce a very large punitive damages award.

82. *Id.* at 2631 (stating that a 3:1 ratio may be appropriate "in quite different cases involving some of the most egregious conduct, including malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain").

83. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2614. The District Court agreed with the jury's verdict of $5 billion in punitive damages and each time the District Court reviewed that award, it concluded that the award was not excessive. *Id.* at 2640. (Breyer, J., concurring in part and dissenting in part) (citing *In re the* Exxon Valdez, 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004)). On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case to the District Court twice before remitting the punitive damages award to $2.5 billion. *In re* Exxon Valdez, 270 F.3d 1215, 1246–47 (9th Cir. 2001); *In re* Exxon Valdez, 472 F.3d 600, 601, 625 (9th Cir. 2006) (per curium); *In re* Exxon Valdez, 490 F.3d 1066, 1068 (9th Cir. 2007). Justices Stevens, Ginsburg, and Breyer dissented from the Supreme Court's judgment that the $2.5 billion award should be reduced: "I would affirm the judgment of the Court of Appeals." *Id.* at 2635 (Stevens, J., concurring in part and dissenting in part), "I would therefore affirm the opinion of the

its knowledge of Hazelwood's prior treatment for drinking, knowledge that Hazelwood drank with Exxon officials, knowledge of Hazelwood's relapse and drinking after his treatment, and permitting Hazelwood to captain the *Exxon Valdez* with this knowledge. One commentator said that the award of $507 million due to the 1:1 cap would do little to deter a corporation like Exxon from repeating its reckless management,[84] noting that Exxon's profit exceeded $40 billion in 2007, and that Exxon made on average $507.5 million every 4½ days in 2007.[85]

Is there any reason for punishing Exxon for its culpable conduct beyond making it pay for the harm it caused with the oil spill? The Supreme Court said that punitive damages, like criminal sanctions, serve legitimate state interests in punishment (retribution) and deterrence. Did Exxon deserve to be punished? Would punitive damages serve to deter Exxon and other oil shipping companies? The answers to these questions depend on the amount of the award and the impact of the award on the corporation. The answer also depends on who decides the amount of the punitive award—jury, trial court, appellate court, Supreme Court, or a legislative body. The jury, District Court, Court of Appeals, Supreme Court majority, and dissenters had different views as to the amount of punitive damages Exxon should pay for its culpable conduct—$5 billion, $2.5 billion, or $507 million—for retribution and deterrence.

PUNITIVE DAMAGES AND DETERRENCE

Before assessing the deterrent value of punitive damages, it should be noted that deterrence can be achieved by imposing civil liability for compensatory damages. If corporations like Exxon know that they will be liable for all of the harm caused by an oil spill to fishermen, the local economy, and the environment, the cost of fully compensating all who suffer from a spill should be an incentive to take preventive steps to avoid large oil spills that will be costly to the corporation. Exxon paid $507 million in compensatory damages to private plaintiffs[86] and $900 million to the federal and state governments to cover their costs of cleaning up the oil spill.[87] In addition, it spent approximately $2.1 billion for its efforts in cleaning up the disaster.[88] Liability for these substantial costs may provide a sufficient de-

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Court of Appeals." *Id.* at 2640 (Ginsburg, J., concurring in part and dissenting in part), "I would uphold it." *Id.* at 2641 (Breyer, J., concurring in part and dissenting in part).

84. *See* Chris Bergen, Note, Exxon Shipping Co. v. Baker*: The Supreme Court Tightens the Purse Strings on Corporate Punitive Awards*, 22 TUL. ENVTL. L.J. 141, 153 (2008).

85. *Id.* (citing Steven Mufson, *Exxon Mobil's Profit in 2007 Tops $40 Billion,* WASH. POST, Feb. 2, 2008, at D1).

86. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. at 2634 (Court took "for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million.").

87. *Id.* at 2613.

88. *In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1047 (D. Alaska 2002). Exxon agreed to pay a $150 million fine, which was later reduced to $25 million plus $100 million of restitution. A

terrence to Exxon and other oil shipping companies without the need for punitive damages. The jury, however, as well as the District Court and Court of Appeals, thought that punitive damages in addition to compensatory damages were necessary to provide effective deterrence, an additional incentive to prevent oil spills.

Deterrence has two aspects, specific and general. Specific deterrence focuses on the offender and aims to discourage him from such conduct in the future. In the case of Exxon, for example, payment of compensatory and punitive damages should provide a financial incentive for Exxon to take steps to avoid future oil spills. General deterrence, on the other hand, sends a message to others. The punishment of Exxon provides an example to other oil companies of what will happen if they engage in similar misconduct.

The argument to juries for punitive damages often focuses solely on specific deterrence. The claim is made that the defendant should have to pay a sum that hurts, a sum based on its wealth that will get the attention of the offender to take steps that will prevent a reoccurrence of the misconduct.[89] The argument further claims that if the award is not high enough, the offender will dismiss the payment as the cost of business and do nothing to prevent future misconduct.

Assessing the deterrent effect of punitive damages in the context of environmental damage caused by corporate misconduct is difficult.[90] Studies show that it is even more difficult to determine the amount of punitive damages that will deter a corporation.[91] Setting the amount of a punitive damages award to achieve optimal deterrence so that the offender is neither under-deterred nor over-deterred is a difficult enterprise.[92] It depends on an assessment of the impact of the award on the offender and on other potential offenders. If the amount of the award fails to change behavior, there is under-deterrence. If an award is above that necessary to achieve prevention, it is excessive and over-deterrence. The difficulty in knowing what is the right amount of punitive damages to deter Exxon and other oil companies

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civil action by the federal and state governments resulted in a consent decree for Exxon to pay at least $900 million, and it paid another $303 million in voluntary settlements with private parties.

89. *See, e.g.*, Doug Rendleman, *A Plea to Reject the United States Supreme Court's Due-Process Review of Punitive Damages, in* THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW (Jeff Berryman & Rick Bigwood eds.) (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1146465.

90. *See, e.g.*, Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime* 6 (Univ. of Pa. Law Sch. Pub. Law and Legal Theory Research Paper Series, Research Paper No. #09-32, 2009), *available at* http://ssrn.com/abstract=1492779 (studies suggest "that effective deterrence is possible only if the prerequisites are satisfied, but that the prerequisites commonly are *not* satisfied."). Professor Robinson identifies the prerequisites for any deterrent effect, which he says are the exception rather than the rule. *Id.* at 3.

91. *Id.* at 4 ("There are a host of facts that make it difficult to predict and control the amount of punishment that will be felt and remembered.").

92. *Id.* at 4–5.

from recklessly or negligently shipping oil is illustrated by the widely different figures determined by the jury ($5 billion), Court of Appeals ($2.5 billion), and Supreme Court majority ($507 million). Determining the minimal amount of punitive damages that will induce Exxon to put measures in place to prevent future oil spills like screening and drug testing of tanker pilots is a difficult task. Punitive damages of $2.5 billion might be sufficient to change Exxon's behavior—on the other hand, maybe $100,000 would be sufficient. Perhaps punitive damages are unnecessary and payment of the cleanup costs of the oil spill[93] and compensatory damages to all who suffered loss would be sufficient deterrence. The Supreme Court's adoption of a 1:1 ratio in *Exxon*, where it said that the compensatory damages of $507 million are substantial, may reflect the notion that high compensatory damages have a significant deterrent effect and that punitive damages above a 1:1 ratio are unnecessary and over-deterrence.

The difficulty of measuring the deterrent effect of punitive damages makes the prediction of the proper amount to deter more of a guess than a scientific measurement. Punishment based on a deterrence theory involves a prediction of the impact of the punishment. Predicting the effect of punishment on behavior, however, is an exceedingly difficult enterprise. It is almost impossible to know in advance whether a particular award will have a deterrent effect. It is not surprising that juries, judges, and parties often have very different views of what is needed to deter. Not even a post-award evaluation of the corporation's behavior provides good answers to the question whether the punitive damages award was effective. If, after paying compensatory and punitive damages, Exxon and other oil companies did nothing more to prevent oil spills, one might conclude that neither the compensatory nor punitive damages had any deterrent effect. If, on the other hand, they changed their policies regarding the hiring and testing of tanker captains and changed the construction of tankers to avoid or minimize oil spills, several conclusions are possible but none is necessarily implied by the fact that corporate behavior changed. Perhaps the cost of compensatory damages alone could have provided the incentive to prevent a similar oil spill. Another possibility is that the additional cost of punitive damages persuaded Exxon to adopt measures to prevent and mitigate oil spills. Or maybe Exxon changed its behavior because it wanted to project an image of a green environmentally-friendly company. The difficulty of identifying the cause of changed behavior after an offender has been ordered to compensate for loss and to pay punitive damages illustrates the difficulty of assessing the deterrent effect of a punitive damages award.

As problematic as the after-the-fact measurement of deterrence can be, the prediction of a deterrent effect at the time that the amount of punish-

93. *In re* Exxon Valdez, 236 F. Supp. 2d at 1047 (stating that Exxon spent about $2.1 billion to clean up the oil spill according to the District Court).

ment is imposed is even more problematic. Determining the amount of a punitive damages award that will deter future misconduct by the offender and others amounts to speculation, based merely on arguments by defendants who seek to minimize their liability and by plaintiffs who have an interest in arguing for high awards.

A related question concerns the effect on deterrence of ratio caps on punitive damages. If corporations know, as they would, about the empirical studies showing that the median award is less than 1:1 and that the possibility of an outlier award is rare,[94] would this knowledge affect their behavior and result in extra precautionary measures? Would the evidence provided by empirical studies increase the deterrent message or minimize it? Would a punitive damages scheme that authorizes double or treble damages provide sufficient deterrence, or is a greater multiple of punitive to compensatory damages required in some cases to deter?

If compensatory damages provide sufficient deterrence, or if the deterrent effect of punitive damages is uncertain, an important question remains: Should Exxon still be punished? If deterrence theory cannot pinpoint the appropriate punitive damages award, then perhaps retribution, which bases the amount of punishment on the degree of wrongfulness of the conduct, will provide the answer as to the proper amount of punishment.

Retribution and Punitive Damages

Retribution rejects the premise that there should be unlimited flexibility to fix the penalty to ensure the punishment is meaningful. Instead, retribution theory assigns and measures punishment based on the degree of wrongfulness.[95] The more wrongful misconduct deserves the more severe punishment.[96] Retribution theory does not measure the amount of punishment on the basis of how much pain a person feels when imprisoned or how much pain a person or corporation feels when fined. Instead, retribution assigns the proper amount of punishment according to the misconduct, not the impact on the offender.[97] The impact of imprisonment or a fine may be quite different for different offenders depending on their wealth or social connections. A small corporation with few assets may suffer more from a $100,000 fine than a rich corporation. A homeless person with friends in jail may not have the same reaction to jail that a person with a job and community and family ties would. But it violates principles of notice and

94. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2624 n.13 (referencing these empirical studies).

95. *See, e.g.*, Romero, *supra* note 7, at 121 (explaining the retributive notion that punishment is deserved and that the severity of the punishment should be measured by how much punishment is deserved). *See id.* at 120–24 for a discussion of the retribution basis for proportionality.

96. *Id.* at 120–21.

97. *See, e.g.*, *id.* at 120 ("What is deserved punishment depends on the wrongfulness of the conduct.").

equal punishment to ratchet up punitive damages after the fact to make sure the punishment is felt. Just punishment does not permit punishment to be open-ended simply to make sure it is felt.

When setting a maximum penalty for certain misconduct, a legislature considers that a crime may be committed under different circumstances—the same crime but with different facts and different offenders. A rational legislature considers that there may be aggravating circumstances in some cases and mitigating circumstances in others. With this in mind, the legislature assigns the maximum punishment for a crime based on what it considers to be the worst-case scenario. A similar approach is to punish a typical occurrence of a crime like robbery with X years in prison, but to authorize a sentence of X plus three years in an especially egregious case. The point is that the legislature determines *in advance* the maximum punishment for a particular crime, thus giving fair notice of the possible punishment. A predefined maximum also ensures that similar offenses receive similar punishment and thus prevents outlier sentences. Retribution theory values the principles of fairness in uniformity and equal treatment of like offenses.[98] Even though the legislature cannot foresee all of the variants of a crime, including those more horrendous than the typical crime it had in mind, just punishment cannot exceed the maximum. If experience shows that the maximum penalty is too low, the legislature can amend the statute and prospectively authorize a higher maximum.

Regulating Punitive Damages to Allow Higher Awards

If, like the district court and the Ninth Circuit believed, Exxon should be punished more severely than the United States Supreme Court thought, then Congress should step in and regulate punitive damages to authorize awards with ratios in the 5:1 or 10:1 range, or even higher for special cases. The Supreme Court's proportionality jurisprudence suggests that punitive damages need to be regulated by legislatures if punitive damages awards are to be respected and upheld.[99]

In a scheme of regulated punitive damages, the Court would defer to legislatively authorized awards with higher ratios than 1:1, 4:1, or even 9:1. The Supreme Court has deferred to legislative schemes for criminal sentences that permit shockingly severe punishment,[100] and it is likely that the Court would also defer to legislative schemes authorizing high punitive

98. *See, e.g.*, Romero, *supra* note 7, at 121 (noting that concepts of fairness in the retribution theory support both uniform, or least similar, punishment for similar offenders and differential punishment for dissimilar offenders).

99. *See, e.g.*, Fisher, *supra* note 7, at 7 ("Court's insistence that punishment be regularized puts a premium on legislative involvement in authorizing and regulating punitive damages.").

100. *See, e.g.*, Ewing v. California, 538 U.S. 11, 25 (2003) (upholding a twenty-five years to life sentence for stealing three golf clubs under the California three-strikes law stating that "selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.").

damages awards.[101] "If Congress passed a law permitting punitive damages up to five times the underlying compensatory damages in maritime cases of corporately enabled drunk driving, it is hard to imagine the Court overriding that assessment."[102]

The Supreme Court's concerns about punitive damages awards are similar to concerns it had about the imposition of the death penalty (before *Furman*)[103] and indeterminate criminal sentencing before the advent of sentencing guidelines.[104] Concerns about arbitrariness and unpredictability regarding punitive damages sound very much like the concerns expressed about the unfettered discretion in juries to decide whether to impose the death penalty,[105] and the unfettered discretion of judges to impose sentences within enormous ranges, which resulted in wide disparity of sentences for the same crime.[106] States responded to *Furman* and the Court's command that jury discretion regarding the death penalty must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"[107] by enacting statutes that require jury findings of specified aggravating factors that distinguish those murders deserving of the death penalty.[108] To limit the wide disparity of prison sentences imposed by judges with broad discretion, legislatures stepped in to regulate criminal sentences by adopting sentencing guidelines or more determinate sentencing schemes.[109] As a result, the Court defers almost completely to the legislative judgment concerning the length of imprisonment.[110]

Deference to legislative judgments regarding punishment by the Supreme Court reflects the Court's hesitancy to substitute its own judgment

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101. *See, e.g.*, Fisher, *supra* note 7, at 32 ("There is no reason to think that the Court would not be equally deferential to a state's desire to accomplish something else through a punitive remedy."); Romero, *supra* note 7, at 158 (noting that legislative judgments as to the proper amount of punitive damages would likely be respected by the courts).

102. *Id.* at 39.

103. Furman v. Georgia, 428 U.S. 238, 310 (1972) (Stewart, J., concurring) (arguing that the sentencing system for imposing the death penalty was "wantonly and freakishly imposed").

104. *See* Fisher, *supra* note 7, at 16 (stating that the Court's analysis in *Exxon* parallels the critique and solution of two sentencing reforms: the move to sentencing guidelines and the judicial imposition of procedural requirements for the imposition of the death penalty).

105. *Id.* at 21 (The *Furman* court was "expressly concerned with placing boundless discretion in the hands of juries . . . .").

106. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2628 (2008) (stating that the Court found it instructive that sentencing guidelines had replaced the system of giving judges "relatively unguided discretion to sentence within a wide range").

107. Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (quoting Gregg v. Georgia, 428 U.S. 153 (1976)) (joint opinion of Stewart, Powell, and Stevens, JJ.).

108. *See, e.g.*, Fisher, *supra* note 7, at 21 (citing Tuilaepa v. California, 512 U.S. 967, 971–72 (1994) (providing that aggravating circumstances "may be contained in the definition of the crime or in a separate sentencing factor (or both)").

109. *Id.* at 17 (explaining that, in 1987, Congress enacted the Federal Sentencing Guidelines to address the problem of unguided discretion in criminal sentencing).

110. *Id.* at 24–25 (noting that particular criminal sentences enjoy almost absolute deference from the Court).

regarding proportionality of punishment for that of a democratically-elected legislature,[111] especially since these judgments are matters of policy. Indeed, the Court has recognized that the determination of proportionality (how serious is the misconduct, and what is the proper punishment) is a particularly legislative function.[112]

To use punitive damages effectively as punishment for conduct like the *Exxon Valdez* oil spill, punitive damages need to be regulated. Without regulation, punitive damages awards—especially high awards—will always be vulnerable to due process challenges and court-imposed limits. Regulation should include, at a minimum: (1) legislative authorization of punitive damages, (2) legislative categorization of the misconduct subject to punitive damages, and (3) legislative assignment of allowable punitive damages.

Although legislatures could address criticisms that punitive damages punish defendants without the protection of the procedural safeguards in criminal cases[113] and regulate the procedures by which punitive damages are awarded, a discussion of procedural protections[114] is beyond the scope of this article. Regulation of the procedural aspects of punitive damages is not necessary in order to achieve judicial deference to punitive damages awards.[115] It is the absence of positive law regarding the authority to impose punitive damages in civil cases and the absence of limits on such punishment that needs to be addressed if the Supreme Court is to treat punitive damages with the same deference that it accords to criminal sentences.[116] Moreover, other commentators have addressed the subject of procedural safeguards for punitive damages.[117]

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111. *See, e.g.*, Ewing v. California, 538 U.S. 11, 28 (2003) (stating that the Court does not sit as a "superlegislature" to second-guess California's policy choices in enacting the three-strike law).

112. *See, e.g.*, *id.* at 28 (legislatures have the "primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme").

113. *See, e.g.*, Jeffrey W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 242–43 (1985) (arguing that a determination that punitive damages are penal should require criminal procedure safeguards); Malcom E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 276–77 (1983).

114. *See, e.g.*, Markel, *Retributive Damages*, *supra* note 7, at 252 (noting that the Court has not extended civil defendants any of the procedural protections available in the criminal context). Professor Markel lists the following rights that defendants in punitive damages cases lack: (1) no right to bifurcated proceeding for liability and punitive damages, (2) no right against vicarious liability, (3) no right against double jeopardy, (4) no right to counsel, (5) no right to a proof beyond a reasonable doubt standard of proof, (6) no right against self incrimination, and (7) no right to a trial court's specification of reasons for upholding or remitting a punitive damages award. *Id.*

115. *See* Fisher, *supra* note 7, at 41 (suggesting that not much detailed legislative regulation is required to trigger judicial deference and that "legislatures need only enact some kind of cap for punitive damages in tort cases").

116. *Id.* at 25 (suggesting that legislation of positive law articulating the penal policies underlying punitive damages and establishing quantified levels of allowable awards should command the respect of the Supreme Court).

117. *See, e.g.*, Markel, *Punitive Damages*, *supra* note 7 (proposing detailed procedural protections for retributive punitive damages). Professor Markel proposes heightened procedural safe-

Legislative Authorization of Punitive Damages

In a democratic society, punishment must be authorized in the form of legislative enactment, reflecting society's judgments regarding what conduct to punish and the proper amount of punishment for particular misconduct.[118] Legislatures make these judgments for criminal punishment in criminal codes that reflect society's sense about the proportionality of criminal sanctions.[119] Punitive damages, on the other hand, have generally been the product of common law judicial development.[120] Punitive damages in the majority of states punish defendants and reward civil plaintiffs[121] without legislative authorization, without a societal judgment about proportionality, and without limits.[122] Instead, determining the proper amount of punitive damages is left to juries. Individual jury awards, however, do not reflect societal judgments in the way that democratically-elected representa-

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guards for defendants facing what he calls retributive punitive damages, damages that have no purpose but punishment. Because he views retributive damages as an intermediate sanction between criminal punishment and deterrence damages, he proposes an intermediate level of procedural safeguards. *Id.* at 1423. He states that "many of the same concerns of error and abuse that motivate procedural safeguards in the criminal context also arise in the punitive damages context, though to a lesser extent because the consequences are less condemnatory and severe." *Id.* at 1435. The intermediate procedures he proposes for retributive punitive damages include: (1) clear and convincing standard of proof, (2) a de novo standard of appellate review of the reprehensibility finding, but deference review as to other findings, (3) trial by jury, (4) right to a super majority verdict, (5) right to bifurcate the liability and damages issues, (6) rights to confront witnesses and present a defense, (7) no right to counsel, (8) no right against self incrimination, (9) right to avoid punitive damages after a criminal conviction for the same conduct, and (10) no right to avoid criminal punishment after suffering punitive damages. *Id.* at 1436–60.

118. *See* Markel, *Retributive Damages*, *supra* note 7, at 263 (explaining that the state must play a central role in authorizing and regulating punishment based on misconduct that not only offends the victim but also the state); Fisher, *supra* note 7, at 26–28.

119. The Supreme Court sees legislatures as having the "primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme." Ewing v. California, 538 U.S. 11, 28 (2003).

120. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620 (2008) (noting that punitive damages were a common law innovation).

121. The allocation of punitive damages to the plaintiff, rather than the state, has been the subject of criticism. Large awards are seen as windfalls for the plaintiff who has been compensated for his losses. For a recent critique of the prevalent practice of awarding punitive damages to the plaintiff and a proposal to split the award with the state, see Markel, *Retributive Damages, supra* note 7, at 302–04 (proposing that the state should capture the bulk of the award, saying it is "wrong-headed to award plaintiffs the bulk of retributive damages"). Professor Markel would permit plaintiffs to receive from the award a "state determined flat award" as an incentive for bringing the suit to the public's attention. Markel, *Punitive Damages*, *supra* note 7, at 1402 (suggesting a fixed award in the amount of $10,000). In addition, Professor Markel proposes that plaintiffs be awarded attorneys' fees for the extra labor in pursuing the punitive damages claim. *Id.*

122. Apart from the six states that do not permit punitive damages and the nineteen states with statutory caps on the amount of punitive damages that can be awarded, the remaining states permit juries to determine the amount of punitive damages without limit. *See* Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1339–46 (2005) (including a useful chart listing the states with caps on punitive damages).

tives do.[123] In reality, juries apply the law given to them in instructions provided by the parties, not from a legislature.[124] In determining what the proper amount of punishment is deserved by different misconduct, juries do not bring to their task the same considerations that legislatures do.[125] Jury verdicts are *ad hoc* decisions based on the particular facts presented in the case. Juries do not know other awards for similar wrongdoing and, therefore, cannot compare their awards to them. Juries cannot compare the misconduct before them with other types of misconduct in order to assess whether the misconduct is especially egregious and deserving of greater punishment. They are not provided evidence of other cases or other awards for similar misconduct when deciding whether the misconduct is particularly deserving of a high award.[126] Legislatures, on the other hand, do consider and compare a range of misconduct that deserves punishment and assign different degrees of punishment according to the degree of wrongfulness. Criminal codes are products of this process.

Legislative Categorization of Conduct Subject to Punitive Damages and Ranking of Allowable Punitive Damages

To justify high punitive damages in the range of a ratio of 5:1 or higher, a legislature would need to establish categories of punishable conduct, rank them in a hierarchy of wrongfulness, and specify the maximum ratio of punitive damages for each category.[127] Criminal codes provide an example of this approach by punishing intentional homicides more severely than unintentional deaths, punishing crimes against the person more severely than property crimes, and subjecting repeat offenders to sentence enhancements. There is no reason that tortious conduct cannot be categorized and ranked just as criminal conduct is.[128] One could, for example, authorize a 1:1 maximum ratio for reckless conduct, 3:1 for knowing misconduct, and 5:1 for intentional wrongs. Or one could authorize a baseline ratio of 3:1 for misconduct causing economic harm, a higher ratio of 5:1 for

123. *See, e.g.*, Romero *supra* note 7, at 155 (arguing that a jury award does not reflect a broad community judgment about the wrongfulness of the conduct, or of the proper amount of punishment).

124. *See* Fisher, *supra* note 7, at 30 (". . . the 'law' in the Exxon jury instructions came from the court and the parties, not from Congress.").

125. *See* Romero, *supra* note 7, at 155.

126. *See* Fisher, *supra* note 7, at 21 ("[J]uries generally are unable (at least without any legal guidance) to compare a case they are seeing to others like it and to decide whether a set of facts is particularly egregious.").

127. *See, e.g.*, Romero, *supra* note 7, at 157–58 (proposing that legislatures use the criminal code model and impose different caps for different types of misconduct); Fisher, *supra* note 7, at 42 (proposing that legislatures specify maximum ratios with respect to more finely grained categories of misconduct).

128. *See, e.g.*, Fisher, *supra* note 7, at 42 (arguing that one can imagine various kinds of aggravating and mitigating factors of tortious conduct, just as in criminal law).

harm to the environment, and an even higher ratio of 10:1 for harm to people.

An alternative approach to the criminal code model would be to borrow from the Supreme Court's death penalty jurisprudence. Legislatures could specify aggravating and mitigating factors to guide juries in determining the amount of punitive damages within the maximum.[129] Another approach would establish a presumptive punishment for the misconduct and authorize juries to depart from the presumptive award by a multiple of two or three depending on the presence or absence of aggravating or mitigating factors specified by statute.[130]

The Supreme Court's insistence that punishment be regularized puts a premium on legislative involvement in authorizing, regulating, and limiting punitive damages. By regulating punitive damages, the objections to unfettered discretion, arbitrariness, and unpredictable awards would be answered.

CRIMINAL SANCTIONS

Criminal sanctions also remain available to punish and deter wrongful conduct that harms the environment.[131] Congress and various states have enacted statutes imposing criminal liability for conduct causing harm to the environment. Some of these laws existed at the time of the *Exxon Valdez* oil spill and were enforced against Exxon and the captain of its oil tanker. The United States prosecuted Exxon for criminal violations of the Clean Water Act,[132] the Refuse Act of 1899,[133] the Migratory Bird Treaty Act,[134] the Ports and Waterways Safety Act,[135] and the Dangerous Cargo Act.[136] Ex-

129. *See, e.g.*, Fisher, *supra* note 7, at 42 (proposing that legislatures provide lists of aggravating and mitigating factors to guide juries respecting permissible amounts of punitive damages and to require juries to find aggravating factors before imposing punitive damages above otherwise presumptive thresholds).

130. *See, e.g.*, N.M. STAT. ANN. §§ 31-18-15–15.1 (2009 Cumulative Supp.) (providing a basic sentence for different felony classifications and permitting the judge to alter the basic sentence by increasing it up to one-third or decreasing it by more than one-third, depending on the proof of aggravating or mitigating circumstances).

131. There is a debate concerning the propriety of punishing a defendant both criminally and with punitive damages for the same conduct. Double punishment for the same conduct raises many of the same concerns that underlie the Double Jeopardy Clause although the Double Jeopardy Clause does not apply to civil litigation between private parties. *See* Markel, *Punitive Damages*, *supra* note 7, at 1450–60 (proposing that punitive damages would not preclude a later criminal prosecution, but a criminal conviction would preclude a later action for punitive damages). This position is similar to that adopted by the Australian High Court in Gray v. Motor Accidents Commission (1998) 196 C.L.R. 1. For a discussion of the implications of this decision, see Tyrone Kirchengast, *The Purification of Torts, the Consolidation of Criminal Law and the Decline of Victim Power*, 10 U. NOTRE DAME AUSTL. L. REV. 85 (2008).

132. Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c)(1) (2006).

133. Refuse Act of 1899, 33 U.S.C. §§ 407, 411 (2006).

134. Migratory Bird Treaty Act, 16 U.S.C. §§ 703, 707(a) (2006).

135. Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1) (2006).

136. Dangerous Cargo Act, 46 U.S.C. § 3718(b) (2006).

xon pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act, and agreed to a total fine of $150 million.[137] This fine was later reduced to $25 million plus restitution of $100 million.[138] Each of these statutes authorizes imprisonment as well as fines. Under the Clean Water Act, for example, negligent violations carry a maximum prison term of one year for the first violation and up to two years for subsequent violations.[139] Knowing violations carry a prison penalty up to three years for the first offense and up to six years for subsequent convictions.[140]

Each of the environmental crimes listed above applies to individuals as well as corporations.[141] Although criminal liability for corporations has its critics,[142] the concept of corporate criminal liability has been accepted by the Supreme Court[143] and is now an established feature of criminal law in general and of environmental crime in particular.[144] Of course, corporations

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137. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008).

138. *Id.*

139. 33 U.S.C § 1319 (c)(1)(B) (2006).

140. 33 U.S.C § 1319 (c)(2)(B). The Refuse Act designates unlawful discharges into navigable waters as a misdemeanor and authorizes imprisonment for a term from thirty days to one year. 33 U.S.C. § 411 (2006). Taking or killing migratory birds in violation of the Migratory Bird Treaty Act amounts to a misdemeanor subject to imprisonment up to six months. 16 U.S.C. § 707(a) (2006). Violations of the Ports and Waterways Safety Act and the Dangerous Cargo Act are classified as Class D felonies subject to imprisonment between five and ten years. 33 U.S.C. § 1232(b)(1), 46 U.S.C. § 3718(b). Class D felonies carry a penalty of imprisonment for more than five years and no more than 10 years. 18 U.S.C. § 3359(a)(4) (2006). Both of these statutes were amended the year after the *Exxon Valdez* oil spill to classify violations of the statutes as Class D felonies, changing the previous penalty of a $50,000 fine and maximum five years in prison. Pub. L. No. 101-380 §§ 4302(c)(1), (j)(1), 104 Stat. 484 (1990).

141. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1321(a)(7) (person defined to include an individual or a corporation); Dangerous Cargo Act, 46 U.S.C. § 3701(4) (person defined to mean an individual or a corporation).

142. *See, e.g.*, Albert W. Alschuler, *Two Ways to Think about the Punishment of Corporations* 1 (Northwestern University School of Law Public Law and Legal Theory Series, No. 09–19, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491263## (arguing that corporate criminal punishment is a mistake because it punishes innocent shareholders); KATHLEEN F. BRICKEY, ENVIRONMENTAL CRIME: LAW, POLICY, PROSECUTION 90 (2008) (noting that although the rules underlying corporate criminal liability are well-settled, corporate criminal responsibility still provokes controversy); J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 17 (2002).

143. *See* N.Y. Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481 (1909).

144. *See, e.g.*, BRICKEY, *supra* note 142, at 89 (practice of prosecuting corporate entities appears to be more prevalent in environmental crime cases); ELLEN S. PODGOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL 16–19 (2009) ("Corporate criminal liability has recently played a significant role in the prosecution of environmental crimes."). For a fuller discussion of the use of the criminal sanction to enforce environmental laws, see Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2413 (1995) [hereinafter Lazarus, *Reforming Environmental Criminal Law*] (proposing how environmental criminal law should be reformed to be an effective enforcement tool); Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861, 864–72 (1996) [hereinafter Lazarus, *Mens Rea in Environmental Criminal Law*].

can only be subjected to criminal fines, but individual corporate employees can be sentenced to prison and fined.

Criminal sanctions can be imposed on the culpable actor. Indeed, the State of Alaska prosecuted Captain Hazelwood for violation of several Alaska statutes prohibiting "reckless endangerment, operating a watercraft while intoxicated, and negligent discharge of oil."[145] At trial on these charges, a jury convicted him of violating only the Alaska statute that made it unlawful to negligently discharge petroleum upon the water or land of the state—a misdemeanor.[146] The trial judge sentenced him to 90 days in jail and a $1,000 fine, or in the alternative, to perform 1000 hours of community service.[147] Both the conviction and sentence were affirmed by the Alaska Court of Appeals.[148]

The federal government, however, did not prosecute either Captain Hazelwood or any Exxon employees for violations of federal environmental crimes even though the penalty provisions in these statutes apply to both individuals and corporations.[149] Although Exxon corporation violated these statutes, as it admitted in its guilty plea,[150] Exxon's commission of these crimes was based on conduct or omissions by employees acting on behalf of the corporation. A corporation can only act through its employees. The conduct of Captain Hazelwood in piloting an oil tanker while intoxicated most likely violated the Clean Water Act's criminal provision prohibiting the negligent discharge of oil into navigable waters.[151] Some Exxon executives also likely violated the Clean Water Act based on findings that Exxon's executives had knowledge of Hazelwood's drinking history and his relapse before putting him in charge of the *Exxon Valdez*.[152] These findings support culpability—either a reckless or a negligent discharge of oil—on the part of the Exxon executives.[153] Those officers who recklessly or negli-

145. Hazelwood v. State, 836 P.2d 943, 945 (Alaska Ct. App. 1992).

146. Hazelwood v. State, 962 P.2d 196, 201 (Alaska Ct. App. 1998).

147. *Id.*

148. *Id.* at 202.

149. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1321(a)(7) (2006) (person defined to include an individual or a corporation); Dangerous Cargo Act, 46 U.S.C. § 3701(4) (2006) (person defined to mean an individual or a corporation).

150. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008) (noting that Exxon pled guilty to violation of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act).

151. 33 U.S.C. § 1321(b)(3) prohibits the discharge of any pollutants into navigable waters of the United States and adjoining shorelines.

152. *See In re* Exxon Valdez, 270 F.3d 1215, 1237–38 (9th Cir. 2002) ("Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound."); *In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1097 (D. Alaska 2004) ("Exxon willfully allowed Captain Hazelwood to continue to operate a supertanker filled with crude oil despite Exxon's knowledge that he was drinking again.").

153. These executives were reckless if they were aware of the risk of an accident and oil spill and consciously disregarded it; but even if they were unaware of the risk, they were negligent in

gently ordered or permitted Captain Hazelwood to pilot the oil tanker would be liable under the Clean Water Act for a criminal violation subject to a sentence of imprisonment up to one year.[154] Furthermore, any corporate officer who knew that Captain Hazelwood was intoxicated when he took charge of the tanker could be imprisoned up to three years for a knowing violation.[155]

Criminal liability may even extend to corporate officers, including high-level executives who control corporate policies, whose participation in the violation is less direct. Under the 'responsible corporate officer' doctrine, corporate employees who have a 'responsible relationship to' or a 'responsible share of' the violation can be criminally liable.[156] This theory of liability applies to any corporate executive who "by reason of his position in the corporation, [had] responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and . . . failed to do so."[157] In addition to lower-level corporate officers with direct responsibility for the activities that led to the criminal violation, the chief executive officer of the corporation,[158] and perhaps some members of the board of directors,[159] might be liable under this standard.

The 'responsible corporate officer' doctrine has been applied to environmental crimes. Indeed, the Clean Water Act includes a 'responsible corporate officer' in its definition of 'person' subject to criminal liability.[160] Furthermore, courts have used the doctrine in upholding criminal liability for high-level executives. The Fourth Circuit has applied the doctrine in a Clean Water Act prosecution,[161] and state courts have used it in enforcing state environmental statutes.[162]

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the sense that they should have known about the risk of relapse and the risk of a serious accident by a drunken ship pilot.

154. 33 U.S.C. § 1319 (c)(1).

155. 33 U.S.C. § 1319 (c)(2).

156. *See* United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975). In both cases the Court held that a president of a corporation could be found guilty of a misdemeanor violation of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1042. In *Dotterweich*, the Court noted that the statute dispensed with any mens rea requirement and imposed liability on any officer 'otherwise innocent' who stood 'in responsible relation' to a violation of the Act. 320 U.S. at 281. The Court in *Park* refined the responsible relation test by adding that criminal liability extends to those officers who have 'a responsible share of' the violation. 421 U.S. at 672–74.

157. *Park*, 421 U.S. at 673–74.

158. The responsible corporate officer doctrine was applied to the president of the corporation in *Dotterweich* and the chief executive officer in *Park*.

159. For an illuminating discussion on the application of the responsible corporate officer doctrine to directors, see Erik Gerding, *United States of America*, *in* DIRECTOR'S PERSONAL LIABILITY FOR CORPORATE FAULT, A COMPARATIVE ANALYSIS 301, 313–18 (Helen Anderson ed., 2008).

160. Clean Water Act, 33 U.S.C. § 1319(c)(6).

161. United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001).

162. For decisions applying the doctrine in water pollution cases, see, for example, State Dep't of Envtl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super. 381 (App. Div. 1995); BEC

Courts are reluctant, however, to apply this doctrine where there is no explicit congressional intent to include this type of liability or where the corporate officer has little or no culpability for the criminal violation.[163] Concerned that this doctrine imposes vicarious criminal liability, the Supreme Court has suggested that the responsible corporate officer doctrine should be limited to statutes that specifically authorize it.[164] Even when a statute explicitly makes a responsible corporate officer subject to criminal liability,[165] lower federal courts have restricted the reach of the doctrine to those officers with direct oversight of the corporate activity that led to the criminal violation.[166] Courts are even more reluctant to rely on the doctrine when the criminal statute requires a 'knowing' *mens rea*.[167] Under this restrictive view, a high-ranking officer with general authority over many operations of the corporation may not qualify as a responsible corporate officer. Only those officers who have been delegated direct responsibility for the activity would meet this restrictive criterion for application of the doctrine. Senior level executives who had no direct responsibility but who were aware of the violation or had knowledge of facts that should have alerted them to the risk of a violation, however, could still be liable based on their personal culpability.

Criminal punishment of senior executives who control corporate policies makes deterrence more effective in the sense that deterring the individuals with the power to change corporate behavior is tantamount to deterring the corporation. If Captain Hazelwood and the responsible Exxon executives had been prosecuted and convicted of negligently discharging oil into

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Corp. v. Dep't of Envtl. Prot., 256 Conn. 602 (2001); State Dep't of Ecology v. Lundgren, 94 Wash. App. 236 (Div. 2 1999). For decisions applying the doctrine in waste disposal cases, see, for example, Comm'r, Dept. of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556 (Ind. 2001); In Matter of Dougherty, 482 N.W.2d 485 (Minn. Ct. App. 1992); People v. Matthews, 7 Ca. App. 4th 1052 (2d Dist. 1992).

163. *See, e.g.*, Celentano v. Rocque, 282 Conn. 645, 671 (2007) (explaining that the strict liability feature of the responsible corporate officer doctrine applies only to a narrow class of 'public welfare' statutes). The responsible corporate officer doctrine, to the extent that it imposes strict liability, is inconsistent with the general principle of criminal law that liability should be premised on personal culpability. A senior executive like the chief operating officer, who is responsible for the general operation of the corporation, but who has delegated responsibility for a particular operation, may have had no knowledge of a violation, but under the doctrine could be liable.

164. Meyer v. Holley, 537 U.S. 280, 287–89 (2003) (rejecting a request to impose liability on the president of a real estate corporation for an employee's violation, characterizing the *Dotterweich* rule as unusually strict and a non-traditional rule of vicarious liability that would be applied only when Congress has specified its intent to apply it).

165. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1319(c)(6).

166. *See, e.g.*, J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 2.07(b) (2002); Harry First, *General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers, in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 5.04(2) (Otto G. Obermaier & Robert G. Morvillo eds., 1998).

167. *See, e.g.*, United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 51–52 (1st Cir. 1991) (explaining that the responsible corporate officer doctrine could not circumvent the explicit 'knowing' requirement for criminal liability under the hazardous waste disposal statute).

the waters of Prince William Sound in violation of the Clean Water Act, they could have been sentenced to a prison term of up to one year.[168] This sanction was not pursued against culpable individuals in the *Exxon* case. If sentenced to prison, corporate executives bear the full measure of the punishment. Unlike fines or punitive damages, which executives can get the corporation to pay, the executive cannot delegate to the corporation or a subordinate to serve his prison sentence. Punishment in the form of a criminal sentence to a prison term has more of the feel of retribution and probably more of a deterrent effect.[169]

One might ask whether punishing misconduct involving environmental harm with a criminal conviction and sentence offers any advantage over punitive damages[170] in view of the fact that a criminal prosecution brings into play criminal procedural protections. The answer to this question depends on the degree of culpability involved in the conduct[171] and the need to punish the transgressor. For intentionally or knowingly causing harm, a criminal conviction makes a stronger statement about the moral quality of the conduct than a punitive damages award.[172] It expresses the moral culpability of the conduct and conveys a stigma that reflects the retributive notion of just desserts. In addition, the criminal sanction, especially imprisonment, sends a much stronger deterrent message about the costs of committing environmental crimes.[173] Criminal sanctions, therefore, have a greater potential to deter future environmental violations than do punitive damages.[174] A punitive damages award obtained by a private party in a civil action also punishes the defendant, but the stigma of a civil award is less, and the message seems to be more about money than punishment. Both criminal sanctions and punitive damages are available to punish culpable

168. 33 U.S.C. § 1319(c)(1).

169. *See, e.g.*, Fisher, *supra* note 7, at 40 ("Just ask an independent businessperson whether she would rather spend years in prison or dole out a large chunk of her corporation's cash reserves.").

170. See BRICKEY, *supra* note 142, at 17–24 for a discussion of the merits of criminal enforcement of environmental laws.

171. *See, e.g.*, Lazarus, *Reforming Environmental Criminal Law*, *supra* note 144, at 2511 (arguing that environmental crimes should involve the kind of morally culpable behavior warranting felony sanctions such as knowing violations). Professor Lazarus argues that the criminal sanction should be employed only when there is moral culpability. *Id.* at 2529 (noting the right not to be incarcerated in the absence of moral culpability).

172. *See, e.g.*, Lazarus, *Mens Rea in Environmental Crime*, *supra* note 144, at 864 ("[T]he imposition of a criminal sanction makes an important symbolic statement regarding the moral culpability of the transgressor . . . it is not merely unlawful—it is criminal in character.").

173. A criminal fine, like a punitive damages award, must be sufficiently severe in order to deter. Otherwise, the fine may be considered just another cost of doing business. *See* BRICKEY *supra* note 142, at 16 (explaining that the risk of corporations considering a fine as a cost of doing business is "especially true in the context of environmental regulation, where the costs of compliance can easily exceed an ordinary criminal fine").

174. Lazarus, *Mens Rea in Environmental Criminal Law*, *supra* note 144, at 867 (noting that criminal sanctions have the unique ability to deter violations, and "the threat of personal criminal penalty can prompt far greater compliance by industry than mere civil sanctions").

defendants. Criminal sanctions should be used to punish especially culpable misconduct, like purposeful or knowing violations. Criminal prosecution may be too punitive in cases involving less culpable violations, and punitive damages should be sufficient to punish such conduct. For the most culpable misconduct, a defendant may be punished by both punitive damages and criminal penalties.

CONCLUSION

Both the type and amount of punishment need to be taken into consideration when punishing environmental misconduct. When the conduct is subject to both criminal sanctions and punitive damages, the type of punishment that is most appropriate in a particular case depends on the culpability of the conduct and the nature of the harm as well as the need for deterrence and retribution. In some cases, the reality of imprisonment of corporate officials may prove to be the best deterrence and the best method to effectively express the moral outrage occasioned by the misconduct. In other cases, a very large punitive damages award may spur executives, board members, and shareholders into making changes that will prevent future misconduct. In some cases, the defendant's conduct may deserve both criminal punishment and punitive damages. The availability of high award punitive damages greater than a 1:1 ratio to compensatory damages, however, will require legislative regulation that categorizes the misconduct subject to punitive damages, assigns the maximum amount of allowable damages for different types of misconduct, and authorizes high awards for particularly reprehensible conduct.