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IN *EXXON SHIPPING CO. V. BAKER*,[1] THE SUPREME COURT of the United States considered three issues surrounding the 1989 *Exxon Valdez* oil spill: (1) whether in maritime law a corporation could be held punitively liable for the reckless actions of the ship's captain; (2) whether federal statute implicitly barred awarding punitive damages; and (3) if punitive damages were allowed, whether the $2.5 billion awarded by the Ninth Circuit was excessive in accordance with maritime common law.[2] Justice Alito took no part in the decision of the case.[3] As a result of Justice Alito's absence, the Court was evenly split and unable to reach a decision on Exxon's derivative liability, so the Ninth Circuit's disposition on this issue was undisturbed.[4] As to the second issue, the Court unanimously held that the federal statute does not implicitly bar punitive damages in maritime law.[5] However, the Justices ruled five-to-three that punitive damages should be limited to a 1:1 ratio as a matter of maritime common law.[6] By failing to reach a majority on the analysis of punitive derivative liability in maritime law, the Court missed an opportunity to resolve a circuit split and adopt the Restatement (Second) of Torts ("Restatement") derivative liability rule, as used by the Ninth Circuit.[7] Further, the Court should have analyzed Exxon's claim that the punitive damages award was excessive under

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1. 128 S. Ct. 2605 (2008).
2. *Id.* at 2614.
3. *Id.* at 2634; *see also* Robert Barnes, *Justices Assess Financial Damages in Exxon Valdez Case*, WASH. POST, Feb. 28, 2008, at A2 (noting that Justice Alito recused himself because of his stockholdings in Exxon).
4. *See infra* Part III.A.
5. *See infra* Part III.B.
6. *See infra* Part III.C.
7. *See infra* Part IV.A.

the traditional due process standard.[8] Rather, the Court framed the punitive damages question and analysis solely on maritime common law, paradoxically claiming it mandates a 1:1 ratio of compensatory to punitive damages, despite maritime case law that suggests judicial deference to Congress, which left punitive damages uncapped.[9] In so doing, the Court missed an opportunity to address confusing due process case law.[10] Rather, the Court rendered an outcome-based decision by framing the grant of certiorari in a manner that did not consider due process and was likely motivated by the majority's belief that Exxon already paid sufficient damages for the 1989 oil spill in other cases.[11] Unfortunately, this holding will affect future maritime litigation regarding punitive damages resulting from egregious or grossly negligent behavior, including BP's potential liability in the recent 2010 Gulf of Mexico oil spill.[12]

I. THE CASE

In 1989, the oil tanker *Exxon Valdez* ran aground on Bligh Reef in Alaska's pristine Prince William Sound, spilling millions of gallons of oil into the surrounding waters.[13] Prior to the accident, the ship's captain, Joseph Hazelwood, unexpectedly left the bridge minutes before the ship was about to make a difficult maneuver.[14] Expert witnesses testified that Hazelwood's actions were unjustified because his absence left only one officer on the bridge when two were required by law, and the remaining officer was not certified to navigate the channel.[15] Additionally, it was later discovered that Hazelwood was intoxicated at the time of the crash[16] and that Exxon had prior knowledge of his recurring alcohol problem.[17] Further, Hazelwood ordered the crew to "rock" the tanker in an attempt to free it from the reef, which may have caused more oil to spill.[18]

8. *See infra* Part IV.B.1.

9. *See infra* Part IV.B.2.

10. *See infra* Part IV.B.4.

11. *See infra* Part IV.B.3.

12. *See infra* Part IV.B.3.

13. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2611 (2008).

14. *Id.* at 2612.

15. *Id.* "A special license is needed to navigate the oil tanker [around Bligh Reef] in . . . Prince William Sound, and Captain Hazelwood was the only person on board with the license." *In Re* Exxon Valdez, 270 F.3d 1215, 1222 (9th Cir. 2001), *vacated*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (*In re Exxon Valdez I*).

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

17. *Id.* at 2612. There was evidence demonstrating that Hazelwood had previously drank on the job, Exxon knew of Hazelwood's drinking problem, and that some Exxon officials even drank with him. *Id.* Further, after rehabilitation treatment, Hazelwood returned to work for Exxon, and there was no evidence that the company monitored his activities. *Id.*

18. *Id.* at 2613.

The disaster required billions of dollars to fund cleanup efforts,[19] and Exxon pled guilty to violations of various federal statutes such as the Clean Water Act ("CWA")[20] and the Refuse Act,[21] ultimately paying $125 million in fines and restitution damages to the United States government.[22] Additionally, Exxon paid $900 million "toward restoring natural resources" to the state of Alaska and the federal government and "another $303 million in voluntary settlements with fishermen, property owners, and other private parties" around Prince William Sound.[23] The federal district court consolidated all civil cases seeking compensatory damages into one action,[24] along with thousands of plaintiffs seeking punitive damages.[25]

The class action suit was organized into three phases:[26] the first phase examined the recklessness and potential punitive liability of Hazelwood and Exxon; the second phase "set compensatory damages for commercial fishermen and Native Alaskans;"[27] and the third phase "determined the amount of punitive damages for which Hazelwood and Exxon were each liable."[28] In the first phase of the trial, the district court found that both Hazelwood and Exxon could be punitively liable for the accident.[29] In the second phase, "the jury awarded $287 million in compensatory damages to the commercial fishermen,"[30] while most Native Alaskans settled out of court.[31] In the third phase, the jury granted punitive damages in the amount of $5000 against Hazelwood and $5 billion against Exxon.[32]

19. *Id.*

20. 33 U.S.C. §§ 1311(a), 1319(c)(1) (2006).

21. 33 U.S.C. §§ 407, 411 (2006).

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

23. *Id.*

24. *See id.* at 2613. Individual plaintiffs claiming compensatory damages against Exxon were divided into three classes including "commercial fishermen, Native Alaskans, and landowners." *Id.*

25. *Id.* ("At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000.").

26. *Id.*

27. *Id.* A separate civil action by the federal government and the State of Alaska resulted in a payment of "$303 million in voluntary settlements with fisherman, property owners, and other private parties." *Id.* at 2613.

28. *Id.*

29. *Id.* at 2614. The jury's instructions regarding corporate liability were:

> [A] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

Id. (quoting Petition for a Writ of Certiorari at app. 301a, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219)).

30. *Id.*

31. *Id.* A majority of the Native Alaskans settled for $20 million out of court, and "those who opted out of that settlement ultimately settled for a total of around $2.6 million." *Id.*

32. *Id.* The court instructed the jury on the purpose of punitive damages, emphasizing that such damages were "designed not to provide compensatory relief but to punish and deter the defendants." *Id.*

Exxon appealed on various issues to the Ninth Circuit,[33] which affirmed the jury's instructions on Exxon's "corporate liability for acts of managerial agents under Circuit precedent."[34] Exxon argued that it could not be held liable for punitive damages for Hazelwood's recklessness.[35] Relying on *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*,[36] the Ninth Circuit rejected this assertion and upheld the district court's decision that Exxon was derivatively or vicariously liable for Hazelwood's actions.[37] In *Protectus*, the Ninth Circuit adopted the Restatement's position on punitive damages and apparent agency, holding that a principal can be liable for its agent's torts "not only where they are authorized, ratified or approved [by the principal] and not only where the agent was unfit and the principal was reckless in employing him, but also where he was employed in a managerial capacity and was acting in the scope of employment."[38]

When determining the amount of punitive damages, the Ninth Circuit remanded twice for "adjustments," relying on Supreme Court due process case law[39] "before ultimately itself remitting the award to $2.5 billion."[40] In October of 2007, the Supreme Court granted certiorari[41] to consider three questions: (1) the extent of Exxon's corporate liability for Hazelwood's recklessness, (2) whether federal statutory law implicitly barred punitive damages, and (3) whether the $2.5 billion punitive award was "excessive" under maritime common law.[42] The Supreme Court did not grant certiorari on the issue of constitutional due process limitations that the lower courts had addressed.[43]

33. *Id.* Exxon appealed various issues including: the availability of punitive damages, the level of proof described in the jury instructions, the sufficiency of evidence for the finding of punitive damages, and the amount of punitive damages in proportion to compensatory damages. *In re Exxon Valdez I*, 270 F.3d 1215, 1225, 1231, 1238 (9th Cir. 2001), *vacated*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

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

35. *In re Exxon Valdez I*, 270 F.3d at 1233.

36. 767 F.2d 1379 (9th Cir. 1985).

37. *In re Exxon Valdez I*, 270 F.3d at 1235.

38. *Id.* (quoting *Protectus*, 767 F.2d at 1386) (internal quotations omitted).

39. *Exxon*, 128 S. Ct. at 2614 ("[T]he Circuit [court] remanded twice for adjustments in light of this Court's *due process cases* before ultimately itself remitting the award to $2.5 billion." (emphasis added)); *see, e.g.*, *In Re Exxon Valdez I*, 270 F.3d at 1246–47; *In re* Exxon Valdez, 472 F.3d 600, 625 (9th Cir. 2006), *vacated*, Exxon Shipping Co. v. Baker 128 S. Ct. 2605 (2008) (*In re Exxon Valdez II*); *see also infra* Part II.B.

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

41. 552 U.S. 989 (2007).

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

43. *See* 552 U.S. 989 (2007) (stating that certiorari was granted "limited to Questions 1, 2, and 3(1)"); Petition for Writ of Certiorari at i, 21, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219) (stating that question three part one is whether punitive damages are limited by federal maritime law and question three part two is whether punitive damages are limited by constitutional due process).

II. LEGAL BACKGROUND

The main issues examined in *Exxon* are derivative liability for punitive damages,[44] due process and maritime limitations on punitive damages,[45] and maritime common law.[46] Specifically, *Exxon* examined the application of punitive derivative liability in maritime cases and the interaction of punitive and compensatory damages in maritime law.

A. Punitive Vicarious Liability in Maritime Law: What Level of Accountability Should Apply to Corporations for their Agents?

It is generally accepted in American law that employers should be held vicariously liable for compensatory damages caused by their agents.[47] However, the assessment of vicarious liability for punitive damages is not as clear because, while the law recognizes that employers should have some form of liability for the action of their employees, many courts believe that "employers should not be fully exposed to vicarious liability for punitive damages."[48]

Assessing punitive damages through vicarious or derivative liability initially evolved in English law and was later adopted by American courts in the nineteenth century.[49] Today, derivative liability for punitive damages is divided among a spectrum of rules, ranging from strict liability[50] to no liability,[51] with modern maritime courts taking three mid-ground positions.[52] Like land-based law,[53] there is a split among federal circuits in maritime law over whether to apply the

44. *See infra* Part II.A.

45. *See infra* Part II.B.

46. *See infra* Part II.C.

47. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 119 (1997) ("From the beginning[,] American law has recognized that employers should generally be held vicariously liable for compensatory damages resulting from the torts of their employees committed in the course and scope of the employment." (citing Justice Story's opinion in *Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818))).

48. *Id.*

49. Deborah Travis, *Broker Churning: Who Is Punished? Vicariously Assessed Punitive Damages in the Context of Brokerage Houses and Their Agents*, 30 HOUS. L. REV. 1775, 1792 (1993).

50. At one end of the spectrum, courts will find the principal is strictly liable for punitive damages resulting from the acts of its agents "regardless of actual authority or ratification." Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 575 n.14 (1982) (quoting Mayo Hotel Co. v. Danciger, 288 P. 309 (Okla.1930) (internal quotations omitted)). This rule was adopted because "it is in accordance with agency law that holds principals liable when their agents commit a tortious act with apparent authority." Muratore v. M/S Scotia Prince, 845 F.2d 347, 354 (1st Cir. 1988).

51. On the other end of the spectrum, some courts refuse to find employers liable at all for punitive damages resulting from their agent's actions. *See generally*, Robertson, *supra* note 47, at 126–27.

52. *See id.* at 126.

53. *See* Travis, *supra* note 49, at 1792 (discussing the general split among non-maritime courts on vicariously assessing punitive damages).

Restatement's view[54] on derivative liability for punitive damages or to use other tests that make it more difficult to find corporate liability.[55]

The Fifth Circuit, following the Sixth Circuit's lead,[56] adopted the most stringent mid-ground rule for vicarious liability in *In re P & E Boat Rentals, Inc.*,[57] requiring derivative liability for punitive damages when the corporation "*authorizes or ratifies* wanton actions of an agent," rather than applying liability merely when an employee acts in the scope of his or her employment.[58] The Fifth Circuit's decision in *P & E Boat Rentals* hinged on the lack of evidence that the company's "policymaking officials were aware" of their foreman's practice, requiring captains to travel at high speeds on the Mississippi.[59] The discussion of "policymaking" officials in *P & E Boat Rentals* is in accord with the Fifth Circuit's view that the corporation itself, not just its employees, must be "considered the wrongdoer."[60] The Fifth Circuit based its decision on an early 19th century maritime case,[61] *The Amiable Nancy*,[62] where the Supreme Court held that owners of a ship could not be punitively liable for the wrongdoing of the captain and crew where the owners "neither directed . . . nor countenanced . . . nor participated . . ." in the wrongful conduct.[63]

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54. The Restatement (Second) of Torts allows punitive damages against a principle by acts of an agent only if:

> (a) the principle or a managerial agent authorized the doing and the manner of the act, or (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (1977).

55. *See In Re Exxon Valdez I*, 270 F.3d 1215, 1235 n.84 (9th Cir. 2001), *vacated*, Exxon v. Baker, 128 S. Ct. 2605 (2008) (stating that Fifth and Sixth Circuits rejected *Protectus* claiming that a principle must ratify the actions of an agent for derivative liability); *see also* Robertson, *supra* note 47, at 126.

56. *See* U.S. Steel Corp. v. Furhman, 407 F.2d 1143, 1146 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970) (denying a vicariously assessed punitive damages award because the captain's actions were not within "authorized procedures dictated by the officials of [the ship owner,] United States Steel") .

57. 872 F.2d 642 (5th Cir. 1989). In *P & E Boat Rentals*, two crew boats collided in heavy fog on the Mississippi River, killing and injuring passengers. *Id.* at 644–45. The district court found that the captain of one of the boats was negligent for not having a valid Coast Guard license, operating a vessel at excessive speed, and failing to monitor the radar and use proper signals. *Id.* at 646.

58. *Id.* at 650 (emphasis added); *see also id.* at 652.

59. *Id.* at 652–53.

60. *Id.* at 652 ("In such a case [where employees acted on their own], the corporation itself cannot be considered the wrongdoer. If the corporation has formulated policies and directed its employees properly, no purpose would be served by imposing punitive damages against it except to increase the amount of the judgment.").

61. *Id.* at 650–51 (citing The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818)).

62. 16 U.S. (3 Wheat.) 546 (1818). In *Amiable Nancy*, the ship-owner of *The Scourge*, who was not on the voyage, was only liable for compensatory damages and not for "vindictive damages" when *The Scourge*'s crew plundered another ship. *Id.* at 546–47, 559.

63. *Id.* at 559. Further, the Fifth Circuit stated that the Supreme Court later affirmed *Amiable Nancy* in the 1893, non-maritime case, *Lake Shore & Michigan Southern Railway Co. v. Prentice*. *See P & E Boat Rentals*, 872

Yet, other federal circuits have different tests to determine maritime derivative liability.[64] The First Circuit adopted a qualified version of the Restatement in *CEH, Inc. v. F/V Seafarer*.[65] To find derivative liability under the First Circuit test, the agent must be employed in a managerial capacity and have acted in the scope of employment, and the principal must have "some level of culpability for the [agent's] misconduct."[66] The First Circuit required this "some level of culpability" standard because of its concern that under a strict reading of the Restatement, a principal could be held liable where its managerial agent was acting within the scope of his or her employment, but by no fault of the employer.[67] While the First Circuit did not specifically define its standard of "some level of culpability" in *CEH*, the court determined that the employer met this standard of culpability because "[n]ot only was there a complete delegation of authority in a troublesome work situation, but also a complete absence of any policy directive, written or oral."[68]

Finally, the Ninth Circuit adopted the Restatement's[69] view of punitive vicarious liability in *Protectus*.[70] In *Protectus*, the Ninth Circuit held that in a maritime case, a principal may be liable for punitive damages resulting from the actions of a reckless agent or actions of a manager within the scope of his or her employment.[71] The Ninth Circuit explained that the Restatement "better reflects the reality of modern

F.2d at 651 ("Seventy-four years later, the Supreme Court affirmed these punitive damage principles in *Lake Shore* . . . ." (citing Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893))).

64. *See In re Exxon Valdez I*, 270 F.3d 1215, 1235 n.84 (9th Cir. 2001), *vacated*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (discussing various federal circuit approaches to punitive derivative liability); *see also* Robertson, *supra* note 47, at 126.

65. 70 F.3d 694 (1st Cir. 1995). In *CEH*, a lobster vessel owner, CEH, sued a fishing boat, her two captains, and her owner for disturbing CEH's lobster traps on the sea floor. *Id.* at 696–67. The fishing vessel, one captain, and the owner were found liable, and the court awarded compensatory and punitive damages. *Id.* at 697–98. The First Circuit found vicarious punitive liability in the owner of the fishing boat for "failure to provide any supervision over his captains" and because the captain of the boat had "complete managerial discretion over the means and methods of fishing." *Id.* at 705.

66. *Id.* at 705.

67. *Id.* Other maritime statutes also include a culpability requirement. *See, e.g.*, Limitation of Shipowners' Liability (Limitation) Act, 46 U.S.C. § 30505 (2006). "The [Limitation] Act allows a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel." Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 446 (2001). Justice Stevens noted Exxon did not attempt to argue that the Limitation Act applied because of the difficulty it would face alleging that Captain Hazelwood's actions were not within the company's "privity or knowledge." Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2635–36 & n.3 (2008) (Stevens, J., concurring and dissenting) (discussing application of the Limitation Act).

68. *CEH*, 70 F.3d. at 705.

69. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 54.

70. Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985).

71. *Id.* The shipowner of the *Protectus* sued dock-owner, North Pacific, when North Pacific's managerial employee ordered the ship cast-off from its dock while a fire was being fought aboard the *Protectus*. *Id.* at 1381–82. The court held that by casting the *Protectus* off from the dock, the North Pacific employee prevented the fire department from putting the fire out. *Id.* at 1381–82. The court found the dock-owner negligent *per se* as well as liable for punitive damages under the Restatement. *Id.* at 1382, 1387.

corporate America,"[72] emphasizing that "a corporation can act only through its agents and employees, and that no reasonable distinction can be made between the guilt of the employee in a managerial capacity acting within the scope of his employment and the guilt of the corporation."[73]

State courts are also split on this issue, with some states requiring corporate approval or ratification,[74] other states adopting versions of the Restatement,[75]and a few states holding "employers liable for punitive damages on even broader grounds."[76]

B. Punitive Damages: Historical Origins and Due Process Considerations

Punitive damages are as ancient as the law itself and can be traced back to 2000 B.C.[77] The theory of punitive damages has continued to be relevant throughout history[78] with authorities calling for punitive-like penalties when there were "certain especially harmful acts."[79] Such punishment damages were first explicitly recognized in England, when fines could be imposed "for more than the injury received" and were later adopted into American common law.[80] Historically, various theories have been promulgated for the purpose of punitive damages,[81] but today, most scholars agree that punitive damages are primarily for retribution and deterrence.[82] The courts have awarded punitive damages in maritime law "where a defendant is shown to have engaged in willful and wanton conduct."[83] Historically, punitive damages served as an extra form of compensation in maritime law, because

72. *Id.* at 1386.

73. *Id.*

74. *See id.* at 1386 (noting the division of authority on derivative liability and that a "majority of courts . . . have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification" (quoting Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 575 n.14 (1982)) (internal quotations omitted)).

75. *See Hydrolevel*, 456 U.S. at 575 n.14. For example, Idaho, Colorado, California, and Oklahoma follow the Restatement. *Id.*

76. *See Protectus*, 767 F.2d at 1387.

77. *See* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 742–43 (2008).

78. *Id.* at 743.

79. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620 (2008); *see also* Seiner, *supra* note 77, at 742–43 (discussing the progression of punitive damages throughout history).

80. *Exxon*, 128 S. Ct. at 2620. (quoting Wilkes v. Wood, (1763) 98 Eng. Rep. 489, 498 (K.B.)); Seiner, *supra* note 77, at 743–44.

81. *See* Seiner, *supra* note 77, at 743.

82. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("[P]unitive damages serve a broader function [than compensatory damages]; they are aimed at deterrence and retribution.").

83. *See In re* P & E Boat Rentals, Inc., 872 F.2d 642, 650 (5th Cir. 1989).

significant compensatory damages for certain intangible injuries like pure economic loss or emotional distress were not always available in maritime law.[84]

Prior to *Exxon*, the Supreme Court affirmed the use of vicarious punitive damages[85] and had only restricted the amount of punitive damages in maritime law if it represented a violation of the Fourteenth Amendment or Fifth Amendment due process clauses.[86] Though the Supreme Court would later provide more guidelines for determining the amount of punitive awards in all due process limitation cases, the Court first emphasized its refusal to set a bright line rule,[87] which was reflected in maritime decisions by lower courts.[88] After the Court espoused its first due process analysis guidelines for all due process cases in 1996, courts applied these due process guidelines to determine whether punitive damages were excessive in maritime cases.[89]

The Court first outlined detailed guidelines for analyzing the constitutionality of punitive damages in the 1996 case *BMW of North America, Inc. v. Gore*.[90] Here, the Supreme Court held that where compensatory damages totaled $4000, a $2 million punitive damages award violated both substantive and procedural due process.[91] The majority opinion rested its conclusion primarily on procedural due process,

84. *See, e.g.*, *Exxon*, 128 S. Ct. at 2636 (Stevens, J., concurring and dissenting) ("General maritime law limits the availability of compensatory damages."); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 n.11 (2001) (stating that before the types of available compensatory damages "broadened," punitive damages were historically used in courts to compensate for intangible injuries); Gough v. Natural Gas Pipeline Co. of America, 996 F.2d 763, 765 (5th Cir. 1993) (stating that compensatory damages for emotional distress under maritime law will only be awarded when the plaintiff demonstrates there was physical impact or injury); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1021 (5th Cir. 1985) ("[C]laims for economic loss unaccompanied by physical damage to a proprietary interest [a]re not recoverable in maritime tort.").

85. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) (holding that punitive *respondeat superior* liability of a corporation for the actions of an employee, and in the absence of any wrongdoing by the corporation, was not a violation of the corporation's due process). Specifically, the *Haslip* Court stated that finding a corporation liable for its agent's wrongdoing in the scope of his or her employment without wrongdoing by the corporation "is not fundamentally unfair and does not in itself violate the Due Process Clause." *Id.*

86. *See* U.S. CONST. amend. V, amend. XIV, §1; *Exxon*, 128 S. Ct. at 2619, 2626; Brief in Opposition at 28–29, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219).

87. *See Haslip*, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. . . . [H]owever, . . . general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.").

88. *See* CEH Inc. v. F/V Seafarer, 70 F.3d 694, 705–06 (1st Cir. 1995) (affirming punitive awards of $10,000 and $50,000 in a maritime case, even though compensatory damages were less than $7,000).

89. *See, e.g.*, Silivanch v. Celebrity Cruises, Inc., 171 F. Supp. 2d 241, 262–63 (S.D.N.Y. 2001) (declining to overrule a punitive damages award of $7 million in a maritime case as excessive when the court awarded $2.6 million in compensatory damages). In *Silivanch*, the court determined a cruise line was negligent for an outbreak of Legionnaires Disease, a type of pneumonia, on its ship. *Id.* at 250, 262–63.

90. 517 U.S. 559 (1996).

91. *Id.* at 585–86. The wrongdoing consisted of BMW's decision not to inform dealers of pre-delivery damage to vehicles, which amounted to necessary repairs totaling less than three percent of the vehicle's value. *Id.* at 562–63. The lower court awarded the respondent $4,000 in compensatory damages, reflecting the diminished value of a "repainted BMW" and $2 million in punitive damages for BMW's concealment. *Id.*

emphasizing the right to notice of potential liability or criminality.[92] The *Gore* Court outlined three "guideposts" to help determine the permissible extent of punitive damages including: (1) "the degree of reprehensibility," (2) "the disparity between the harm or potential harm" and the punitive damages award, and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[93] Additionally, the Court recognized a need for a "higher ratio" of punitive to compensatory damages where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[94]

Declining to set forth a bright-line test, the Supreme Court has struggled with the ratio of compensatory damages to punitive damages. In 2003, the Supreme Court again struck down punitive damages on due process grounds in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[95] The Court held that damages were excessive when $145 million was awarded punitively with only $1 million awarded for compensation.[96] Using the guideposts from *Gore*, the Court emphasized that "few awards exceeding a single-digit ratio between punitive and compensatory damages to a significant degree, will satisfy due process."[97] The Court refused to state or apply a specific formula to determine punitive damages.[98]

More recently, in 2008, the Fourth Circuit held in *EEOC v. Federal Express Corp.*[99] that a punitive damages award for the violation of the Americans with Disabilities Act ("ADA") was constitutional even though it was 12.5 times the compensatory damages award.[100] Specifically, the court recognized that the ratio is only one aspect of the *Gore* guideposts and found the award was reasonable because it was well within the ADA statutory $300,000 cap on total damages.[101]

Additionally, the Court has struggled with considering harm to others in the "degree of reprehensibility" guidepost. In 2007, the Supreme Court addressed due process concerns about punitive damages in the context of a cigarette smoker's death in *Philip Morris USA v. Williams*.[102] In a five-to-four decision, the *Williams* Court decided that punitive damages awarded, even in part, to punish for harm to non-parties is a violation of the due process clause and therefore unconstitutional.[103]

92. *Id.* at 574.

93. *Id.* at 575.

94. *Id.* at 582.

95. 538 U.S. 408 (2003).

96. *Id.* at 412, 418.

97. *Id.* at 425.

98. *Id.* ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.").

99. 513 F.3d 360 (4th Cir. 2008).

100. *Id.* at 377–78.

101. *Id.* at 378 ("[T]he punitive damages award was plainly reasonable in light of at least three relevant factors: reprehensibility, proportionality, and the statutory cap.").

102. 549 U.S. 346 (2007). Decedent's estate sued Philip Morris, claiming that Philip Morris' conduct misled decedent into thinking cigarette smoking was safe. *Id.* at 349–50.

103. *Id.* at 353.

However, the Court further confused[104] the issue by stating that it is permissible to address harm to others in the *Gore* reprehensibility guidepost.[105]

Thus, while it seems clear that the Supreme Court has set some due process limitations on punitive damages, the Court has never set a specific ratio or limit on punitive damages.

C. Maritime Law and Damages

Maritime law, also known as admiralty law,[106] is predominantly judge-made law and within the federal court's jurisdiction,[107] but Congress also has the power to create or change maritime law through legislation so long as its actions comport with the Constitution.[108] The federal courts were given jurisdiction over maritime law in Article III of the Constitution.[109] Federal courts are allowed to "draw on the substantive law inherent in the admiralty and maritime jurisdiction, and to continue the development of this law within constitutional limits."[110] The Supreme Court has recognized its role in maritime litigation, stating that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law

104. *See* Wendy Rose Parcells, *A Monumental Decision or Just an Environmental Catastrophe? An In-Depth Look at the Ramifications and Shortcomings of the U.S. Supreme Court Decision in* Exxon Shipping Co. v. Baker, 16 U. BALT. J. ENVTL. L. 1, 25 (2008) ("[T]he Williams [sic] decision is imprecise and left uncertainty and confusion as to how a jury is to be instructed . . . . The Supreme Court's holding was contradictory.").

105. *Williams*, 549 U.S. at 355. Specifically, the Court stated:

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet . . . a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Id.

106. *See* Debra D. Burke, *Cruise Lines and Consumers: Troubled Waters*, 37 AM. BUS. L.J. 689, 694 & n.30 (2000) (stating that although the Constitution refers to all cases of "admiralty and maritime jurisdiction," that the words "'admiralty' and 'maritime' are almost synonymous," with "maritime" reflecting a more general term not limited to the law).

107. *Id.* at 694 (citing U.S. CONST. art. III, § 2); *see also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008) (recognizing that maritime law is largely judge-made (quoting Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979))).

108. *See* Crowell v. Benson, 285 U.S. 22, 55 (1932) ("In amending and revising the maritime laws, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction." (footnotes omitted)); *see also Exxon*, 128 S. Ct. at 2619 (noting that maritime law is largely common law but subject to Congress' authority "to legislate otherwise if it disagrees with the judicial result").

109. U.S. CONST. art. III, § 2 (extending federal appellate court jurisdiction to "all Cases of admiralty and maritime Jurisdiction").

110. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 361 (1959) (internal quotations and citations omitted); *see also* U.S. CONST. art. III, § 2, cl. 2.

maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'"[111]

Yet, despite the Supreme Court's influence in this area of law, there are many maritime statutes.[112] For example, the courts are required to look to the Jones Act when determining tort damages available to a decedent sailor.[113] Through the Limitations Act, Congress explicitly limited the derivative liability of ship-owners if the employee's wrongdoing was not within the ship-owner's "privity or knowledge."[114] Most importantly, there are no maritime statutes explicitly limiting the size of punitive damages in a derivative liability case,[115] and prior to *Exxon*, the Court had never considered limitations on the size of punitive damages within maritime common law.[116]

III. THE COURT'S REASONING

In *Exxon Shipping Co. v. Baker*, the United States Supreme Court was split equally in its ruling on derivative liability; thus, the Ninth Circuit's decision on apparent agency remained undisturbed.[117] However, the Court unanimously[118] held that

111. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975) (citing Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 20 (1963)).

112. *See, e.g.*, Jones Act (Merchant Marine Act of 1920), Pub. L. No. 66-261, 41 Stat. 988 (codified as amended in scattered sections of 46 U.S.C.); The Limitation Act, 46 U.S.C. § 30505 (2006) (imposing a general limit of liability on vessel owners); Trans-Alaska Pipeline Authorization Act (TAPPA), 43 U.SC. §§ 1651–1655 (2006).

113. *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19, 36 (stating that the court must look to the Jones Act to determine the extent of damages available to a decedent sailor, since the Act "limits recovery to losses suffered during the decedent's lifetime" (citing Act of Mar. 4, 1915, ch. 250, 41 Stat. 1007 (1920) (current version at 46 U.S.C. §§ 30104–05 (2006)))).

114. The Limitation Act, 46 U.S.C. 30505(b) (2006); Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 439 (2001) ("The Limitation Act allows a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel."). The Supreme Court in *Exxon* recognized that Exxon did not attempt to argue the Limitation Act applied because of the difficulty it would face alleging Captain Hazelwood's actions were not within the company's "privity or knowledge." Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2635–36 (2008) (Stevens, J., concurring and dissenting) (discussing application of the Limitation Act).

115. *See Exxon*, 128 S. Ct. at 2635 ("In light of the many statutes governing liability under admiralty law, the absence of any limitation on an award of the sort at issue in this case suggests that Congress would *not* wish use to create a new rule restricting the liability of a wrongdoer like Exxon.").

116. *See id.* at 2619–20 (majority opinion) ("Exxon raises an issue of first impression about punitive damages in maritime law . . . . [Exxon] argue[s] that this award exceeds the bounds justified by the punitive damages goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm."); Brief in Opposition, *supra* note 86, at 29.

117. *Exxon*, 128 S. Ct. at 2616 (stating that if a court is equally split, there can be no order and no reversal (citing Durant v. Essex Co., 74 U.S. (7 Wall.) 107 (1869))). Noting that the Court was equally divided, Justice Souter held that it would "leave the Ninth Circuit's opinion undisturbed," and thus the derivative liability decision is not precedential. *Id.* There were only eight Justices presiding because Justice Alito, an owner of Exxon stock, took no part in the decision of the case. *Id.* at 2634; *A Punitive Ruling: Supreme Court Strayed When It Reduced Damages Paid to Exxon Valdez Oil-Spill Victims*, HOUS. CHRON., June 30, 2008, at B6.

statutory law did not implicitly bar punitive damages[119] and ruled in a five-to-three[120] decision that the $2.5 billion award against Exxon should be reduced to no more than the compensatory damages for the case under maritime common law.[121]

A. An Evenly Split Court Left the Ninth Circuit's Ruling on Exxon's Derivative Liability Undisturbed

The Justices could not align a majority on the issue of whether maritime law allows derivative liability of a principal for a captain's actions.[122] Exxon argued, in line with the Fifth and Sixth Circuit,[123] that maritime precedent barred application of derivative liability to the ship-owner by citing two nineteenth century cases that held that punitive damages are not available against a ship-owner for a captain's recklessness without the ship-owner's explicit ratification.[124] Baker countered that the Restatement should prevail, citing the Ninth Circuit decision in the instant case and *Protectus*,[125] while distinguishing Exxon's cases.[126] The Restatement permits "corporate liability in punitive damages for reckless acts of managerial employees" acting within the scope of their employment.[127] Since the Justices were at a stalemate, the Court left the Ninth Circuit's judgment undisturbed, finding Exxon liable, and stated that this ruling was not precedential.[128]

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118. Justice Souter's opinion holding that statutory provisions did not bar punitive damages was joined by Justices Roberts, Scalia, Kennedy, and Thomas. *Exxon*, 128 S. Ct. at 2611. Justices Stevens, Ginsburg and Breyer concurred regarding statutory preemption, but dissented in the Court's holding on reducing the punitive damages. *See id.*

119. *Id.* at 2619.

120. Justices Stevens, Ginsburg, and Breyer dissented in the Court's holding on reducing the punitive damages. *Id.* at 2634 (Stevens, J., concurring and dissenting); *id.* at 2639 (Ginsburg, J., concurring and dissenting); *id.* at 2640 (Breyer, J., concurring and dissenting).

121. *Id.* at 2634 (majority opinion).

122. *Id.* at 2616.

123. *See supra* Part II.A.

124. Exxon first relied on *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), for establishing that ship-owners are not derivatively liable. *Id.* at 2614–15. Furthermore, Exxon said the principle was affirmed in a later case, *Lake Shore & Michigan Southern Railway Co. v. Prentice*, where in a tort action against a railroad company, the Court held that an employer is only liable for compensatory damages, and not punitive awards. *Id.* at 2615–16 (citing Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893)).

125. *Exxon*, 128 S. Ct. at 2616 (citing Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985) (holding that the Restatement rule on derivative liability for punitive damages is the law in the Ninth Circuit)).

126. *Exxon*, 128 S. Ct. at 2616. Exxon relied on the Fifth and Sixth Circuit line of cases, *Amiable Nancy* and *Lake Shore*, disclaiming any derivative punitive liability. *See supra* note 123; *supra* Part II.A. Baker claimed that *Amiable Nancy* was only dicta "because punitive damages were not at issue" and that *Lake Shore* "merely rejected company liability for the acts of a railroad conductor, while saying nothing about liability for agents higher up the ladder, like ship captains." *Id.*

127. *Exxon*, 128 S.Ct. at 2616 (citing 4 RESTATEMENT (SECOND) OF TORTS § 909(c) (1977)).

128. *Id.*

B. The Court Unanimously Agreed that Federal Statutory Law Does Not Preempt Punitive Damages

Exxon argued that the Clean Water Act ("CWA") barred any punitive damages available at common law.[129] The Ninth Circuit rejected this claim on the merits[130] and the Supreme Court affirmed this assertion on both procedural and substantive grounds.[131] Though the Supreme Court disagreed with the Ninth Circuit's reasoning in reaching its decision on procedural grounds,[132] the circuit decision did not turn on the procedural issue, so the Court found that the Ninth Circuit did not abuse its discretion.[133]

The Court affirmed the Ninth Circuit's decision on the merits, finding that because Congress was silent on the availability of punitive damages in the CWA, common law was not preempted.[134] The Court was not persuaded that the CWA, "a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals."[135] Thus, the Court, having already affirmed by way of a split decision the Ninth Circuit's finding of common law derivative liability, found that the federal statute did not preempt punitive damages in maritime law.[136]

C. A Closely Divided Court Restricted Punitive Damages to a 1:1 Ratio with Compensatory Damages

Next, the Court determined the appropriate ratio of punitive to compensatory damages. Unlike the Ninth Circuit and district court's analysis that confronted due process restrictions on punitive damages, the Supreme Court only granted certiorari on the question of whether maritime common law restricted the ratio of

129. *Id.*

130. *In re Exxon Valdez I*, 270 F.3d 1215, 1231 (9th Cir. 2001), *vacated*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

131. *Exxon*, 128 S. Ct. at 2616, 2618.

132. *Id.* at 2616–18. The district court rejected the defendant's claim that the Trans-Alaska Pipeline Authorization Act preempted punitive damages. *Id.* at 2616–17. After the district court's decision, Exxon filed a motion "almost thirteen months after the stipulated motions deadline," arguing that two recent cases demonstrated that the rule on punitive damages in maritime law was "displaced by federal statutes, including the CWA." *Id.* at 2617. The district court denied this motion, but Exxon raised it again in the Ninth Circuit. *Id.* While the Ninth Circuit recognized the lateness of Exxon's motion, it held that it should not be denied on procedural grounds because "Exxon had consistently argued statutory preemption throughout the litigation, and the question was of massive . . . significance." *Id.* (citations and internal quotations omitted). The Supreme Court disagreed, stating that the defendant's motion was not timely, but ultimately left the discretion of the Ninth Circuit intact because the ruling did not affect the outcome of the case. *Id.* at 2618 n.6.

133. *Id.* ("We do have to say, though, that . . . if the case turned on the propriety of the Circuit's decision to reach the preemption issue we would take up the claim that it exceeded its discretion.").

134. *Id.* at 2618–19.

135. *Id.* at 2619.

136. *Id.* at 2618.

punitive to compensatory damages and did not undertake a constitutional analysis using due process case law.[137] Exxon argued that maritime common law prevented an award of this magnitude[138] for punitive damages, stating that the "award exceed[ed] the bounds justified by the punitive damages goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm."[139] The Court ultimately agreed, restricting punitive damages to a 1:1 ratio with compensatory damages.[140]

The majority compared the use of punitive damages in various states and nations, and determined that many states have imposed statutory limits[141] on punitive damages and that the United States has a higher and more frequent rate of punitive awards than any other country.[142] The majority then distinguished *Exxon* from "constitutional level" cases that discussed the "due process standards that every award must pass."[143] Justice Souter, writing for the majority, noted that although the Court refused to set a hard-line formula in the due process cases, "'few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.'"[144]

However, Justice Souter explained that such due process cases differed from the case *sub judice* because this review only dealt with maritime common law, "which precedes and should obviate any application of the constitutional standard."[145] The Court stated that the due process cases originated out of state common law and thus provided federal review only on the constitutional issue.[146] However, the Court in the instant case was not considering the intersection of punitive damages and due process, but rather the regulation of punitive damages in maritime law, over which the federal courts have jurisdiction.[147] Thus, in the absence of any statute, the responsibility of determining punitive damages in maritime common law is in the Court's discretion since maritime law is regulated by federal courts.[148] Specifically,

137. *See supra* note 43; *see also* Brief in Opposition, *supra* note 86, at 29.

138. The award issued by the Ninth Circuit was $2.5 billion. *Exxon*, 128 S. Ct. at 2614.

139. *Id.* at 2619–20.

140. *Id.* at 2634.

141. *Id.* at 2623–25. The Court noted that many states have put a monetary cap or ratio cap on punitive damages based on the ratio between punitive and compensatory damages. *Id.* at 2623.

142. *Id.*

143. *Id.* at 2626 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

144. *Id.* (quoting *State Farm*, 538 U.S. at 425).

145. *Id.* at 2626. The Court noted that constitutional due process cases have dealt with awards subject to state law restrictions, whereas in this case, the court deals with the intersection of federal maritime law at common law. *Id.*

146. *Id.* ("[T]he only matter of federal law within . . . [the Court's previous due process cases] appellate authority was the constitutional due process issue.").

147. *Id.*

148. *Id.* at 2626–27 ("Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.").

Justice Souter noted that while Congress maintains "superior authority" in maritime law, legislative inaction did not prohibit the Court from setting a limitation.[149]

Next, the Court created a standard for limiting punitive damages in a maritime case. Because the Court stated that it had jurisdiction to review this case under maritime common law and not due process standards, the Court did not use the guideposts established in the due process cases.[150] Rather, the Court first listed the goals of punitive damages, stating that the award must be "reasonably predictable" and not "excessive."[151] The majority then considered the different ways of determining the appropriateness of damages, by looking at various state methods,[152] and analyzing both verbal and quantitative tests.[153] Ultimately, the Court decided that quantitative tests were the superior method.[154]

Specifically, the Court stated that a ratio between punitive and compensatory damages was the most effective means of determining the reasonableness of punitive damages.[155] Noting that few states have a ratio higher than 3:1, the majority considered whether a 3:1, a 2:1, or a 1:1 ratio would be best.[156] Justice Souter reasoned that a 3:1 ratio was inappropriate because states usually enact such harsh ratios for "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," as opposed to the facts in Exxon's case, which, the majority stated, did not rise to the level of malicious conduct.[157] The majority also rejected a 2:1 ratio (treble damages), stating that it applied in areas of law vastly different from maritime law, particularly where private suits are rare and thus require inducement to supplement governmental enforcement, but that such

149. *Id.* at 2630 n.21. Justice Souter explained that "[w]here there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard, subject of course to congressional revision." *Id.*

150. *Id.*

151. *Id.* at 2627.

152. Justice Souter explained that the Court's analysis was based on maritime common law, and not the constitutional boundaries considered in other Supreme Court due process cases. *Id.* at 2626–27. To aid its analysis, the Court then examined various state court analyses, based on state common law as guidance for how maritime common law should consider its punitive damage limits, separate from the due process analysis. *Id.* at 2627–28. The Court explained that previous Supreme Court due process cases have considered state common law before constitutional considerations, but, ultimately, "could provide no occasion to consider a common-law standard of excessiveness." *Id.* (quoting Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 279 (1989) (internal quotations omitted)).

153. *Id.* at 2627. For example, the Court described verbal tests such as Maryland's "nonexclusive list of nine review factors" such as "degree of heinousness" and the value of deterrence, as well as Alabama's factors including "actual or likely harm" and whether the defendant made a profit off of the harm. *Id.* at 2627–28. Quantitative methods described include ratios or caps. *Id.* at 2629.

154. *Id.* at 2629.

155. *Id.*

156. *Id.* at 2631–33.

157. *Id.* at 2631–32.

inducement was not needed here.[158] Ultimately, the Court ruled that a 1:1 ratio was appropriate, because the median of punitive damages in similar civil cases was below this 1:1 standard.[159] Also, the Court wanted to protect against "awards that are unpredictable and unnecessary."[160]

Justice Scalia, joined by Justice Thomas, concurred, supporting the holding as consistent with prior case law such as *State Farm*, but also stating his disagreement with the outcome of those cases.[161]

Justin Stevens concurred with the Court's ruling on derivative liability and federal statutory preemption.[162] However, he dissented on the issue of the ratio of punitive to compensatory damages.[163] Specifically, he argued that the Court should not impose restrictions on punitive damages where Congress had not, and that there should be an abuse of discretion review standard.[164] Justice Stevens stated that while a large proportion of maritime law is judge-made, a large component of it is also statutory, so the legislature should determine any limits on damages.[165] He argued that because Congress chose not to limit punitive damages, the Court should not proactively do so,[166] nor should it "overstep the well-considered boundaries imposed by federal legislation."[167] Specifically, Justice Stevens examined current statutes that demonstrated Congress's ability, yet reluctance to limit punitive damages.[168] Further, Justice Stevens stated that maritime law generally limits compensatory damages, which may be why Congress chose not to limit punitive awards.[169] Justice Stevens further noted that caps and ratios are typically imposed legislatively and the majority could not cite *any state* court decision that "imposed a precise ratio" as the majority did here.[170]

158. *Id.* at 2632.

159. *Id.* at 2633.

160. *Id.*

161. *Id.* at 2634 (Scalia, J., concurring). In *Gore*, Scalia wrote "the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting).

162. *Exxon*, 128 S. Ct. at 2634 (Stevens, J. concurring and dissenting).

163. *Id.* at 2634–35.

164. *Id.* at 2635.

165. *See id.* at 2634–35.

166. *Id.* at 2635.

167. *Id.* at 2635 (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) (internal quotations omitted).

168. *Id.* at 2635. Justice Stevens argued that Exxon's case did not fall within the purview of the Limitations Act, which limited the liability of a ship-owner if there was no wrongdoing within the ship-owner's "privity or knowledge." *Id.* at 2635. Additionally, Justice Stevens cited the Trans-Alaska Pipeline Authorization Act, which restricted certain damages, but explicitly did not restrict punitive awards. *Id.* at 2636.

169. *Id.* at 2636–37.

170. *Id.* at 2637. The majority responded to Justice Stevens' criticism, claiming that the legislature has "largely left to this Court the responsibility for fashioning the controlling rules for admiralty law." *Id.* at 2630 n.21 (majority opinion). Justice Souter argued that where a new rule is needed in maritime law, precedent points to "setting a judicially derived standard, subject of course to congressional revision." *Id.*

Justice Ginsburg dissented in the Court's ruling regarding the ratio as well, arguing that while the Court has the power to make a restriction, it should refrain from doing so.[171] Justice Breyer also dissented, arguing that while he recognized the need to limit punitive awards, the *Exxon* case was especially egregious and warranted an award above the Court's ruling of a 1:1 ratio.[172]

IV. ANALYSIS

By failing to reach a majority on how derivative liability in maritime law should be applied, the Court missed an opportunity to adopt, with precedential effect, the Restatement rule on derivative liability.[173] Furthermore, the Court should have analyzed the punitive damages award under due process case law because maritime law had only ever considered this constitutional limitation.[174] The Supreme Court usurped the legislature's role and created a new rule in maritime common law restricting punitive damages to a 1:1 ratio with compensatory damages.[175] The Court did this despite Congress having set no limits on punitive damages in maritime derivative liability cases and maritime common law, which suggests courts should defer to Congress.[176] The Court preempted analysis of due process limitations by granting certiorari only to assess maritime common law limitations on punitive damages, and may have been motivated to enact such a strict ratio to prevent Exxon from having to pay any more damages for the 1989 oil spill.[177] By creating an arbitrary new standard, the Court missed an opportunity to clarify the existing due process guidelines.[178]

A. Missing the Boat on Derivative Liability

By failing to reach a majority on the question of how punitive derivative liability should be applied in maritime cases,[179] the Supreme Court failed to fully resolve an issue on which the circuits are split.[180] Without guidance from the Supreme Court, the circuit courts have promulgated three interpretations of when to apply punitive

171. *Id.* at 2639 (Ginsburg, J., dissenting). She stated that there was no "urgent need in maritime law to break away from the 'traditional common law approach under which punitive damages are determined by a properly instructed jury, followed by trial-court, and then appellate-court review, to ensure that [the award] is reasonable.'" *Id.* (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) (alteration in original)).

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

173. *See infra* Part IV.A.

174. *See infra* Part IV.B.1.

175. *See infra* Part IV.B.2.

176. *See infra* Part IV.B.2.

177. *See infra* Part IV.B.3.

178. *See infra* Part IV.B.4.

179. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2616 (2008) (describing the Court's inability to reach a majority on derivative liability and thus leaving the Ninth Circuit's decision undisturbed); *see also supra* Part III.A.

180. *See supra* Part II.A.

derivative liability in maritime law, including: 1) the Ninth Circuit's adoption of the Restatement; 2) the Fifth and Sixth Circuit's application of *Nancy*; and 3) the First Circuit's qualified Restatement rule.[181]

The Court should have adopted the Restatement rule, as applied in *Protectus*, which states that a principal may be liable for the actions of a manager acting within the scope of his or her employment.[182] As the Ninth Circuit observed in *Protectus*, the Restatement "better reflects the reality of modern corporate America,"[183] because "a corporation can only act through its agents and employees."[184] With growing globalization and increasing use of the corporate structure, "no reasonable distinction can be made between the guilt of the employee in a managerial capacity acting within the scope of his employment and the guilt of the corporation."[185] The Fifth and Sixth Circuit rule requiring ratification by the corporation[186] and the First Circuit's qualification of culpability are thus outdated and difficult to satisfy in the modern corporate world because "no corporate executive or director would approve the egregious acts to which punitive damages would attach," thus plaintiffs could only ever recover compensatory damages.[187]

Furthermore, scholars and the courts are moving toward unifying and clarifying diverse law by adopting Restatements and Uniform Codes.[188] The *Exxon* Court's inability to reach a decision on derivative liability has thus left application inconsistent across the circuits.[189]

B. Using Common Law to Subvert a Clearer Due Process Channel

The Supreme Court wrongfully analyzed Exxon's challenge to the size of the punitive damage award. The Justices preempted the due process issue by granting certiorari only to the maritime common law question and ignoring the due process argument.[190] The Court stated that Exxon's challenge was "an issue of first impression about punitive damages in maritime law,"[191] when in reality it was an

181. *See supra* Part II.C.

182. Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985).

183. *Id.* at 1386.

184. *Id.*

185. *Id.*

186. *See supra* Part II.A.

187. *Protectus*, 767 F.2d at 1386.

188. *See, e.g.*, Fred H. Miller & Duchess Bartmess, *Uniform Laws: Possible Useful Tribal Legislation*, 36 TULSA L.J. 305, 305 (2000) (stating that uniform laws "harmonize" differing laws and "make[] the law more intelligible"(quoting WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 11 (1991))); ALI, About the American Law Institute, http://www.ali.org/doc/thisIsALI.pdf (last visited Feb. 24, 2010) (stating that American law's two chief defects are "its uncertainty and its complexity").

189. *See supra* Part II.A. (discussing the circuit split on the question of maritime derivative liability).

190. *See supra* note 43; *see also* Brief in Opposition *supra* note 86, at 29.

191. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008).

issue the Court should have decided based on well-settled due process case law[192] and maritime statutes.[193]

In an attempt to render an outcome-based decision, the Court distinguished the due process cases from the instant case.[194] The Court alleged that the due process cases were substantively based on state law and federal jurisdiction only arose due to the constitutional challenges, while the Court's jurisdiction in the instant case was due to the fact that it was a maritime law challenge.[195] On this basis, the Court concluded that the punitive damages award must be reviewed under maritime common law as opposed to due process law.[196] Additionally, the Court asserted that federal maritime common law authority precedes and precludes any application of the due process standards, which set the outer limit for punitive damages awards.[197] The Court's reasoning is flawed in several ways. First, the Court should have reviewed punitive damages under due process case law because the size of punitive damages in this case and other maritime cases, have been treated solely as a due process issue.[198] Even if the Court was correct that federal maritime common law obviates due process case law, then it should have taken into account maritime statutes[199] and prior federal maritime court decisions, which applied due process standards to maritime punitive damages awards.[200] Second, the Court did not rely on any precedent and ignored maritime statutory law when it essentially usurped Congress's role and legislated a limit on punitive damages.[201] The likely motivation behind creating an arbitrary limitation was to limit Exxon's liability, given the enormous amount of expenses the company had already incurred.[202] As a result of the Court's decision to create a new standard for maritime punitive damages that precludes application of due process case law, the Court missed an opportunity to clarify the recently muddled *Gore* guideposts.[203]

1. Prior Maritime Cases Used the Gore *Guideposts to Evaluate Punitive Damages*

The Court should have used fundamental guideposts announced in *Gore* to determine the appropriate punitive damages without creating a new and arbitrary

192. *See infra* Part IV.B.1.
193. *See infra* Part IV.B.2.
194. *Exxon*, 128 S. Ct. at 2626.
195. *Id.*
196. *Id.* at 2626–27.
197. *Id.* at 2626.
198. *See infra* Part IV.B.1.
199. *See infra* Part IV.B.2.
200. *See infra* Part IV.B.2.
201. *See infra* Part IV.B.2.
202. *See infra* Part IV.B.3.
203. *See infra* Part IV.B.4.

standard.[204] Regardless of how the Court attained jurisdiction, the issue of whether a punitive damages award is excessive in maritime law is a due process issue.[205] No court had ever considered such a "maritime excessiveness argument resembling Exxon's" claim of a maritime common law punitive limit.[206] Furthermore, as respondents argued, Exxon had likely waived its rights to such a claim in actions in the Ninth Circuit because Exxon "told the Ninth Circuit there was no need to reach the issue" of punitive damage limitations under maritime law and the lower court did not even address the issue.[207] Exxon cited to the ability "of [state] common-law courts to make rules governing punitive damages" as its argument for a federal maritime common law standard.[208] However, just because state common law has the ability to cap punitive damages,[209] does not mean such a cap is required or even necessary, particularly when there is no legal history of one.[210]

For instance, the Ninth Circuit in the instant case used the *Gore* guideposts to determine that the $5 billion verdict against Exxon was excessive and ultimately cut it in half.[211] In fact, Exxon had primarily argued on constitutional grounds and the

204. *See supra* note 93 and accompanying text.

205. For examples of cases that reached the federal courts through maritime jurisdiction and used due process, not common law analysis, see *In re Exxon Valdez I*, 270 F.3d 1215, 1241–43 (9th Cir. 2001), *vacated*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (analyzing the reprehensibility of Exxon's actions under *Gore*); CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 705–06 (1st Cir. 1995) (discussing, pre-*Gore*, that the Supreme Court "rejected a 'mathematical bright line' approach to the award of punitive damages" (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991))); Silivanch v. Celebrity Cruises, Inc., 171 F. Supp. 2d 241 (S.D.N.Y. 2001) (using *Gore*'s guide-posts in a maritime case to affirm punitive damages of $7 million when the court awarded $2.6 million in compensatory damages).

206. Brief in Opposition, *supra* note 86, at 29.

207. *Id.* at 28–29.

208. Petition for a Writ of Certiorari, *supra* note 43, at 22.

209. *See generally* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 438 (2003) (Ginsberg, J., dissenting) (discussing the ability of states to regulate punitive damages with state statute and common law rather than the outer limits used in a constitutional review).

210. Brief in Opposition, *supra* note 86, at 29. Even if the Court was correct in determining that federal maritime common law obviates due process law, the Court should only apply an abuse of discretion standard to evaluate the lower court's decision, rather than creating an arbitrary ratio. *See* Brief for Respondents at 53, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219) ("When no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination [concerning the size of the award] under an abuse-of-discretion standard." (quoting Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 433 (2001) (alteration in original) (internal quotations omitted))). So long as a trial court has supported its decision with sufficient evidence and explained "why the award satisfies governing standards," this standard is met. *Id.* at 54 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18–25 (1991)). Further, even if the Court wanted to create a new common-law standard, such a standard "should mirror the three [guideposts] that this Court has prescribed as a matter of substantive due process (and which themselves are largely derived from common law), so as to ensure that punitive awards receive consistent review." *Id.* at 57.

211. *See In Re Exxon Valdez I*, 270 F.3d 1215, 1246 (9th Cir. 2001) (remanding and stating the punitive award must be reduced in light of *BMW* and *Cooper Industries*); *In Re* Exxon Valdez, 490 F.3d 1066, 1095 (9th Cir. 2007) (*In Re Exxon Valdez III*) (stating that the punitive damages are "not warranted" and reducing them to $2.5 billion).

Ninth Circuit analyzed the reprehensibility of Exxon's actions.[212] While determining "that Exxon's conduct was reprehensible because it knew of the risk of an oil spill in the transportation of huge quantities of oil through the icy waters of Prince William Sound[] [a]nd it knew Hazelwood was an alcoholic" the Ninth Circuit stated that many "factors reduce reprehensibility" before it remanded the case back to the district court to consider a reduction in light of due process cases.[213] Thus, the Ninth Circuit used the *Gore* guidepost factors to appropriately limit the punitive damages in the instant case.[214]

Furthermore, maritime due process case law suggests that bright-line ratios should not be used to determine punitive damages. In the pre-*Gore* maritime case *CEH, Inc. v. F/V Seafarer*, the First Circuit cited non-maritime Supreme Court case law that "rejected a 'mathematical bright line' approach to the award of punitive damages."[215] In *CEH*, the court refused to reduce punitive damages against a captain for $10,000 and against the ship's owner, for $50,000 when the compensatory awards were less than $7000.[216] In its analysis, the First Circuit did not investigate ratios and standards to apply a separate maritime common law standard.[217]

Additionally, maritime cases after *Gore* used *Gore*'s due process analysis to affirm punitive damages that were not a 1:1 ratio. In *Silivanch v. Celebrity Cruises, Inc.*,[218] the Southern District of New York refused to overturn a $7 million punitive award when the compensatory damages were only $2.6 million for passengers who contracted Legionnaires' Disease on the defendant's cruise ship.[219] The cruise line's conduct was considered "sufficiently wanton" to merit punitive damages when it was "aware that [its] whirlpool spas presented [an] increased risk of illness, including Legionnaires' Disease" and that its spas had faulty filters.[220] Using the *Gore* guideposts, the court stated the defendants were liable, including that they were "sufficiently blameworthy" and that the ratio of compensatory to punitive damages was not excessive compared to the harm inflicted.[221]

In conclusion, it seems clear that the issue of excessive punitive damages in maritime law is a due process issue and maritime courts should use due process case law to analyze the excessiveness of punitive damages rather than create an arbitrary standard.

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212. Brief in Opposition, *supra* note 86, at 25.

213. *In re Exxon Valdez I*, 270 F.3d at 1242.

214. *Id.* at 1240–41.

215. 70 F.2d 694, 705–06 (1st Cir. 1995) (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)).

216. *Id.* at 697–98.

217. *Id.* at 705–06.

218. 171 F. Supp. 2d 241 (S.D.N.Y. 2001).

219. *Id.* at 262–63.

220. *Id.* at 262.

221. *Id.* Notably, the court did not use a different "maritime" standard to determine the validity of the punitive award. *Id.*

2. Judicial Activism: Throwing Legislative Intent Overboard

The *Exxon* Court essentially legislated a 1:1 ratio despite the fact that there have been no prior judicial decisions or congressional action mandating a strict ratio in maritime punitive damages.[222] The Supreme Court ignored due process cases like *Gore* and *State Farm*[223] when it created a new rule for maritime punitive damages and instead examined verbal or quantitative methods used by different states,[224] notably adopted *only* through legislation.[225] In fact, the Court would not even address due process case law because it only granted certiorari to the maritime common law question.[226]

Judicial activism is defined by Black's Law Dictionary as instances where "judges allow their personal views about public policy, among other factors, to guide their decisions."[227] As Justice Stevens argued in his dissent, maritime law is a mix of judicially mandated standards and statutes,[228] but the Court should not step into a legislative function when "a legislative body . . . [is] better equipped to perform the task at hand."[229] Many commentators have urged judicial deference to Congress and specifically argued against judicial activism in maritime law and noted (before *Exxon*) that the Supreme Court was providing "substantial deference to Congress' role in fashioning maritime law."[230] Commentators argue for deference, stating that while federal courts may supplement legislation, Congress retains "superior authority over the development of maritime law" particularly since it has "'legislated extensively in these areas.'"[231]

Arguably, Congress legislated all of the punitive restrictions it intended to make when it only prohibited punitive damages where there was wrongdoing by the agent with the principal's privity or knowledge in the Limitations Act.[232] Any argument that maritime common law limited liability should be obviated by the Limitations

222. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2637 (2008) (Stevens, J., concurring and dissenting) (stating that the majority could not cite one judicial decision where a court imposed a precise ratio).

223. *See supra* Part II.B.

224. *See Exxon*, 128 S. Ct. at 2623 (majority opinion).

225. *Id.* at 2637 (Stevens, J., concurring and dissenting) (stating that legislatures, not courts, have adopted ratios to limit punitive damages).

226. *See supra* note 43.

227. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

228. *Exxon*, 128 S. Ct. at 2634–35.

229. *See id.* at 2635 (quoting Boyle v. United Tech. Corp., 487 U.S. 500, 531 (1988) (Stevens, J., dissenting) (internal quotations omitted)).

230. *See, e.g.*, Craig H. Allen, *Introduction: The Osceola After 100 Years: Its Meaning and Effect on Maritime Personal Injury Law in the United States*, 34 RUTGERS L.J. 605, 613–14 (2003).

231. *Id.* (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 28 (1990)).

232. *See Exxon*, 128 S. Ct. at 2635 (discussing the Limitations Act to illustrate that the absence of a statute limiting damages of the sort in *Exxon* indicates that Congress has no desire to create any such "new rule restricting the liability of a wrongdoer like Exxon"); *see also* 46 U.S.C. § 30505 (2006). Exxon did not attempt to argue the Limitation Act applied because of the difficulty it would face alleging Captain Hazelwood's actions were not within the company's "privity or knowledge." *Exxon*, 128 S. Ct. at 2635–36.

Act, where Congress created its own restrictions.[233] Furthermore, in the Trans-Alaska Pipeline Authorization Act ("TAPAA"), Congress capped compensatory liability in certain oil spills, but "it did not restrict the availability of punitive damages."[234] Additionally, compensatory damages for intangible injuries, such as pain and suffering or pure economic loss "absent direct physical damage to property or proprietary interest" are historically awarded less-liberally in maritime law than other areas, thus providing another good reason not to cap punitive damages.[235] Essentially, the *Exxon* Court ignored statutory intent and case law that emphasized that "an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation."[236]

Further, the Court fully overstepped its bounds by analyzing empirical data to determine the correct ratio to apply, despite numerous decisions that have emphasized that Congress should make such analyses.[237] The Court's examination of median punitive amounts and state ratios substitutes the will of the judiciary for that of Congress, which "is better able to evaluate [such ratios] than is this Court."[238] Though the majority argued that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime,"[239] the Court failed to take into account that Congress had already clearly indicated its unwillingness to remove or restrict punitive damages where there is egregiousness and wrongdoing.[240] Even if there was some ambiguity as to whose role it is to create limits on punitive damages, courts agree that deciding remedies should be left up to Congress.[241]

Additionally, the Court bypassed due process punitive damage case law, which specifically states that the judiciary will not adopt a particular ratio.[242] Although *State Farm* states that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process,"[243] the case does not

233. Brief in Opposition, *supra* note 86, at 29.

234. *See Exxon*, 128 S. Ct. at 2636.

235. *See id.* at 2636–37 (quoting 1 T. SCHEONBAUM, ADMIRALTY AND MARITIME LAW § 14-7 (4th ed. 2004) (internal quotations omitted)). "[I]t appears that maritime law continues to treat such [intangible] injuries as less than fully compensable, or not compensable at all." *Id.* at 2637. "Accordingly, there may be less reason to limit punitive damages in this sphere than there would be in any other." *Id.*

236. Miles v. Apex Marine Corp, 498 U.S. 19, 27 (1990).

237. *See Exxon*, 128 S. Ct. at 2637–38 & n.7 (arguing that Congress is better apt than the judiciary to analyze large quantities of data).

238. *See id.* at 2636.

239. *See id.* at 2630 n.21 (majority opinion).

240. *See id.* at 2635–36 (Stevens, J., concurring and dissenting) (discussing congressional intent in statutes such as the Limitations Act and TAPAA).

241. *See id.* at 2637 n.7 (quoting Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 513 (1982)).

242. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424–25 (2003).

243. *Id*. at 425.

foreclose the judiciary from seeking punitive damages beyond that ratio.[244] The facts of *Exxon*, particularly the egregiousness of Hazelwood's actions and Exxon's pre-existing knowledge of his alcohol problem, would seemingly be the archetypal case in which the court would want to go beyond the single-digit ratio.[245] While the events in *Exxon* may not merit the $5 billion reward initially granted, the Ninth Circuit considered the "guidepost" factors[246]and ultimately avoided such a high ratio, reducing the award to $2.5 billion.[247] The Court's decision to create a maximum 1:1 ratio prevented both the *Exxon* Court and future maritime courts from considering the egregiousness of the case in awarding punitive damages.[248] Thus, by creating a new arbitrary standard, ignoring maritime statutes, and not utilizing due process cases that explicitly avoid setting a ratio on punitive damages, the Court improperly legislated a maximum 1:1 ratio from the bench.[249]

3. The Court Created an Outcome-Based Standard for Limiting Punitive Damages in Maritime Cases

The Court may have been motivated to create a 1:1 ratio in order to prevent Exxon from paying more damages when it had already paid billions of dollars to the United States government, the State of Alaska, and other plaintiffs.[250] The Justices set the stage for this ruling by granting certiorari only to the maritime common law question[251] and ignoring the years of litigation and analysis on due process case law

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244. *See, e.g.*, EEOC v. Fed. Express Corp., 513 F.3d 360, 377–78 (4th Cir. 2008) (holding that a punitive damages award equal to a ratio 12.5 times the compensatory damages award was not a violation of due process).

245. *See supra* Part I (discussing Hazelwood's alcoholism); *see also* BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996) (explaining that the "degree of reprehensibility" guidepost is the most important factor in determining the reasonableness of a punitive damages award). The *State Farm* Court described the reprehensibility analysis:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

538 U.S. at 418.

246. *See In re Exxon Valdez I*, 270 F.3d 1215, 1241 (9th Cir. 2001). The Ninth Circuit, using the due process cases, analyzed the reprehensibility of Exxon's actions. *Id.*

247. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2614 (2008).

248. *See id.* at 2634 (stating the maximum "punitive-to-compensatory ratio" is now 1:1 in maritime law).

249. *See id.*

250. *Exxon*, 128 S. Ct. at 2613 (discussing the amount of damages Exxon already paid); *see* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 258 (2005) (stating that some analysts argue that judges base decisions on "influences . . . other than an independent judgment of the law"). Other influences include policy outcomes, for example, that the court did not want Exxon to have to spend any more money on damages than they already had. *See Exxon*, 128 S. Ct. at 2613.

251. *See supra* note 43.

that took place in the Ninth Circuit and district court.[252] The Supreme Court's actions are even more confusing because the Ninth Circuit did not analyze the maritime common law claim.[253] The Court's decision supports the view of some scholars that votes on writs of certiorari to the Supreme Court are "preliminary strategic judgments on the merits."[254] In this case, by eliminating the due process issue, the Justices could make a more narrowly tailored ruling that would provide for substantial limits on punitive damages in this one case and in maritime law, without affecting other areas of the law through a due process analysis.[255]

Analysts claim that judges are often motivated by external factors, beyond legal considerations when making judicial decisions.[256] Instead of being "motivated primarily to decide cases based upon an independent assessment of the law and facts," judges may make decisions to reach "the outcome they prefer."[257] After framing the question to its liking, the Court went out of its way in its opinion to detail the significant amount of money that Exxon had already paid stating: "Exxon spent around $2.1 billion in cleanup efforts," and that Exxon settled civil cases by paying "$900 million toward restoring natural resources" and "another $303 million in voluntary settlements."[258] Thus, the Court strongly hinted it was concerned that Exxon had, in the Court's view, paid sufficient damages.[259] This reasoning may have caused the Court to use maritime common law as an excuse to limit punitive damages so that Exxon would be spared additional costs.[260] Such an argument is compelling in this case because previous maritime case law used the due process guidelines without considering common law restrictions.[261]

Furthermore, the full impact of this decision is likely to be felt for years, if not decades, as parties around the Gulf of Mexico deal with the recent April 20, 2010 BP oil spill that continues to destroy pristine environmental wildlife and decimate

252. *See supra* note 43; Brief in Opposition, *supra* note 86, at 25 (stating that the Ninth Circuit "reviewed the Phase III verdict only under the Due Process Clause," in part because of Exxon's request to analyze due process before any common-law considerations).

253. Brief in Opposition, *supra* note 86, at 29 ("[N]either the district court nor the Ninth Circuit passed on the issue [of punitive damage limitations under maritime common law].").

254. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 12 (1991).

255. *See generally* Victoria Lockard & Anna A. Summer, *United States:* Exxon Shipping Company v. Baker*: Chipping Away At Punitive Damages Awards*, MONDAQ BUS. BRIEFING, Aug. 27, 2008 ("The Exxon [sic] decision is precedent only in the context of maritime law.").

256. *See* Friedman, *supra* note 250, at 270–71. This case note does not allege that the Justices considered Justice Alito's stock ownership when making their decision. *See* Barnes, *supra* note 3 (discussing Justice Alito's recusal from the case due to stock ownership in Exxon).

257. *See* Friedman, *supra* note 250, at 270.

258. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008).

259. *See id.*

260. *See id.* (citing the numerous payments Exxon had made to attempt the rectify the damage caused by the oil spill). *See generally* Friedman, *supra* note 250, at 270–71 (discussing potential sources of external influence on judicial opinions).

261. *See supra* Part IV.C.1.

industries such as commercial fishing.[262] The *Exxon* 1:1 compensatory to punitive damages limitation will affect any potential future litigation against BP, such as lawsuits claiming that egregious actions led to these current and impending economic losses.[263]

4. The Court Should Have Used This Opportunity to Clarify the Gore *Guideposts*

Finally, in bypassing a due process analysis, the Court missed an opportunity to precisely define the guidelines established in *Gore* and later modified in *Williams*.[264] In *Williams* the Supreme Court stated that harm to non-parties could be considered in the reprehensibility of conduct guidepost, but paradoxically stated harm to non-parties could not be considered.[265] Scholars have noted that the *Williams* case created confusion over when harm to a non-party could be used in the punitive damage analysis.[266] Since the oil spill in the *Exxon* case caused harm to various non-parties such as fishermen and Native Alaskans, it would have been an ideal time for

262. On April 20, 2010, BP-owned oil rig, *Deepwater Horizon*, exploded and sunk, spilling thousands of gallons of oil daily from its source into the Gulf of Mexico. *See generally Next Step to Stop Oil: Throw Garbage at It*, CNN.COM, May 11, 2010, http://www.cnn.com/2010/US/05/09/gulf.oil/index. Html (discussing the April 20, 2010 explosion of the BP *Deepwater Horizon* Oil Rig in the Gulf of Mexico and the subsequent oil spill); *White House Raises Specter of Misconduct in Oil Spill*, FOXNEWS.COM, May 5, 2010, http://www.foxnews.com/ politics/2010/ 05/05/bp-costs-add [hereinafter *White House Raises Spector*] (discussing environmental and economic repurcussions of the BP oil spill). The oil leak has continued unabated for weeks and as of the date of this publication, BP has failed to stop it. *White House Raises Spector*, *supra.*

263. *See White House Raises Spector*, *supra* note 262. Many commentators have stated concerns that BP cannot be held liable for more than $75 million in economic losses because of restrictions under the Oil Pollution Act of 1990, which was passed after the Exxon *Valdez* spill. *Id.*; *see also* Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of 33 U.S.C.). However, the cap on economic damages does not apply "if somebody is found to be either grossly negligent, conduct willful—involved in willful misconduct, or in violation of federal regulations." *White House Raises Spector*, *supra* note 262 (quoting White House Communications Director, Dan Pfeiffer). Thus, if BP's actions were egregious enough to implicate punitive liability for the oil spill, parties could seek compensatory damages higher than $75 million, but they would still be restricted by the 1:1 compensatory to punitive damages ratio mandated by *Exxon*. While an investigation into the cause of the spill is still ongoing, any punitive damages claims that could arise from it will thus be limited.

264. 549 U.S. 346 (2007).

265. *Id.* at 355.

266. *See* Parcells, *supra* note 104, at 27. Parcells laments:

> The Baker [sic] case presented an opportunity to clarify how a judge is to instruct a jury with respect to whether harm to third parties (parties other than the plaintiffs) can be considered by a jury when determining the reprehensibility of the offense and if punitive damages are warranted, but then to disregard that information in determining the amount of the award. However, since the Supreme Court in Baker specifically refused to address the due process claim asserted by Exxon . . . the due process issue on punitive damages awards will continue to confuse juries, judges and practitioners alike.

Id.

the Court to clarify a confusing *Gore* guidepost.[267] Such clarification will have to be addressed in a future case, leaving lower courts without direction for now.[268]

Thus, the Court created a new standard to prevent higher costs for Exxon rather than relying on sufficient due process guidelines that had aided earlier maritime court decisions and missed an opportunity to clarify confusing case law about when non-parties may bring punitive damage claims.[269]

V. CONCLUSION

The *Exxon* Court's failure to reach a majority on the issue of punitive derivative liability prevented the Court from resolving a circuit split over the rule for derivative liability by adopting a uniform Restatement rule on derivative liability.[270] Further, by framing the issue solely on maritime common law, the Court did not follow punitive damages due process case law,[271] but rather, arbitrarily limited punitive damages to a 1:1 ratio with compensatory damages when the Court should have deferred to Congress instead of legislating from the bench.[272] In reaching its decision, the *Exxon* Court missed an opportunity to clarify confusing due process case law[273] and has potentially given the maritime industry an easier standard on damages than other industries.[274] For instance, any punitive claims by commercial fisherman or other injured plaintiffs from the recent 2010 BP Gulf of Mexico oil spill will be restricted by the *Exxon* rule.[275] Innocent parties with punitive damages claims may feel the full impact of the Supreme Court's decision to mandate a 1:1 ratio between compensatory and punitive damages in maritime law, as punitive damages against BP, if found responsible for any egregious actions, will be severely limited.[276] Time will tell if this limit on punitive damages will serve as less of a deterrent against tortious behavior by the maritime industry than its land-based counterparts, but in an effort to limit damages against Exxon,[277] the Court legislated a ratio that only stirs the already stormy seas of punitive-damage analysis.

267. *Exxon*, 128 S. Ct. at 2611 (stating that the issues presented in the case involve analysis of punitive damages).
268. *See* Parcells, *supra* note 104 at 27–28.
269. *See supra* Part IV.B.1
270. *See supra* Part IV.A.
271. *See supra* Part IV.B.1.
272. *See supra* Part IV.B.2.
273. *See supra* Part IV.B.4.
274. *See generally* Lockard & Summer, *supra* note 255.
275. *See supra* Part IV.B.3.
276. *See supra* Part IV.B.3.
277. *See supra* Part IV.B.3.