Oil and Water: How the Polluted Wake of the Exxon Valdez has Endangered the Essence of Punitive Damages

"The value of money itself changes from a thousand causes; and at all events, what is of ruin to one man’s fortune, may be a matter of indifference to another’s." 1

I. INTRODUCTION

In the late hours of March 23, 1989, the Exxon Valdez supertanker moved through the waters of Prince William Sound off the coast of Alaska, en route to deliver fifty-three million gallons of crude oil to the lower forty-eight states.2 Steering the vessel was Captain Joseph Hazelwood, still intoxicated from the five double vodkas he drank in the waterfront bars of Valdez just prior to leaving port.3 As the clock approached midnight, just minutes before the ship was scheduled to make a required turn, Captain Hazelwood abruptly and inexplicably abandoned the bridge to return to his cabin.4 With no one to properly navigate the scheduled turn, the supertanker grounded on the reef

1. 4 WILLIAM BLACKSTONE, COMMENTARIES *371.
2. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2612 (2008). The Valdez supertanker was over 900 feet long and Exxon frequently used it to transport large quantities of oil from the end of the Trans-Alaska Pipeline in Valdez, Alaska, to the lower forty-eight states. Id. Fifty-three million gallons of crude oil is equal to over one million barrels. Id.
3. See id. (noting witnesses testified Hazelwood drank at least five double vodkas on night of accident). Coast Guard officers also testified to smelling alcohol on Hazelwood’s breath upon boarding the ship, and sobriety tests confirmed that Hazelwood was drunk at the time of the spill. Initial Brief of Appellee-Respondent at 9 n.8, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219) (describing witness observations). Furthermore, in their brief, the plaintiffs provided a detailed account of the rampant culture of alcoholism in Exxon’s Valdez operation. See id. at 4-9. Exxon officials learned through internal complaints, made as early as 1985, that Hazelwood drank aboard the ship and boarded the ship drunk on several occasions. Id. at 5. Under Exxon’s written alcohol policy, Hazelwood’s failure to report his own on-duty drinking should have resulted in his termination. Id. Instead, Exxon sent Hazelwood to a twenty-eight day alcohol treatment program, followed by a prescribed after-care rehabilitation program that he subsequently stopped attending. Id. Less than one year later, Hazelwood began drinking again. Id. at 6. “He drank—often with Exxon personnel—‘in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers.’” Id. His supervisors soon became privy to this relapse and began to receive reports that he had “fallen off the wagon.” Id. One such report was sent directly to the President of Exxon Shipping. Id.
4. See Exxon, 128 S. Ct. at 2612 (recounting events leading up to spill). Upon taking control of the ship at 11:20 p.m., after a state-licensed pilot navigated the ship’s first leg through the Valdez Narrows, Hazelwood radioed the Coast Guard for permission to move east across the inbound lane to a less icy path. Id. At Hazelwood’s request, the Coast Guard cleared the Valdez to cross the inbound lane. Id. Hazelwood completed this maneuver, towards safer waters, but this action left the Valdez pointing in the direction of an underwater reef off Bligh Island. Id. This development required Hazelwood to turn the ship back west into the shipping lane around Busby Light, just north of the reef. Id.
below, causing the hull to fracture, spilling eleven million gallons of crude oil into the waters of Prince William Sound. These events amounted to the worst oil spill in American history and ignited an eruption of litigation, which now seems, after twenty years, to have reached its final act.

The denouement of this legal epic came in the Supreme Court’s recent decision in Exxon Shipping Co. v. Baker, a class action lawsuit brought by the more than 32,000 commercial fishermen, native Alaskans, and landowners affected by damage from the spill. Upon granting certiorari, the Court sought to determine whether the $2.5 billion punitive damages award was greater than maritime law should allow under the circumstances. Ultimately, the Court held that, in cases of maritime law involving reckless conduct, the amount of punitive damages awarded should not exceed the compensatory damages by a ratio greater than 1:1. As a result, the Court reduced the original punitive award of $5 billion to $507.5 million, the equivalent of the compensatory damages awarded.

Though this holding is presently confined to maritime law, the 1:1 ratio represents the first occasion of the Court’s willingness to draw a “mathematical bright-line” to cap a punitive verdict in the name of substantive due process, after explicitly refusing to do so at every past opportunity. Nevertheless, the Exxon decision represents the next natural step down the path the Court has been traveling for many years, where the punitive-to-compensatory ratio has emerged as the critical measurement when determining whether punitive damage awards are constitutionally excessive under substantive due process. Albeit, the Court has perpetually struggled to provide meaningful guidance in this area, insisting that punitive awards must fall within a constitutionally-

5. See id. at 2612-13 (describing events preceding ship’s grounding). Prior to going below, Hazelwood put the tanker on autopilot and told third mate Joseph Cousins to return the ship to the shipping lane once it came abeam of Busby Light. Id. at 2612. Cousins was unlicensed to navigate those waters. Id. The reason that the ship failed to make the turn at Busby Light remains a mystery. Id.
8. See id. at 2611 (describing respondent party and cause of action).
9. Id. (setting forth questions before Court). The Court also granted certiorari to address two other questions regarding punitive damages under maritime law. Id.
10. Id. at 2634 (announcing holding of decision).
13. See Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2629 (2008) (Declaring ratio between compensatory and punitive damages central feature in due process analysis); see also infra note 114 and accompanying text (discussing Court’s preference for punitive-to-compensatory ratio).
acceptable range despite being unable to adequately define any boundaries.\textsuperscript{14}

Beyond the perpetual ineffectiveness of the Court’s chosen path, however, there exist deeper flaws that have caused the Court to effectively disregard the fundamental objectives of punitive damages: punishment and deterrence.\textsuperscript{15} Nonetheless, if the Court continues to treat the punitive-to-compensatory ratio as the barometer of constitutional due process, then fixed ratios and mathematical bright lines to cap punitive damage awards could soon become the norm.\textsuperscript{16} Accordingly, the flaws of this paradigm must be realized and a new standard must emerge so that the hull confining the 	extit{Exxon} holding to maritime law does not fracture, allowing it to seep into other areas of law and further pollute a doctrine that is already overdue for a cleanup effort.\textsuperscript{17}

This Note explores the flaws underlying the Court’s reliance on the punitive-to-compensatory ratio as a barometer of due process and argues that the Court should realign its approach to evaluating constitutional excessiveness in order to preserve the punishment and deterrence objectives of punitive damages.\textsuperscript{18} Part II offers insight into the original design of punitive damages and tracks the Court’s increasing reliance on the punitive-to-compensatory ratio, beginning in the late 1980s.\textsuperscript{19} Part III will explain the flaws of the Court’s paradigm.\textsuperscript{20} In addition, Part III will outline an alternative approach to reviewing punitive damage awards that will both alleviate the Court’s constitutional concerns and

\textsuperscript{14}See Exxon, 128 S. Ct. at 2625 (discussing existence of unpredictability even with constitutional range); State Farm, 538 U.S. at 424-25 (refusing to identify concrete constitutional limits but insisting few awards should exceed single-digit ratio); Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 434-35 (2001) (recognizing constitutional line inherently imprecise and review dependent on facts of case); Gore, 517 U.S. at 582-83 (discussing constitutional limitations of punitive awards); Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994) (indicating Constitution imposes substantive limit on size of awards); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459-62 (1993) (holding punitive award 526 times larger than compensatory award not grossly excessive); Haslip, 499 U.S. at 23-24 (qualifying 4:1 punitive-to-compensatory ratio as close to line of constitutional impropriety); Barry v. Edmunds, 116 U.S. 550, 565 (1886) (stating nothing better settled than peculiar function of jury to determine amount of verdict); Day v. Woodworth, 54 U.S. 363, 371 (1851) (noting punitive amount left to jury’s discretion and dependent on particular circumstances of each case); see also State Farm, 538 U.S. at 430-31 (Ginsburg, J., dissenting) (discussing Court’s inconsistent history applying constitutional range of ratios); Gore, 517 U.S. at 602 (Scalia, J., dissenting) (lamenting lack of guidance in majority’s opinion). In his Gore dissent, Justice Scalia argued, “[the majority’s] opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a ‘constitutionally proper’ level of punitive damages might be.” See Gore, 517 U.S. at 602.

\textsuperscript{15}See infra Part III.A (outlining flaws of Court’s current method).

\textsuperscript{16}See infra note 103 (discussing possibility Court will extend ruling beyond maritime law); see also Liptak, supra note 6 (suggesting potential implications of Court’s ruling).

\textsuperscript{17}See generally infra Part III (highlighting flaws of Court’s current method).

\textsuperscript{18}See generally infra Part III (suggesting alternative approach to punitive awards).

\textsuperscript{19}See infra Part II.A (explaining origins and purpose of doctrine of punitive damages); infra Part II.B (describing constitutional challenges and Court’s response); infra Part II.C (focusing on Justice O’Connor’s dissenting opinions leading to ratio-centric method of review); infra Part II.D (outlining cases where ratio emerged as central feature of punitive post-judgment analysis); infra Part II.E (examining Court’s reasoning in Exxon).

\textsuperscript{20}See infra Part III.A (highlighting flaws of Court’s current method).
remain true to the fundamental purposes underlying their imposition.21

II. HISTORY

A. Still Water: The Origins and Purposes of Punitive Damages

The awarding of punitive damages by civil juries first occurred in England prior to the American Revolution.22 One of the first cases to reference the concept was Huckle v. Money,23 where the English Court upheld an award of “exemplary damages.”24 Declining to disturb the jury verdict, the court observed that such awards depended upon a variety of circumstances and noted that the law does not specify what the measure of damages should be in tort actions.25 Furthermore, the Lord Chief Justice noted that “it must be a glaring case indeed of outrageous damages in tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.”26 In a subsequent case, Wilkes v. Wood,27 Lord Chief Justice Pratt of the King’s Bench offered a clearer statement of the fledgling legal concept.28 Determining that it was within the power of the jury to give greater damages than what was necessary to compensate for the injury, he explained “[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.”29

The doctrine of punitive damages eventually crossed the Atlantic to be adopted by American common law.30 Moreover, as in England, American courts explicitly designed the doctrine of punitive damages to carry out two objectives: punish the wrongdoer and deter future similar conduct.31 Thus,
American courts instructed juries not to look to the actual damages a defendant’s conduct caused, but rather to look at the facts and circumstances of each case and determine an amount that would adequately accomplish these objectives. Furthermore, courts fully recognized that this exercise was a function unique to juries and that only in the rarest of circumstances should a court encroach upon the jury’s expression of moral outrage. Over time, however, these standards softened to the point where judicial review of punitive awards became an accepted safeguard against extreme and unwarranted verdicts. And so it was that these basic principles formed the common-law understanding of punitive damages, and though criticized, the doctrine remained an accepted feature of the American legal system, relatively undisturbed in this design until the late twentieth century.

32. See Lake Shore, 147 U.S. at 115 (noting law’s policy to impose exemplary damages to punish and teach lesson); Barry, 116 U.S. at 365 (observing jury’s peculiar function to determine verdict where no precise rule); Day, 54 U.S. at 371 (reiterating punitive damages determined at jury’s discretion and based on reprehensibility of conduct); Coryell, 1 N.J.L. at 77 (instructing jury not to base damages on proof of suffering but for example’s sake).

33. See Barry, 116 U.S. at 365 (discussing jury function of calculating damages).

In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award.

Id.; see also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 26-27 (1991) (Scalia, J., concurring) (discussing state of law at time Fourteenth Amendment passed). Scalia noted that, at the time of the Fourteenth Amendment’s adoption, punitive damages were a well-established feature of American common law. Haslip, 499 U.S. at 26-27. Furthermore, he observed that, at the time, no one thought it necessary to have a procedure for discarding a jury’s discretion regarding the amount of a punitive damages award. Id.

34. See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001) (noting role of appellate court to review trial court’s determination absent constitutional issue); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 424 (1994) (observing jury awards sometimes require correction); Haslip, 499 U.S. at 15 (indicating jury determination reviewed by trial and appellate courts to ensure reasonableness). But see Haslip, 499 U.S. at 40-41 (Kennedy, J., concurring) (discussing jury discretion in assessing punitive awards). In his concurring opinion, Justice Kennedy noted that jury determination of punitive damages has been so well-settled a principle that no further examination of its fairness or rationality ought to be necessary. Haslip, 499 U.S. at 40. Furthermore, he pointed to two reasons why inconsistency would naturally exist in jury determinations of punitive awards. Id. at 41. The first reason is that a jury is charged to rule in one case and not as a permanent body. Id. Therefore, due to their case-by-case existence, juries may reach very different outcomes based on similar instructions. Id. The second reason for inconsistency, according to Kennedy, is the generality of the instructions themselves. Id. Lastly, he opined that “[t]hese features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity.” Id. But see also infra notes 52-57 and accompanying text (discussing judicial distrust of juror motives).

35. See Haslip, 499 U.S. at 15 (summarizing traditional common-law approach). “Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury’s determination is then reviewed by trial and appellate courts to ensure that it is reasonable.” Id.; see also Cooper, 532 U.S. at 432 (maintaining imposition of punitive damages expression of moral condemnation); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 260-61 (1984) (Blackmun, J., dissenting) (explaining primary purpose of punitive
B. A Gathering Storm on the Horizon: Constitutional Challenges to Punitive Damages, 1988-1993

Beginning in the late 1980s, larger punitive damage awards began to fuel growing concerns regarding the unfettered discretion of juries to impose “quasi-criminal” penalties. This prompted an emergence of new constitutional challenges to substantial punitive damage awards, proffering that such awards violated the Eighth Amendment’s Excessive Fines Clause and the Fourteenth Amendment’s Due Process Clause. While the Court ultimately held that the Excessive Fines Clause did not apply to punitive damage awards, it acknowledged, but did not rule upon, the potential validity of due process challenges to large awards. Inevitably, the Court was required to examine the constitutional validity of the common-law punitive damages doctrine under the Due Process Clause of the Fourteenth Amendment.

The first occasion to review a punitive award under constitutional due

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36. See Haslip, 499 U.S. at 18 (noting concern about high punitive damages); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989) (recognizing Due Process Clause may place outer limits on size of punitive awards). “It would be . . . inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional.” Haslip, 499 U.S. at 18. But see Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (stating Fourteenth Amendment did not destroy State’s history and substitute mechanical components of law). “If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.” Jackman, 260 U.S. at 31.


38. See Browning-Ferris, 492 U.S. at 262-77 (denying applicability of Excessive Fines Clause, but implying merit of due process claim); Bankers Life & Cas., 486 U.S. at 87-88 (O’Connor, J., concurring) (explaining punitive awards could violate due process and stating issue worthy of Court’s attention in future). In Browning-Ferris, the Court held that the Excessive Fines Clause only applied to criminal cases and not to civil suits where the government had not prosecuted the action. Browning-Ferris, 492 U.S. at 263-64. Furthermore, the Court observed that the question of whether due process imposed outer limits on jury awards of punitive damages had never been addressed by the Court. Id. at 276-77. Nevertheless, because the petitioners failed to allege any unfair procedure or jury bias, the Court determined that inquiry must await another day. Id. at 277; see also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 9-12 (1991) (summarizing cases where Court deferred due process challenges).

39. See Haslip, 499 U.S. at 15-24 (holding punitive award did not violate constitutional due process); see also infra notes 40-47 and accompanying text (discussing early case where Court evaluated punitive awards under constitutional due process).
process came in *Pacific Mutual Life Insurance Co. v. Haslip*, where the Court held that although the punitive award was greater than four times the amount of the compensatory award, the decision did not violate the defendant’s right to procedural due process because the trial court afforded the defendant a number of procedural protections from jury caprice. The Court observed, however, that although the punitive award “does not cross the line into the area of constitutional impropriety,” a punitive award greater than four times the compensatory award “may be close to the line.”

The Court next confronted this issue in *TXO v. Alliance Resources Corp.*, where the Court upheld a punitive award that was 526 times greater than the compensatory award. In doing so, the Court concluded that a jury deliberating a punitive award must weigh many factors based on a variety of facts and circumstances that are unique to the case. For that reason, the Court

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41. See *id. at 12* (noting all prior challenges to constitutional status of punitive damages deferred by Court); see also *id. at 23-24* (holding punitive award not constitutional violation of due process). In this case, suit was brought against the defendant insurance company when the defendant failed to pay the plaintiff’s medical bills after hospitalization. See *id. at 4-6*. This occurred because the defendant’s agent failed to remit the plaintiff’s premiums to the defendant, thereby allowing coverage to lapse. *Id. at 6*. The jury awarded the plaintiff $200,000 in compensatory damages and $840,000 in punitive damages, a ratio of greater than 4:1. *Id. at 6 n.2*. This case reflected a substantial shift in the Court’s attitude towards punitive damages and represented a significant departure from the traditional common-law approach:

In view of this consistent history, we cannot say that the common-law method for asserting punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the *Fourteenth Amendment* to affect it. . . . [T]he common-law method for assessing punitive damages was well established before the *Fourteenth Amendment* was enacted. Nothing in that Amendment’s text or history indicates an intention on the part of its drafters to overturn the prevailing method. This, however, is not the end of the matter. It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. We note once again our concern about punitive damages that ‘run wild.’ Having said that, we conclude that our task today is to determine whether the Due Process Clause renders the punitive damage award in this case constitutionally unacceptable.

*Id. at 17-18* (citations omitted).
42. *Id. at 23-24* (assessing legal impact of decisions large punitive damages).
44. *Id. at 462*. In this case, the jury found for the defendant on a counter-claim for slander of title arising from the original plaintiff’s nefarious business practices surrounding oil and gas development rights to a tract of land in West Virginia. *Id. at 447-53*. The jury awarded $19,000 in actual damages and $10 million in punitive damages. *Id. at 446*. To qualify its affirmation of a punitive award so disproportionate to the amount of actual damages, the Court explained that, when examining the relationship between the punitive award and the actual damages, it is permissible to consider the potential damage that might have resulted from a defendant’s conduct, as opposed to looking simply at the actual damages caused. *Id. at 462*. Thus, taking the potential damages into account greatly reduces the disparity between the punitive and compensatory damages. *Id.; see also BMW of N. Am. v. Gore, 517 U.S. 559, 581* (observing ratio in *TXO* closer to 10:1 when potential harm considered).
doubted the utility of an objective test to determine the validity of a punitive award as a matter of constitutional due process and refused to draw a mathematical bright line separating the constitutionally acceptable from the constitutionally unacceptable. The Court further clarified that it could not endorse an approach that concentrates entirely on the relationship between actual and punitive damages.

C. Against the Current: The O’Connor Dissents, 1989-1993

During the same period of time, in her dissenting opinions, Justice Sandra Day O’Connor championed the belief that the Court should take affirmative steps to strictly limit the discretion of juries when determining punitive awards. Justice O’Connor based her argument on the belief that punitive damage award amounts should bear a reasonable relationship to the actual damages caused so that juries were not given unfettered leeway to impose excessive punishments derived from their own passions and prejudices. Moreover, she expressed particular concern over the vulnerability of large corporations, given the likelihood that jurors might feel improperly justified in transferring large sums of corporate wealth to needier plaintiffs.

For example, in Browning-Ferris, Justice O’Connor stressed the “skyrocketing” state of modern punitive damages, noting that the fear of uncertain punitive liabilities had hindered the development of new products and programs in certain industries. In Haslip, Justice O’Connor characterized

Such awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.

Id. at 457.

46. Id. at 458 (reiterating courts cannot use mathematical formula to determine excessiveness).
49. See TXO, 509 U.S. at 472-78 (O’Connor, J., dissenting) (outlining dangers of jury discretion in awarding punitive damages); Haslip, 499 U.S. at 43 (O’Connor, J., dissenting) (noting vague jury instructions invite jury to calculate punitive damages based on bias and prejudice).
50. See TXO, 509 U.S. at 491 (O’Connor, J., dissenting) (opining jurors might feel justified in redistributing wealth based on perceived social ills); Haslip, 499 U.S. at 43 (O’Connor, J., dissenting) (noting juries permitted to target unpopular defendants and redistribute wealth).
51. See Browning-Ferris, 492 U.S. at 282 (O’Connor, J., dissenting in part) (setting forth special concerns of corporations facing unchecked jury discretion in awarding punitive damages). Specifically, she opined that the threat of such large awards was causing pharmaceutical manufacturers to forego introducing
punitive damages as a “powerful weapon,” with “devastating potential for harm” when exercised indiscriminately. Moreover, she believed that the jury instructions in state courts often lacked meaningful guidance, effectively permitting juries to “target unpopular defendants, penalize unorthodox views, and redistribute wealth,” resulting in “[m]ultimillion dollar losses [being] inflicted on a whim.” For that reason, she placed great weight on the need for procedural safeguards to constrain the unfeigned discretion of juries to prevent them from awarding punitive damages arbitrarily and maliciously.

Finally, in *TXO*, Justice O’Connor criticized the Court for failing to adequately address a system that she believed was rapidly becoming “arbitrary and oppressive.” In her view, ensuring that punishments remained proportionate to their underlying offenses required urgent judicial action. Advocating for objective criteria, she opined that the relationship of the punitive award to the compensatory award would be the best vehicle for achieving objectivity and avoiding the risks of jury prejudice.


After *TXO*, the Court was more willing to evaluate whether punitive awards could be per se excessive as a matter of substantive due process. In *Honda* new medicines and vaccines into the market due to the fear of uncertain liabilities. In addition, she maintained that airplane and automobile manufacturers were abandoning projects due to the possibility of large punitive damage awards in the event of unforeseen accidents. Justice O’Connor also argued that the Eighth Amendment’s Excessive Fines Clause should apply to punitive damage awards as a result of their penal nature.

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52. *Haslip*, 499 U.S. at 42 (O’Connor, J., dissenting) (stressing alarming state of common-law procedures for awarding punitive damages).

53. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42-43 (1991) (O’Connor, J., dissenting) (explaining consequences of inadequate jury instructions). In evaluating the instruction on punitive damages read to the jury by the Alabama court at trial, Justice O’Connor opined the following:

Instead of reminding the jury that its decision must rest on a factual or legal predicate, the instruction suggests that the jury may do whatever it ‘feels’ like. It thus invites jurors to rely upon emotion, bias, and personal predilections of every sort. . . . [I]t as much permits a determination based upon the toss of a coin or the color of the defendant’s skin as upon reasoned analysis of the offensive conduct.

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54. *Id.* at 54-64 (O’Connor, J., dissenting) (stressing need for strong procedural safeguards to protect defendants from overzealous juries).


56. See *id.* at 481-84 (stressing negative consequences of unfettered jury discretion in assessing punitive damages).


58. See *infra* Part II.D (discussing cases distinguishing procedural and substantive due process when
Motor Co., Ltd. v. Oberg, the Court definitively distinguished procedural due process from substantive due process when it was called upon to determine the constitutionality of an Oregon state constitutional amendment that effectively prohibited judicial review of punitive awards. In its analysis, the Court acknowledged that the Constitution places a substantive limit on the size of punitive damage awards, regardless of whether procedural due process has been satisfied. Ultimately, the Court held that the amendment was unconstitutional on procedural grounds, thereby avoiding the task of identifying the characteristics that would render a punitive damages award unconstitutionally excessive under substantive due process.

The first occasion to overturn a punitive award on the grounds that its excessiveness violated the defendant’s right to substantive due process came in 1996. In BMW of North America v. Gore, the jury returned a verdict with a punitive damage award of $2 million, despite a compensatory award of only $4,000, after an automobile distributor failed to disclose that its cars had been damaged during delivery. The Court stipulated that its determination of whether the punitive award violated constitutional due process would be guided by the “[e]lementary notion of fairness . . . that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that the State may impose.” Furthermore, the Court established three “guideposts” to operate as objective criteria in the analysis: the degree of reprehensibility of the conduct, the disparity between the harm or potential harm suffered and the punitive award, and the difference between the remedy determining constitutionality of punitive awards).

60. See id. at 418 (announcing issue presented). More precisely, the amendment prohibited judicial review of punitive awards, except where the court found definitively that there was no evidence to support the awarded amount. Id.
61. Id. at 420-21 (emphasizing procedural component of due process).
62. Id. at 420 (noting question presented involved procedural due process and not unconstitutional excessiveness).
63. See BMW of N. Am. v. Gore, 517 U.S. 559, 585-86 (1996) (holding punitive award grossly excessive and above constitutional limit). The specific question presented to the Court in Gore was whether the punitive award exceeded the constitutional limit. Id. at 562-63. The Court granted certiorari because it “believed that a review of this case would help to illuminate ‘the character of the standard that will identify unconstitutionally excessive awards’ of punitive damages.” Id. at 568 (citing Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 420 (1994)).
64. 517 U.S. 559 (1996).
65. See id. at 563-68 (outlining facts of case). After purchasing a new BMW from an authorized dealer, the plaintiff took the car to an independent detailer, where the detailer discovered the car had previously been repainted. Id. at 563. The plaintiff brought suit alleging BMW’s failure to disclose that the car had been repainted constituted a material misrepresentation during the negotiation of the purchase. Id. at 563. At trial, the court discovered that BMW had adopted a nationwide policy in which cars that were damaged by less than three percent of the suggested retail price during manufacturing or transportation were sold as new without revealing to the distributors or their customers that the car had previously been damaged. Id. at 563-64.
66. See id. at 574 (setting forth principles governing analysis of issue).
and the civil penalties authorized or imposed in comparable cases.  

Applying these three guideposts, the Court ultimately determined that the award was unconstitutionally excessive. In applying the second guidepost, the punitive-to-compensatory ratio, the Court observed that this ratio was perhaps the most commonly cited indicator of excessiveness, noting that the decisions in Haslip and TXO endorsed the significance of this ratio. The Court, however, rejected a categorical approach, reiterating that it could not draw a mathematical bright line to separate the constitutionally acceptable from the constitutionally unacceptable punitive awards. Nevertheless, the Court proffered that in most cases, the ratio would need to fall within a constitutionally acceptable range.

In the 2003 case, State Farm Mutual Automobile Insurance Co. v. Campbell, the Court reviewed a $145 million punitive award where the amount of the compensatory award was only $1 million. Citing Justice O’Connor’s previous dissents, the Court emphasized that due process requires fair notice of the likely consequences of offensive conduct and that unfettered

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67. Gore, 517 U.S. at 574-85 (applying three guideposts to $2 million punitive award). But see id. at 605 (Scalia, J., dissenting) (criticizing guideposts established by majority). “In truth, the ‘guideposts’ mark a road to nowhere; they provide no real guidance at all.” Gore, at 605 (Scalia, J., dissenting).

68. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996) (holding award grossly excessive and beyond constitutional limit). With regard to the first guidepost, the Court noted that there existed no aggravating factors to indicate that the conduct was particularly reprehensible. Id. at 576. Furthermore, with regard to the third guidepost, the Court determined that the punitive award far exceeded any statutory fines available for comparable conduct. Id. at 583-84. Justice Scalia observed, in his dissenting opinion, that the majority did not explore the legal significance of its criteria anywhere in the opinion, making them guideposts that mark a “road to nowhere.” Id. at 605 (Scalia, J., dissenting).

69. Id. at 580-81 (majority opinion).

70. Id. at 582-83 (rejecting categorical approach and mathematical bright line). Nevertheless, the Court recalled that in Haslip, it determined that a punitive award of more than four times the compensatory damages “might be ‘close to the line.’” Id. at 581 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991)). Furthermore, the Court recalled that in TXO, it clarified that the harm potentially resulting from the defendant’s conduct could be considered when examining the punitive-to-compensatory ratio. Id. Therefore, the Court reasoned that the TXO decision suggested that the constitutional ratio was not more than 10:1. Id.

71. See id. at 582-83 (qualifying rejection of mathematical bright line approach). The Court observed that a lower compensatory award may justify a higher ratio and vice versa. Id. at 582. Furthermore, the Court reasoned that a hard-to-detect injury or monetary harm might justify a higher ratio. Id.


73. See id. at 412 (announcing question presented). This case involved claims against State Farm for fraud and intentional infliction of emotional distress. Id. at 414 (summarizing facts of case). The suit arose out of State Farm’s conduct while resolving a wrongful death claim brought against its insured after an automobile accident. Id. at 412-13. At trial, evidence exposed that State Farm implemented a national program called the “Performance, Planning and Review,” or “PP & R policy” in which State Farm employed unethical means to cap payouts on claims. Id. at 415; see also id. at 431-36 (Ginsburg, J., dissenting) (offering further details about “PP & R policy”). Based on this evidence, the jury awarded $2.6 million in compensatory damages and a punitive award of $145 million. See State Farm, 538 U.S. at 415. The trial court then reduced the compensatory award to $1 million and the punitive award to $25 million. Id. The Utah Supreme Court reinstated the $145 million punitive award after applying the three guideposts set forth in Gore. Id. at 415-16; see also supra note 67 and accompanying next (discussing guideposts Court established in Gore); infra note 128 and accompanying text (observing Court’s habit of downplaying egregiousness of conduct when overturning punitive awards).
jury discretion could result in arbitrary deprivations of property. The Court therefore opined that evidence of a defendant’s net worth creates the potential for juries to freely express their prejudices against wealthy corporations through exorbitant punitive damage awards.

Next, the Court applied the three guideposts established in Gore to determine whether the punitive award was excessive. With regard to the second guidepost—the punitive-to-compensatory ratio—the Court again dismissed the notion of a mathematical bright-line ratio, but declared that few awards exceeding a single-digit ratio would satisfy due process. Furthermore, the Court noted that although there could be exceptions, single-digit multipliers are more likely to satisfy due process. Ultimately, the Court explained that the judiciary is responsible for ensuring that awards of punitive damages are both reasonable and proportionate to the harm caused and the compensatory damages awarded. Accordingly, the Court overturned the punitive award, concluding that a ratio of 145:1 was not appropriate under the circumstances.

In the final major case addressing punitive damages prior to Exxon—Phillip Morris USA v. Williams—the Court considered whether due process forbade a jury from directly punishing defendants for harm caused to third parties not before the court. In so doing, the Court explained that punishments...
substantiated not in law, but on the impulses of juries, constitute an arbitrary deprivation of property and thereby violate constitutional due process. Therefore, the Court reasoned that where a state fails to employ adequate measures to prevent juries from awarding such damages, its punitive damage system may be unconstitutional. Consequently, the Court held that where a state court allows a jury to consider harms done to third parties when calculating a punitive award, that court has failed to safeguard the defendant from the jury’s prejudices and caprices. Hence, because the Court concluded that the Utah courts allowed the jury to directly punish the defendant for harm to third parties, it held that the decision violated the defendant’s constitutional rights as a matter of procedural due process.

E. Uncharted Waters: Exxon Shipping Co. v. Baker

In Exxon Shipping Co. v. Baker, 32,000 commercial fishermen, native Alaskans, and landowners brought suit to recover the damage done to their livelihoods as a result of the more than 1300 miles of Alaskan shoreline affected by the largest oil spill in American history. At trial, a jury in the United States District Court for the District of Alaska awarded the plaintiffs $5 billion in punitive damages after twenty-two days of deliberation. That award, however, was ultimately reduced to $2.5 billion by the United States Court of Appeals for the Ninth Circuit after several remands to the district court failed to produce a satisfactory result. Following that reduction, the Supreme Court granted certiorari to determine whether the $2.5 billion punitive damages award was "greater than maritime law should allow under the circumstances."

The Court characterized this question as "an issue of first impression about punitive damages in maritime law, which falls within a federal court’s
jurisdiction to decide in the manner of a common law court." Consequently, after many years spent struggling to define the substantive due process limits on punitive damage awards, the Court permitted itself to examine punitive damages against a fresh canvas, unencumbered by the dauntingly cluttered jurisprudence surrounding the doctrine. The Court explained that the true problem posed by the common-law doctrine of punitive damages lay not with the high dollar amounts being awarded but in the stark unpredictability that resulted from too much jury discretion.

Accordingly, the Court held that justice would be better served by allowing defendants to predict their exposure to punitive damages with greater accuracy. The Court reasoned that this could best be accomplished by "pegging punitive-to-compensatory damages using a ratio or maximum multiple." Applying this framework, the Court held that in cases of maritime law involving reckless conduct, the ratio of the punitive award to the compensatory award should not exceed 1:1. Thus, the Court overturned the $2.5 billion punitive award and concluded that the punitive damage award was not to exceed $507.5 million in punitive damages, the equivalent of the compensatory damages.

III. ANALYSIS

Over the past thirty years, the Court has developed the philosophy that punitive awards violate the constitutional right to due process if the award does not bear a reasonable relationship to, or constitute a reasonably predictable consequence of, the defendant’s wrongful conduct. Accordingly, the Court

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92. Exxon, 128 S. Ct. at 2619 (citing U.S. Const. art. III, § 2, cl. 2) (stating question of first impression, subject to authority of Congress if they disagree with result); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979) (declaring admiralty law judge-made law to great extent); Romero v. Int’l Terminal Operating Co., 358 U.S. 354, 360-61 (1959) (observing constitutional grant empowered federal courts to continue development of maritime law).

93. See supra note 92 and accompanying text (explaining excessive punitive damages question of first impression within judge-made area of maritime law); see also Exxon, 128 S. Ct. at 2626 (distinguishing from issue of due process because reviewing jury award for conformity with maritime law); id. at 2629-30 (acknowledging Court acting as common-law court to cure problem judicially derived standards created); supra Part II.B-D (examining history of punitive damage review by Supreme Court in non-maritime cases).

94. See Exxon, 128 S. Ct. at 2625 (examining inconsistency in punitive damage awards and problem of outlier awards).

95. Id. at 2629 (concluding best to eliminate unpredictable punitive awards by using standards more rigorous than constitutionally necessary).

96. Id. (stating pegging punitive to compensatory damages using ratio or maximum multiple more promising alternative).

97. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2633 (2008) (holding 1:1 punitive-to-compensatory ratio fair upper limit in maritime cases involving reckless conduct). The Court chose this ratio based on data indicating the median ratio across a spectrum of circumstances was less than 1:1. Id. (noting in well-functioning system, median roughly expresses jurors’ sense of reasonable penalties).

98. See id. at 2634 (accepting compensatory calculation and remanding to reduce punitive award in accordance with 1:1 ratio).

99. See, e.g., id. at 2627 (maintaining due process requires punishments to be reasonably predictable
has adopted the punitive-to-compensatory ratio as the primary barometer of due process when reviewing constitutional challenges to punitive awards. Moreover, the Court’s recent decision in Exxon Shipping Co. v. Baker amounts to a significant change in the law of punitive damages, as it represents the Court’s first drawing of a mathematical bright line to limit a punitive award in the name of substantive due process, after refusing to do so at any time in the past. Prior to Exxon, the Court perpetually struggled to provide meaningful guidance, as it insisted that punitive awards must fall within a constitutionally-acceptable range despite being unable to adequately define any boundaries. Thus, given the unprecedented nature of the bright line drawn in Exxon, there is uncertainty as to whether the Court will continue to limit punitive damage awards to fixed ratios in order to escape the quagmire of defining the constitutionally-acceptable range of ratios.

100. See Exxon, 128 S. Ct. at 2629 (qualifying punitive-to-compensatory ratio as central feature in due process analysis). Of the three guideposts established in Gore, only the second guidepost, punitive-to-compensatory ratio, is a quantifiable measurement, as opposed to an abstract comparison. The Court’s first guidepost, the degree of reprehensibility, is a highly subjective and easily manipulated standard of measure and therefore does not provide the Court with any objective guidance. Moreover, though the Court’s third guidepost, the potential sanctions for comparable misconduct, could be considered quantifiable, it has been given little consideration by the Court in most of the subsequent cases. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) (minimizing significance of third Gore guidepost); see also infra note 114 (discussing Court’s preference for quantifiable standards).

101. Compare Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2632-34 (2008) (holding punitive award should not exceed compensatory award by greater than 1:1 ratio), with id. at 2626 (acknowledging Court consistently rejected notion of constitutional bright line), and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 402, 425 (2003) (declining to impose bright-line ratio for maximum allowable punitive damages), and Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 434-35 (2001) (explaining constitutional line inherently imprecise and not marked by simple mathematical formula), and TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459-60 (1993) (noting Court has eschewed approach concentrating entirely on relationship between punitive and actual damages). It is important to note that the bright-line 1:1 ratio decided in Exxon was not decided as a matter of constitutional due process, but rather was decided as a matter of federal common law in maritime cases. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008) (identifying Court’s power to settle issues of maritime law as common-law court); id. at 2629-30 (justifying Court’s decision to use hard numbers by explaining role of common-law court). But see infra note 103 and accompanying text (suggesting Court may extend decision beyond maritime law).

102. See State Farm, 538 U.S. at 430 (Ginsburg, J., dissenting) (discussing Court’s inconsistent history applying constitutional range of ratios); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991) (qualifying 4:1 punitive-to-compensatory ratio as close to line of constitutional impropriety); supra note 14 and accompanying text (discussing Court’s trouble identifying range of acceptable ratios); see also Exxon, 128 S. Ct. at 2625 (discussing existence of unpredictability even with constitutional range).

103. See Exxon, 128 S. Ct. at 2634 n.28 (noting in large class-action suits, 1:1 ratio possibly represents upper constitutional limit). Though it is unclear, a careful reading of the decision reveals a potentially broader intent. For example, in justifying its power as a common-law court to impose a hard cap on punitive damages,
Even if the Court does not extend the Exxon decision, using the punitive-to-compensatory ratio as the primary indicator of constitutional due process is an unworkable and inherently flawed concept. Though the Court often recites the maxim that punitive damages are intended to punish and deter, this practice takes for granted and effectively turns a blind eye to these fundamental objectives. Accordingly, this analysis seeks to uproot the current paradigm and suggest an alternative method of reviewing punitive damage awards that remains true to their essential functions.

For clarity’s sake, as the current paradigm balances the amount of the award against the harm resulting from the defendant’s wrongful conduct, this paradigm will be referred to as “conduct-based review.” Conversely, under the paradigm this Note will suggest, the individual defendant’s resources will operate as the Court’s objective barometer of due process, just as the punitive-to-compensatory ratio does under conduct-based review. Therefore, the suggested paradigm will be referred to as “defendant-based review.”

the Court asserts that it has traditionally been the responsibility of the courts to review punitive damages, thereby making the courts responsible for their evolution. In effect, by acknowledging the broader flaws in its general approach to punitive damages in order to justify its aggressive action, the Court creates the natural inference that this is the solution necessary to fix the flaws of its general approach. Moreover, the Court goes out of its way to emphasize that Congress is free to legislate otherwise if it disagrees with the Court’s decision. This disclaimer reflects the sentiment that the decision to adopt a mathematical bright line to cap punitive awards should probably be reached by Congress. Therefore, if the Court were to extend this holding into the common law, it could be excused as being a necessary consequence of congressional inaction.

A. The Problems of Conduct-Based Review

Prior to the onset of constitutional challenges levied against large punitive awards, the common-law doctrine of punitive damages was a system by which juries, as representative bodies, imposed financial penalties upon civil wrongdoers to express the moral outrage of their respective communities.\footnote{See, e.g., Exxon, 128 S. Ct. at 2620 (observing punitive damages’ common-law history as untethered to strict multipliers when imported to America); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) (describing traditional common-law approach to punitive damages); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (proffering punitive damages private fines levied by civil juries to punish and deter); Barry v. Edmunds, 116 U.S. 550, 565 (1886) (noting court not permitted to substitute its discretion for jury’s); Day v. Woodworth, 54 U.S. 363, 371 (1851) (explaining jury may use discretion to impose punitive damages based on enormity of offense).} Because punitive damage verdicts represented the voice of the community, appellate courts were hesitant to disturb them, affording great deference to the discretion of the jury.\footnote{See, e.g., Barry, 116 U.S. at 565 (declaring courts should not set aside jury verdicts for excessiveness absent gross error); Day, 54 U.S. at 371 (noting determination of punitive damages left to discretion of jury); Huckle v. Money, (1763) 95 Eng. Rep. 768, 769 (K.B.) (asserting courts should only overturn jury’s punitive verdict in rarest circumstances); see also supra notes 30-35 and accompanying text (discussing early history of punitive damages in America). This deference has, however, steadily eroded over time as American courts have become increasingly skeptical over the motives of juries. See Honda Motor Co., Ltd., v. Oberg, 512 U.S. 415, 425 (1994) (noting difficulty of probing juror reasoning caused courts to review damages based on size of awards); id. at 434 (rejecting historic basis for jury being final arbiter of amount of punitive award); see also supra Part II.C (outlining views of Justice O’Connor regarding juries’ propensity for prejudice). But see Oberg, 512 U.S. at 448-49 (Ginsburg, J., dissenting) (noting courts rarely exercise power to overturn punitive awards).} The purposes for allowing juries to impose such penalties were explicit: to punish the wrongdoers and deter similar conduct in the future.\footnote{See supra notes 31-32 accompanying text (discussing purposes of punitive damages).} As due process challenges began to gain traction in the late 1980s, the Court expended great effort to manufacture objective criteria to limit punitive awards, but did so without considering whether such criteria were harmonious with these fundamental objectives.\footnote{Compare BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996) (establishing objective criteria to determine constitutionality of damage awards), with Philip Morris USA v. Williams, 549 U.S. 346, 361-62 (2007) (Thomas, J., dissenting) (rejecting restrictions on punitive damages as inconsistent with doctrine and Constitution), and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (describing Gore factors inconsistent with principled application), and Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 445-46 (2001) (Ginsburg, J., dissenting) (recognizing awards of punitive damages as jury function), and Gore, 517 U.S. at 599 (Scalia, J., dissenting) (opining Fourteenth Amendment assures opportunity to contest reasonableness but not that awards actually be reasonable). Each of the three guideposts the Court established in Gore focuses upon the conduct of the defendant and the resulting actual damages. See Gore, 517 U.S. at 574-75 (setting forth criteria for determining constitutionality of punitive damages).} Moreover, as a result of the Court’s due process concerns, the merit of conduct-based review was accepted as a foregone conclusion and the punitive-to-compensatory ratio emerged as the primary indicator of due process.\footnote{See Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2628 (2008) (implying preference for quantifiable, rather than verbal, jury instructions); Gore, 517 U.S. at 580 (qualifying punitive-to-compensatory ratio as most commonly cited indicum of excessiveness). For additional justification in using the punitive-to-}
The Court’s adoption of the punitive-to-compensatory ratio and its predisposition for conduct-based review in general are both inherently at odds with the pursuit of adequate punishment and effective deterrence.\(^{115}\) This is because, under conduct-based review, the Court assesses the proportionality of the punitive award to the underlying conduct by way of a dollar-to-dollar comparison, effectively disregarding the practical reality that the value of a fixed sum of money is relative to its holder.\(^{116}\) Thus, despite maintaining that the purposes of punitive damages are punishment and deterrence, the Court all but disregards the financial impact of the verdict on the wrongdoer, the variable on which the effectiveness of the award as a vehicle of punishment and deterrence depends.\(^{117}\)

This theoretical flaw has practical implications as well.\(^{118}\) For instance, where a jury is hamstrung by a fixed ratio, or range of ratios, there is no guarantee that it will have the ability to impose meaningful punishment upon

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\(^{116}\) See supra note 116 and accompanying text (discussing relationship between defendant’s wealth and punishment and deterrence).

\(^{117}\) See Exxon, 128 S. Ct. at 2629-34 (holding 1:1 ratio maximum allowable award but making no reference to Exxon’s financial status). Of course, Exxon’s position is somewhat unique in this case, as in the aftermath of the spill, the company spent approximately $2.1 billion in cleanup efforts; thus, one could argue that under these circumstances, a relatively forgiving punitive award would be warranted. Id. at 2613. Regardless, the Court’s holding does not imply in any way that this fact influenced its holding. See id. at 2629-34 (determining appropriate damages measure).

\(^{118}\) See infra notes 120-130 and accompanying text (discussing practical implications of theoretical flaw).
the defendant or effectively deter the wrongful conduct’s repetition. This is especially true in cases where corporate defendants have such unfathomable wealth that no matter how egregious its conduct, the maximum punitive award would amount to no more than a proverbial drop in the bucket. Consequently, such corporate giants could justify committing whatever egregious conduct they please, so long as the upside outweighs the maximum allowable punitive award under the Court’s vision of reasonableness.

This proclivity for corporate protection is not surprising, however, when one traces the origins of conduct-based review back to Justice O’Connor’s early dissenting opinions. In those opinions, Justice O’Connor urged, with little factual support, that jurors were habitually drawing upon their passions and prejudices to arbitrarily deprive corporate defendants of property and capriciously redistribute wealth. In effect, Justice O’Connor’s alarmist tone

119. See infra note 120-121 and accompanying text (discussing conflict between jury sense of moral outrage and Court’s vision of reasonableness).

120. Compare Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 (2008) (plurality opinion) (concluding punitive award must be no greater than $507.5 million), with Exxon Mobil Corp., Annual Report (Form 10-K), at 23 (Feb. 28, 2008) (reporting Exxon Mobil Corp.’s 2007 net income more than $40 billion), and Jad Mouawad, Exxon Mobil Profit Sets Record Again, N.Y. TIMES, Feb. 1, 2008, available at http://www.nytimes.com/2008/02/01/business/01cnd-exxon.html (reporting Exxon Mobil Corp.’s 2007 profits highest annual profits ever recorded by any company). Therefore, though an impressive sum, the maximum allowable punitive award under the Court’s holding amounted to only 1.24 percent of Exxon Mobil Corp.’s profits from the prior year. See Mouawad, supra. Consequently, Exxon Mobil Corp. could afford to pay the punitive damages for causing the largest oil spill in American history with only four-and-a-half days’ worth of its 2007 profits. See Mouawad, supra (calculating Exxon earned more than $1287 of profit per second in 2007).

121. See Exxon, 128 S. Ct. at 2633 n.27 (observing $2,500,000,000 punitive award five times greater than what Court considers reasonable); see also BMW of N. Am. v. Gore, 517 U.S. 559, 599-600 (1996) (Scalia, J., dissenting) (concluding Court’s new rule constrained by no principle other than Justices’ assessment of reasonableness). “Today’s decision, though dressed up as a legal opinion, is really no more than a disagreement with the community’s sense of indignation or outrage expressed in the punitive award . . . .” Gore, 517 U.S. at 600.


123. See Haslip, 499 U.S. at 61 (O’Connor, J., dissenting) (citing study by RAND Institute for Social Justice). Justice O’Connor cited only one empirical study to factually support her views regarding the state of punitive damages. Id. But see Exxon, 128 S. Ct. at 2624-26 (concluding runaway punitive awards not real problem); Thomas H. Cohen, Punitive Damage Awards in Large Counties, 2001 (U.S. Dep’t of Justice, March 2005) (finding punitive damage awards between 1992 and 2001 relatively consistent); Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data, 3 J. OF EMPIRICAL LEGAL STUD. 263, 278 (2006) (noting stability in median ratios of punitive-to-compensatory damages over time). Moreover, the actual findings of the study Justice O’Connor cites do not warrant her alarmist tone. See generally MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS (RAND Institute for Civil Justice 1987). For instance, as acknowledged by its authors, the study’s findings are limited because it only examined punitive damages in Cook County, IL and San Francisco, CA. Id. at v, ix. Furthermore, despite findings indicating an overall increase in punitive awards, a large portion of
shadowed her questionable reasoning and created a false sense of urgency that made the implementation of her own reforms seem all the more necessary. 124 Specifically, her suggested reforms involved limiting the amounts of punitive awards to a multiplier of the compensatory award, under the belief that the punitive amount must be reasonably proportionate to the actual financial damage resulting from the offensive conduct. 125 Consequently, as shown by the majority opinions in Oberg and Gore, Justice O’Connor’s views strongly steered the Court toward a predisposition to conduct-based review and a heightened sensitivity to jury bias towards large corporations. 126

By capping potential punitive liabilities based on compensatory damages rather than on the defendant’s resources, the Court allows wealthy corporations to use the Constitution as a shield to protect them from juries’ full expressions of moral outrage. 127 Moreover, the Court’s protectionist attitude is further evidenced by the Court’s curious habit of downplaying the full egregiousness of the defendants’ conduct when overturning substantial punitive awards imposed on large corporate defendants. 128 Accordingly, the Court’s continued

the study’s findings are relatively mild. See generally id. For example, the study found that even though punitive damages in personal injury cases received most of the criticism in the debate over punitive awards, the ratio of punitive-to-compensatory damages rarely exceeded 2:1 in such cases. Id. at iii. Similarly, over the course of the twenty-four year period of study, there were only six products liability cases resulting in punitive damages in the examined jurisdictions. Id. at v. But see supra note 51 and accompanying text (discussing Justice O’Connor’s account of punitive damages’ effects on manufacturers). In addition, the study concluded that courts most frequently imposed punitive damages upon defendants who were found to have intentionally harmed plaintiffs and that in most of these cases, the damages were modest. Mark Peterson et al., Punitive Damages: Empirical Findings (RAND Institute for Civil Justice 1987). Nevertheless, in Browning-Ferris, Justice O’Connor opined, without citing any examples, that the threat of large awards had caused pharmaceutical manufacturers to forego introducing new medicines and vaccines into the market due to the fear of uncertain punitive liabilities. See Browning-Ferris, 492 U.S. at 282 (O’Connor, J., dissenting in part). She also maintained, without citing any examples, that airplane and automobile manufacturers were abandoning projects due to the possibility of exposure to large punitive damage awards. 129

124. See supra notes 52-56 and accompanying text (emphasizing Justice O’Connor’s urgent tone in dissenting opinions); see also supra note 123 and accompanying text (highlighting weaknesses in Justice O’Connor’s reasoning).
125. See TXO Prod. Corp., v. Alliance Res. Corp., 509 U.S. 443, 479-84 (1993) (O’Connor, J., dissenting) (suggesting Court tether allowable punitive damages to multiplier of compensatory damages). To be sure, however, the majority had also touched upon similar sentiments in cases preceding Gore. See id. at 459-62 (noting significance of punitive-to-compensatory ratio); Haslip, 499 U.S. at 23-24 (quantifying punitive award in terms of punitive-to-compensatory ratio).
127. See supra note 121 and accompanying text (discussing conflict between effective punishment and deterrence and Court’s version of reasonableness).
adherence to this flawed paradigm is highly unsettling from a policy standpoint in light of the deluge of corporate malfeasance in America since the turn of the twenty-first century. Ultimately, therefore, the Court should neither endorse nor employ practices that protect powerful corporations from feeling fair and necessary financial pain when they commit egregious acts that do great damage to the communities in which they operate. Hence, the Court should abandon the revisions it has made to the common-law doctrine of punitive damages and again conclude, as Justice O’Connor once did, that “[p]unitive damages are . . . ripe for reevaluation.”

B. The Virtues of Defendant-Based Review

In order for a jury to calculate a monetary sum that will inflict the desired retributive impact and ensure that the offensive conduct will ultimately prove too costly to be worth repeating, the wealth and resources of the defendant must be at the forefront of the analysis. Accordingly, under defendant-based review, the wealth of the defendant would operate as the Court’s objective barometer of due process, just as the punitive-to-compensatory ratio does under


130. See supra notes 122-129 and accompanying text (describing Court’s sensitivity to punitive exposure of corporate defendants).

131. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (advocating punitive damage reform). Given the difficulty the Court has had ruling upon the issue, it may be appropriate for Congress to step in and provide a definitive resolution. See Exxon, 128 S. Ct. at 2619 (noting Congress has power to legislate otherwise if they disagree with Court’s decision).

132. See Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring) (discussing evidence of defendant’s financial worth upon judicial review).

For example, if the defendant in the instant case were the individual mortician earning $20,000 per year, this fact should be admissible in support of a post-judgment motion on the issue of the validity of the award. The gravity of the wrong may be the same, whether the defendant is a salaried employee or a multimillion dollar corporation, but, in the case of the former, the $220,000 verdict would be far out of proportion to its intended purpose. What it takes to punish the one bears no relationship to what it takes to punish the other.

Id. Additionally, in Green Oil, the Supreme Court of Alabama observed that “the award in the instant case ought to be large enough to hurt. It ought to sting in order to deter; this is its purpose.” Id. at 222 (quoting Southern Life & Health Ins. Co. v. Whitman, 358 So.2d 1025 (Ala. 1978)). Similar attitudes have been expressed in Kansas. See KAN. STAT. ANN. § 60-3701(b)(6), (e)(1)-(2) (2005) (limiting punitive damages to lesser of defendant’s average gross annual income or $5 million); Smith v. Printup, 866 P.2d 985, 1011 (Kan. 1993) (articulating purpose of punitive damages). “Punitive damages are awarded to punish the wrongdoer. . . . The amount of the award is to be calculated with the individual defendant’s financial status and conduct in mind.” Smith, 866 P.2d at 1011.
conduct-based review. This upon reviewing awards for constitutional excessiveness, the Court would compare the amount of the punitive award to the defendant’s total resources and determine whether such a deprivation is warranted based on the egregiousness of the defendant’s conduct. This would allow the Court to accurately gauge the financial impact of the punitive award, which will ultimately determine its effectiveness as a vehicle of punishment, as well as whether the offensive conduct will ultimately prove too costly to be worth repeating. Accordingly, defendant-based review would ensure that punishment and deterrence remain the focus in reviewing punitive verdicts, thereby staying true to the fundamental principles of the doctrine.

In addition to ensuring that the goals of punishment and deterrence remain in the forefront of the analysis, defendant-based review could alleviate the Court’s primary due process concerns: that the punitive award is both reasonably proportionate to, and the reasonably predictable consequence of, the defendant’s wrongful conduct. First, the Court’s reasonably proportionate requirement could be satisfied under defendant-based review if the Court examined whether the financial pain felt by the defendant was proportionate to the egregiousness of the wrongful conduct, rather than simply comparing dollar

133. See supra note 1 and accompanying text (quoting William Blackstone); supra note 115 and accompanying text (observing how Court disregards merit of assessing defendant’s wealth); supra notes 127-129 and accompanying text (expounding ways in which Court shields corporate defendants from full expressions of community outrage); supra note 132 and accompanying text (illustrating underlying rationale of defendant-based review).


135. See William Blackstone, 4 Commentaries *371 (noting value of money changes depending on size of individual fortune); supra note 115 and accompanying text (observing Court fails to give defendant’s wealth adequate weight in analysis); see also Green Oil Co. v. Hornsby, 539 So.2d 218, 222-23 (1989). The Hornsby court relied, in part, on Ridout’s-Brown Serv. Inc. v. Holloway:

To the ‘gravity of the wrong’ element should be added this inquiry: What (i.e., how much) will it take to punish this defendant? The purpose of this two-fold test is to particularize both the wrongful act and the wrongdoer. Only when both elements—the gravity of the wrongful act and the amount of damages necessary to punish the particular defendant—are considered and weighed one against the other, can the award be rationally adjudged to accomplish the ultimate purpose of exemplary damages.


136. See supra note 35 and accompanying text (summarizing original design of common-law doctrine of punitive damages).

amounts. In effect, though the dollar amount of the punitive award might not necessarily appear proportionate to that of the compensatory award, the financial impact of the punitive award would be appropriate given the defendant’s wrongful conduct. Thus, after only a simple adjustment to the Court’s approach, defendant-based review could ensure that the punitive verdicts levied against defendants are reasonably proportionate to their wrongful conduct, thereby preserving defendants’ rights to due process.

Second, to satisfy the “reasonably predictable” requirement, the Court could set forth objective criteria to guide its analysis, as it has unsuccessfully attempted to do under conduct-based review. In this effort, the Court could assess punitive awards based on their percentage values of a predetermined indicator of wealth (e.g. net worth, yearly profits, annual income, etc.) and could adjust the jury verdict as necessary to reflect its assessment of the particular conduct’s egregiousness. For even greater objectivity, the Court could adopt fixed percentages of the predetermined indicator to cap the maximum allowable awards for defined levels of egregiousness. In either formulation, what would naturally result from such a method would be a sliding scale, whereby defendants could look to prior cases and reasonably anticipate that if they partake in ‘X’ wrongful conduct, they could stand to lose ‘Y’ percent of their assets. By examining what the Court has considered


These criss-crossing platitudes yield no real answers in no real cases. And it must be noted that the Court nowhere says that these three ‘guideposts’ are the only guideposts; indeed, it makes very clear that they are not explaining away the earlier opinions that do not really follow these ‘guideposts’ on the basis of additional factors thereby reiterating our rejection of a categorical approach. In other words, even these utter platitudes, if they should ever happen to produce an answer, may be overridden by other unnamed considerations.

Id.

139. See Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989) (discussing pursuit of punishment and deterrence). “[A]lthough punitive damages need bear no particular relationship to actual damages, they nonetheless, must not exceed an amount that will accomplish society’s goals of punishment and deterrence.”

Id.

140. See supra notes 137-139 (explaining Court’s reasonably predictable requirement satisfied through defendant-based review).

141. See supra Part II.D (outlining Court’s development of objective criteria). But see Exxon, 128 S. Ct. at 2629-30 (acknowledging Court created problematic situation with regard to punitive damages).

142. See KAN. STAT. ANN. § 60-3701(b)(6), (e)(1)-(2) (2005) (limiting punitive damages to lesser of defendant’s average gross annual income or $5 million); Exxon, 128 S. Ct. at 2628 (suggesting quantifiable standards favored over verbal formulations offered to jury); Gore, 517 U.S. at 591 (explaining reprehensibility constrains where defendant’s wealth creates open-ended basis for inflating awards).


144. See infra text accompanying notes 148-160 (providing example of workable solution under defendant-based conduct).
reasonable for similarly egregious conduct in the past, the wrongdoer could reasonably predict his potential exposure, should he decide to undertake the wrongful conduct.\textsuperscript{145} Thus, through the implementation of objective criteria focusing on the resources of the defendant, the Court could ensure that punitive awards are the reasonably predictable consequences of the defendant’s wrongful conduct, thereby preserving their rights to constitutional due process.\textsuperscript{146} Thus, the Court could finally harmonize the fundamental objectives of punitive damages with the requirements of due process.\textsuperscript{147}

An example would help illustrate the practicality of defendant-based review: imagine that in three separate trials, three different corporate defendants are all found liable for damages resulting from the same civil wrong; specifically, due to reckless conduct, a boat in each defendant’s business fleet crashed into a pier resulting in the deaths of several people.\textsuperscript{148} In the first trial, the defendant is a closely-held corporation that provides fishing trips for tourists and grosses an annual profit of $500,000; the jury imposes a punitive verdict of $350,000.\textsuperscript{149} In the second, the defendant is a large shrimp corporation that grosses an annual profit of $100 million; the jury imposes a punitive verdict of $15 million.\textsuperscript{150} In the third, the defendant is a multi-national conglomerate that grosses an annual profit of $1 billion; the jury imposes a punitive verdict of $250 million.\textsuperscript{151} All arguing that their respective verdicts are excessive and therefore constitute violations of due process, the three defendants appeal and their cases are reviewed by the same appellate court.\textsuperscript{152}

In the first case, the appellate court evaluates the egregiousness of the conduct and determines that the award was consequently excessive, as it would disgorge the closely-held corporation of seventy percent of its annual profits.\textsuperscript{153} The appellate court then overturns the award and concludes that a constitutionally acceptable punitive award would be no more than $100,000, representing twenty percent of the defendant’s annual profits.\textsuperscript{154} The appellate court then turns to the second case and recognizes that in light of the defendant’s annual profits of $100 million, the same punitive verdict, $100,000

\begin{itemize}
\item \textsuperscript{145} See infra text accompanying notes 148-160.
\item \textsuperscript{146} See Exxon, 128 S. Ct. at 2627 (concluding punitive damage awards should be reasonably predictable in severity).
\item \textsuperscript{147} See supra note 137 and accompanying text (explaining constitutional concerns could be alleviated under defendant-based review).
\item \textsuperscript{148} See infra notes 153-161 and accompanying text (applying proposed solution to facts of hypothetical).
\item \textsuperscript{149} See infra notes 153-161 and accompanying text.
\item \textsuperscript{150} See infra notes 153-161 and accompanying text.
\item \textsuperscript{151} See infra notes 153-161 and accompanying text.
\item \textsuperscript{152} See infra notes 153-161 and accompanying text (applying defendant-based review to facts of hypothetical).
\item \textsuperscript{153} See supra note 34 and accompanying text (discussing appellate courts’ role in deflating excessive punitive awards); see also supra note 134 and accompanying text (explaining reprehensibility constrains where defendant’s wealth creates open-ended basis for inflating awards).
\item \textsuperscript{154} See supra notes 120-121 and accompanying text (explaining why punitive awards should bear relationship to defendant’s wealth).
\end{itemize}
(amounting to one tenth of one percent of the defendant’s annual profits), would not be enough to inflict meaningful punishment, nor would it likely compel the defendant to take the necessary measures to ensure that similar occurrences do not happen in the future. 155 Therefore, applying the holding of the first case, the court calculates that twenty percent of the shrimp company’s annual profits would be $20 million; however, satisfied that the $15 million award is reasonably close to twenty percent of the annual profits, the appellate court affords the jury the appropriate deference and affirms the award. 156 Now, with two cases addressing similar conduct, the court turns to the third case and calculates that the punitive verdict represents twenty-five percent of the multi-national conglomerate’s annual profits. 157 Relying on its earlier decisions, the court lowers the award to $200 million, or twenty percent of the annual profits, but then determines that due to the large windfall for the plaintiff, it would be more prudent to adjust the verdict to the lower end of the established range and impose a punitive verdict of $150 million, or fifteen percent of the annual profits. 158

As illustrated by this example, even though the court’s analyses under defendant-based review resulted in vastly different punitive amounts for the same conduct, each defendant will experience a level of financial pain that is both proportionate to the egregiousness of their wrongful conduct and proportionately equal to each of the two other defendants. 159 Furthermore, these defendants and other sea-faring corporations will now be placed on notice that, for similarly reckless conduct, a civil jury could disgorge them of 15 to 20 percent of their annual profits. 160 Therefore, as illustrated by this example, defendant-based review is a practical and workable method of reviewing punitive damage awards for excessiveness while simultaneously allowing civil juries to effectively punish and deter defendants from all fathoms of wealth. 161

IV. CONCLUSION

The Supreme Court’s current approach towards reviewing punitive damage awards largely relies upon comparing the dollar value of the punitive verdict to

155. See supra notes 116-121 and accompanying text (discussing relationship between defendant’s wealth and punishment and deterrence).
156. See supra note 35 and accompanying text (including deference to jury assessment in original design of punitive damage doctrine).
157. See supra text accompanying note 151 (explaining facts of hypothetical).
158. See infra text accompanying note 151 (setting forth how reasonable predictability occurs under defendant-based review).
159. See infra text accompanying note 151 (setting forth how reasonable predictability occurs under defendant-based review).
160. See supra note 137 and accompanying text (explaining reasonably predictable requirement); see also supra text accompanying notes 153-158 (setting forth how defendant-based review satisfies requirement).
161. See supra text accompanying note 152-160 (proffering a practical and workable solution under paradigm of defendant-based review).
the dollar value of the harm caused by the defendant. By employing this exercise, the Court fails to adequately consider the defendant’s financial resources, a variable that directly governs the retributive impact and the deterrent power of the punitive damage award. Accordingly, under the Court’s current approach, punishment and deterrence are treated as afterthoughts rather than as the fundamental reasons for punitive damages. Consequently, the Court routinely defangs legitimately assessed punitive awards calculated by civil juries to punish and deter large corporate defendants who do harm to their communities. This practice is especially troubling considering the rise in corporate malfeasance in America since the turn of the twenty-first century.

Nonetheless, the Court has perpetually struggled to mold its approach into a workable mechanism for conducting appellate review of punitive awards. Much like a cat chasing its tail, the Court’s inability to obtain a solution to this dilemma has only caused the Court to hasten its pursuit and intensify its effort. Instead of pursuing a more open-minded approach, the Court has barreled forward by moving in the direction of fixed punitive-to-compensatory ratios and mathematical bright lines to restrict punitive damages. Though presently confined to cases arising under maritime law, the aggressive holding of Exxon could ultimately permeate other areas of law, or alternatively, prompt congressional action to relieve the Court of this burdensome issue by providing definitive guidelines for assessing punitive damages.

It is with these possibilities in mind that this Note has attempted to both explain the debate and advocate an approach that is harmonious with the doctrine’s original objectives. By measuring punitive verdicts against the defendant’s resources as opposed to the harm caused, the Court could ensure that all societal actors have an equivalent interest in acting responsibly within their communities. Thus, the wealthiest corporations, that are the most immune to financial impositions, will no longer be able to use the Constitution as a shield from the expressions of moral outrage by civil juries, but will instead be held sufficiently accountable for their egregious wrongdoing.

Over the past several decades, the Court has so polluted the law of punitive damages that the fundamental features of the doctrine’s original design are no longer recognized. Moreover, despite the present limitations of the Exxon decision, it is likely that the Court will look to it as a manufactured lifebuoy to rescue it from the choppy sea in which it has immersed itself. Before that happens, however, either the Court or Congress should conduct its own clean-up effort and restore the exercise of assessing punitive damages to an approach where effective punishment and deterrence remain the primary concerns. Until that occurs, the Court’s reforms in the law of punitive damages and the principal purposes for their imposition will continue to exist in disharmony, just like oil and water.

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