ARTICLES

IN RE EXXON VALDEZ: APPLICATION OF DUE PROCESS CONSTRAINTS ON PUNITIVE DAMAGES AWARDS

JOSEPH J. CHAMBERS*

This Article examines the application of due process restraints on punitive damages as articulated by the United States Supreme Court, in the context of the $5 billion punitive damage award stemming from the Exxon Valdez *oil spill. The author asserts that the* Exxon Valdez *punitive damages case and its extensive appellate history demonstrate the practical application problems that have arisen under the Supreme Court's due process analysis of punitive damages awards. The author concludes that the Supreme Court's due process review of punitive damages awards has failed to produce predictability and uniformity in such awards and will likely be followed by additional guidelines to be set forth by the Court in future cases.*

I. INTRODUCTION

On March 24, 1989, the supertanker *Exxon Valdez* ran aground on Bligh Reef and spilled approximately eleven million gallons of oil into Prince William Sound.[1] Wind, ocean currents,

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* J.D. Candidate, University of Connecticut School of Law, 2004; M.A. (Northern Studies), University of Alaska–Fairbanks, 1999; B.A. (Political Science), Marquette University, 1993. The author worked as a National Park Service ranger at four parks in Alaska between 1996 and 1999. The author extends special thanks to Avi Brisman and Professor Kurt Strasser for their suggestions, and to his wife, Stefanie, for her encouragement and support.

1. Doug O'Harra, *Sound Battles Back, But Threats Linger; Exxon Valdez – Legacy of a Spill*, ANCHORAGE DAILY NEWS, Mar. 21, 1999, at 1M.

and tidal action spread the oil until it eventually covered more than thirteen-hundred miles of the Alaskan coastline and caused severe environmental, social, and economic damage.[2] The Exxon Corporation conducted a cleanup operation aimed at removing the oil from the shore, spending over $2.1 billion in the effort.[3] In addition, Exxon initiated a claims settlement program, voluntarily paying out $300 million to compensate those persons who were economically harmed by the spill.[4] However, the spill precipitated numerous lawsuits which were filed in both state and federal court by both public and private litigants.[5]

In *In re Exxon Valdez*, commercial and subsistence fishermen, landowners, and others harmed by the oil spill filed a class action suit to recover economic damages.[6] Exxon admitted that its negligence had caused the oil spill; however, the jury found that Exxon had been reckless, which opened the door to liability for punitive damages.[7] In September 1994, the jury delivered a $5 billion puni-

2. Doug O'Harra, *Researchers Track Crude's Wandering Trail; Spread of Oil from the Exxon Valdez,* ANCHORAGE DAILY NEWS, Mar. 21, 1999, at 5M; Exxon Valdez Oil Spill Trustee Council, *Oil Spill Facts: Spill Prevention and Response*, *at* http://www.oilspill.state.ak.us/facts/prevention.html (last visited on Sept. 22, 2003).

3. Exxon Valdez Oil Spill Trustee Council, *Oil Spill Facts: Questions and Answers*, *at* http://www.oilspill.state.ak.us/facts/qanda.html (last visited on Sept. 22, 2003). In this Article, "Exxon" refers collectively to the Exxon Corporation and Exxon Shipping Company. Exxon Shipping Company was renamed Sea River Shipping. *Id*. The *Exxon Valdez* was renamed the *Sea River Mediterrranean*. *Id*. A provision of the Oil Pollution Act of 1990 bars any vessel which has spilled more than one million gallons of oil after March 22, 1989 from Prince William Sound—a provision which was obviously written to include the Exxon Valdez. *See* 33 U.S.C. § 2737 (1994). In 1999, Exxon merged with Mobil to become ExxonMobil, one of the largest private oil companies in the world. *Exxon Mobil Corporation Announces New Global Structure*, PR NEWSWIRE, Dec. 2, 1999.

4. *In re* Exxon Valdez, 270 F.3d 1215, 1223 (9th Cir. 2001) [hereinafter Exxon II]. *Exxon I* refers to the jury trial verdict awarding $5 billion in punitive damages award.

5. Robert E. Jenkins & Jill Watry Kastner, *Running Aground in a Sea of Complex Litigation: A Case Comment On the Exxon Valdez Litigation*, 18 UCLA J. ENVTL. L. & POL'Y 151, 155-59 (2000) ("The Exxon Valdez litigation began with more than 52,000 plaintiffs and 84 law firms filing more than 200 suits in both state and federal court in the first year alone . . . . [B]y September 1991, 252 private lawsuits were filed seeking a total of $59 billion.").

6. *Exxon II*, 270 F.3d at 1225.

7. *Id*.

tive damages verdict against Exxon.[8] At the time, the award was the largest in United States history.[9]

In November 2001, the United States Court of Appeals for the Ninth Circuit vacated the $5 billion punitive damages jury verdict and directed the district court to reduce the award on remand.[10] Specifically, the Ninth Circuit held that while punitive damages were permissible, the $5 billion award was so large that it deprived Exxon of fair notice that such a large verdict could be imposed, and was therefore excessive under the Due Process Clause.[11] In its holding, the court relied upon two recent decisions of the United

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8. Jenkins & Kastner, *supra* note 5, at 192.

9. 270 F.3d at 1238; Jenkins & Kastner, *supra* note 5, at 192. The $5 billion award against Exxon does not seem quite so shocking in comparison to the July 2000 award of $144 billion in the Florida class action suit against cigarette manufacturers. *See infra* note 27. For a description of the due process excessiveness issues raised in the Florida tobacco litigation, see Virginia A. Canipe, *Crossing the Excessiveness Line: The Implications of* BMW v. Gore *On Multi-Billion Dollar Tobacco Litigation Punitive Damages*, 36 WAKE FOREST L. REV. 1157 (2001). *See also* Meghan A. Crowley, *From Punishment to Annihilation:* Engle v. R.J. Reynolds Tobacco Co.*—No More Butts—Punitive Damages Have Gone Too Far*, 34 LOY. L.A. L. REV. 1513 (2001).

10. *Exxon II*, 270 F.3d at 1246-47.

11. *See id*. at 1238-47 (discussing constitutional due process requirements stipulating that punitive damages awards cannot be so grossly excessive as to deny fair notice). For an explanation of the Due Process Clause and the distinction between the *procedural* and *substantive* due process rights implicated by punitive damages awards, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997), stating:

> The Fifth and Fourteenth Amendments, respectively, provide that neither the United States nor state governments shall deprive any person "of life, liberty, or property without due process of law." This clause has been interpreted as imposing two separate limits on government, usually called "procedural due process" and "substantive due process."
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> *Procedural due process*, as the phrase implies, refers to the procedures that the government must follow before it deprives a person of life, liberty, or property . . . .
>
> *Substantive due process*, as that phrase connotes, asks whether the government has an adequate reason for taking away a person's life, liberty, or property . . .
>
> [An] example of the distinction between procedural and substantive due process can be found in challenges to large punitive damage awards. Procedural due process requires that there be safeguards such as instructions to the jury to guide their discretion, and judicial review to assure the reasonableness of the awards. Substantive due process prevents excessive punitive damages awards, regardless of the procedures followed.

Id. at 419-20.

States Supreme Court—*BMW of North America, Inc. v. Gore*[12] and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,*[13] which together established criteria for judicial review of jury awards for punitive damages. The Ninth Circuit concluded: "The $5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW* and *Cooper*. It must be reduced."[14]

In December 2002, the district court on remand remitted $1 billion of the punitive damages award.[15] While the district court acknowledged that it had to reduce the award, it nonetheless rejected the Ninth Circuit's conclusion that the original award was excessive under the Due Process Clause.[16] Instead, the district court found that the "award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of fair notice—its right to due process."[17]

Exxon appealed to the Ninth Circuit, challenging the district court's decision to set the punitive damages award at $4 billion. On August 18, 2003, before the parties even submitted appellate briefs, the Ninth Circuit vacated the district court's judgment and remanded the case so that the district court could reconsider its decision in light of *State Farm Automobile Insurance Company v. Campbell*,[18] decided by the Supreme Court in April of 2003.[19] Before the end of 2003, the parties will submit briefs and present oral arguments to the district court regarding whether *State Farm* requires a greater reduction in the punitive damages award.[20]

The focus of this Article is the application of the Supreme Court's recently identified due process constraints on punitive damages awards in *In re Exxon Valdez*. First, Part II will review the Supreme Court's emerging substantive due process "fair notice

12. 517 U.S. 559 (1996). While the Ninth Circuit and the district court of Alaska use "*BMW*" as shorthand when referring to the case, some courts—most notably the Supreme Court—often refer to the case as "*Gore*." This Article uses "*BMW*" as shorthand.

13. 532 U.S. 424 (2001).

14. *Exxon II*, 270 F.3d at 1246.

15. *In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002) [hereinafter Exxon III].

16. *Id*.

17. *Id*.

18. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003).

19. Sea Hawk Seafoods, Inc. v. Exxon Corp., No. 03-35166, at 1 (9th Cir. Aug. 18, 2003) (Order) [hereinafter Exxon IV].

20. *In re* Exxon Valdez, No. A89-0095-CV, at 2 (D. Alaska Aug. 26, 2003) (Order for Further Proceedings on Punitive Damages Award) [hereinafter Exxon V].

excessiveness" jurisprudence regarding punitive damages awards culminating in *BMW*, *Cooper*, and *State Farm*.

Next, Part III will summarize the background of *In re Exxon Valdez*. This Part will describe the spill and its aftermath, including Exxon's $2.1 billion clean-up effort. In addition, Part III will discuss the civil and criminal penalties imposed on Exxon after the spill. Part III will also summarize the spill-related litigation relevant to *In re Exxon Valdez*, including the $900 million settlement Exxon paid to government trustees to compensate for the damages done to public natural resources, as well as a failed class action suit filed by outdoor recreation enthusiasts seeking to recover damages for their lost use of natural resources.

Part IV will summarize the parties' arguments on the substantive due process challenge to the punitive damages award contained in their briefs to the Ninth Circuit and the district court. Part IV will then discuss the Ninth Circuit's decision to vacate the verdict based on its analysis of *BMW's* "fair notice excessiveness" guideposts and remand the case to the district court with instructions to reduce the punitive damages award. Next, Part IV will examine the district court's decision to reduce the punitive damages award against Exxon by $1 billion. Finally, Part IV will discuss the Ninth Circuit's order that vacated the reduced award and remanded the case so that the district court could reconsider the punitive damages award in light of *State Farm*.

Part V will discuss the following questions regarding due process excessiveness review that were raised by *In re Exxon Valdez*: (1) Do *BMW's* guideposts lead to uniformity?; (2) Is *de novo* review appropriate?; (3) Does excessiveness review needlessly undermine the role of the jury?; (4) Should additional guideposts be considered?; and (5) Should a defendant's expenses be used to mitigate the amount of punitive damages? This Article concludes that application of due process excessiveness review does not lend itself to uniformity and that the Supreme Court's jurisprudence will require additional guidelines in order to settle the various problematic issues. In addition, Part V will discuss two important, evolving issues—extraterritoriality and multiple punishments—that were *not* raised by *In re Exxon Valdez*, but which have led the Supreme Court to further constrain punitive damages awards in *State Farm*.

II. PUNITIVE DAMAGES AWARDS & SUBSTANTIVE DUE PROCESS "FAIR NOTICE EXCESSIVENESS" CHALLENGES

A. Punitive Damages Awards

While compensatory damages are meant only to compensate the plaintiff for actual loss or injury, the aim of punitive damages is to disgorge from the defendant "any profit gained through misconduct and to inflict a financial harm . . . sufficiently severe to dissuade the defendant and others from engaging in the conduct at issue."[21] In other words, punitive damages are awarded "to punish reprehensible conduct and to deter its future occurrence."[22] They have been described as "private fines levied by civil juries."[23] By the nineteenth century these fines had become a "well-established principle of the common law" and were sanctioned by the Supreme Court in *Day v. Woodworth*.[24] However, even then they proved controversial.[25] Indeed, Chief Justice Rehnquist once observed that "the doctrine of punitive damages has been vigorously criticized throughout the Nation's history."[26]

During the past decade, the perception among some observers that out-of-control juries frequently award plaintiffs ever-increasing punitive damages has sparked a movement for tort reform.[27] Other observers contend that the punitive damages crisis is

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21. Daniel M. Weddle, *A Practitioner's Guide to Litigating Punitive Damages After* BMW of North America, Inc. v. Gore, 47 DRAKE L. REV. 661, 662 (1999).

22. Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

23. *Gertz*, 418 U.S. at 350.

24. 54 U.S. (13 How.) 363, 371 (1851).

25. *Id*. (acknowledging the controversial nature of punitive damages awards, but accepting them as a longstanding fixture of the common law).

26. Smith v. Wade, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting).

27. *See* Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1010, 1034-35 (1999) (arguing that reform is needed to address the chilling effect of punitive damages awards and recommending legislation and judicial constraints on punitive damages awards); *see also* George L. Priest, *The Problem and Efforts to Understand It, in* PUNITIVE DAMAGES: HOW JURIES DECIDE 1 (2002) ("Over the past two decades, our country has experienced a dramatic increase in the incidence and magnitude of punitive damages verdicts rendered by juries in civil litigation. Perhaps the most extraordinary example is the July 2000 award of $144.8 billion in the Florida class action brought against cigarette manufacturers. But there are many other examples of huge verdicts . . . ."); Crowley, *supra* note 9, at 1515, 1531 (describing an

a politically-driven myth based upon anecdotal evidence derived only from a few well-known outlier cases.[28] Nonetheless, many state legislatures have responded to calls for tort reform by passing legislation curtailing punitive damages awards.[29] In addition, state courts are increasingly receptive to constitutional challenges to punitive damages awards and have articulated factors—similar to those contained in *BMW*—designed to facilitate judicial review and control of punitive damages awards.[30]

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increase in punitive damages awards against corporate defendants and suggesting reforms to "restore balance, fairness, and predictability to punitive damages law").

28. *See, e.g.,* Theodore Eisenberg, *Damage Awards in Perspective: Behind The Headline-Grabbing Awards in* Exxon Valdez *and* Engle*,* 36 WAKE FOREST L. REV. 1129, 1134–39 (2001) (showing no significant increase in punitive damages awards between 1991 and 1996); Lori Woodward O'Connell, *The Case for Continuing to Award Punitive Damages*, 36 TORT & INS. L. J. 873, 883-89 (2001) (arguing that punitive damages awards are not increasing in number or frequency and are not excessively high or unpredictable); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1112-40 (1996) (refuting general claims of a nationwide punitive damages crisis); Michael Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 687-704 (1996) (concluding that there is no empirical evidence of an emerging punitive damages crises); Richard C. Reuben, *Plaintiffs Rarely Win Punitives, Study Says*, 81 A.B.A. J. 26, 26 (Oct. 1995) (describing a Department of Justice study that revealed that juries awarded punitive damages to plaintiffs in only six percent of the cases they won, and awarded more than $50,000 in only half of those cases); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers,* 42 AM. U. L. REV. 1269 (1993) (refuting a punitive damages crisis and affirming positive functions of punitive damages); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 39-43 (1990) (refuting claim of nationwide punitive damages problem).

29. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 614-19 (1996) (Ginsburg, J., dissenting) (providing an appendix to the dissenting opinion listing legislation from sixteen states, which curtails punitive damages awards by various methods including: "(1) caps on awards; (2) provisions for payments of sums to state agencies rather than to plaintiffs; and (3) mandatory bifurcated trials with separate proceedings for punitive determinations").

30. Although critical of the result, Justice Breyer's description of the Alabama Supreme Court's review of the punitive damages award in *BMW v. Gore* provides an example of how one state has actively developed methods for the judicial review of punitive damages. *BMW*, 517 U.S. at 586-93 (Breyer, J. concurring); *see also infra* notes 135-152 and accompanying text discussing the factors the Utah Supreme Court applied in *State Farm*.

B. The Pre-*BMW* Decisions of the United States Supreme Court

While *BMW*, *Cooper*, and *State Farm* are correctly regarded as landmark federal decisions, the Supreme Court had begun to identify constitutional constraints on punitive damages awards as early as 1986. In these cases, the Court heard constitutional challenges to awards and expressed concern that excessive punitive damages awards jeopardized constitutional rights. However, the Court fell short of imposing constitutional constraints to actually reduce punitive damages.

In *Aetna Life Insurance Co. v. Lavoie,*[31] while the punitive damages award was set aside on other grounds, the Supreme Court noted that the constitutionality of punitive damages raised "important issues which, in an appropriate setting, must be resolved."[32] Similarly, in *Bankers Life & Casualty Co. v. Crenshaw,*[33] the Supreme Court did not reach the constitutional challenge to a punitive damages award because the issue had not been properly raised in the state court.[34] In a concurring opinion, however, Justice O'Connor expressed the view that unrestricted jury discretion over punitive damages awards presented "serious" procedural due process problems.[35] Additionally, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[36] the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment "does not constrain an award of [punitive] damages in a civil suit."[37] However, the Court reserved the question of whether the Due Process Clause is a constraint on jury discretion over punitive damages awards even in the absence of statutory limits.[38]

In 1991, the Supreme Court stated for the first time that the Due Process Clause imposes a limit on punitive damages awards.[39] In *Pacific Mutual Life Insurance Co. v. Haslip*,[40] the Court sought to determine "whether the Due Process Clause render[ed] the pu-

31. 475 U.S. 813 (1986).

32. *Id*. at 816, 828-29.

33. 486 U.S. 71 (1988).

34. *Id*. at 76-80.

35. *Id.* at 87-88 (O'Connor, J., concurring in part and concurring in the judgment).

36. 492 U.S. 257 (1989).

37. *Id*. at 263-64.

38. *Id*. at 276-77.

39. THEODORE OLSON, ET AL., CONSTITUTIONAL CHALLENGES TO PUNITIVE DAMAGES AFTER *BMW V. GORE* 4 (George C. Landrith ed., 1998).

40. 499 U.S. 1 (1991).

nitive damages award in [*Haslip*] constitutionally unacceptable."[41] To that end, the Court stated that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[42] The Court ultimately upheld the punitive damages award, finding that the award had an "understandable relationship to [the] compensatory damages."[43] The Court also declined to "draw a mathematical bright line" for the judicial review of punitive damages awards that would fit every case, but stated that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[44] Thus, the Court upheld a punitive damages award that was four times the amount of the compensatory damages, stating that the award "may be close to the line . . . [but] does not cross the line into the area of constitutional impropriety."[45]

In *TXO Production Corp. v. Alliance Resources Corp.*,[46] the Court upheld a punitive damages award while reiterating that "reasonableness" is an important factor in determining whether a punitive damages award is so "grossly excessive" that it violates the Due Process Clause.[47] *TXO* involved a bad faith advancement of a quitclaim by the defendant, TXO, in an effort to renegotiate an oil and gas royalty arrangement with the plaintiff.[48] The Court upheld a punitive to compensatory ratio of 526 to one in part because of the malicious and fraudulent conduct.[49] In a concurring opinion, however, Justice Kennedy warned that "[a] case involving vicarious liability, negligence, or strict liability might present different issues."[50]

Finally, in *Honda Motor Co. v. Oberg*,[51] the Supreme Court held that an Oregon law denying its courts the authority to reduce or vacate excessive punitive damages awards violated the Due Process Clause.[52] The Court stated that "[j]udicial review of the size of

41. *Id*. at 18.
42. *Id*. at 18.
43. *Id*. at 22-24.
44. *Id*.
45. *Id*. at 23-24.
46. 509 U.S. 443 (1993).
47. *Id*. at 453, 458.
48. *Id*. at 447-49.
49. *Id*. at 453, 462.
50. *Id*. at 469 (Kennedy, J., concurring in part and concurring in the judgment).
51. 512 U.S. 415 (1994).
52. *Id*. at 434-35.

punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded."[53] Together, these cases established the foundation for the Court's watershed decisions in *BMW* and *Cooper*.

C. *BMW of North America, Inc. v. Gore*: The Fair Notice Excessiveness Guideposts

In *BMW of North America, Inc. v. Gore*,[54] the Supreme Court, in a 5-4 decision, held that the amount of a punitive damages award violated the Due Process Clause of the Fourteenth Amendment because it was so excessive that the defendant did not have fair notice that it would be imposed.[55] The majority opinion articulated the following three guideposts to be considered when a court determines whether a punitive damages award is constitutionally excessive: (1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties that could be imposed for comparable conduct.[56] After applying these guideposts to the facts, the Court vacated the punitive damages award and remanded the case to the Alabama Supreme Court.[57]

In *BMW,* the plaintiff, Dr. Gore, purchased a new car from an authorized dealer, only to discover later that the car had been partially repainted by the national distributor, presumably after sustaining damage during transport.[58] The defendant, BMW of North America, had followed its practice of not disclosing pre-delivery damage to dealers or customers when the cost of repair amounted to less than three percent of the car's retail price.[59] In fact, the cost of repainting the car purchased by Gore was about six hundred dollars—only 1.5 percent of the retail price.[60] BMW contended that its non-disclosure policy was consistent with the laws of Alabama and of other states, while Gore alleged that the failure to dis-

53. *Id*. at 421.

54. 517 U.S. 559 (1996).

55. *Id*. at 574-75. *BMW* has received significant attention from scholars and the legal community. *See generally*, OLSON, *supra* note 39; George C. Freeman, Jr., *Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 57 BUS. LAW. 587 (2002); Weddle, *supra* note 21, at 661; Sabrina C. Turner, *The Shadow of* BMW of North America, Inc. v. Gore, WIS. L. REV. 427 (1998).

56. *BMW*, 517 U.S. at 575-85.

57. *Id.* at 585-86.

58. *Id*. at 563.

59. *Id*. at 563-64.

60. *Id*. at 564.

close constituted suppression of a material fact amounting to fraud.[61]

Gore brought suit in Alabama State Court and claimed actual damages of four thousand dollars, asserting that this was the decrease in the value of the car as a result of the damage and repainting.[62] To support his claim for punitive damages, Gore presented evidence that BMW had sold nearly one thousand cars nationwide without disclosing similar repairs.[63] Gore claimed $4 million in punitive damages—the estimate of actual damage of four thousand dollars per car, multiplied by one-thousand cars.[64] The jury then found that BMW had defrauded Gore and found the distributor liable for four thousand dollars in compensatory damages.[65] The jury also determined that BMW's non-disclosure policy constituted "gross, oppressive or malicious" fraud and awarded $4 million in punitive damages.[66]

On appeal, BMW claimed that the punitive damages award was constitutionally excessive.[67] This argument was rejected by the Alabama Supreme Court, which applied a "fair notice excessiveness" inquiry[68] based on a seven-factor test articulated in *Green Oil Co. v. Hornsby*.[69] The Alabama Supreme Court found BMW's conduct reprehensible and concluded that the punitive damages award had a "reasonable relationship" to the harm that had resulted from BMW's conduct.[70] Nonetheless, the Alabama Supreme Court ordered a remittitur and cut the punitive damages award in half—to $2 million—because it found that the jury had improperly relied upon BMW's acts outside of Alabama when determining the amount of the award.[71]

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61. *Id*. at 563-65.
62. *Id*. at 564.
63. *Id*.
64. *Id*.
65. *Id*. at 565.
66. *Id*.
67. *Id*. at 566.
68. *Id*.
69. 539 So. 2d 218, 223-24 (Ala. 1989). Justice Breyer's concurrence in *BMW* lists the *Green Oil* factors that were part of the Alabama Supreme Court's excessiveness inquiry, but argues that they were applied in a fashion that imposed little actual constraint on the punitive damages. *BMW*, 517 U.S. at 589.
70. *BMW*, 517 U.S. at 567.
71. *Id*. Remittitur is a method by which a trial judge can review jury award for excessiveness and order a new trial unless plaintiff accepts a reduction of the jury award. *See also* Fed. R. Civ. P. 59(a) (granting trial judges the power to amend judgments).

After BMW appealed, the United States Supreme Court granted certiorari, stating: "we believed that a review of this case would help illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages."[72] At the outset of its opinion, the Supreme Court noted: "Punitive damages may properly be imposed to further a State's (sic) legitimate interests in punishing unlawful conduct and deterring its repetition."[73] The Court then described a state's interest in prohibiting deceptive trade practices.[74] Next, the Court stated that while Congress could enact a full disclosure requirement for the entire nation, no single state could impose such a policy outside of its own jurisdiction.[75] This also means that "a state may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States (sic)."[76] The Court thus concluded that Alabama *lacked* the authority to punish a party through legislative fines or judicially imposed penalties for conduct that occurred lawfully in another state and did not impact Alabama or its residents.[77] Therefore, the Court expressed approval of the Alabama Supreme Court's reduced punitive damages award that was based only on BMW's conduct in Alabama.[78]

The Supreme Court concluded, however, that even though the reduced punitive damage award was based only on BMW's conduct in Alabama, it was *still* "grossly excessive."[79] This conclusion triggered the Court's own fair notice excessiveness inquiry: "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these [state] interests [punishing unlawful conduct and deterring its repetition] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[80]

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72. *BMW*, 517 U.S. at 568 (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994)).

73. *Id*. The Court then stated that:

> In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow . . . in any particular case. Most States . . . afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence.

Id.

74. *Id*. at 568-70 (noting the "patchwork of rules" in existence throughout the fifty states ranging from judicial processes to legislative acts).

75. *Id*. at 571.

76. *Id*. at 572.

77. *Id*. at 572-73.

78. *Id.* at 573-74.

79. *Id*. at 574.

80. *Id*. at 568.

The *BMW* Court began its fair notice excessiveness inquiry by noting that the Due Process Clause requires that a person receive fair notice both of the conduct that will subject him to punishment as well as the severity of the penalty that a state may impose.[81] The Court concluded that since "BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy," the $2 million punitive damages award against it was grossly excessive.[82]

In arriving at this conclusion, the Court applied the three guideposts noted earlier to determine whether a punitive damages award is reasonable or excessive.[83] The first guidepost is the degree of reprehensibility of the defendant's conduct.[84] The Court considered reprehensibility one of the most important indicia of reasonableness because of the longstanding emphasis placed on the "principle that punitive damages may not be 'grossly out of proportion to the severity of the offense.'"[85] The Court held that BMW's conduct was not sufficiently reprehensible to justify the punitive damages award in the case, pointing out that the non-disclosure policy inflicted only economic harm and was not indicative of indifference to, or reckless disregard for, the health and safety of others.[86]

Next, the Court considered the second guidepost: the ratio between the punitive damages award and the actual harm to the plaintiff.[87] The Court termed the comparison between the punitive damages award and the compensatory award "significant," pointing out that "exemplary damages must bear a 'reasonable relationship' to compensatory damages."[88] As in its previous decisions, however, the Court was adamant in declining to set a rule as to the permissible ratio beyond which punitive damages awards would automatically be considered excessive.[89] The Court stated: "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[90] The Court also made

81. *Id*. at 574.

82. *Id*. at 574-75.

83. *Id*. at 575-85; *see supra* note 56 and accompanying text.

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

85. *Id*. at 575-76 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991)).

86. *Id*. at 576, 580. The Court also noted that BMW made no deliberate false statement nor did it commit an act of affirmative misconduct. *Id*. at 579.

87. *See id*. at 580-83.

88. *Id*. at 580.

89. *Id*. at 582-83.

90. *Id*. (quoting *Haslip*, 499 U.S. at 18).

clear its preference for an analysis based on a flexible reasonableness standard rather than a categorical approach, noting that particularly egregious acts that result in low compensatory damages awards can still support high punitive damages awards, especially if the "injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[91]

The Court did, however, consider a mathematical analysis when it reviewed the punitive-to-compensatory ratios previously upheld and then compared them to the ratio in the case.[92] The Court stated that, in *Haslip*, it had called a punitive damages award that was four times greater than the compensatory award "close to the line" but had nonetheless upheld it.[93] The Court also pointed out that it upheld a ten to one ratio in *TXO* which took into account not only the actual harm, but also the potential harm of the defendant's conduct.[94] In comparison, the Court observed that the punitive damages award levied against BMW was thirty-five times the total actual damages of the fourteen Alabama consumers who had purchased repainted cars and five-hundred times the actual damages awarded to the plaintiff.[95] The Court then held that this ratio was unacceptable because it was "dramatically greater" than those it had previously upheld.[96]

Finally, the *BMW* Court applied the third guidepost by comparing the punitive damages award with the civil and criminal sanctions that could be imposed for similar misconduct[97] and observing that the maximum civil penalty for violation of the Alabama Deceptive Trade Practice Act was only two thousand dollars.[98] The Court reasoned that such relatively low civil penalties for similar misconduct in other states did not provide fair notice that an offender could be subject to a multimillion dollar penalty.[99] This lack

91. *Id*. at 582-83. Some academics have proposed that punitive damages should be based on the difficulty of detection of the harm. *See, e.g.,* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 954 (1998) (arguing that punitive damages should only be awarded if a tortfeasor has a chance of escaping liability for the harm caused and that the amount of punitive damages should be the actual damages multiplied by a factor representing the chance of escaping liability).

92. *BMW*, 517 U.S. at 581-82.

93. *Id*. at 581 (quoting *Haslip*, 499 U.S. at 23-24).

94. *Id.*

95. *Id.* at 582 n.35-37.

96. *Id*. at 582.

97. *Id*. at 583-85.

98. *Id*. at 584.

99. *Id*.

of fair notice of the severity of the penalty constituted a violation of the Due Process Clause.[100]

Based on its analysis of the three fair notice excessiveness guideposts, the Supreme Court held that the "grossly excessive award imposed in this case transcend[ed] the constitutional limit" and reversed the Alabama Supreme Court's decision to set the punitive damages award at $2 million.[101] The Court also found that BMW's conduct did not justify such a large sanction.[102] The Court then remanded the case to the Alabama Supreme Court for their "independent determination . . . of the award necessary to vindicate the economic interests of Alabama consumers."[103]

D. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[104] the Supreme Court reaffirmed that the Due Process Clause pro-

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100. *Id*. at 574; *see also* discussion *supra* at Part II.C.

101. *BMW*, 517 U.S. at 585-86.

102. *Id*. at 585. Justice Stevens authored the majority opinion in *BMW*, which was joined by Justices O'Connor, Kennedy, Souter, and Breyer. Justice Breyer also wrote a concurring opinion in which he criticized the Alabama Supreme Court's excessiveness inquiry, calling the standards used "vague" and concluding that the standards imposed "no significant constraints" against arbitrary results from the punitive damages award. *Id*. at 588. Justice Scalia, joined by Justice Thomas, dissented, stating that the Fourteenth Amendment does not provide a federal guarantee that punitive damages awards be reasonable and that federal invalidation of a state-court punitive damage award is "an unjustified incursion into the province of state governments." *Id*. at 598-99. Regarding the majority's fair notice excessiveness guideposts, Scalia stated:

> [T]he 'guideposts' mark a road to nowhere . . . . The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair'.

Id. at 605-06. Justice Ginsburg, joined by Chief Justice Rehnquist, also dissented, stating that the majority "unnecessarily and unwisely venture[d] into territory traditionally within the State's domain." *Id*. at 607. Justice Ginsburg pointed out that since the Alabama court had reviewed the jury's award by applying factors previously approved by the Supreme Court, its decision was "entitled to a presumption of legitimacy." *Id*. at 611.

103. *Id*. at 586. On remand the Alabama Supreme Court affirmed the order denying a new trial on the condition of the plaintiff's acceptance of a remittitur reducing the punitive damages award to $50,000. BMW of N. Am., Inc., v. Gore, 701 So. 2d 507, 515 (Ala. 1997).

104. 532 U.S. 424 (2001).

hibits the imposition of grossly excessive punishments on tortfeasors.[105] The Court echoed its decision in *BMW* and instructed lower courts to evaluate due process challenges to punitive damage awards by use of the three fair notice excessiveness guideposts.[106] Remarkably, the *Cooper* Court also held that "courts of appeal should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."[107]

In *Cooper*, Leatherman Tool Group sued Cooper Industries in United States District Court after Cooper created marketing materials that used modified photographs of a Leatherman pocket tool for the purpose of advertising its own similar product.[108] The jury found Cooper guilty of trade dress infringement and unfair competition and awarded Leatherman $50,000 in compensatory damages.[109] The jury also found that Cooper had "acted with a conscious indifference to Leatherman's rights" and awarded $4.5 million in punitive damages.[110] The district court considered, but ultimately denied, any reduction based on a fair notice excessiveness inquiry utilizing the *BMW* excessiveness guideposts.[111]

On appeal, the Ninth Circuit Court of Appeals upheld the punitive damages award.[112] The Ninth Circuit reviewed the district court's finding that the punitive damages award was "proportional and fair given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to deter an entity of Cooper's size."[113] The Ninth Circuit then held that the district court's decision to leave the punitive damages award intact was not an abuse of discretion.[114]

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105. *Id*. at 434. The *Cooper* Court also shed light on the relationship between due process excessiveness of punitive damages and the Eighth Amendment. *Id*. at 433-44. The Court stated that the Due Process Clause of the Fourteenth Amendment "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Id*.

106. *Id*. at 440.

107. *Id*. at 436.

108. *Id*. at 427-28. Leatherman alleged trade dress infringement under the federal Lanham Act, 15 U.S.C. § 1125(a) (2003), and common-law false advertising and unfair competition. *Id*. at 428.

109. *Id*. at 429.

110. *Id*. The jury responded to an interrogatory that asked whether Cooper had acted with malice. *Id*. After answering in the affirmative, the jury was asked to determine the amount of the punitive damages award. *Id*.

111. *Id*. at 429.

112. *Id*. at 430.

113. *Id*.

114. *Id*. at 431.

The Supreme Court granted Cooper's petition for a writ of certiorari to resolve a circuit split regarding the standard of review to be applied when an appellate court reviews a district court's determination of the constitutionality of a punitive damages award.[115] The Supreme Court initially held that *de novo* review—not abuse of discretion—is the proper standard.[116] The Court reasoned that while the jury's assessment of the amount necessary to compensate a plaintiff for an injury is a factual determination, the jury's award of punitive damages does not constitute a finding of "fact" but is instead an expression of moral condemnation.[117] Through this reasoning, the Court was able to overcome the Seventh Amendment's prohibition of the re-examination of facts found by a jury.[118]

The Court further justified its holding by stating that considerations of institutional competence when applying the three *BMW* guideposts "fail to tip the balance in favor of deferential appellate review," therefore favoring the use of an abuse of discretion standard.[119] By providing its own fair notice excessiveness inquiry based on the *BMW* guideposts, the Court illustrated that a *de novo* review could have led the appellate court to a different conclusion.[120] The Court then remanded the case so that the Ninth Circuit could apply the *BMW* fair notice excessiveness guideposts under the more demanding *de novo* standard.[121] Applying the heightened

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115. *Id*.

116. *Id*.

117. *Id*. at 432, 437.

118. *Id*. at 437. The Court stated: "Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its *amicus*." *Id.* The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

119. *Cooper,* 532 U.S. at 440.

120. *Id*. at 441-42.

121. *Id*. at 443. Justice Stevens delivered the majority opinion in *Cooper*, which was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas and Breyer. Justice Thomas filed a concurring opinion in which he stated that, if given the opportunity, he would vote to overrule *BMW* because he does not believe that the Constitution constrains the size of punitive damages awards. *Id*. Similarly, Justice Scalia concurred in the judgment concerning *de novo* review, but stated that he "was . . . of the view that excessive punitive damages do not violate the Due Process Clause." *Id*.

standard, the Ninth Circuit reduced the $4.5 million punitive damages award to $500,000.[122]

E. *State Farm Mutual Automobile Insurance Co. v. Campbell*

As the Supreme Court expanded its due process fair notice excessiveness jurisprudence, it established guideposts for courts to use when determining whether a punitive damages award is constitutionally excessive[123] and established that a *de novo* standard should be used to review lower courts' decisions regarding the constitutionality of a given punitive damages award.[124] Other questions—such as whether a state can punish a defendant for unlawful out-of-state conduct, whether evidence of bad conduct unrelated to that which harmed the plaintiff can be used to show reprehensibility, and whether a defendant's wealth is a proper factor for courts to use when reviewing the constitutionality of a punitive damages award—remained largely unanswered until *State Farm Mutual Automobile Insurance Company v. Campbell*.[125]

In *State Farm*, the defendant insurance company appealed the decision of the Utah Supreme Court to reinstate a jury's $145 million punitive damages award after the trial judge had reduced the award to $25 million through a remittitur.[126] After applying the *BMW* guideposts to the facts of the case, the United States Supreme Court held that the punitive damages award was constitutionally excessive and remanded the case so that the Utah Supreme Court could determine an appropriate lesser amount.[127] The Court stated that the punitive damages award "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."[128]

In *State Farm*, after a severe automobile accident, Campbell, who was insured by State Farm, faced two civil actions, including a wrongful death suit. Even though State Farm had evidence that Campbell caused the accident, it chose not to settle for $25,000—the amount of Campbell's policy limits.[129] When the case against Campbell went to trial, the jury found him at fault for the accident

122. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1152 (9th Cir. 2002).

123. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-86 (1996).

124. *Cooper*, 532 U.S. at 436.

125. 123 S. Ct. 1513 (2003).

126. *Id*. at 1519.

127. *Id*. at 1526.

128. *Id*.

129. *Id*. at 1518.

and awarded the plaintiffs more than $185,000 in damages.[130] State Farm, despite previous assurances to Campbell that he would have no liability for the accident, made it clear that it did not intend to pay the amount of the judgment against Campbell in excess of his policy limit.[131]

Campbell filed suit against State Farm, alleging bad faith, fraud, and intentional infliction of emotional distress.[132] During the trial, Campbell introduced evidence that State Farm's decision to take the accident case to trial was part of a company-wide scheme to cap payouts on claims and that State Farm had engaged in numerous fraudulent practices as part of its scheme.[133] The jury found that State Farm had acted in bad faith and, because State Farm's conduct was "intentional and sufficiently egregious to warrant punitive damages," it granted an award of $2.6 million in compensatory damages and $145 million in punitive damages.[134] The trial court denied State Farm's motions for a judgment notwithstanding the verdict and for a new trial, but ordered a remittitur of both damage awards, which reduced the compensatory damages award to $1 million and the punitive damages award to $25 million.[135]

On appeal, the Utah Supreme Court applied a punitive damages award excessiveness inquiry based on its own jurisprudence as well as the *BMW* guideposts. First, the court noted that pursuant to *Cooper*, it was required to review the trial court's decision on the punitive damages award *de novo*.[136] The court applied the following seven factors that were previously articulated in *Crookston v. Fire Insurance Exchange*:[137]

> 1) the relative wealth of the defendant; 2) the nature of the alleged misconduct; 3) the facts and circumstances surrounding such misconduct; 4) the effect of the conduct on the lives of the plaintiff and others; 5) the probability of future recurrence of the conduct; 6) the relationship of the parties; and 7) the amount of actual damages awarded.[138]

The Utah court observed that the trial court had based its remittitur solely on the last factor and took issue only with the ratio of the

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130. *Id*.
131. *Id*.
132. *Id*.
133. *Id.*
134. *Id*. at 1519.
135. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1143 (Utah 2001).
136. *Id*. at 1143-44.
137. 817 P.2d 789 (Utah 1991).
138. *Campbell*, 65 P.3d at 1146.

punitive damages to the actual damage award.[139] After an extensive analysis of each factor, the Utah court held that the jury's punitive damages award was not excessive under *any* of the factors and held that the trial court's remittitur was not required.[140]

The Utah court then turned to an excessiveness inquiry based on the *BMW* guideposts.[141] The court recognized that *BMW's* reprehensibility guidepost was similar to the factors in *Crookston* relating to the nature and circumstances of the misconduct.[142] Accordingly, it chose to incorporate its earlier analysis, concluding that the reprehensibility guidepost did not favor a finding that the punitive damages award was excessive.[143]

The Utah court next considered the *BMW* ratio guidepost, noting that since there is no categorical rule on the permissible ratio of the compensatory damages award to the punitive damages award, courts must instead determine the reasonableness of the ratio based on the facts and circumstances of each case.[144] The court concluded that a high ratio was proper in the case because "State Farm's fraudulent conduct ha[d] been a consistent way of doing business for the last twenty years, directed specifically at some of society's most vulnerable groups."[145] The Utah court also found that while the probability of further misconduct by State Farm was high, the probability of its having to pay damages for that misconduct was low, a finding which further supported a high ratio.[146]

Finally, the Utah court applied *BMW*'s third guidepost and compared the punitive damages award with the civil and criminal penalties that could be imposed for comparable misconduct.[147] The court rejected State Farm's argument that only fines actually imposed could be used in the comparison, observing that *BMW* explicitly stated that a court should look at "penalties that *could* be imposed for comparable misconduct."[148] In reaching its decision, the Utah court tallied the possible penalties that could have been imposed for the fraudulent misconduct in the case, which included fines, revocation of State Farm's state business license, disgorge-

139. *Id*.
140. *Id*. at 1152.
141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*. (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996)).
145. *Id*. at 1154.
146. *Id*.
147. *Id*.
148. *Id*. (quoting *BMW*, 517 U.S. at 583) (emphasis added).

ment of illicit profits, and imprisonment of State Farm's officers for up to five years.[149]

It is worth noting that the Utah court's decision did not directly address extraterritoriality—the extent to which the jury considered evidence of State Farm's misconduct outside the state of Utah—when it determined the punitive damages award. As previously discussed, in *BMW*, both the Alabama Supreme Court and the United States Supreme Court considered this issue crucial.[150] The Utah Supreme Court did, however, consider two issues raised by State Farm that may have related to evidence of out-of-state conduct: the admissibility of evidence of "other acts" introduced to show State Farm's pattern of misconduct and the admissibility of expert witness testimony introduced to show State Farm's improper and fraudulent company-wide policies.[151] While the Utah court rejected State Farm's arguments on these issues, it is surprising that the court did not consider, as part of its excessiveness inquiry, whether the "other acts" evidence and the expert witness testimony included evidence of State Farm's misconduct outside of Utah.[152] This consideration could have been improper for the jury to undertake when determining the punitive damages award under *BMW*.

On appeal, the United States Supreme Court conducted its own excessiveness review based on *BMW's* guideposts and held that the $145 million punitive damages award must be reduced, stating that "this case is neither close nor difficult."[153] In analyzing the case under *BMW's* reprehensibility guidepost, the Court held that a more modest punitive damages award would satisfy Utah's interests and that it was inappropriate to use the case "as a platform to expose and punish" State Farm's nationwide policies.[154] The Court then reiterated the proposition from *BMW* that a State cannot punish a defendant for *lawful* out-of-state conduct.[155] In addition, the Court observed that a state does not "have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the [s]tate's jurisdiction."[156]

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149. *Id*.

150. *BMW*, 517 U.S. at 567, 572-73; *see supra* notes 67-80 and accompanying text.

151. *Campbell*, 65 P.3d at 1155, 1159.

152. *Id*. at 1155-61.

153. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1515 (2003).

154. *Id*. at 1516.

155. *Id*. at 1522.

156. *Id*. (emphasis added).

The Court next rejected the plaintiff's argument that the evidence of State Farm's out-of-state lawful conduct was used solely to show motive against the plaintiff.[157] Punishment based upon consideration of conduct unrelated to that which harmed the plaintiff raises the specter of multiple punishments for the same harm—something the Court sought to avoid.[158] The Court stated that evidence of other bad acts "may be probative when it demonstrates the deliberateness and culpability of the defendant's action . . . but that conduct must have a nexus to the specific harm suffered by the plaintiff."[159] The Court then found that the jury in *State Farm* had "awarded punitive damages to punish and deter conduct that bore no relation to the [plaintiff's] harm."[160] The Court continued:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit the courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here.[161]

As for *BMW's* ratio guidepost, the Court again declined to impose a bright-line ratio rule, cautioning that the punitive damages award in any case "must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."[162] However, the Court concluded that few awards "exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[163] The Court stated: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1."[164] The Court next observed that while double-digit ratios may be appropriate where a highly reprehensible act results in small economic damages, the converse is also true: "When compensatory damages are substantial, then a lesser ratio, perhaps only [1-to-1], can reach the outmost limit of the due process guarantee."[165]

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157. *Id*.
158. *Id*. at 1523.
159. *Id*. at 1522.
160. *Id*. at 1523.
161. *Id*.
162. *Id*. at 1524.
163. *Id*.
164. *Id*.
165. *Id*.

The Court additionally noted that the plaintiffs in *State Farm* had received a substantial ($1 million) compensatory award to compensate economic injury and emotional distress.[166] The Court, however, viewed the compensatory award in the case as having a punitive element that was improperly duplicated in the punitive damages award.[167] The Court then rejected the Utah Supreme Court's justifications for the large punitive damages award, which included a low rate of detection and punishment for State Farm's bad conduct and enormous wealth.[168]

Next, the Court analyzed the case under *BMW's* comparable sanctions guidepost, noting that the "most relevant civil sanction . . . appears to be a $10,000 fine for an act of fraud, . . . an amount dwarfed by the $145 million punitive damages award."[169] The Court rejected the Utah court's speculation regarding the loss of the business license, disgorgement of profits, and possible imprisonment since these possibilities were "drawn from evidence of out-of-state and dissimilar conduct."[170] After completing its excessiveness analysis, the Court held that only "a punitive damages award at or near the amount of compensatory damages" would be justified.[171]

The *Exxon Valdez* oil spill occurred in 1989—seven years before the Supreme Court carved out a substantive due process right against "excessive" punitive damages awards in *BMW*. The evolving due process excessiveness jurisprudence continues to af-

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166. *Id*.

167. *Id*. at 1525.

168. *Id*. at 1526. The Court stated: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id*. at 1525.

169. *Id*. at 1526.

170. *Id*.

171. *Id*. Justice Scalia dissented, adhering to his view that "the Due Process Clause provides no substantive protections against excessive or unreasonable awards of punitive damages." *Id.* (Scalia, J., dissenting). Justice Thomas also offered a dissent, reiterating his statement from *Cooper* that "the Constitution does not constrain the size of punitive damages awards." *Id*. (Thomas, J., dissenting) (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (Thomas J., concurring)). Justice Ginsburg also dissented, expressing the view that the Court's opinion erodes deference to state decisions regarding the scope of punitive damages they will allow. *Id*. at 1527-31 (Ginsburg, J., dissenting). Justice Ginsburg stated:

> I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages. Even if I were prepared to accept the flexible guidelines prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.

Id. at 1531.

fect the post-spill litigation immensely. In November of 2001, the Ninth Circuit applied the *BMW* guideposts to *In re Exxon Valdez* and concluded that the jury's $5 billion punitive damages award was excessive under the Due Process Clause.[172] The Ninth Circuit then remanded the case to the district court with an order to reduce the award.[173] In December 2002, the district court, complying with the Ninth Circuit's order, reduced the award by $1 billion.[174] Exxon, unsatisfied with the reduction, filed an appeal. In August 2003, even before the parties submitted appellate briefs, the Ninth Circuit vacated the district court's judgment and remanded the case so that the district court could reconsider its decision in light of *State Farm v. Campbell*—the Supreme Court's most recent due process excessiveness decision.[175] While *In re Exxon Valdez* commenced long before the Supreme Court's decisions in *BMW*, *Cooper*, and *State Farm*, these cases will have a significant impact on the final outcome of the litigation. In addition, *In re Exxon Valdez* raises several issues regarding due process excessiveness review of punitive damages awards that remain unresolved even after *State Farm*. These issues will be discussed in Part V.

III. *IN RE EXXON VALDEZ*: THE BACKGROUND

A. The Spill and its Aftermath

The events surrounding the *Exxon Valdez* oil spill provide the factual context upon which the Ninth Circuit and the district court reached opposite conclusions regarding the constitutionality of the punitive damages award. The *Exxon Valdez* departed the Alyeska Pipeline Terminal at 9:12 p.m. on March 23, 1989, loaded with over fifty-three million gallons of North Slope crude oil bound for a refinery in California.[176] The vessel was a 987-foot-long single-hulled

172. *Exxon II*, F.3d 1215, 1241 (9th Cir. 2001).

173. *Id*.

174. *Exxon III*, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002).

175. *Exxon IV*, No. 03-35166, at 1 (9th Cir. Aug. 18, 2003) (Order). The Supreme Court decided *State Farm* in April, 2003.

176. Exxon Valdez Oil Spill Trustee Council, *Oil Spill Facts: Details About the Accident*, *at* http://www.oilspill.state.ak.us/facts/details.html (last visited Oct. 1, 2003); *see also* John Keeble, *The Imaginary Journey of Captain Joseph Hazelwood*, *in* THE EXXON VALDEZ DISASTER: READINGS ON A MODERN SOCIAL PROBLEM 23-33 (J. Steven Picou, et al., eds., 1997) (describing in detail the events immediately preceding and following the grounding of the *Exxon Valdez* and describing contributing factors such as crew fatigue and understaffing).

tanker and was the second-newest tanker in Exxon's fleet.[177] The ship contained nineteen crew members and the captain, Joseph Hazelwood.[178] During the hours before the ship's departure, Hazelwood consumed at least fifteen ounces of alcohol.[179] In fact, Hazelwood was an alcoholic who had undergone treatment but had resumed drinking while in command of Exxon's ships—facts that were known to Exxon long before the spill.[180]

After the ship exited the natural harbor, Hazelwood took control from a harbor pilot and began the regular procedures to maneuver the ship out of the normal shipping lanes in order to avoid heavy ice calved from nearby glaciers.[181] Hazelwood instructed the first mate to return the vessel to the normal shipping lanes and left the bridge.[182] However, the first mate failed to properly turn the vessel and the ship "fetched up . . . hard aground . . . off Bligh Reef" at 12:04 a.m.[183] Hazelwood reported the grounding to the United States Coast Guard and attempted to move the vessel off the reef.[184] If he had been successful, the vessel might have capsized, risking the lives of the crew, and increasing the magnitude of the spill.[185]

The vessel was badly damaged and the grounding caused an oil spill of massive proportions.[186] Within the first few hours, over ten million gallons of oil spilled.[187] Furthermore, the oil spill response plans proved woefully inadequate, and three days of calm weather passed without much oil being skimmed from the surface.[188] A response barge maintained by Alyeska Pipeline Service Company was out of service and unavailable for use, and there

177. Exxon Valdez Oil Spill Trustee Council, *supra* note 176; *see also* National Response Team, *The Exxon Valdez Oil Spill: A Report to the President*, May 1989 *in* THE EXXON VALDEZ DISASTER: READINGS ON A MODERN SOCIAL PROBLEM 39-50 (J. Steven Picou, et al., eds., 1997) (describing the design of the *Exxon Valdez* and the spill response plans that existed prior to the *Exxon Valdez* oil spill).

178. Exxon Valdez Oil Spill Trustee Council, *supra* note 176.

179. *Exxon II*, 270 F.3d 1215, 1223 (9th Cir. 2001).

180. *Id*.

181. *Exxon III*, 236 F. Supp. 2d 1043, 1045-46 (D. Alaska 2002).

182. *Id*. at 1046.

183. Exxon Valdez Oil Spill Trustee Council, *supra* note 176.

184. *Exxon III*, 236 F. Supp. 2d at 1046.

185. *Id*. at 1046-47.

186. Brian O'Donoghue, *Diver's First Glimpse: Supertanker Impaled On Rocks of Bligh Reef*, FAIRBANKS DAILY NEWS-MINER, Mar. 24, 1999, at A8 ("There was a huge geyser of oil bubbling up two or three feet above the surface of the water.")

187. National Response Team, *supra* note 177, at 39.

188. Exxon Valdez Oil Spill Trustee Council, *supra* note 2.

were insufficient skimmers, booms, and dispersants to make a difference in so large a spill.[189] The one bright spot in the response effort was the lightering operation—removing the remaining oil to another ship—that was undertaken in spite of enormous risk to the crew involved, but that ultimately kept forty-two million gallons of oil from spilling.[190] A storm hit on March 26, 1989, and strong winds, coupled with ocean currents and tidal action, spread the oil, washing it onto beaches as far as six-hundred miles from Bligh Reef.[191] The oil, in varying concentrations, eventually covered thirteen-thousand miles of the Alaskan coastline.[192]

Commercial and subsistence fishing, recreational tourism, and shore-based businesses were immediately disrupted as a result of the spill.[193] Coastal communities, fishermen, boat owners, and other property owners suffered extensive economic damages.[194] Individuals and communities also suffered grave non-economic damages.[195]

The spill is no longer one of the top fifty largest spills worldwide, but is considered to have had the greatest negative effect on the environment.[196] As a result of the spill, the natural resources in the area were devastated.[197] However, the question of the extent of environmental damage and recovery remains a matter of dispute.[198]

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189. *Id*.

190. *See Exxon III*, 236 F. Supp. 2d at 1047; Brian O'Donoghue, *Battle Waged to Unload 991,000 Barrels of Crude*, FAIRBANKS DAILY NEWS-MINER, Mar. 25, 1999, at A1.

191. O'Harrra, *supra* note 2, at M5.

192. Exxon Valdez Oil Spill Trustee Council, *supra* note 2.

193. *Exxon III*, 236 F. Supp. 2d at 1047.

194. *Id*.

195. *See generally* THE EXXON VALDEZ DISASTER: READINGS ON A MODERN SOCIAL PROBLEM (J. Steven Picou, et al., eds., 1997) (collection of articles focusing on the spill as a systemic "technological disaster" and describing the ecological, economic, social, cultural, and psychological impacts); SHARON K. ARAJI, THE EXXON VALDEZ OIL SPILL: SOCIAL, ECONOMIC, AND PSYCHOLOGICAL IMPACTS ON HOMER (1992); s*ee also* Exxon Valdez Oil Spill Trustee Council, *Home Page*, *at* http://www.oil.spill.state.ak.us (last visited Oct. 22, 2003) (providing a comprehensive collection of information related to all aspects of the spill, as well as a large topical bibliography of scholarly articles and links to other sources of information).

196. Exxon Valdez Oil Spill Trustee Council, *supra* note 3 ("The timing of the spill, the remote and spectacular location, the thousands of miles of rugged and wild shoreline, and the abundance of wildlife in the region combined to make it an environmental disaster well beyond the scope of other spills.").

197. Nancy Lord, *Oil in the Sea: Initial Biological Impacts of the Exxon Valdez Oil Spill, in* THE EXXON VALDEZ DISASTER: READINGS ON A MODERN SOCIAL

Exxon soon began a cleanup operation that took place over the next three summers and that employed over ten thousand workers, one thousand boats, and one hundred aircraft.[199] The operation cost Exxon $2.1 billion.[200] However, only a small percentage of the spilled oil—about 14%—was actually recovered.[201] Exxon also began a settlement program with the individuals and entities who had suffered economic damages as a result of the spill, and eventually paid out more than $300 million to over ten-thousand claimants.[202]

B. Exxon's Settlement with the Government Trustees

Shortly after the spill, the federal government and the State of Alaska filed suit against Exxon to recover for environmental damage caused by the spill. The parties ultimately settled the suit, and Exxon agreed to pay a significant amount in fines and restitution, plus an amount for the settlement itself. The Ninth Circuit, when it concluded that the punitive damages award in *In re Exxon Valdez* was excessive, pointed to this settlement agreement as a factor that should mitigate the size of the punitive damages awarded.[203] This section summarizes the settlement agreement and its effect on subsequent private litigation.

The United States and the State of Alaska, acting as trustees for the public, filed suit against Exxon pursuant to provisions of the Clean Water Act[204] and the Comprehensive Environmental Re-

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PROBLEM 104 (J. Steven Picou, et al., eds., 1997) (stating that over 260,000 birds, and 3,500 sea otters died as a result of the spill).

198. Doug O'Harra, *Exxon Valdez: Legacy of a Spill: Sound Battles Back, But Threats Linger,* ANCHORAGE DAILY NEWS, Mar. 21, 1999, at M1 (stating: "Over the years since the March 24, 1989, spill, Prince William Sound has become a demonstration of the resilience of nature and the persistence of North Slope crude."). There are also several ten-year retrospective newspaper accounts covering the ecological and other impacts of the spill. *See also* Glen Martin, *Valdez Spill Leaves Bitter Residue; Oil is gone after 10 years, but ecological, economic fallout continues*, S.F. CHRON., Mar. 24, 1999, at A1; Ross Anderson, *The Spill Is Gone—10 Years Later, Debate Still Rages over Effects of the Exxon Valdez Disaster In Alaska,* SEATTLE TIMES, Mar. 21, 1999, at A14.

199. Martin, *supra* note 198, at A1.

200. *Id*.

201. *Id*.

202. *Exxon II*, 270 F.3d 1215, 1223 (9th Cir. 2001); Jenkins & Kastner, *supra* note 5, at 155.

203. *Exxon II*, 270 F.3d at 1244.

204. Clean Water Act, 33 U.S.C. §§ 1251-1386 (2000).

sponse, Compensation, and Liability Act[205] in order to "recover damages for restoration of the environment as well as for losses sustained by the public regarding the use of natural resources."[206] The United States also criminally prosecuted Exxon for violating several environmental statutes, including provisions of the Clean Water Act, the Refuse Act, the Migratory Bird Treaty Act, the Ports and Waterways Safety Act, and the Dangerous Cargo Act.[207]

As part of the subsequent settlement agreement, Exxon pled guilty to four misdemeanor counts, was fined $25 million, and was ordered to pay $100 million in criminal restitution.[208] Exxon also agreed to pay $900 million into a trust fund administered by agencies of the United States and the State of Alaska.[209] The district court approved the parties' consent decree in October 1991, stating that the recovery was "compensatory and remedial" and that "[n]othing in this agreement . . . is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement."[210]

Since the government trustees had acted on behalf of the public to recover the damages to the environment, no future plaintiff could thereafter recover damages for environmental harms. In *Alaska Sport Fishing Association v. Exxon Corporation,*[211] a group representing sport fishing enthusiasts filed a class action suit argu-

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205. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000) (hereinafter "CERCLA").

206. Jenkins & Kastner, *supra* note 5, at 181.

207. *Exxon III*, 236 F. Supp. 2d 1043, 1048 (D. Alaska 2002).

208. *Id*.

209. *Id.* at 1047; *see also* United States v. Exxon Corp., No. A91-082 at 3 (D. Alaska 1991) (consent decree); State of Alaska v. Exxon Corp., No. A91-083 Civil, at 3 (D. Alaska 1991) (consent decree). The Exxon Valdez Oil Spill Trustee Council, consisting of three state and three federal agency representatives was formed to use the settlement funds to restore the injured ecosystem. *See* Exxon Valdez Oil Spill Trustee Council, *Oil Spill Facts: Settlement*, *at* http://www.oilspill.state.ak.us/gem/facts/settlement.html (last visited Mar. 11, 2003); *see also* Diane S. Calendine, *Investigating The Exxon Valdez Restoration Effort: Is Resource Acquisition Really Restoration?*, 9 DICK. J. ENVTL. L. & POL'Y 341, 343 (2000) (criticizing the use of the settlement trust funds to purchase equivalent lands instead of attempting to return the damaged lands to pre-spill conditions); Kevin R. Murray, et. al., *Natural Resource Damage Trustees: Whose Side Are They Really On?*, 5 ENVTL. LAW. 407, 407 (1999) (describing the federal statutes which appoint governmental entities to act as trustees to oversee the process of repairing damaged natural resources and offering pointed criticism of those systems).

210. United States v. Exxon Corp., No. A91-082, at 3, 26 (D. Alaska Oct. 9, 1991) (consent decree).

211. 34 F.3d 769 (9th Cir. 1994).

ing that they suffered an injury distinct from that suffered by the general public—lost recreational use of public natural resources due to the oil spill.[212] The Ninth Circuit found that the two governments in the previous settlement agreement had acted as public trustees with authority to recover lost-use damages.[213] Therefore, the court concluded that privity of interest existed between the trustees and the sport fishers and that sufficient identity of the issues existed to bar the sport fishers' suit under the doctrine of *res judicata*.[214] Subsequently, the Ninth Circuit distinguished the *In re Exxon Valdez* plaintiffs, who sought to recover economic damages due to commercial fishing losses, from the *Alaska Sport Fishing* plaintiffs.[215]

IV. *IN RE EXXON VALDEZ*: THE CASE

This section summarizes the *In re Exxon Valdez* litigation as it pertains to the due process excessiveness challenge raised by Exxon and is divided into several sub-sections: Section A discusses the case before the district court; Section B discusses the arguments made by Exxon regarding its due process excessiveness challenge; Section C discusses the plaintiffs' response to those arguments; Section D summarizes the Ninth Circuit's decision to vacate the punitive damages award and remand; Section E summarizes the parties' arguments to the district court upon remand; and Section F summarizes the district court's conclusion that the punitive damages award *was not* constitutionally excessive.

A. The Case Before the District Court

The thirty thousand claims brought by private parties seeking to recover economic damages slowly filtered through the judicial funnel of the Alaska state court system and then, after removal, through the federal district court system.[216] Through various mo-

212. *Id*. at 770-71; s*ee also* Scott Kerin, Alaska Sport Fishing Association v. Exxon Corporation *Highlights the Need to Take a Hard Look at the Doctrine of* Parens Patriae *When Applied to Natural Resource Damage Litigation*, 25 ENVTL. L. 897, 923 (1995) (describing the suit brought by sport fishing enthusiasts and offering a critical analysis of the Ninth Circuit's "blind allegiance to the sufficiency of government *parens patriae* action" to the detriment of private litigants).

213. *Alaska Sport Fishing Ass'n*, 34 F.3d at 772.

214. *Id*. at 774.

215. *Exxon II*, 270 F.3d 1215, 1227-28 (9th Cir. 2001); s*ee also infra* notes 325-329 and accompanying text.

216. Jenkins & Kastner, *supra* note 5, at 166-78 (providing a detailed summary of the complicated litigation following the spill); *see also* David Lebedoff, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME

tions filed by Exxon, the plaintiffs were gradually whittled down.[217] Most of the remaining claims were consolidated into one class action—*In re Exxon Valdez*—with three certified classes for compensatory damages: (1) a commercial fishing class; (2) a Native class; and (3) a landowner class.[218] Exxon did not dispute its liability for compensatory damages, stipulating that its negligence had caused the oil spill.[219] Only the amount of the compensatory damages and Exxon's liability for punitive damages were disputed.[220] In addition, the district court certified a mandatory punitive damages class, "so the award would not be duplicated in other litigation and would include all punitive damages the jury thought appropriate."[221]

The trial began on May 2, 1994, and was divided into three phases.[222] In the first phase, the jury found that Exxon had been reckless, which made it liable for punitive damages.[223] In the second phase, the jury found that Exxon was liable to the commercial fishermen for $287 million in compensatory economic damages.[224] In the third phase, the jury was charged with deciding the appropriate amount of a punitive damages award, if any, against Exxon.[225] Regarding the jury verdict on punitive damages, the district court stated, "In consultation with counsel, unusually detailed punitive damages instructions were developed for the purposes of this case."[226] The jury returned a punitive damages award of $5 billion.[227] Exxon filed a motion for reduction or remittitur of the award, but it was denied by the district court, which entered a final judgment in favor of the plaintiffs on September 24, 1996.[228] Exxon

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1 (1997) (providing an interesting literary account of the people involved in the oil spill and subsequent civil litigation).

217. Jenkins & Kastner, *supra* note 5, at 168.

218. *Exxon II*, 270 F.3d at 1225; *Exxon III*, 236 F. Supp. 2d 1043, 1048 (D. Alaska 2002).

219. *Exxon III*, 236 F. Supp. 2d at 1048.

220. *Id*.

221. *Exxon II*, 270 F.3d at 1225.

222. *Exxon III*, 236 F. Supp. 2d at 1048.

223. *Id*.

224. *Id*.

225. *Exxon II*, 270 F.3d at 1225. A fourth phase, to determine the compensatory damages of the plaintiffs other than the commercial fishermen was planned, but these claims settled before trial. *Id*.

226. *Exxon III*, 236 F. Supp. 2d at 1049.

227. *Id*. at 1068.

228. *Id*. at 1050 n.24.

subsequently appealed and obtained a stay of execution by posting a *supersedeas* bond in the amount of $6.75 billion.[229]

B. Exxon's Due Process Challenge to the Punitive Damages Award

On appeal, Exxon raised several issues, including a due process challenge to the $5 billion punitive damages award.[230] Specifically, Exxon argued that when analyzed under the *BMW* guideposts, the jury's award exceeded the constitutional limit of the Due Process Clause and "must be drastically reduced."[231] Considering the degree of reprehensibility guidepost first, Exxon argued that it

229. *Id*. at 1050. A *supersedeas* bond is required when a party petitions to set aside a judgment or to stay execution during an appeal from which the other party may be made whole if the action is unsuccessful. BLACK'S LAW DICTIONARY 1438 (6th ed. 1990); *see also* Fed. R. Civ. P. 62(d).

230. Joint Opening Brief of Appellants Exxon Corp. and Exxon Shipping Co. at 71-76, *Exxon II*, 270 F.3d 1215 (9th Cir. 2001) (No. 97-351191). In its Opening Brief—which was over one-hundred pages long—Exxon raised the following additional nine main arguments: (1) Exxon argued that *any* award of punitive damages was impermissible under the Due Process Clause because sufficient punishment and deterrence had already been obtained through the $900-million settlement with government trustees, the $304 million in compensation to private parties, the $125 million in criminal penalties, and the $2.1 million clean-up expenditure, *id*. at 27; (2) Exxon argued that under federal maritime law punitive damages are not available when other liabilities and costs provide effective deterrence and punishment, *id*. at 32; (3) Exxon argued that the $900 million settlement with the State of Alaska—which acted in a *parens patriae* capacity—included all public punitive damages claims and therefore barred future plaintiffs from seeking punitive damages under the principle of *res judicata*, *id*. at 34-40; (4) Exxon argued that availability of the common law punitive damages remedy was preempted by the Clean Water Act's remedial scheme in which Congress had explicitly provided remedies to punish and deter oil spills but had deliberately chosen not to provide punitive damages even for "willful misconduct," *id*. 40-41; (5) Exxon argued that the district court erred when it instructed the jury that the burden of proof to be used to determine whether punitive damages were warranted was the preponderance of the evidence standard and not the heightened clear and convincing evidence standard, *id*. at 43-47; (6) Exxon argued that under federal maritime law it should not have been held vicariously liable for Hazelwood's recklessness, because Hazelwood violated its explicit policies and instructions, *id*. at 48-52; (7) Exxon argued that the jury's punitive damages award could not be supported due to insufficient evidence that Hazelwood recklessly caused the grounding or that Exxon recklessly disregarded the risk of an accident, *id*. at 56-62; (8) Exxon argued that the jury improperly considered evidence from outside the record, *id*. at 85; and (9) Exxon argued that the jury incorrectly calculated the compensatory damages award, *id*. at 88.

231. *Id*. at 71.

had been improperly punished for Hazelwood's unauthorized acts, which were contrary to company policies.[232] Exxon contended that any negligence on its part in hiring and supervising Hazelwood fell short of the recklessness needed to justify a large punitive damages award.[233] Exxon also argued that the award was unwarranted because its conduct was unintentional, unlike the examples of reprehensible conduct identified by the Supreme Court, such as violence, deceit, or intentional malice.[234] Exxon stated, "[n]either the grounding of the *Exxon Valdez* nor the oil spill resulted in plaintiffs' death or personal injury, or put their 'health and safety' at risk."[235]

Exxon also contended that the reprehensibility of its conduct was fully mitigated by its extensive post-spill "efforts to clean up the oil and mitigate any harm from it, at a cost of over $2 billion"[236] Exxon also took issue with the plaintiffs' argument that the oil spill was reprehensible because it caused great environmental harm.[237] Exxon pointed out that the district court had instructed the jury not to consider damage to natural resources or to the environment generally.[238] To that end, Exxon emphasized the following portion of the district court's jury instruction: "Any liability for punitive damages relating to these harms has been fully resolved in proceedings involving the Exxon defendants and the Natural Resource Trustees. . . ."[239]

Next, Exxon turned to *BMW's* second guidepost—the ratio of the punitive damages award to the actual harm to the plaintiff. Exxon noted that the district court had calculated the total harm to the plaintiffs as somewhere between $288 and $418 million, which resulted in a punitive to compensatory ratio of somewhere between twelve to one and seventeen to one.[240] Exxon stated, "If 4-to-1 was

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232. *Id*. at 72.

233. *Id*.

234. *Id*. at 71-72 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996)).

235. *Id*. at 73 (quoting *BMW*, 517 U.S. at 599).

236. *Id*.

237. Joint Reply Brief and Joint Answering Brief of Exxon Corp. and Exxon Shipping Co. at 44, *Exxon II*, 270 F.3d 1215 (9th Cir. 2001) (No. 97-351191). Like its Opening Brief, Exxon's Reply Brief was over one-hundred pages long.

238. *Id*.

239. *Id*.

240. Joint Opening Brief of Appellants Exxon Corp. and Exxon Shipping Co. at 74-75, *Exxon II*, 270 F.3d 1215 (9th Cir. 2001) (No. 97-351191). Exxon also contended that the district court had improperly included the voluntary payments Exxon had made to some plaintiffs in its total and that the true amount of the

'close to the line' in *Haslip*—a case of intentional fraud which was purposely concealed—then in this case, with easy-to-detect harm, substantial compensatory damages, and an unparalleled record of remedial and corrective measures costing more than $3 billion, a 4-to-1 ratio would be far over the line."[241]

Regarding *BMW's* third guidepost—comparison of the sanctions imposed for similar conduct—Exxon argued that the punitive damages award was excessive since it had already paid the criminal sanction imposed against it by the district court. Exxon argued that federal and state officials, acting pursuant to the Clean Water Act, had found that a fine of $25 million (remitted from $150 million) and restitution of $100 million "was sufficient to accomplish punishment and deterrence in light of Exxon's $3.5-billion expenditures for clean up, natural resource damages, and claims payments."[242] Exxon noted that the punitive damages award was twenty times the amount of the criminal fine and argued that since *BMW* advised reviewing courts to give "substantial deference" to comparable sanctions, the punitive damages award against it "must be set aside or drastically reduced." [243]

Exxon contended that the plaintiff's analysis of the comparable sanction guidepost was flawed.[244] Specifically, Exxon argued

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harm was only $222 million, a figure which would result in a twenty-three to one ratio. *Id*. at 75.

241. *Id*. at 76. Exxon also criticized the plaintiff's analysis of *BMW's* ratio guidepost, arguing that the high-ratio cases the plaintiffs cited involved a combination of intentional torts, low compensatory damages, and low detection rates, which necessitate larger punitive damages to provide deterrence. Joint Reply Brief and Joint Answering Brief of Exxon Corp. and Exxon Shipping Co. at 45, *Exxon II* (No. 97-351191). Exxon stated that: "None of the plaintiff's cases involved a non-intentional tort for which (1) criminal punishment had previously been assessed; (2) compensatory damages were in the multimillions; and (3) the tortfeasor's accident-related losses and expenses were in the *multibillions*." *Id*. at 46. Exxon also provided a lengthy critique of the manner in which the plaintiffs calculated the amount of their harm. *Id*. at 46-50. Exxon contended that the plaintiffs should not have included the following items in their calculation of harm: (1) the $98 million settlement payment from Alyeska; (2) the $123 million Exxon voluntarily paid to fish processors; (3) the $339 million that the plaintiffs claimed in the impact stipulation; (4) the amount of *potential* harm that *could have* resulted if more oil had spilled; and (5) the claims made by the plaintiffs which were not legally cognizable. *Id*.

242. Joint Opening Brief Of Appellants Exxon Corp. and Exxon Shipping Co. at 76, *Exxon II* (No. 97-351191).

243. *Id.* at 77.

244. Joint Reply Brief and Joint Answering Brief of Exxon Corp. and Exxon Shipping Co. at 50, *Exxon II* (No. 97-351191).

that the plaintiffs' estimate of the potential criminal penalty of $8 billion had a "fairy-tale quality . . . in a world where the $125 million in fines and restitution actually imposed exceeded the *total* of all previous environmental fines . . . ."[245] Exxon argued that under *BMW*, the consideration "is not the hypothetical fine that *could have* been imposed, but the fine that actually was imposed."[246] Furthermore, Exxon contended it did not have fair notice of such a huge penalty—the basis for *BMW*.[247]

In addition to providing an analysis of the *BMW* guideposts, Exxon also took issue with what it characterized as the "[p]laintiff's wealth argument."[248] Exxon argued that just because it can afford to pay the punitive damages award, it does not make it reasonable.[249] Exxon stated that the *BMW* court sent a clear message that the wealth of the defendant is not a valid basis for affirming a large punitive damages award.[250] Exxon contended that the costs of the oil spill had already sufficiently deterred the company and stated that, "[t]here is simply no rational basis to conclude on the basis of Exxon's size or wealth that piling on an additional $5 billion was or is necessary to induce Exxon to change its behavior."[251]

C. The Plaintiffs' Arguments Regarding Exxon's Due Process Challenge to the Punitive Damages Award

The Plaintiffs' Brief included a lengthy discussion of the due process challenge to the punitive damages award.[252] The plaintiffs

245. *Id*. at 51 (emphasis in the original).
246. *Id*. (emphasis in the original).
247. *Id*. at 51-52.
248. *Id*. at 52.
249. *Id*.
250. *Id*. at 52-53.
251. *Id*. at 56.
252. Brief of the Plaintiffs at 116-49, *Exxon II*, 270 F.3d 1215 (9th Cir. 2001) (Nos. 97-351191, 97-35193). In its 247-page brief, the plaintiffs made the following arguments: (1) that the district court gave Exxon extraordinary procedural and substantive protections, *id*. at 59-65; (2) that Exxon cannot claim immunity from punitive damages as a matter of law due to the costs, sanctions, and settlements arising from the spill, *id*. at 65-84; (3) that the Clean Water Act does not preempt punitive damages awards, *id*. at 78-84; (4) that the district court correctly instructed the jury that the burden of proof required to prove Exxon's recklessness was the preponderance of the evidence standard, *id*. at 85-87; (5) that Exxon could be held responsible for the reckless actions of a managerial agent, *id*. at 95-106; (6) that the evidence was sufficient to support the jury's findings that the spill was caused by recklessness, *id*. at 106-16; (7) that the $5-billion punitive damages award was proper, *id*. at 116-49; (8) that the district court properly rejected Exxon's allegation that the jury had considered outside material, *id*. at 150-53; and

began by discussing the standard of review that should be applied when a court examines the due process fair notice excessiveness inquiry of a lower court.[253] Since the Plaintiff's Opening Brief predated *Cooper's* holding that a *de novo* standard must be applied, the plaintiffs stated that only the abuse-of-discretion standard should be used.[254] Similarly, the plaintiffs argued that the district court itself was obliged to give "substantial deference" to the jury's discretion to award punitive damages.[255] Pointing out that the district court had "conducted a thorough review of the jury's determination [based on] the relevant factors," the plaintiffs argued that the district court had not abused its discretion when it concluded that a reasonable jury could have determined that the punitive damages award was required to punish and deter Exxon and that the award was not contrary to the great weight of the evidence.[256]

Based on these contentions, the plaintiffs argued that "review of the punitive damage factors that have been identified by the Supreme Court and this Court" would show that "the district court was well within its discretion."[257] The plaintiffs offered the following factors to the Ninth Circuit for its review: (1) the reprehensibility of Exxon's conduct; (2) the vulnerability of the plaintiffs; (3) the actual and potential harm caused by Exxon's conduct; (4) a comparison of the potential criminal and civil penalties; (5) Exxon's financial condition; and (6) Exxon's lack of contrition.[258]

The plaintiffs sought to provide the evidentiary basis upon which the jury could have found that Exxon's conduct was reprehensible. First, the plaintiffs pointed to Exxon's stipulation that it knew that an oil spill in Prince William Sound would have a signifi-

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(9) that the jury's calculation of the compensatory damages award was based on substantial evidence and should not be disturbed, *id*. at 154-60.

253. *Id*. at 116.

254. *Id*. at 116-19.

255. *Id*. at 119. To support its contentions, the plaintiffs quoted the following portion of the Supreme Court's decision in *Browning-Ferris v. Kelco Disposal, Inc.*:

> In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by law, and to determine . . . whether a new trial or remittitur should be ordered. The Court of Appeals should then review the district court's determination under an abuse-of-discretion standard.

Id. at 117 (quoting Browning-Ferris v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989)).

256. *Id*. at 119 (citation omitted).

257. *Id*. at 120.

258. *Id*. at 121-42.

cant impact on the environment.[259] Second, the plaintiffs contended that Exxon knew that assigning an alcoholic master to a tanker would increase the likelihood of such a spill.[260] Third, the plaintiffs contended that Exxon knew that Hazelwood was an alcoholic who was likely to suffer a relapse.[261] Under *BMW's* reprehensibility guidepost, the plaintiffs concluded that Exxon's knowing disregard of these risks was an "'aggravating factor' indicative of 'particularly reprehensible conduct.'"[262]

The plaintiffs then contended that the vulnerability of those harmed was also an aggravating factor in assessing the degree of reprehensibility of the defendant's conduct.[263] Specifically, the plaintiffs pointed to *BMW* for the proposition that "infliction of economic injury . . . when the target is financially vulnerable, can warrant a substantial penalty."[264] The plaintiffs contended that since commercial and subsistence fishing are inherently difficult and risky endeavors dependent on natural resources, the plaintiffs were particularly vulnerable to the risk of a major oil spill, but, unlike Exxon, they had virtually no ability to avoid that risk.[265]

Next, the plaintiffs made an argument based on *BMW's* second guidepost—the ratio between the punitive damages award and the harm caused by the defendant's conduct.[266] Unlike Exxon, the plaintiffs characterized the ratio as between the punitive damages award and "the 'harm,' not the net compensatory damage judgment."[267] The plaintiffs argued the relevant estimate of harm to be used in the ratio was the amount stipulated by the parties in Phase III of the trial in the Impact Stipulation, and *not*, as Exxon argued, the Phase II net compensatory damage judgment.[268] Under the stipulation, the plaintiffs' $768 million harm amount results in a ratio of 6.5-to-1.[269] Using Exxon's $432 million harm amount results

259. *Id*. at 121 (citing the trial transcript).

260. *Id*.

261. *Id*. at 122. Plaintiffs also argued that Exxon knew of the risk of crew fatigue that resulted from operating its tankers with a reduced number of crew members and of the risks of transporting oil through the sound at night and when ice was present. *Id*. at 122-23 (citing the trial transcript).

262. *Id*. at 123 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996)).

263. *Id*. at 125.

264. *Id*. at 124 (quoting *BMW*, 517 U.S. at 599).

265. *Id*. at 125-26.

266. *Id*. at 126-34.

267. *Id*. at 127 (internal citations omitted).

268. *Id*.

269. *Id*. at 128-29.

in a ratio of 11.6-to-1.[270] The plaintiffs pointed out that: "[e]ither ratio is well within the range of ratios upheld in recent punitive damages cases."[271]

In addition, the plaintiffs contended that under *BMW*, "a higher ratio . . . may be justified when the potential harm is greater than the harm that actually occurred or when it is difficult to establish the existence or value of the harm, so that the compensatory damages awarded do not reflect the total harm."[272] Using a "potential harm" argument to justify the large punitive damages to harm ratio, the plaintiffs argued that if the tanker, the *Exxon Valdez*, had spilled more than eleven million of the fifty million gallons of oil it carried "the harm would have been many times greater."[273] The plaintiffs also argued that a higher ratio is justified because the economic harm of an "oil spill is difficult to quantify and prove" and because much of the harm caused by the spill remained uncompensated.[274]

Turning to *BMW's* third guidepost—the comparison between the punitive damages award and the sanctions imposed for similar conduct—the plaintiffs contended that the relevant inquiry under *BMW* is whether there is "'fair notice' to the tortfeasor of the potential for punishment of the order of magnitude assessed."[275] Unlike Exxon, the plaintiffs characterized this guidepost as a comparison of the punitive damages award with "civil or criminal penalties that *could be imposed*" for comparable misconduct.[276] The plaintiffs pointed out that *if* Exxon had been convicted of violating the five federal statutes under which it had been indicted, the district court *could have imposed* a criminal penalty of "twice the gross loss" pursuant to the Federal Sentencing Guidelines.[277] The plain-

270. *Id*.

271. *Id*. at 129. The plaintiffs provide a long string cite of cases to support their argument. *Id*. at 129 n.62.

272. *Id*. at 131 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)). In actuality, the *BMW* Court stated that: "A higher ratio may . . . be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW*, 517 U.S. at 582.

273. Brief of the Plaintiffs at 147, *Exxon II* (Nos. 97-351191, 97-35193) (internal quotation omitted).

274. *Id*. at 131. Regarding uncompensated harm the plaintiffs stated that: "Over 40,000 individuals and businesses who suffered hundreds of millions of dollars of economic harm were barred by the [district court's maritime law] dismissals." *Id*. The plaintiffs also claimed that "vast emotional and psychological harm" has gone uncompensated. *Id*. at 132-33.

275. *Id*. at 134.

276. *Id*. (emphasis added by plaintiffs) (quoting *BMW*, 517 U.S. at 584).

277. *Id*. (citing 18 U.S.C. § 3571(d) (2001)).

tiffs then argued that the gross loss amount included the $900 million trustee settlement, the $2.1 billion in cleanup costs, and all the harm to the private plaintiffs—estimated at $432 million to $950 million—for a total loss of up to $4 billion, which would permit a criminal penalty of up to $8 billion.[278] Therefore, the plaintiffs argued, "Exxon certainly had notice that the applicable punishment could exceed $5 billion."[279]

In addition to the *BMW* guideposts, the plaintiffs offered two other factors that they contended have been used by courts when "determining the amount of punitive damages necessary to punish and deter."[280] First, the plaintiffs argued that the financial condition of the defendant must be reflected in the punitive damages award or else a wealthy defendant could be "impervious to the sting of a punitive damage award."[281] The plaintiffs then demonstrated that "Exxon's imperviousness to any punitive damage award" by listing evidence offered at the trial to establish Exxon's wealth, including Exxon's average annual revenue for the years 1989-1993 ($116.6 billion), Exxon's market capitalization in 1993 ($78.4 billion), and Exxon's average net income for the years 1989-1993 ($4.8 billion).[282] Second, the plaintiffs argued that the degree of remorse or contrition exhibited by a defendant is also a factor used to determine the punishment.[283] On this point, the plaintiffs discussed Exxon's post-spill conduct, attempting to show Exxon's alleged lack of contrition.[284]

Finally, the plaintiffs argued that prior payments made by Exxon as a result of the spill should *not* be viewed as a significant mitigating factor.[285] The plaintiffs argued that the criminal penalty punished Exxon only for negligence, not recklessness, and that all the other amounts paid would have been required even if Exxon had spilled the oil innocently.[286] Furthermore, the plaintiffs contended that since the jury was not allowed to consider harm to the environment when assessing the punitive damages, Exxon's

278. *Id*. at 135-36.
279. *Id*. at 136.
280. *Id*.
281. *Id*. at 137.
282. *Id*. at 138-39.
283. *Id*. at 142.
284. *Id*. at 143-45.
285. *Id*. at 146.
286. *Id*.

cleanup expenditures should not be used to mitigate the punitive damages award.[287]

D. The Ninth Circuit's Decision to Vacate the Punitive Damages Award and Remand for Consideration under the *BMW* Guideposts

In a decision filed on November 7, 2001, the Ninth Circuit held that although an award of punitive damages was *not* barred, the $5 billion jury verdict was excessive and must be reduced by the district court upon remand.[288] While the court responded to each of the main issues raised in the parties' briefs, the grounds for vacating the award rested on Exxon's due process challenge to the punitive damages award.[289]

1. *The Ninth Circuit's Due Process Fair Notice Excessiveness Inquiry*. The Ninth Circuit began by summarizing the Supreme Court's due process fair notice excessiveness jurisprudence.[290] The court noted, "Two critical Supreme Court opinions, decided after the district court's decision in this case, have expanded the way courts review constitutional challenges to large punitive damages awards."[291] The court then described the fair notice excessiveness guideposts established by *BMW* and the *de novo* review standard established by *Cooper*.[292]

Noting that the district court had not had the opportunity to perform a fair notice excessiveness inquiry based upon the new criteria (since neither *BMW* nor *Cooper* had yet been decided), the Ninth Circuit stated that it lacked a "constitutional analysis by the district court over which to exercise any *de novo* review."[293] The court then remanded the issue stating, "[b]ecause we believe the district court should, in the first instance, apply the appropriate standards, we remand for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*."[294] The Ninth Circuit, however, went on to pro-

287. *Id*. at 146-47. The plaintiffs made two additional arguments relating to the punitive damages award: (1) that maritime law does not limit punitive damages, *id*. at 147-48; and (2) that the manner in which the post-judgment interest was calculated reduced the impact of the punitive damages award on Exxon, *id*. at 149.

288. *Exxon II*, 270 F.3d 1215, 1242, 1246-47 (9th Cir. 2001).

289. *Id*. at 1241.

290. *Id*. at 1239-41.

291. *Id*. at 1239.

292. *Id*. at 1239-40; *see also* discussion *supra* Part II.D.

293. *Exxon II*, 270 F.3d at 1241.

294. *Id*.

vide its own lengthy excessiveness analysis based upon *BMW's* guideposts, in order to "aid [the district court's] consideration."[295]

The Ninth Circuit first analyzed the case under the degree of reprehensibility guidepost. The court compared Exxon's conduct to that of the defendant in *BMW*, which the Supreme Court had not found reprehensible enough to support the large punitive judgment against it.[296] The court noted that neither case involved violence, nor "trickery or deceit," and that in both cases the claims were solely for injuries to private economic interests.[297] The court reiterated that the *In re Exxon Valdez* jury had been instructed to exclude consideration of the environmental and natural resource harm and focus only on the private economic harm when determining Exxon's punitive damages liability.[298]

The Ninth Circuit found that Exxon's conduct was reprehensible because it was aware of the risks of transporting oil through Prince William Sound and knew Hazelwood was a relapsed alcoholic.[299] The court stated, however, that "this goes more to justify punitive damages than to justify punitive damages at so high a level."[300] For the court, several factors reduced the reprehensibility of Exxon's conduct:

> Exxon spent millions of dollars to compensate many people after the oil spill, thereby mitigating the harm to them and the reprehensibility of its conduct. Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior. Also, as bad as the oil spill was, Exxon did not spill the oil on purpose, and did not kill anyone.[301]

The Ninth Circuit then turned to *BMW's* second guidepost—the ratio of the punitive damages award to the actual harm to the plaintiff, noting that the "reasonable relationship" ratio required by *BMW* is "intrinsically somewhat indeterminate" because of the difficulty in estimating the likely harm of the defendant's conduct.[302] The court then accepted the district court's range estimate

295. *Id*. at 1241-46.

296. *Id*. at 1241-42; *see* discussion *supra* Part II.C.

297. *Exxon II*, 270 F.3d at 1241-42.

298. *Id.* at 1242.

299. *Id*.

300. *Id*. Although the court noted that Exxon had both direct liability for its own acts and vicarious liability for Hazelwood's acts, it stated that the comparison of the $5000 punitive damages award against Hazelwood and the $5-billion punitive damages award against Exxon raised concerns "about the jury's evaluation of their relative reprehensibility." *Id*.

301. *Id*. at 1242-43.

302. *Id*. at 1243.

of the total harm as $287 million to $418 million, and stated that it "produces a ratio [to the $5 billion punitive damages award] between 12-to-1 and 17-to-1. This ratio greatly exceeds the 4-to-1 ratio that the Supreme Court called 'close to the line' in [*Haslip*]."[303]

The Ninth Circuit stated that the voluntary payments made by Exxon should not be used as part of the harm estimate for purposes of calculating the ratio "because that would deter settlements prior to judgment."[304] Similarly, the court reasoned that Exxon's cleanup expenditures, casualty losses, fines, settlements, and compensatory damages "should be considered part of the deterrent already imposed" for the spill.[305] After tabulating Exxon's costs attributable to the spill at $3.4 billion, the court stated:

> A company hauling a cargo worth around $25.7 million has a large incentive to avoid a $3.4 billion expense for the trip. . . . Just the expense, without any punishment, is too large for a prudent transporter to take much of a chance, given the low cost of making sure alcoholics do not command their oil tankers.[306]

For the court, *BMW's* ratio guidepost helps avoid the over-deterrence that can result from excessive punitive damages

303. *Id*. (quoting Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991)).

304. *Id*. at 1244.

305. *Id*. One can query why the cleanup costs should be considered as part of the deterrent and excluded as part of the harm. As the Ninth Circuit reminded, the case was not about "befouling the environment," yet only because the environment was befouled did Exxon have to spend so much to clean it up. If the jury was not allowed to consider harm to the environment when determining the punitive damages, why should the expenses of mitigating harm to the environment be deducted as deterrent already imposed and used as a justification to reduce the jury's award?

306. *Id*. The Ninth Circuit's reasoning is dubious. First, the court assumes that the only risk to be avoided when transporting oil on tankers is that posed by alcoholic masters. In reality, the risks (and costs of avoiding those risks) are much more prevelant. Due to the toxic nature of crude oil, transporting it *at all* entails risk. Certainly, transporting at night, when ice is present in the shipping lanes, with a tanker that lacked a double-hull, and with a skeleton crew, all increased the risk that the *Exxon Valdez* would spill oil into Prince William Sound. Hazelwood's alcoholism was only the most direct cause of the spill on that particular trip. Second, the court fails to realize that it isn't only the *expense* of an accident that gives a corporation an incentive to take measures to avoid the accident, but rather the *likelihood* of such an accident. If the likelihood of a major oil spill is low—say one spill per every five thousand trips—and the transporter determines that it would cost more to implement all of the preventive measures than to cover the costs of a spill, the transporter may choose to simply risk it. This is especially true if much of the harm of an oil spill remains externalized.

awards.[307] The court concluded that a "lesser amount" than the $5 billion punitive damages award would be enough to deter future bad acts by Exxon.[308]

Finally, the Ninth Circuit examined the case under *BMW's* "comparable sanctions" guidepost.[309] The court explained that the purpose of the guidepost is to accord "substantial deference" to legislative judgments regarding the civil or criminal penalties "that could be imposed for comparable misconduct."[310] Since there were legislative statutes regarding the conduct at issue and because actual penalties had been imposed on Exxon as a result of the spill, the court found the case to be "unusually rich in comparables."[311]

The court stated that Exxon's criminal liability for a misdemeanor under the appropriate federal statute would be a fine of $200,000, or as the plaintiffs argued, a fine of double the gross loss resulting from the offense—which, under the district court's highest estimate of damages would result in a fine of about $1 billion.[312] The court also examined the civil liabilities provided under the federal Trans-Alaska Pipeline Act.[313] The court noted that under the Act, the maximum sanction for which a vessel owner or operator could be held strictly liable for discharging oil was $100 million—"only 1/50 of the punitive damages award."[314] The court next considered the $150 million plea agreement that Exxon entered into with the United States, stating that it "represent[ed] an adversarial judgment by the executive officers of the state and federal governments who had the public responsibility for seeking the ap-

307. *Id*. The Ninth Circuit appeared to favor the view that punitive damages awards should be imposed to achieve economically optimal deterrence. However, this "economic efficiency" theory was discredited by the Supreme Court's decision in *Cooper*, which stated that deterrence is only one of the objectives of punitive damages, and that juries might properly value the punishment of immoral behavior above economic efficiency. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 439 (2001). For an explanation of the economically optimal deterrence theory by its principal academic proponents, see Polinsky & Shavell, *supra* note 91, at 877.

308. *Exxon II*, 270 F.3d at 1244.

309. *Id*. at 1245.

310. *Id*. (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).

311. *Id*.

312. *Id*. (citing 18 U.S.C. § 3571(c)-(d) (2001)). The court rejected the plaintiff's notion that the $2.1 billion Exxon spent on the cleanup should be part of the loss to be doubled, stating that it is damage to Exxon itself and not loss to another person as required by federal statute. *Id*.

313. *Id*. (citing 43 U.S.C. § 1653(c)(1) (1986)).

314. *Id*. (citing 43 U.S.C. § 1653(c)(3)).

propriate level of punishment" and that it had been approved by the district court as such.[315]

The court completed its analysis of the comparable sanctions guidepost by discussing the maximum permissible civil penalty under the federal Oil Pollution Act, which Congress passed as a result of the *Exxon Valdez* oil spill to "assure that such spills would be adequately deterred and punished in the future."[316] According to the court, Exxon would have faced a civil penalty up to $3,000 for each of the 261,905 barrels of oil it spilled resulting in a maximum of $786 million.[317] Each of the criminal and civil penalties the Ninth Circuit compared are far less than the $5-billion punitive damages award.

The Ninth Circuit concluded its due process fair notice excessiveness inquiry by stating that:

> The $5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW* and *Cooper Industries*. It must be reduced. Because these Supreme Court decisions came down after the district court ruled, it could not apply them. We therefore, vacate the award and remand so that the district court can set a lower amount in light of the *BMW* and *Cooper Industries* standards.[318]

2. *The Ninth Circuit's Decision That Punitive Damages Were Not Barred*. While the due process fair notice excessiveness issue led the Ninth Circuit to vacate the punitive damages award and remand for reduction, five other issues warrant mention in this Article. Upon consideration of these issues, the court held that punitive damages were *not* barred in the case.[319] First, the court rejected Exxon's argument that punitive damages were barred under due process because it had already been sufficiently punished and deterred by the criminal fines, civil sanctions, clean-up expenditures and other costs.[320] Second, the court rejected Exxon's argument that punitive damages are not allowed under maritime law, concluding that they generally *are* allowable under maritime law, and thus were included in the present case.[321]

Third, the Ninth Circuit rejected Exxon's argument that punitive damages were barred by *res judicata* as a result of its settlement with the government trustees who acted as *parens patriae* for

315. *Id*. at 1245-46.
316. *Id*. at 1246 (citing 33 U.S.C. § 1321(b)(7)(2001)).
317. *Id*.
318. *Id*. at 1246-47.
319. *Id*. at 1226.
320. *Id*. at 1225-26.
321. *Id*. at 1226-27.

natural resource damage claims brought on behalf of the public pursuant to the Clean Water Act.[322] The court stated that the consent decree explicitly provided that "nothing in this agreement . . . is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement."[323] The court also noted that the consent decree described the settlement as "compensatory and remedial," rather than punitive.[324]

Fourth, the court distinguished *Alaska Sport Fishing Ass'n v. Exxon Corp.*,[325] upon which Exxon had relied for the proposition that the consent decree had barred all future private claims for punitive damages.[326] The Ninth Circuit explained that the sport fishing enthusiasts in that case were barred from claiming damages on behalf of the public for lost use of natural resources because they were in privity with the State, which had acted as *parens patriae* to protect the natural resources.[327] By contrast, the *In re Exxon Valdez* plaintiffs "sued to vindicate harm to their private land and their ability to fish commercially and for subsistence."[328] The court held that the private claims for punitive damages therefore remained unaffected by the consent decree settling the public natural resource damage claims.[329]

Fifth, the Ninth Circuit rejected Exxon's contention that punitive damages were preempted by federal statute, concluding that the Clean Water Act "does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights."[330] Specifically, the court stated that:

> [A] statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy . . . . The absence of any private right of action in the Act for damage from oil pollution may more reasonably be

322. *Id*. at 1227-28.
323. *Id*. at 1227 (quoting the district court's consent decree).
324. *Id*.
325. 34 F.3d 769 (9th Cir. 1994).
326. *Exxon II*, 270 F.3d at 1227.
327. *Id*. at 1227-28.
328. *Id*. at 1228.
329. *Id.*
330. *Id*. at 1231. To support its holding, the Ninth Circuit stated that the Clean Water Act "expressly provides that it does *not* preempt common law rights to other relief," and quoted the following section of the Act for support: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation *or to seek any other relief*." *Id*. at 1230. (quoting 33 U.S.C. § 1365(e) (1990)) (emphasis added by the court).

> construed as leaving private claims alone than as implicitly destroying them.[331]

The court added, "What saves [the] plaintiff's case from preemption is that the $5-billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment."[332]

E. The Parties' Arguments to the District Court Upon Remand

In memoranda to the district court, both parties reiterated their respective positions on the due process fair notice excessiveness issue.[333] The arguments, however, were sharply focused on the Ninth Circuit's application of the *BMW* factors and the extent to which it was binding on the district court.[334] Each party also suggested new amounts for the punitive damages award.[335]

1. *Exxon's Memorandum*. Exxon argued that the Ninth Circuit's due process excessiveness analysis was binding upon the district court.[336] Specifically, Exxon argued that the analysis was "not in any sense dictum, since it is the rationale—the only explanation the Ninth Circuit gave—for the Court's holding that an award of $5

331. *Id*. at 1231.

332. *Id*.

333. *See* Memorandum of Points and Authorities in Support of Renewed Motion of the Defendants Exxon Mobil Corp. and Exxon Shipping Co. for Reduction or Remittitur of Punitive Damages Award, *In re* Exxon Valdez, 236 F. Supp. 2d 1043 (D. Alaska 2002) (No. A89-095); Plaintiffs' Memorandum In Opposition to Renewed Motion of Exxon Defendants For Reduction or Remittitur of Punitive Damages Award, *Exxon III*, 236 F. Supp. 2d 1043 (D. Alaska 2002) (No. A89-045).

334. *See* Memorandum of Points and Authorities in Support of Renewed Motion of the Defendants Exxon Mobil Corp. and Exxon Shipping Co. For Reduction or Remittitur of Punitive Damages Award at 1-3, *Exxon III* (No. A89-095); Plaintiffs' Memorandum In Opposition to Renewed Motion of Exxon Defendants for Reduction or Remittitur of Punitive Damages Award at 5-9, 13-22, *Exxon III* (No. A89-045).

335. Memorandum of Points and Authorities in Support of Renewed Motion of the Defendants Exxon Mobil Corp. and Exxon Shipping Co. For Reduction or Remittitur of Punitive Damages Award at 24-25, *Exxon III* (No. A89-095); Plaintiffs' Memorandum in Opposition to Renewed Motion of Exxon Defendants for Reduction or Remittitur of Punitive Damages Award at 79, *Exxon III* (No. A89-045).

336. Memorandum of Points and Authorities in Support of Renewed Motion of the Defendants Exxon Mobil Corp. and Exxon Shipping Co. for Reduction or Remittitur of Punitive Damages Award at 1, *Exxon III* (No. A89-095).

billion was 'too high.'"[337] Exxon contended that, consistent with the Ninth Circuit's analysis, the district court was required to reduce the punitive damages award to an amount between $25 million and $40 million.[338]

To justify such a radical decrease in the punitive damages award, Exxon turned to the Ninth Circuit's application of the *BMW* guideposts.[339] Exxon argued that while some punitive damages could be awarded against it for the tragic oil spill, its conduct did not involve a sufficiently high degree of reprehensibility to warrant a *substantial* punitive damages award.[340] Since the Ninth Circuit found none of the aggravating factors identified in *BMW* as indicative of particularly reprehensible conduct, Exxon argued that only modest punitive damages were justified.[341] Echoing the Ninth Circuit, Exxon asserted that its post-spill actions mitigated the harm to people and the environment and therefore reduced the reprehensibility of its conduct.[342] Exxon stated that the reprehensibility guidepost "militates in favor of a significant reduction from the maximum amount of punitive damages that might otherwise be allowable under the remaining *BMW* guideposts . . . ."[343]

Next, Exxon argued that its "lack of reprehensibility" justified only a two to one ratio of actual harm to punitive damages under *BMW*'s ratio guidepost.[344] Exxon contended that the Ninth Circuit had held "that only compensatory damages awarded by judgment, not settlements or other pre-judgment payments, count for pur-

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337. *Id*. at 2-3. Exxon cited ten cases for the proposition that upon remand a district court "has no choice about how to proceed. It 'must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion.'" *Id*. (quoting Vizcaino v. U.S. District Court, 173 F.3d 713, 719 (9th Cir. 1999).

338. *Id*. at 3.

339. *Id.*

340. *Id*. at 3-4 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996)). However, in a footnote, Exxon expressed a contrary view:

> [P]unitive damages were not properly awarded in this case, in any amount. The Ninth Circuit having rejected these arguments, they are foreclosed in this Court, and Exxon does not now make them. Nevertheless, this motion is without prejudice to Exxon's position. Should a further appeal become necessary, Exxon expressly reserves the right to argue, in the Court of Appeals *en banc* and in the Supreme Court, that the only permissible award of punitive damages in this case is zero, and/or that a complete new trial of punitive damages is required.

Id. at 1 n.1.

341. *Id*. at 5-6.

342. *Id*. at 6-7.

343. *Id*. at 7.

344. *Id*. at 8-9.

poses of the ratio calculus."[345] Exxon stated that the total amount of compensatory judgments against it was $20.3 million, which, under the two to one ratio it advocated, would result in a punitive damages award of $40 million.[346] For Exxon, the Ninth Circuit's "rule" limiting the ratio calculus to compensatory judgments would minimize litigation because parties who had already been compensated would not clog the courts due to the "lure of punitive damages . . . nor press claims for vast sums in addition to what is necessary to make them whole."[347]

To justify the two to one ratio, Exxon argued that since a four to one ratio for intentional fraud was "close to the line" in *Haslip*, the ratio chosen in a case involving unintentional acts should be much lower.[348] Since the "appropriate ratio depends primarily on the need for deterrence," and since the spill had already cost it over $3.4 billion, Exxon contended that the conduct had already been deterred and, therefore, a high ratio was not justified.[349] Exxon further argued that when large compensatory damages are awarded—

345. *Id*. at 8. Exxon took great license in its interpretation of the following Ninth Circuit statement: "The amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment." *Exxon II*, 270 F.3d 1215, 1244 (9th Cir. 2001).

346. *See* Memorandum of Points and Authorities in Support of Renewed Motion of the Defendants Exxon Mobil Corp. and Exxon Shipping Co. for Reduction or Remittitur of Punitive Damages Award at 8-9, *Exxon III*, 236 F. Supp. 2d 1043 (D. Alaska 2002) (No. A89-095). Exxon did not attempt to reconcile its loose interpretation of the Ninth Circuit's dicta with *BMW's* explicit instruction that the amount to be used in the ratio calculus is "the actual harm inflicted on the plaintiff." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996).

347. *See* Memorandum of Points and Authorities in Support of Renewed Motion of the Defendants Exxon Mobil Corp. and Exxon Shipping Co. for Reduction or Remittitur of Punitive Damages Award at 11, *Exxon III*, (No. A89-095). Exxon also argued that the prejudgment payments it made to commercial fishermen should not be viewed as compensation for harm, but rather as measures taken which *prevented* harm from occurring. *Id.* at 12. For Exxon, this was due to the fact that the payments were made before the fishing season, rather than after it, when fishermen usually get paid for the season's catch. *Id*. In this regard Exxon stated that "the only difference in [a fisherman's] economic position from what it would have been had there been no spill, is that he received his money *sooner*." *Id*. at 13. Exxon also stated that the fishermen whom it employed during the cleanup "had larger cash incomes than they would have earned if there had been no spill," a factor that it argued undermined the punitive damages award. *Id*.

348. *Id*. at 14.

349. *Id*. at 14-15.

as in the verdict here—higher ratios for punitive damages are unwarranted.[350]

Next, Exxon argued that the Ninth Circuit's analysis of the comparable sanctions guidepost did not support the large punitive damages award.[351] Exxon reiterated that *BMW* required substantial deference to the legislative judgments regarding appropriate sanctions and, since the Attorney General of the United States and the state of Alaska had already imposed a punishment based upon those judgments, an additional larger punishment for deterrence was neither necessary nor allowable under *BMW*.[352] Exxon evidenced that under the comparable sanctions guidepost, the punitive damages award could not exceed the $25 million fine that was imposed as punishment.[353]

Exxon then offered its suggestion for the reduced amount: "Applying all guideposts together, it is plain that a constitutional punitive damages award could not possibly be greater than $40 million. An award in a range between $25 million and $40 million would fit the Ninth Circuit's analysis of the law and facts, and would reconcile the *BMW* guideposts."[354]

2. *Plaintiff's Memorandum*. The plaintiffs argued that the district court was not bound by the Ninth Circuit's analysis of the *BMW* guideposts because they were not explicit holdings.[355] Specifically, the plaintiffs argued that the Ninth Circuit's use of the *BMW* guideposts only bound the district court to reduce the punitive damages award and to conduct a due process fair notice excessiveness inquiry.[356]

The plaintiffs further contended that the remainder of the Ninth Circuit's opinion was merely offered as an "'analysis to aid [in] th[e] consideration' of the *BMW* guideposts," and therefore was not binding.[357] To support their argument, the plaintiffs pointed to the prose and tenor of the Ninth Circuit's decision, arguing that it was couched "in abstract, tentative language, consistent with [the] recognition that [the district court] is in a superior

350. *Id*. at 15-16.
351. *Id*. at 17-23.
352. *Id*. at 18-20.
353. *Id*. at 24.
354. *Id*.
355. Plaintiffs' Memorandum in Opposition to Renewed Motion of Exxon Defendants for Reduction or Remittitur of Punitive Damages Award at 6-9, *Exxon III* (No. A89-045).
356. *Id*. at 5-6.
357. *Id*. at 6 (quoting *Exxon II,* 270 F.3d 1215, 1241 (9th Cir. 2001).

position to apply the law to the facts 'in the first instance.'"[358] The plaintiffs stated that the Ninth Circuit's analysis of "some of the relevant factors did not purport to preempt [the district court's] plenary consideration of the [issue]. . . . If [it] had regarded its discussion as dispositive, it would have set the constitutional limit itself rather than remanding."[359]

Next, the plaintiffs attempted to "aid" the district court by providing their own lengthy due process inquiry.[360] The Plaintiffs' Memorandum reiterated previous points and raised new arguments directed toward undermining the Ninth Circuit's conclusion that the punitive damages award was excessive under *BMW's* guideposts.[361] First, the plaintiffs argued that Exxon had fair notice that its reckless and highly reprehensible conduct would "subject it to substantial punitive damages."[362] Specifically, the plaintiffs contended that Exxon's conduct was clearly reprehensible because it knowingly left a relapsed alcoholic in command of a supertanker, risking vast pollution and exposing the vulnerable plaintiffs to broad economic and non-economic harm.[363] The plaintiffs also contended that Exxon's reprehensibility should not be discounted by its pre-trial payments since they were not prompt, comprehensive, or sincere.[364]

The plaintiffs further argued that the $5 billion punitive damages award was fully consistent with *BMW's* ratio guidepost because the amount of the award bore a reasonable relationship to the harm resulting from Exxon's conduct. On this point, the plaintiffs contended that the "harm" used in the ratio could properly include actual economic harm, non-economic harm, and the likely harm that stemmed from Exxon's reckless conduct.[365] The plaintiffs argued that the Ninth Circuit had properly refused to subtract Exxon's pretrial settlements when computing the actual harm, but then took issue with the court's statement that "[t]he cleanup expenses Exxon paid should be considered as part of the deterrent already imposed."[366] Concluding its ratio analysis, the plaintiffs argued a high ratio was justified due to the circumstances of the case

358. *Id*. at 6 (quoting *Exxon II,* 270 F.3d at 1242).
359. *Id*. at 8.
360. *Id*. at 13.
361. *Id*. at 14-76.
362. *Id*. at 13-14.
363. *Id*. at 14-25.
364. *Id*. at 31.
365. *Id*. at 37-45.
366. *Id*. at 46-51 (quoting *Exxon II,* 270 F.3d 1215, 1244 (9th Cir. 2001)).

and that ratios much higher than four to one are fully consistent with Supreme Court and Ninth Circuit precedent.[367]

Next, the plaintiffs turned to the comparable sanctions guidepost, arguing that "[a] proper application of the law reveals that Exxon had fair notice that it could be subject to criminal fines in excess of the $5 billion punitive damages award."[368] Specifically, the plaintiffs argued that the Ninth Circuit had *not* suggested that the criminal penalty actually imposed on Exxon was the only relevant sanction to be considered.[369] Rather, the plaintiffs contended that the Ninth Circuit directed the district court to consider *all* the "'penalties that could be imposed.'"[370] The plaintiffs pointed out that Exxon had fair notice that a major oil spill would expose it to criminal and civil monetary sanctions far in excess of $5 billion dollars and that Exxon executives, with "the responsibility and authority to prevent acts that [could] cause a grounding," could have faced imprisonment for up to one year.[371]

In addition, the plaintiffs also argued that when performing a *BMW* review, a court must look at the defendant's financial condition.[372] Specifically, the plaintiffs argued that Exxon's financial strength required a large punitive damages award in order to provide meaningful punishment and deterrence.[373] The plaintiffs argued that Exxon's financial resources had allowed it to delay the litigation, impose great burdens on the plaintiffs, and profit from the delay by earning a "handsome profit" on the money set aside to pay the judgment.[374]

Finally, the plaintiffs explicitly stated their suggestion regarding the reduced punitive damages award: "[The] plaintiffs recognize that the Ninth Circuit has directed [the district court] to reduce the punitive damages award, after analyzing the *BMW* guideposts. Plaintiffs respectfully submit, however, that any reduction of the jury's verdict below $4 billion cannot be justified under Supreme Court precedent."[375]

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367. *Id*. at 58.
368. *Id*. at 64.
369. *Id*.
370. *Id*. (quoting *Exxon II*, 270 F.3d at 1245 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996))).
371. *Id*. at 71-73 (citing 33 U.S.C. §§ 407, 411, 1319(c) (2000)).
372. *Id*. at 73.
373. *Id*. at 74.
374. *Id*. at 76-77.
375. *Id*. at 79.

F. The District Court's Decision to Reduce the Punitive Damages Award by $1 Billion

On December 9, 2002, the district court issued an order granting Exxon's Motion for Reduction or Remittitur of the Punitive Damages Award and adopted the plaintiffs' suggestion to reduce the award to $4 billion.[376] While the court acknowledged that pursuant to the Ninth Circuit's remand order it had to reduce the award, it nonetheless rejected the Ninth Circuit's conclusion that the original award was excessive.[377] Instead, the district court concluded that the "award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of fair notice—its right to due process."[378] The court stated:

> [Since this] court's independent evaluation of the *BMW* factors as applied to the facts of this case have led it to the conclusion that the $5 billion award was not grossly excessive, the court does not perceive any principled means by which it can reduce that award. . . . Since the $5 billion award must be reduced, the court adopts the plaintiffs' position as the means of resolving conflict between its judgment and the directions of the court of appeals.[379]

Before the district court presented its due process excessiveness inquiry, it made several observations regarding *BMW*. First, the court noted that while application of the reprehensibility and comparable sanctions guideposts have been relatively consistent, appellate courts have been "willing to find a wide variety of ratios constitutionally acceptable"—providing lower courts with little guidance.[380] Second, the court observed that a major portion of the Supreme Court's decision in *BMW* focused on limiting Alabama's ability to punish and deter BMW to its legitimate *in-state* interests—a situation unlike the present case in which no attempt was made to punish or deter Exxon for conduct unrelated to the oil spill in Prince William Sound.[381] Third, the court observed that

376. *Exxon III*, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002).

377. *Id*.

378. *Id*.

379. *Id*.

380. *Id*. at 1052 (citing numerous cases showing the wide disparity in ratios appellate courts have upheld); s*ee also* Swinton v. Potomac Corp., 270 F.3d 794, 818-19 (9th Cir. 2001) (concluding that a twenty-eight to one ratio was acceptable); United Int'l Holdings Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1232-33 (10th Cir. 2000) (finding that only a .87 to one ratio was acceptable when there was a large compensatory award); Johanson v. Combustion Eng'g, Inc., 170 F.3d 1320, 1338-39 (11th Cir. 1999) (holding that a one hundred to one ratio was acceptable).

381. *Exxon III*, 236 F. Supp. 2d at 1052-53 ("[T]he plaintiffs in making their claims, this court in instructing the jury, and the jury in awarding punitive dam-

BMW "was concerned that punitive damages were determined with reference to an inappropriate set of interests."[382] The court noted that in the present case, proper and prescient jury instructions—unchallenged by the parties—were given, which mirrored the guideposts subsequently embodied in *BMW*.[383] This prevented the jury from looking at other interests—such as environmental concerns—which were inappropriate considerations.[384] The court summarized its instructions to the jury as follows:

> The jury was instructed on the purpose of punitive damages: punishment and deterrence. The jury was admonished not to be arbitrary: punitive damages must have a rational basis in the record and bear a reasonable relationship to harm done or likely to result from the defendant's conduct. The jury also was instructed on the subjects of reprehensible conduct and consideration of mitigation (as by voluntary payments) and some comparison to other available sanctions.[385]

Finally, the district court observed that the situation was unlike *BMW*, in which the defendant potentially faced "overdeterrence" as a result of different plaintiffs seeking multiple punitive damages awards based on the same conduct.[386] Rather, in the present case, the mandatory punitive damages class prevented Exxon from being exposed to such multiple suits for punitive damages.[387]

Turning to the *BMW* guideposts, the district court first discussed Exxon's reprehensibility.[388] The court found that while Exxon's conduct was non-violent and unintentional, it nonetheless was highly reprehensible since Exxon officials "deliberately permit[ed] a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic crude oil," while knowing the effects that a major oil spill would have on Prince William Sound.[389] The court concluded:

> On the *BMW* hierarchy of reprehensibility, Exxon's conduct, while not reaching the top, falls just short. Its conduct was criminal. Exxon's decision to leave Captain Hazelwood in command of the *Exxon Valdez* demonstrated reckless disregard for the livelihood, health, and safety of the residents of Prince Wil-

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ages, were all focused upon the appropriate, relevant interests for which deterrence and punishment through punitive damages is permissible.").

382. *Id*. at 1053.
383. *Id*.
384. *Id*. at 1054.
385. *Id*. at 1053.
386. *Id*. at 1054.
387. *Id*.
388. *Id*.
389. *Id*. at 1055-56.

> liam Sound, the crew of the *Exxon Valdez*, and others. Exxon's conduct was highly reprehensible.[390]

Next, the district court analyzed the ratio guidepost, noting that under *BMW*, the compensatory side of the ratio included both the "actual harm to the victim and the harm that was likely to occur"—something the jury in the present case had been instructed to consider.[391] The district court concluded that the harm estimate *was not* limited to the compensatory damage award, but also included other recoveries.[392] By its own calculations, the district court found the total compensated harm to be $507 million.[393]

The court then took issue with what it called "the most troubling aspect" of the Ninth Circuit's decision: in applying *BMW's* ratio analysis, the Ninth Circuit stated that a court should subtract from the harm side the amount of voluntary payments made by a defendant, in order to encourage pretrial settlements.[394] The district court rejected this proposition, and found that the weight of judicial authority supported the opposite conclusion—that payments made prior to judgment are *included* when calculating the harm side of the ratio.[395] The district court found the Ninth Circuit's reasoning illogical and stated that discounting voluntary payments would reduce a defendant's risk of going to trial, thereby encouraging trials and *deterring* settlements.[396]

The district court contended that deducting voluntary payments from the harm was not appropriate in the present case because the jury had been given specific instructions to guide it in determining the appropriate amount of punitive damages.[397] Specifically, the court pointed out that the jury was instructed to consider mitigating factors, such as payments the defendant made to compensate victims and the cost of remedial measures.[398] The court noted that it must presume the jury understood and followed the instructions to the best of its ability, stating:

> Presumably the jury already considered whether and to what extent punitive damages would be mitigated based on voluntary payments by Exxon before judgment. Reducing actual harm . . . unfairly skews the ratio in Exxon's favor, and in effect gives Exxon double credit for voluntary payments by reducing both

390. *Id*. at 1057.
391. *Id*.
392. *Id*. at 1058-60.
393. *Id*. at 1060.
394. *Id*.
395. *Id*.
396. *Id*. at 1061.
397. *Id.*
398. *Id*.

> punitive damages and actual harm for purposes of the . . . ratio analysis. In this case, the court concludes that it should not discount actual harm by voluntary payments made by Exxon.[399]

The district court next pointed out that there was additional harm above the $507 million in compensated harm that should be included in the total harm figure and ratio analysis.[400] First, the court noted that Exxon's recklessness caused more than mere economic harm to the 32,677 claimants, who were not merely "deceived about the quality of the paint on a new car[,]" but whose lives were disrupted.[401] The court noted that the oil spill caused social conflict, cultural disruption, and psychological stress in the affected communities.[402] Second, the court noted that some plaintiffs, reinstated into the class action, had not yet had their damages determined, but that significant harm was likely.[403] Third, the court noted that it is impossible to calculate the *potential* harm that might have occurred if more oil had spilled.[404] The court stated:

> Because there is no way to quantify the non-economic, likely or potential harms discussed above, the appropriate approach is to proceed with the ratio calculation, but to accommodate the unknowns by allowing a higher ratio to pass muster . . . . In *BMW*, the Court observed that "[a] higher ratio may . . . be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine."[405]

Even without considering additional harm, however, the district court noted that the $5 billion punitive damages award, along with its $507 million compensated harm total, produces a harm-to-punitive ratio of 9.85 to one.[406] Such a ratio follows both Supreme Court and Ninth Circuit precedents.[407]

Subsequently, the district court responded to the Ninth Circuit's statement that *BMW's* ratio analysis helps avoid overdeterrence.[408] The Ninth Circuit's suggestion that economically optimum deterrence had already been achieved due to Exxon's casualty losses, cleanup expenses, fines, and settlement payments was re-

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399. *Id*.
400. *Id*. at 1062-64.
401. *Id*. at 1062.
402. *Id*.
403. *Id*. at 1062-63.
404. *Id*.
405. *Id*. at 1063.
406. *Id*.
407. *Id*.
408. *Id*. (citing *Exxon II,* 270 F.3d 1215, 1244 (9th Cir. 2001).

jected by the district court.[409] It viewed the appellate court's economic analysis as only "mak[ing] sense in the abstract or academic world[,]" and that "what it theoretically takes to deter a rational business person (cleanup costs, etc.), and what it takes to deter corporate officials given to reckless conduct are very different."[410]

The district court also considered the way in which Exxon's financial strength should factor into the ratio analysis.[411] The court noted that while "punitive damages are intended to punish and deter, they are not intended to be an economic death sentence."[412] The court, however, concluded that given Exxon's financial status, the $5 billion award would not be a death sentence and was necessary to deter Exxon from further continued recklessness in its transport of oil through Prince William Sound.[413] In concluding its ratio analysis, the court stated that a ten to one punitive damages ratio was justified under the circumstances of the case and that the $5 billion award did not excessively deter or excessively punish Exxon.[414]

Finally, the district court examined the case under *BMW's* comparable sanctions guidepost. The court noted that Exxon had been charged with five counts of violating federal criminal statutes, had pled guilty to three counts, and had paid a $25 million fine and $100 million in restitution.[415] The court stated, however, that since due process "fair notice" is the focus of the comparable sanctions analysis, the *potential* sanctions are the proper criteria to consider.[416] In this regard, the court noted that under each of the five federal criminal offenses, Exxon might have been fined "twice the gross [pecuniary] loss" occasioned by the spill, resulting in fines that could have exceeded the "jury's punitive damages award in this civil case."[417] The court also noted that federal law provides for imprisonment—"a recognized legislative signal of heightened seriousness of the offense."[418] The court concluded its comparable sanctions analysis by stating, "the court is well satisfied that Exxon was quite fairly on notice that its officers could face imprisonment and the company could face in excess of $5 billion in criminal and

409. *Id.* at 1064.
410. *Id*.
411. *Id*. at 1064-65.
412. *Id*. at 1065.
413. *Id*.
414. *Id*.
415. *Id*. at 1066.
416. *Id*.
417. *Id*. at 1066-67 (citing 18 U.S.C. § 3571(d) (2000)).
418. *Id*. at 1067 (citing 18 U.S.C. § 3551).

civil penalties for recklessly spilling crude oil into Prince William Sound."[419]

G. Appeal and Remand: Order for Reconsideration in Light of *State Farm v. Campbell*

Exxon, apparently unsatisfied with the $1 billion reduction of the $5 billion award, appealed the district court's decision.[420] The plaintiffs, at the district court's urging, cross-appealed, presumably seeking to have the original verdict reinstated or to obtain a smaller reduction.[421] On August 18, 2003, before the parties even submitted appellate briefs, the Ninth Circuit vacated the district court's judgment and remanded the case so that the district court could reconsider the $4 billion award in light of *State Farm*,[422] decided by the Supreme Court in April 2003.[423]

Exxon argued against a remand, pointing out that since a challenge to the district court's application of *State Farm* would require *de novo* review by the Ninth Circuit, a remand would be a waste of judicial resources.[424] The plaintiffs argued that the court should remand again so that the district court could apply the *State Farm* decision.[425] The plaintiffs also argued that since Exxon would likely make new arguments based on *State Farm*, a limited remand to the district court was appropriate.[426]

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419. *Id*.

420. While the plaintiffs' judgment continues to earn interest, Exxon long ago posted a $6.75-billion *supersedeas* bond to cover the judgment, so it has little to lose by seeking further reduction in the punitive damages award. *Id*. at 1050.

421. *See id*. at 1069 n.88 (stating: "[I]f Exxon chooses to take a further appeal for the purpose of seeking a more generous reduction of the jury's punitive damages award, then the court urges the plaintiffs to cross-appeal, for, if left to apply *BMW* without the requirement that it effect some reduction of the $5 billion punitive damages award, this court would have . . . denied Exxon any relief whatever.").

422. 123 S. Ct. 1513 (2003).

423. *See Exxon IV*, No. 03-35166, at 1 (9th Cir. Aug. 18, 2003) (Order).

424. Exxon's Letter Brief, *Exxon II*, 270 F.3d 1215 (9th Cir. 2001) (Nos. 03-35166, 03-35219).

425. Plaintiffs/Appellees-Cross-Appellants' Letter Brief Concerning Suggestion to Remand this Appeal to the District Court in Light of *State Farm* Decision at 1, *Exxon IV* (Nos. 03-35166, 03-35219).

426. *Id*. Exxon also argued that if the court decided to remand the case, the judgment of the district court should be vacated so that Exxon would not continue to incur the cost of the letter of credit it posted in order to stay execution of the judgment during its appeal. *Id*. Exxon explained that "[c]ontinuing to post that letter of credit costs Exxon approximately $19,750 per day or about $1.8 million per quarter." *Id*.

On August 26, 2003, after learning of the remand, the district court issued an order requesting that supplemental briefs from the parties "shall provide the court with such additional arguments based upon *State Farm* as the parties deem appropriate."[427] The district court's order also established the brief and oral argument schedule, which is slated to be completed before the end of 2003.[428]

It is unlikely that the district court's analysis of *State Farm* will compel it to reduce the $5 billion punitive damages award further than its previous $1 billion remittitur. As will be explained in Part V, *In re Exxon Valdez* does not raise the issues of extraterritoriality and multiple punishment—two problems paramount to the Supreme Court's conclusion that the punitive damage award was excessive in *State Farm*.[429]

Furthermore, in *State Farm*, the Supreme Court declined the opportunity to impose a bright-line formula that courts could apply when examining the ratio guidepost.[430] Since the district court concluded that the total compensated harm was $507 million, a $4 billion punitive damages award would result in only a "single-digit multiplier," which the *State Farm* Court stated is "more likely to comport with due process" than a double-digit ratio.[431] Although the *State Farm* Court stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outmost limit of the due process guarantee[,]" it was also careful to note that the punitive damages award "must be based upon the facts and circumstances" of the case and not on comparisons to ratios that were upheld in dissimilar cases.[432] While the *State Farm* plaintiffs consisted of one family, the *In re Exxon Valdez* plaintiffs number in the thousands. This fact is likely to persuade the district court that a higher single-digit ratio (such as eight to one or nine to one) is warranted in the case, even though the compensated damages were substantial.

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427. *Exxon V*, No. A89-0095-CV, at 2 (D. Alaska Aug. 26, 2003) (Order for Further Proceedings on Punitive Damages Award).

428. *Id*.

429. *See infra* Part V.A.1; *see also supra* notes 150-171 and accompanying text.

430. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S.Ct 1513, 1524 (2003).

431. *Id*.

432. *Id*.

V. *IN RE EXXON VALDEZ*: QUESTIONS RAISED (AND NOT RAISED) REGARDING DUE PROCESS EXCESSIVENESS REVIEW OF PUNITIVE DAMAGE AWARDS

A. Questions *Not* Raised in *In re Exxon Valdez*: Extraterritoriality and Multiple Punishment

When examining the Ninth Circuit and the district court decisions in *In re Exxon Valdez*, two important issues relating to due process excessiveness review are noticeably absent—extraterritoriality and the multiple punishment problem. These issues provided the Supreme Court with added justification to overturn punitive damages awards that it viewed as excessive in both *BMW* and *State Farm*.[433]

1. *Extraterritoriality*. According to the Supreme Court, both defendants in *BMW* and *State Farm* were improperly subjected to punitive damages awards that punished them for their company-wide policies conducted outside the jurisdiction of the respective state courts.[434] Unlike the defendants in *BMW* and *State Farm*, Exxon was not punished for extraterritorial conduct unrelated to its in-state conduct that caused specific harm to the plaintiffs.

BMW was premised in large part upon the Court's requirement that punitive damages only be awarded to vindicate "legitimate interests"—which did not include punishing BMW for its *lawful* out-of-state conduct.[435] *BMW* left open the question of whether a state can punish a defendant for *unlawful* out-of-state conduct.[436] In the interim between *BMW* and *State Farm*, two circuit courts addressed the issue and held that a defendant *may not* be punished for *unlawful* extraterritorial conduct.[437]

In *State Farm*, the Supreme Court followed suit and further curtailed the State's authority to impose punitive damages awards, by deciding that Utah may not punish State Farm for *unlawful* extraterritorial conduct.[438] The Court vacated the punitive damages award in large part because evidence was presented to the jury regarding unlawful acts committed by State Farm outside Utah that

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433. *See supra* Parts II.C., II.E.

434. *See* BMW of N. Am. v. Gore, 517 U.S. 559, 572-74 (1996); *State Farm*, 123 S. Ct. at 1522-23.

435. *BMW*, 517 U.S. at 568.

436. OLSON, *supra* note 39, at 22.

437. *See* White v. Ford Motor Co., 312 F.3d. 998 (9th Cir. 2002); Continental Trend Resources, Inc. v. OXY USA Inc., 101 F.3d 634 (10th Cir. 1996).

438. *State Farm*, 123 S. Ct. at 1522.

did not have a "nexus to the specific harm suffered by the plaintiff."[439] In other words, the Supreme Court found that extraterritorial evidence of a defendant's reprehensible acts that are unrelated to the harm done to a plaintiff "may not serve as the basis for punitive damages."[440] This decision further reduces the risk that a state will be able to punish a defendant for reprehensible acts committed outside of its jurisdiction through the imposition of punitive damages awards.

2. *The Multiple Punishment Problem*. A second evolving issue that was absent from *In re Exxon Valdez* is whether due process is violated when a defendant is subjected to multiple punitive damages awards because of "repeated imposition of punishment for the same act or course of conduct."[441] As the district court pointed out, the creation of a mandatory punitive damages class prevented Exxon from being subject to multiple punitive damages awards.[442]

A recent example of the multiple punishment problem surfaced in *State Farm*.[443] In addition to the fair notice and extraterritorial aspects of the due process right, *State Farm* raised the issue of whether—and at what point—a defendant's due process rights are violated when the party is subject to multiple punitive damages awards arising in different cases, but stemming from the same conduct.[444] That State Farm potentially faced multiple punitive damages awards for its fraudulent nationwide policies led the Court to place restrictions on the use of evidence of lawful and unlawful out-of-state conduct.[445] Specifically, the Court stated that such out-of-state conduct "must have a nexus to the specific harm suffered by the plaintiff."[446]

While it had been rejected by many courts, a due process right against multiple punitive damages awards was gaining ground even

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439. *Id*.

440. *Id*. at 1523.

441. OLSON, *supra* note 39, at 21.

442. *Exxon II*, 270 F.3d 1215, 1225 (9th Cir. 2001); *see generally* Laura J. Hines, *Obstacles to Determining Punitive Damages In Class Actions*, 36 WAKE FOREST L. REV. 889 (2001) (describing the procedural and substantive obstacles to resolving punitive damages in class actions, including cases utilizing mandatory classes).

443. *State Farm*, 123 S. Ct. at 1523; s*ee also supra* notes 157-160 and accompanying text.

444. *State Farm*, 123 S. Ct. at 1523.

445. *Id*. at 1522-23.

446. *Id*. at 1522.

prior to *State Farm*.[447] In 1997, Judge Posner, writing for the Seventh Circuit, noted that the Supreme Court's evolving due process excessiveness jurisprudence threatened the traditional view that multiple punitive damages awards do not violate due process.[448] Posner stated: "[I]t could be argued that a piling on of awards by different courts for the same act might result in excessive punishment for that act."[449] Some commentators have suggested that a constitutional prohibition on multiple punitive damages awards is a logical extension of *BMW*; since punitive damages may only be imposed to further a state's legitimate interests in punishment and deterrence and since previous punitive damages awards may already have vindicated those interests, a state may sometimes be barred from imposing any new punitive damages award.[450] At some point "the aggregate amount of multiple punitive awards may surpass a constitutional threshold."[451] *State Farm* clarifies that use of evidence of a defendant's out-of-state conduct is quite limited—a decision which should reduce the risk that a defendant will be subject to multiple punitive damages awards stemming from the same conduct.

B. Questions Raised Regarding Due Process Excessiveness Review

In re Exxon Valdez raises many questions regarding due process excessiveness review. This Article points to many of them when discussing the parties' arguments and the courts' decisions.[452] However, five other questions addressed below warrant more ex-

447. Thomas B. Colby, *Beyond The Multiple Punishment Problem: Punitive Damages As Punishment For Individual, Private Wrongs*, 87 MINN. L. REV. 583, 587 (2003) (noting that "numerous cases and articles have wrestled with the question of whether and in what circumstances a state may subject a defendant to multiple punitive damages awards for the same conduct"); *see also* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 48-50 (Tex. 1998) (providing a list of cases with dicta suggesting that multiple punitive damages awards for the same conduct is unconstitutional, when the total amount of punitive damages exceeds the amount necessary to achieve the state's legitimate interests in punishment and deterrence). *But see* Dunn v. Hovic, 1 F.3d 1371, 1385-86 (3d Cir. 1993) (providing a list of decisions holding that multiple punitive damages awards stemming from the same conduct are not unconstitutional).

448. *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 609 (7th Cir. 1997).

449. *Id.*; *see also* OLSON, *supra* note 39, at 21.

450. *See* Colby, *supra* note 447, at 651 n.257; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

451. *Owens-Corning*, 972 S.W.2d at 51.

452. *See supra* Parts II., IV.

tensive consideration. The first three of these questions suggest a need for critical examination of the effects of the Supreme Court's due process excessiveness jurisprudence. The final two questions raise issues that are likely to lead to further evolution of that jurisprudence.

1. *Do BMW's Guideposts Lead to Uniformity*? The *BMW* guideposts offer flexibility by allowing courts to determine whether or not a given punitive damages award is excessive through a case-by-case consideration of factual circumstances.[453] In theory, this approach balances the reviewing court's goal of vindicating the state's legitimate interests in punishment and deterrence with the goal of imposing a punitive damages award that does not violate the defendant's due process right to fair notice. Since each case is unique, a wide range of punitive damages awards will be upheld. The Supreme Court, in rejecting strict mathematical formulas and favoring flexibility, appears comfortable with the disparity in the sizes and ratios of punitive damages that lower courts have upheld in different cases. It is not the outcome of different cases that should be uniform, but rather the excessiveness review itself, which the Supreme Court attempted to provide when articulating the *BMW* guideposts.[454]

In re Exxon Valdez raises the question of whether the flexible guideposts afford so much discretion that they undermine the goal of uniformity. Both the district court and the Ninth Circuit applied the *BMW* guideposts to the same case.[455] The results of those excessiveness inquiries however, were far different: the Ninth Circuit concluded that the $5 billion punitive damages award was so excessive that it violated Exxon's due process right to fair notice; the district court concluded that the award was not excessive, but rather fully justified and not in violation of any constitutional right.[456] This Article has provided a detailed description of the reasoning behind each court's excessiveness inquiry in order to show that application of *BMW's* guideposts can lead to opposite conclusions.[457]

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453. *See supra* notes 90-91 and accompanying text.

454. Mark A. Klugheit, *"Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 825 (2002) ("The three *BMW* guideposts were, undoubtedly, an attempt to bring order, objectivity and some predictability to awards of punitive damages . . . by providing standards for judicial review.").

455. *Exxon II*, 270 F.3d 1215, 1239-40 (9th Cir. 2001); *Exxon III*, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002).

456. *Exxon II*, 270 F.3d at 1242, 1246-47; *Exxon III*, 236 F. Supp. 2d at 1068.

457. *See supra* Parts IV.D.–IV.E.

In re Exxon Valdez's striking lack of uniformity in the application of the *BMW* guideposts is partially resolved by the *de novo* standard of review dictated by the Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*[458] Thus, the Ninth Circuit's excessiveness review trumps the district court's. However, while *Cooper* avoids a judicial impasse, it does nothing to resolve the underlying uniformity problem: courts may still reach vastly different damages determinations from the same factual circumstances.

In a dissenting opinion in *BMW*, Justice Scalia stated:

> [T]he 'guideposts' mark a road to nowhere . . . . The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.'[459]

As Justice Scalia implied, the broad question of whether or not a punishment is fair is a subjective consideration. The *BMW* guideposts—especially the ratio and comparable sanctions guideposts—offer a modest degree of mandatory objectivity for the specific question of whether an award is so excessive that it deprives the defendant of the due process right to fair notice.[460] Since application of the guideposts is flexible, however, the initial subjective consideration of fairness may erode what little objectivity is offered by the guideposts. Some commentators suggest that the *BMW* guideposts have provided at least a measure of uniformity and objectivity by giving courts guidance where none previously existed.[461] Others, however, have concluded that *BMW* has not resulted in greater objectivity or precision.[462] One commentator stated:

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458. 532 U.S. 424, 436 (2001) (stating a *de novo* standard of review is proper when reviewing a district court's determination of the constitutionality of a punitive damages award).

459. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 605-06 (1996) (Scalia, J., dissenting).

460. *See* Jonathan Gross & Jeffrey D. Hayes, *What Punitive Damages Message is the U.S. Supreme Court Sending?*, 69 DEF. COUNS. J. 447, 450 (2002) (describing *BMW's* reprehensibility guidepost and suggesting a strategy for defense counsel: "There is no objective test for reprehensibility. Instead, it is a subjective conclusion, and good rhetorical skills can influence the outcome of this decision. In addition, a punitive damages defendant should make a record at trial of any mitigating factors that later can be argued on appeal. An example comes from the *Exxon Valdez* case.").

461. Turner, *supra* note 55, at 449 (stating that *BMW* "instilled a modicum of order into the previous chaos").

462. Klugheit, *supra* note 454, at 826.

> Since the Supreme Court has not offered its own guidance on how its three *BMW* factors . . . are to be applied, it is these state and federal decisions arising out of post-*BMW* remands that illustrate the consequences of *BMW* for the real world . . . [which] remain, much as before, replete with opportunity for inconsistency, irrationality, and uncertainty.[463]

While the guideposts may not lead to uniformity and objectivity, they at least focus a court's due process excessiveness review. In addition, each due process excessiveness case that reaches the Supreme Court offers a fresh opportunity for the court to further refine the *BMW* analysis and provide further parameters for lower courts. The Court's recent decision in *State Farm* illustrates that the due process jurisprudence is not static. Future appellate and Supreme Court decisions will likely continue to refine *BMW's* guideposts and add to the due process excessiveness inquiry in a way that increases uniformity. Increased guidance, however, comes at a price. As Justice Ginsburg noted in her *State Farm* dissent, the flexible guideposts prescribed in *BMW* have been swiftly converted into instructions that resemble "marching orders."[464] Increasing guidance erodes the respect and restraint usually accorded to the states' determinations regarding punitive damages.[465]

2. *Is De Novo Review Appropriate*? In *Cooper*, the Supreme Court resolved a circuit split concerning whether the abuse of discretion or the *de novo* standard should be applied when an appellate court reviews a district court's determination of the constitutionality of a punitive damages award.[466] The *Cooper* Court held that the *de novo* standard should be applied.[467] The Court justified its holding by stating that "[c]onsiderations of institutional competence fail to tip the balance in favor of deferential appellate review."[468] The Court stated that district courts only have an advantage over courts of appeals when examining *BMW's* reprehensibility guidepost, "and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor."[469] The Court then stated that both trial and appellate

463. *Id*. at 832.

464. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1531 (2003) (Ginsburg, J., dissenting).

465. *Id*.

466. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431 (2001).

467. *Id*. at 436.

468. *Id*. at 440.

469. *Id*.

courts are equally capable of analyzing *BMW*'s ratio guidepost.[470] Finally, the Court concluded that the appellate courts were better suited to analyze the comparable sanctions guidepost, since it calls for broad legal comparisons.[471]

In re Exxon Valdez offers a striking example of a district court and an appellate court reaching far different conclusions after analyzing the *BMW* guideposts. Each court conducted its analysis utilizing different underlying premises regarding the guideposts themselves. In other words, the application of the guideposts was not uniform. Perhaps more importantly, even when the separate inquiries were alike, the courts reached opposite conclusions regarding the constitutionality of the punitive damages award.

In re Exxon Valdez raises the question of whether a *de novo* review is appropriate. If the appellate courts have superior competence to conduct an excessiveness inquiry based on *BMW's* guideposts—as the Court implicitly held in *Cooper*—one should be able to point to specific aspects of the two excessiveness inquiries of *In re Exxon Valdez* in order to show that superiority. First, where did the district court's analysis fall short? Second, how did the appellate court provide a more insightful analysis of *BMW*'s guideposts? Although the differences in the courts' respective inquiries can readily be pointed out—as this Article has done—it is more difficult to find reasons why considerations of institutional competence favor the appellate court by looking at *In re Exxon Valdez*.

If the excessiveness review in a given case hinges on the reprehensibility guidepost, perhaps the district court's excessiveness inquiry should be given greater deference than the *de novo* standard provides. After all, the *Cooper* Court stated that reprehensibility was best analyzed by the district court. Arguably, reprehensibility was the most important guidepost in *In re Exxon Valdez*. If institutional competence favors letting the district court decide, why should *de novo* review supplant the *more competent* analysis of the district court with the *less competent* analysis of the appellate court?

As previously discussed, the excessiveness inquiry is necessarily somewhat arbitrary and subjective due to the flexibility inherent in the guideposts themselves. *De novo* review, however, should do more than substitute the appellate court's analysis of the *BMW* guideposts for that of the district court. If *de novo* review is the appropriate standard, one should be able to see how it facilitates a more insightful and accurate assessment of the constitutionality of

470. *Id*.
471. *Id*.

a given punitive damages award. When examining the excessiveness inquiries conducted in *In re Exxon Valdez*, it is unclear whether *de novo* review achieved these aims. On the other hand, over time *de novo* review may offer the advantage of more consistent application of the *BMW* guideposts, especially as the requirements and limitations of the due process excessiveness inquiry are further refined.[472]

3. *Does Excessiveness Review Needlessly Undermine the Role of the Jury*? *De novo* review provides a greater check on the jury's determination of punitive damages awards (and the trial court's subsequent review of the award) than the abuse of discretion standard.[473] When adopting *de novo* review, the *Cooper* Court addressed concerns that *de novo* review infringes on the Seventh Amendment right to a jury trial.[474] The *Cooper* Court reasoned that the jury's determination of the appropriate amount of punitive damages is not a finding of fact, which would implicate the Seventh Amendment's Reexamination Clause.[475] Specifically, the Court stated that "[a] jury's assessment of [compensatory damages] is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."[476] In addition, the Court stated that as the types of compensatory damages available have increased, punitive damages have come to serve "a more purely punitive (and therefore less factual)" purpose.[477] The *Cooper* Court also stated that determination of the amount necessary to achieve deterrence is not a pure question of fact since the jury may legitimately have broader concerns than simply economically optimum deterrence.[478]

Justice Ginsburg, the lone dissenter in *Cooper*, argued that only the abuse of discretion standard should be applied since the "jury's verdict on punitive damages is fundamentally dependent on

472. *But see* Lisa M. White, *A Wrong Turn on the Road to Tort Reform: The Supreme Court's Adoption of De Novo Review in* Cooper Industries v. Leatherman Tool Group, Inc., 68 BROOK. L. REV. 885, 921-23 (2003) (concluding that *de novo* review will not provide different results than the abuse of discretion standard and stating that the abuse of discretion standard is sufficiently rigorous to scrutinize excessive punitive damages awards).

473. *See Cooper*, 532 U.S. at 436.

474. *Id.* at 437; *see also* U.S. CONST. amend. VII.

475. *Cooper*, 532 U.S. at 437; *see also Leading Cases*, 115 HARV. L. REV. 306, 359 (2001).

476. *Cooper*, 532 U.S. at 432.

477. *Id*. at 438 n.11.

478. *Id*. at 439.

determinations we characterize as factfindings."[479] Justice Ginsburg pointed out that the determination of a punitive damages award is no less factual than a determination of non-economic compensatory awards such as pain and suffering: "Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding . . . it seems to me the other should be so regarded as well."[480] The factual bases underlying a punitive damages award include "the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, [and] whether the defendant behaved negligently, recklessly, or maliciously."[481]

The *Cooper* Court enumerated the following factors that the jury had been instructed to consider: (1) the character of the defendant's conduct; (2) the defendant's motive; (3) the amount necessary to achieve specific and general deterrence; and (4) the defendant's income and assets.[482] The Court then stated that, "Although the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings."[483]

In re Exxon Valdez raises the question of the extent of the jury's role in determining punitive damages and whether that role has been needlessly undermined by an excessiveness inquiry conducted under the *de novo* standard of review. If the jury made specific findings of fact in applying these instructions when determining the amount of punitive damages, is it proper for a reviewing court to disregard those factual findings? As the district court pointed out, the *In re Exxon Valdez* jury was given explicit instructions regarding the factors they were to consider, which presciently mirrored *BMW's* guideposts.[484] Specifically, the district court charged the jury that: (1) the purposes of a punitive damages award are punishment and deterrence; (2) it could not arbitrarily set the amount of the award; (3) the award must have a rational basis in the record; (4) the award must bear a reasonable relationship to the harm done or be likely to result from the defendant's conduct;

479. *Id*. at 446 (Ginsburg, J., dissenting).
480. *Id*. at 446-47 (Ginsburg, J., dissenting) (internal citations omitted).
481. *Id*. at 446.
482. *Id*. at 439 n.12.
483. *Id*. (citations omitted).
484. *Exxon III*, 236 F. Supp. 2d 1043, 1053 (D. Alaska 2002).

(5) the award should reflect the reprehensibility of the defendant's conduct; and (6) it could consider whether prior payments and sanctions mitigated that reprehensibility.[485]

If a jury is instructed in a manner that incorporates *BMW's* guideposts, query whether its punitive damages award—arguably based on a series of factual determinations—should be disregarded as long as it is not a result that "no reasonable juror" would reach. For example, if the jury is informed about *BMW's* "hierarchy of reprehensibility" and the range of punitive-to-harm ratios that have been upheld in similar cases, and it is provided with a laundry list of the sanctions available for comparable conduct, does it make sense to disregard the jury's final determination of the appropriate level of punitive damages, which are based on these underlying factual determinations?

Although writing long before the *BMW* guideposts were articulated, Justice O'Connor, in her dissenting opinion in *Haslip*, criticized the broad discretion given to juries, stating that "[w]hile I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously."[486] On the other hand, at least one observer has concluded that additional jury instructions will fail to produce fewer excessive punitive damages awards since jurors often have difficulty with their instructions.[487]

Perhaps the distinction between *procedural* and *substantive* due process rights helps resolve this issue. As one scholar explained, "Procedural due process requires that there be safeguards such as instructions to the jury to guide their discretion, and judicial review to assure the reasonableness of the awards. Substantive due process prevents excessive punitive damages awards, regardless of the procedures followed."[488] While the instructions the district court gave to the *In re Exxon Valdez* jury may have fully protected Exxon's *procedural* due process rights, they still may have failed to protect Exxon's *substantive* due process right against excessive punitive damages awards.

Nonetheless, it is difficult to see why a defendant's substantive due process right cannot be protected when the district court reviews the jury award under the "no reasonable juror" standard, or

485. *Id*.

486. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1990) (O'Connor, J., dissenting).

487. Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 190 (2002).

488. *See* CHEMERINSKY, *supra* note 11, at 420.

if necessary, when an appellate court applies an abuse of discretion standard when reviewing the district court's excessiveness inquiry. A constitutionally excessive punitive damages award should not survive these reviews.[489] The higher *de novo* standard may needlessly allow an appellate court to substitute its own factually based determination of the appropriate amount of punitive damages for that of the jury.

Some commentators have suggested the more radical solution of splitting the responsibilities over punitive damage determinations between the judge and the jury.[490] Under one proposal the jury would have the duty to make the underlying factual determinations, including the appropriateness of punitive damages, the level of reprehensibility of the defendant's conduct, and the relative wealth of the defendant.[491] The trial judge would then determine the amount of punitive damages necessary to achieve punishment and deterrence, while ensuring that the award is not constitutionally excessive—a determination that is a question of law.[492] The jury's factual determinations would be afforded deference under the abuse of discretion standard, while the judge's award would be subject to *de novo* review.[493]

Further evolution of the due process excessiveness jurisprudence may resolve issues regarding the proper role of the jury in determining punitive damages awards. Even if the current framework has the consequence of taking punitive damages award determinations away from the jury due to fearful trial judges who simply order remittiturs rather than face *de novo* review, the present Supreme Court is unlikely to reverse its holding in *Cooper*.

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489. Of course, *Cooper* proves the opposite by showing that at least some punitive damages awards will survive the abuse of discretion review and fail the *de novo* review. The Ninth Circuit initially upheld the punitive damage under an abuse of discretion review, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431 (2001), and subsequently reduced the award under a *de novo* review after the Supreme Court remanded the case to the circuit court to apply the heightened standard, Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1152 (9th Cir. 2002). *See supra* notes 114-122 and accompanying text.

490. Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 470-71 (2002) (providing an historical summary of punitive damages and the relative power of the judge and jury in awarding them); *see also* Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179 (1998) (arguing that the power to set punitive damages in federal court should rest with trial judges, subject to appellate review, rather than with juries).

491. Litwiller, *supra* note 490, at 470-71.

492. *Id*. at 470.

493. *Id*. at 471.

Subsequent decisions, however, may create additional jury instruction requirements and may refine how a well-instructed jury's determination should be reviewed. Finally, the more radical proposal discussed above is not inconceivable; purely factual findings could be reserved for the jury, while judges could be given exclusive authority to determine the amount of punitive damages awards.[494]

4. *Is the Defendant's Wealth A Relevant Consideration*? As previously discussed, the *BMW* Court articulated three guideposts to be considered when a court determines whether a punitive damages award is constitutionally excessive: (1) reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm; and (3) comparison to other sanctions.[495] However, neither *BMW*, *Cooper*, nor *State Farm* states that these are the only guideposts that can be considered.

In re Exxon Valdez raises the question of whether additional guideposts can or should be considered when courts conduct their excessiveness inquiries. Most notably, *In re Exxon Valdez* asks whether the jury can consider the wealth of the defendant. In addition, the case raises the closely related question of whether courts should consider the wealth of the defendant when reviewing the jury's punitive damages award to determine whether it is so excessive that it violates the defendant's substantive due process rights.

Most courts allow the jury to consider the defendant's wealth when it determines the amount of punitive damages.[496] Evidence regarding a defendant's wealth is introduced to prove whether the defendant has sufficient financial resources to pay a large award and to show whether such an award is necessary to punish and deter the defendant.[497] Some observers have argued that permitting juries to consider wealth is unwise, irrational, and unconstitutional since a defendant should be punished for the harm in question, and not simply for being wealthy.[498] Critics of evidence relating to a de-

494. Indeed, the Fourth Circuit Court of Appeals now directs district court judges to perform a more stringent review upon a motion for remittitur of punitive damages awards by independently assessing how much a defendant should be punished when the award rests on a policy judgment as opposed to a factual determination. Atlas Food Sys. & Serv. v. Crane Nat'l Vendors, Inc. 99 F.3d 587, 594-95 (4th Cir. 1996).

495. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575-85 (1996).

496. *See* Klugheit, *supra* note 454, at 839.

497. *Id*.

498. Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. LEGAL STUD. 415, 423 (1989) ("Punishment based on the characteristics of the actor, rather than on spe-

fendant's wealth also argue that no greater deterrence is needed for more wealthy defendants since both wealthy and poor defendants conduct the same cost-benefit analysis when determining whether or not to engage in an activity, and the threat of liability will equally deter both.[499] On the other hand, those in favor of allowing juries to consider the wealth of a defendant argue that it is necessary "to assure that a punitive damages award is sufficient to punish the defendant and deter future wrongful conduct."[500]

In *Pacific Mutual Life Insurance Co. v. Haslip,* the Supreme Court upheld the guideposts used by the Alabama Supreme Court to review a jury's punitive damages award, one of which was "the 'financial position' of the defendant."[501] In *TXO Production Corp. v. Alliance Resource Corp.,* the Supreme Court upheld the jury's award of punitive damages after the trial court had instructed the jury that it could consider the wealth of the defendant as a factor when determining the amount of punitive damages.[502] The Court noted that the defendant had failed to properly raise the issue of whether the jury instruction regarding the defendant's wealth violated due process.[503] In dicta, the Court stated that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations."[504] The *TXO* Court, however, also reiterated its position from *Haslip* that the wealth of the defendant is a factor that can be taken into account when assessing punitive damages.[505]

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cific misconduct, threatens fundamental notions of freedom from government constraint.").

499. *See* Schwartz, *supra* note 27, at 1022-23; *see also* Polinsky & Shavell, *supra* note 91, at 911 (stating that the wealth of corporate defendants should never be a factor in assessing punitive damages and should only rarely be a factor with individual defendants).

500. Michael J. Pepek, TXO v. Alliance: *Due Process Limits and Introducing a Defendant's Wealth When Determining Punitive Damages Awards*, 25 PAC. L.J. 1191, 1224 (1994).

501. 499 U.S. 1, 22 (1990).

502. 509 U.S. 443, 466 (1993). For an overview of the *TXO* decision, *see supra* notes 47-49 and accompanying text.

503. *TXO Prod. Corp.*, 509 U.S. at 464.

504. *Id*. Others have stated that "consideration of the wealth of large corporations may only aggravate the problems with jury decisionmaking . . . ." Klugheit, *supra* note 454, at 840.

505. *TXO Prod. Corp.*, 509 U.S. at 464. In a dissenting opinion, Justice O'Connor accepted that "the defendant's wealth is a permissible consideration" for the jury, but warned that "courts must have authority to recognize the special danger of bias that such considerations create." *Id*. at 492 (O'Connor, J., dissenting).

The *BMW* Court chose not to articulate the defendant's wealth as one of its excessiveness guideposts, even though the *Haslip* Court upheld an excessiveness inquiry that included the defendant's wealth as a factor.[506] Instead, the *BMW* Court focused on the substantive due process right which "dictate[s] 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 a State may impose."[507] BMW's wealth was simply not a factor the Court considered when it sought to determine whether the large punitive damage award had violated the substantive due process right of fair notice. Specifically, the Court stated that "the fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice."[508]

In *State Farm*, the Supreme Court rejected the Utah Supreme Court's use of State Farm's wealth as a justification for the large punitive damages award.[509] While the Court *did not* reject the jury's use of the defendant's wealth when determining the punitive damages award and *did not* expressly state that the defendant's wealth has no place in a due process excessiveness inquiry, the Court reiterated its position from *BMW,* stating that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."[510]

Some district courts have seized upon the omission of the defendant's wealth from *BMW's* guideposts and have concluded that evidence of a defendant's wealth cannot be offered at trial.[511] These courts erroneously fail to distinguish between use of the defendant's wealth as a consideration in the assessment of punitive damages, and use of the defendant's wealth as a guidepost in determining whether a punitive damages award is so excessive that it violates due process. Since the Supreme Court has not prohibited either of these uses of a defendant's wealth, prohibiting such evidence at trial seems wildly premature absent applicable legislation or a decision by a higher court.

It is fully consistent to allow evidence of a defendant's wealth to be used by the jury when it determines the amount of punitive

506. *See* Klugheit, *supra* note 454, at 840 (stating that *BMW* gives "defendants at least some basis to argue that their wealth should not be considered at all by the jury in assessing punitive damages").

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

508. *Id*. at 585.

509. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1525 (2003).

510. *Id*.

511. *See, e.g.,* Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation).

damages, yet prohibit reviewing courts from using the same evidence as a guidepost when conducting an excessiveness review. Evidence of the defendant's wealth is relevant as the jury determines the amount necessary to punish and deter a particular defendant. A court conducting an excessiveness review, however, must protect the defendant's substantive due process right to fair notice and should not be overly concerned with the amount necessary to punish and deter. If the reviewing court concludes that the defendant did not have fair notice of the punishment that could be imposed for the conduct that harmed the plaintiff, the court must reduce the punitive damages award. Neither the wealth of the defendant, nor the likelihood that a reduced amount would insufficiently punish and deter the defendant should change this outcome. The constitutional maximum punitive damages award in a given case is based on fair notice, not on notions of what is necessary to punish and deter the defendant.

5. *Should a Defendant's Expenses Mitigate the Amount of Punitive Damages?* While *BMW*'s guideposts have served to focus the excessiveness inquiry now required to protect the defendant's substantive due process right to fair notice, the lack of guidance provided to lower courts on how to apply the guideposts has created conflicts, as the following example demonstrates. One of the biggest sources of disagreement between the Ninth Circuit and the district court concerned how Exxon's various spill-related expenditures should affect analysis of the *BMW* guideposts and the extent to which these expenditures should mitigate the amount of the punitive damages award.

The Ninth Circuit contended that the spill-related expenditures should be factored into the *BMW* excessiveness inquiry and should serve to discount the amount of punitive damages. When the Ninth Circuit analyzed the case under *BMW*'s reprehensibility guidepost, it stated that Exxon's pre-trial payments mitigated the reprehensibility of its conduct.[512] The court stated that "[r]eprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior."[513] When examining the ratio guidepost, the Ninth Circuit stated that these pre-trial payments should not be used as part of the harm estimate for purposes of calculating the ratio "because that would deter settlements prior to judgment."[514] The Ninth Circuit also reasoned that the

512. *Exxon II*, 270 F.3d 1215, 1242-43 (9th Cir. 2001).
513. *Id*. at 1242.
514. *Id*. at 1244.

cleanup costs, casualty losses, fines, settlements, and compensatory judgments "should be considered part of the deterrent already imposed" for the spill under the ratio guidepost in order to avoid over-deterrence.[515]

The district court rejected the Ninth Circuit's approach and concluded that Exxon's spill-related expenditures should not mitigate the amount of the punitive damages award.[516] Specifically, the district court stated that payments made prior to judgment should be *included* when calculating the harm side of the ratio.[517] The district court stated that the Ninth Circuit's approach would actually encourage trials and deter settlements.[518] In addition, the district court contended that since the jury had already been permitted to use Exxon's spill-related expenditures to mitigate its calculation of the amount of the punitive damages award, a reviewing court conducting an excessiveness inquiry should not deduct those expenditures a second time in the ratio analysis.[519]

Since one of the purposes of punitive damages is deterrence, it is clearly relevant for a jury to consider the amounts a defendant has paid as a result of its harmful conduct when determining the appropriate amount of an award. However, the extent to which a reviewing court conducting an excessiveness inquiry should use pre-trial expenditures to reduce the level of reprehensibility of the defendant's conduct and to reduce the harm side of the ratio analysis is a more difficult assessment. The purpose of the excessiveness inquiry is to determine whether the punitive damages award is so excessive that it violates the defendant's substantive due process right to fair notice. *BMW*'s guideposts exist to help determine whether a defendant had fair notice of the punishment that could be imposed for the conduct that harmed the plaintiff. Under the guideposts, when a defendant's conduct is highly reprehensible, when the difference between the harm and the punitive damages award is small, and when comparable sanctions could have been imposed for the conduct, a reviewing court should conclude that the defendant's right to fair notice has not been violated.

Considerations of whether the punitive damages award has resulted in economically optimum deterrence or whether the combination of pre-trial expenditures and the punitive damages award have resulted in over-deterrence are distinct from the fair notice excessiveness inquiry required by *BMW* and its progeny. A court

515. *Id*.
516. *Exxon III*, 236 F. Supp. 2d 1043, 1060 (D. Alaska 2002).
517. *Id*.
518. *Id*. at 1061.
519. *Id*.

conducting such a review should not be overly concerned with whether the jury has determined the precise amount necessary to deter the defendant's conduct. Since punishment is an equal goal of punitive damages, a reviewing court should not focus exclusively on saving a defendant from over-deterrence, for, as the *Cooper* Court pointed out, society's interest in punishment and deterrence may override its interest in economic efficiency.[520]

The difficulty is that in order to determine the fair notice issue, a reviewing court must assess the reprehensibility of the defendant's conduct and calculate the harm that the conduct caused. Ignoring subsequent remedial measures taken by a defendant does not provide a complete picture of the defendant's reprehensibility. A defendant who takes prompt measures to reduce the harm caused by its conduct is clearly less reprehensible than a defendant who does nothing. Similarly, the calculation of the harm caused by the defendant's conduct as required under the ratio analysis necessarily involves including some harms and excluding others.

The *In re Exxon Valdez* jury was instructed that it could decide whether Exxon's spill-related expenditures properly mitigated the need for punishment and deterrence. In other words, the jury was allowed to use these expenditures to offset its determination of the appropriate amount of the punitive damages award. Under these circumstances, a court conducting an excessiveness review to determine the fair notice issue should not use the expenditures to reduce the defendant's liability for punitive damages under *BMW*'s guideposts, since the jury already had a chance to do so. While *BMW*'s guideposts themselves add difficulty, a reviewing court should attempt to focus on the fair notice issue to the extent possible and should avoid simply substituting its own subjective notion of the amount necessary to punish and deter the defendant for that of the jury. Under the current due process excessiveness jurisprudence, as long as the defendant had fair notice, the award cannot be deemed unconstitutional, even if the reviewing court concludes that the award may result in over-deterrence.

VI. CONCLUSION

In re Exxon Valdez provides an opportunity to examine application of the Supreme Court's recent decisions regarding the substantive due process right against excessive punitive damages awards. Procedurally, the case has progressed during a period of rapidly evolving due process excessiveness jurisprudence. The case

520. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 439-40 (2001).

raises several questions regarding the effects of that jurisprudence and points to problematic issues which may lead to further evolution.

As troublesome aspects of due process excessiveness review reach the Supreme Court, the Court will undoubtedly continue to provide additional guidance regarding *BMW*'s guideposts and the manner in which they are to be analyzed. Further guidance, however, is likely to erode the authority of the states to determine the allowable scope of punitive damages, to decrease deference appellate courts give to trial courts, and to diminish the role of the jury. The perceived benefits of the excessiveness inquiry—uniformity and predictability—have not yet materialized. While the Supreme Court has succeeded in prescribing a uniform analysis for determining whether a punitive damages award is constitutionally excessive, the practical application—as illustrated by *In re Exxon Valdez*—has proved problematic. Whether evolution of the due process excessiveness jurisprudence will clear up these problems, or whether the Supreme Court, in its determination to rein in punitive damages awards, will create additional problems through further guidance, remains to be seen.