

# THE *EXXON VALDEZ* CASE AND REGULARIZING PUNISHMENT

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## ABSTRACT

*In this Article, the Author discusses the implications of the Supreme Court's recent decision in Exxon Shipping Co. v. Baker for the Court's ongoing punitive damages jurisprudence, as well as for the Constitution's regulation of punishment more generally. The Exxon decision reveals that, notwithstanding modern rhetoric decrying supposedly "skyrocketing" punitive damages awards, the Court is troubled by the common law system of awarding punitive damages not so much because of the size of awards it allows as because of such awards' perceived unpredictability. From this insight, the Author argues that the Court's concerns about large punitive damage awards are therefore essentially procedural, not substantive, in nature. That is, the Court's current concerns over punitive damages mirror criticisms levied a generation ago against systems of criminal sentencing that generated vast and unjustified disparities in punishment. The constitutional imperative, now as then, is to regularize punishment. But that is all, the Author contends, that the Constitution really requires: once legislatures step into the breach and set to regulating punitive damages, the Court should*

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One further note of explanation concerning my involvement in the *Exxon* case: Because I believe deeply in the plaintiffs' cause, it would be easy for me to use this forum to pen a jeremiad criticizing all that I think was wrong or unfair concerning the Court's resolution of the case—particularly the Court's ultimate judgment that there was nothing unusually reprehensible about Exxon's conduct. But I have decided not to do that. Rather, I seek to *understand* the Court's decision on its own terms. My hope is that elucidating the Court's reasoning will provide legislatures, organizations, and citizens interested in preserving the availability of stiff punitive damages in appropriate future cases with an understanding of how to go about doing that.

*defer to legislatures' policy goals and chosen means of effectuating them. In particular, if a legislature decides to give its democratic imprimatur to large punitive awards, the Court should accede to such determinations in the same way it regularly accedes to legislative determinations dictating exceptionally severe criminal punishment.*

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## INTRODUCTION

At last, we arrive at the root of the problem.

We have known for roughly two decades that the Supreme Court is troubled by the modern, common-law system of awarding punitive damages.<sup>1</sup> After grumbling about increasingly large punitive awards in the late 1980s and early 1990s, the Court has invoked the Due Process Clause in four cases over the past twelve years to strike down a series of

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1. By "common-law system of punitive damages," I mean the system under which juries may award punitive damages in tort cases in order to punish and deter certain kinds of reprehensible behavior and face no statutory constraints with respect to the amount they may award. *See infra* notes 26–30.

multi-million dollar awards.<sup>2</sup> But the Court has been rather imprecise about what exactly is problematic about the common-law system for awarding punitive damages. At times, the Court has described unconstitutional awards as “grossly excessive,”<sup>3</sup> or disproportionate, with respect to the defendant’s conduct.<sup>4</sup> At others, it has derided punitive awards as “arbitrary”<sup>5</sup> and faulted the “imprecise” and “discretion[ary]” manner<sup>6</sup> in which they were administered.<sup>7</sup> In other words, the Court has vacillated concerning the basic issue of whether the problem plaguing the common-law system of awarding punitive damages is substantive or procedural in nature (or some combination of both).

The stakes of this conceptualization are high. If the problem with the modern system of awarding punitive damages is a substantive one, then the Court’s holdings mean that the Due Process Clause in any given case flatly forbids a jury from imposing punitive damages above a given level—apparently some low-level multiple of the underlying compensatory damages—no matter how much notice the defendant received that a bigger award was possible or how fair the trial was. But if the problem with the modern system of awarding punitive damages is essentially a procedural one, then the Court’s holdings mean that legislatures and courts could allow punitive damages far in excess of low-single-digit ratios so long as the governing law provides fair notice, the court gives clear jury instructions, and related rules of fair play are followed.

The Supreme Court’s decision to review the \$5 billion punitive damages award arising from the notorious *Exxon Valdez* oil spill—reduced to \$2.5 billion by the Ninth Circuit—offered the prospect that the Court would finally pin down the conceptual basis for exerting serious appellate review over punitive damages. Exxon’s challenge to the award, which was roughly five times the plaintiffs’ compensatory recoveries, was largely substantive in nature.<sup>8</sup> And the trial in the case

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2. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW v. Gore*, 517 U.S. 559 (1996).

3. *State Farm*, 538 U.S. at 417; *Cooper*, 532 U.S. at 434; *BMW*, 517 U.S. at 574.

4. *Cooper*, 532 U.S. at 434; *BMW*, 517 U.S. at 575.

5. *Philip Morris*, 549 U.S. at 351; *State Farm*, 538 U.S. at 416.

6. *State Farm*, 538 U.S. at 417.

7. *Philip Morris*, 549 U.S. at 352; *State Farm*, 538 U.S. at 416.

8. One of Exxon’s arguments—that the jury was inappropriately allowed to consider its wealth—was procedural in character. See Brief for Petitioner at 55–56, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (No. 07-219). But the Court ultimately declined to address the argument. See generally *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

had been managed to avoid various procedural pitfalls: the trial court created a “mandatory punitive damages class” to avoid the prospect of double punishment; the trial court made sure that the jury did not hear any evidence concerning Exxon’s actions in other jurisdictions or respecting anyone besides the plaintiff class; and the trial court gave the jury “unusually detailed” instructions to guide the jury’s discretion in calibrating any punitive award to what it determined to be the nature of Exxon’s wrongdoing.<sup>9</sup> Finally, there was reason to expect a clear theoretical explication from the Supreme Court because the case was grounded in maritime law—a form of federal common law. This legal framework rendered the Supreme Court more free than in purely constitutional cases arising from state-court judgments to reveal and to implement its own policy preferences concerning “the desirability of regulating [punitive damages] as a common law remedy.”<sup>10</sup>

The result in *Exxon* seems to reinforce the prevailing view that the Court’s punitive damages jurisprudence has a robust substantive component.<sup>11</sup> The Court reduced the award from roughly \$2.5 billion to \$500 million, or from a five-to-one ratio to compensatory damages to a one-to-one ratio.<sup>12</sup> The business bar already is propounding the decision as a substantive decision, suggesting that the Constitution limits punitive awards to a one-to-one ratio of compensatory damages, at least when such damages are substantial and the conduct giving rise to the award is something short of extraordinarily reprehensible.<sup>13</sup>

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9. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1080–82 (D. Alaska 2004).

10. *Exxon Shipping*, 128 S. Ct. at 2626–27.

11. For examples of scholarly pieces before *Exxon* claiming that this jurisprudence was substantive in nature, see Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1056–57 (2004); Samuel Issacharoff & Catherine Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1426 (2006) (asserting that “*Gore* and *Campbell* have effectuated a substantive rather than merely procedural revision of punitive damages law”); Cass R. Sunstein, et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2087 (1998); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 118–19, 127–28 (2005).

12. *Exxon Shipping*, 128 S. Ct. 2605.

13. See David T. Leitch, *Is There a Constitution in (the) House?*, 12 GREEN BAG 2d 23, 33 (2008); Lester Sotsky & Daniel J. Stewart, *Punitives Post-Exxon*, NAT’L L.J., Sept. 29, 2008, at 12; Lewis Goldshore & Marsha Wolf, *The Mother of All Oil Spills*, 193 N.J. L.J., 510, No. 7, Index 473 (Aug. 18, 2008) (quoting Robin Conrad, executive vice president of National Chamber Litigation Center, as interpreting *Exxon* as “[l]imiting punitive damages to no more than the amount of [a] compensatory award”); 2 Robert L. Haig, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42:66.70 (2d ed. 2008); 4 Andrew L. Frey et al., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42:66.70 (2d ed. 2008). Just three months after *Exxon* was handed down, the American Tort Reform Association and the Chamber of Commerce filed an amicus brief in the U.S. Supreme Court, asking the Court explicitly to hold that the Constitution imposes a one-to-one

The Court's opinion, however, reveals that its concerns with punitive awards are far less substantive than the result would suggest. "The real problem," the Court said, "is the stark unpredictability of punitive awards."<sup>14</sup> The "spread between high and low individual awards," the Court continued, "is unacceptable."<sup>15</sup> So in the absence of any statutory framework governing the size of maritime punitive awards, the Court felt entitled to establish a presumptive cap on awards that was just above the average amount awarded by juries in tort cases involving similar misconduct.<sup>16</sup>

The Court's emphasis on unpredictability—rather than its dramatic one-to-one remedy—finally reveals the Court's true source of unease with the modern system of awarding punitive damages. In a nutshell, this Article contends, the Court perceives the common-law system of imposing civil punishment as mirroring two historically erratic systems of imposing criminal punishment. The Court expressly referred to one such system: the sentencing system for noncapital felonies that prevailed in federal courts before the advent of the Federal Sentencing Guidelines.<sup>17</sup> Under that system, judges had unfettered discretion to choose sentences within enormous ranges.<sup>18</sup> Judges, as a functional matter, could follow any theory of punishment they desired, and they could rely on any factors they wished in selecting sentences.<sup>19</sup> Consequently, a defendant who came up for sentencing had "no way of knowing or reliably predicting whether he [would] walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between."<sup>20</sup>

The second system—unmentioned by the Court, but seemingly equally if not more salient—is the system of capital punishment that existed in the states prior to the Supreme Court's decision in *Furman v.*

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ratio in cases involving "very large compensatory damages and questionable reprehensibility." Brief for American Tort Reform Ass'n et al. as Amici Curiae Supporting Petitioners at 14, *NiSource, Inc. v. Estate of Garrison G. Tawney*, 129 S. Ct. 626 (2008) (No. 08-219), 2008 WL 4325538. At least one lower court already has accepted this argument. See *Jurinko v. Medical Protective Co.*, No. 06-3519, 2008 WL 5378011 (3d Cir. Dec. 24, 2008).

14. *Exxon Shipping*, 128 S. Ct. at 2625.

15. *Id.*

16. *Id.* at 2634.

17. *Id.* at 2626–28.

18. *Id.* at 2628 (noting that under the "indeterminate" federal system, judges had "relatively unguided discretion to sentence within a wide range," and "similarly situated offenders were sentenced [to], and did actually serve, widely disparate sentences").

19. *Id.*

20. MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 6 (1972).

*Georgia*.<sup>21</sup> Under that system, every defendant convicted of murder or another capital offense was subject to the death penalty. Yet state law gave juries no rules or even guidance toward determining which offenders should be sentenced to death. As a result, capital punishment was arbitrarily imposed on an unlucky—rather than a necessarily more reprehensible—slice of the class of eligible offenders.<sup>22</sup>

The Court's treating the common law system of awarding punitive damages as equivalent to unstructured systems of imposing criminal punishment reveals that its recent invocation of due process principles to invalidate punitive awards is, at once, quite unremarkable and quite dramatic. It is unremarkable in the sense that it is boilerplate constitutional law that punishment may not be imposed arbitrarily. That, indeed, is the essence of the rule of law. It animates foundational due process principles such as the void-for-vagueness doctrine.<sup>23</sup> Furthermore, unpredictability is an infirmity that is easily addressed (at least in the sense of reducing unpredictability to a constitutionally acceptable level). For example, following Frankel's critique of the federal sentencing system and the Court's decision in *Furman*, legislatures stepped in to regularize criminal punishment in those realms. The result, a generation later, is a body of constitutional law in which the Supreme Court defers almost completely to legislative and administrative bodies concerning the permissible length of prison sentences and even as to when capital punishment may be imposed. There is no reason to believe that punitive damages law could not follow a similar path.

At the same time, the Court's suggestion that any system of punishment that produces erratic results violates the Due Process Clause is dramatic—even radical—in that it elevates the importance of legislation to a new and fairly extraordinary level. The Court historically has allowed states and the federal government to determine levels of punishment according to common law, relying within its elastic boundaries on individualized judgments of judges and juries. But now, even systems of punishment with deep common-law traditions of regulating discretion at a relatively high level are subject to constitutional challenge to the extent that they generate apparently unjustified disparities. The Court now reads the Due Process Clause, in short, to require policymaking bodies to regularize, through positive law, not just the presence but also the *amount* of punishment—and to give their democratic imprimatur to any regime allowing unusually harsh penalties.

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21. 408 U.S. 238 (1972).

22. *Id.* at 309–10 (Stewart, J., concurring).

23. *See, e.g.,* *Kolendar v. Lawson*, 461 U.S. 352, 358 (1983).

The four parts of this article that follow explore the implications of this new brand of due process. More specifically, the Article lays out the implications of bringing punitive damages jurisprudence expressly into line with the regularization principle that exists in criminal sentencing law. The Article also describes the potential significance of doing the reverse—that is, applying the regularization principle as it already exists in punitive damages law to certain criminal sentencing systems to which the Supreme Court has not yet turned its attention.

Part I quickly traces the arc of the Court's recent punitive damages jurisprudence, from the Court's refusal to protect defendants from "excessive" punishment under the Eighth Amendment, to its development of the current due process framework for reviewing punitive awards. Part II unpacks the analysis and holding of the *Exxon* case. Part III compares this analysis to the criminal sentencing reform movement and to the *Furman* revolution, describing how the same basic procedural concern animates each: a motivation to regularize punishment.

Part IV is the meat of the article. It ponders the largely unexamined doctrinal consequences of the Court's sharpened focus on regularizing punishment in punitive damages cases.<sup>24</sup> It does so in relatively broad brush strokes, providing more a schematic for legal and doctrinal development than a prolonged consideration of any particular theoretical detail.

Section A deals with the future of the Court's punitive damages jurisprudence. It explains, first, how the Court's insistence that punishment be regularized puts a premium on legislative involvement in authorizing and regulating punitive damages. Second, this section posits that once legislatures take responsibility for punitive damages, they have discretion to pursue a diverse array of goals through such damages. For example, a legislature could choose—as the plaintiffs

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24. No recent articles of which I am aware argue, as I do here, that the Court's punitive damages jurisprudence should be understood exclusively in terms of a check on arbitrariness. One piece published last year argues, as I do here, that criminal sentencing law should be expressly applied to punitive damages awards, granting increased deference to punitive awards when legislatures have expressly allowed the amount at issue. See Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN L. REV. 109 (2008). But Professor Romero believes that legislatively authorized levels of punitive awards should merely "assist courts in the proportionality analysis" of such awards, *id.* at 119–20, whereas I contend that such limits should render substantive judicial analysis virtually nonexistent. Furthermore, Professor Romero approaches the question of proportionality solely from the perspective of retribution, *see id.* at 120–24, whereas I consider whether a state may pursue interests other than retribution in allowing punitive damages. See *infra* notes 159–163 and accompanying text.

unsuccessfully argued in the absence of legislation in *Exxon*—to allow enhanced punitive damages as quasi-compensation when necessary to force a defendant to internalize the full impact of its wrongdoing. Third, this section emphasizes that Congress and state legislatures have more leeway than one might think to statutorily authorize stiff punitive damage awards. In particular, they have discretion to allow punitive damages far exceeding a one-to-one ratio to compensatory damages, even in cases involving substantial damages.

Section B turns the tables and quickly sketches the potential impact of the Court's insistence on regularization on certain states' criminal sentencing systems. While many such systems contain sufficient positive law to satisfy the Court's concerns regarding predictability, some systems (perhaps a majority) still grant juries and judges expansive and virtually unregulated discretion to calibrate noncapital prison sentences. Outlier sentences imposed under these unstructured systems appear now to be susceptible to due process challenges.

## I. LEGAL ORIGINS OF, AND MODERN RESTRICTIONS ON, PUNITIVE DAMAGES

### A. Background

For centuries, juries have been allowed to impose punitive damages in tort cases.<sup>25</sup> Though the precise purposes of such damages have varied somewhat over the years, modern courts generally agree that the predominant purposes of such damages are to punish and deter reprehensible behavior.<sup>26</sup>

Under the common-law method of assessing punitive damages, a jury need not abide by any particular numerical limitations in setting the amount of such an award. As the Supreme Court has put it, the jury is simply "instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct."<sup>27</sup> With this generalized guidance, the jury is largely free, "as the voice of the community," to decide how much money the defendant should be forced to pay to the plaintiff.<sup>28</sup> The defendant has a right to appeal, but review is limited to whether the

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25. See generally *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (recounting this history in the courts of upholding punitive damages judgments).

26. See, e.g., *BMW v. Gore*, 517 U.S. 559, 568 (1996).

27. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991).

28. *BMW*, 517 U.S. at 600 (Scalia, J., dissenting); see also *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than that . . . it is the peculiar function of the jury to determine the amount [of punitive damages]"); *Day*, 54 U.S. at 371 (task of determining proper amount traditionally left to jury).

jury abused its discretion or acted with passion or prejudice—a test that might sound meaningful but that itself is discretionary and is generally perceived as being quite weak.<sup>29</sup>

Twenty-one states—mainly in recent times—have established monetary caps on punitive damages or limits on the ratio a punitive award may bear to compensatory damages.<sup>30</sup> Numerous federal statutory causes of action that allow for punitive damages limit them in a like manner.<sup>31</sup> But the majority of states still impose no limit at all,<sup>32</sup> as do the majority of federal statutes, such as the frequently invoked 42 U.S.C. § 1983.<sup>33</sup>

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29. See, e.g., *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433–35 (2001) (abuse of discretion); *Haslip*, 499 U.S. at 15 (appellate review for “reasonable[ness]”); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1121–22 (10th Cir. 2004) (“passion” or “prejudice”).

30. See *Cooper*, 532 U.S. at 433 n.6; *BMW*, 517 U.S. at 614–16 (Ginsburg, J., dissenting) (collecting such statutes).

31. See, e.g., 6 U.S.C. § 1142 (2006) (whistleblower protection for public transportation employees, limited to \$250,000); 7 U.S.C. § 18 (2006) (violation of law governing commodity brokers; limited to two times actual damages); *id.* (violations of Commodities Exchange Act, limited to twice actual loss); 7 U.S.C. § 21 (2006) (violation of law governing futures exchanges, limited to two times actual damages); *id.* (registered commodities futures association, limited to twice actual loss); 7 U.S.C. § 25 (2006) (violations of Commodities Futures Trading Act, limited to twice actual loss); *id.* (violation of law governing commodity exchanges, limited to two times actual damages); 15 U.S.C. § 1691e (2006) (equal credit opportunity, limited to \$10,000 or 1% of net worth); 42 U.S.C. § 1981a (2006) (intentional employment discrimination, limited to \$50,000 to \$300,000, depending on size of employer); 49 U.S.C. § 20109 (2006) (whistleblower actions related to rail transportation, limited to \$250,000); 49 U.S.C. § 31105 (2006) (retaliation for actions related to motor vehicle safety, limited to \$250,000).

32. See Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1339–46 (2005).

33. See *Smith v. Wade*, 461 U.S. 30 (1983) (holding that punitive damages are available under 42 U.S.C. § 1983). For a selection of other federal statutes allowing punitive damages, see 11 U.S.C. § 303 (2006) (bad faith filing of bankruptcy petition); 11 U.S.C. § 362 (2006) (willful breach of automatic stay in bankruptcy); 11 U.S.C. § 363 (2006) (bid-rigging by purchasers from bankruptcy estate); 12 U.S.C. § 3417 (2006) (breach of financial privacy by government agency); 15 U.S.C. § 78u (2006) (wrongful disclosure of financial information by SEC); 15 U.S.C. § 298 (2006) (frivolous suit by jewelry trade association); 15 U.S.C. § 1116 (2006) (wrongful seizure under the trademark act); 15 U.S.C. § 1679g (2006) (violations by credit repair agencies); 15 U.S.C. § 1681n (2006) (unauthorized disclosure of consumer credit reports); 15 U.S.C. § 1691e (unauthorized disclosure by government agency of consumer credit reports); 17 U.S.C. § 1322 (2006) (wrongful injunction for copyright violation); 18 U.S.C. § 248 (2006) (interference with access to reproductive health clinics); 18 U.S.C. § 2252A (2006) (child pornography); 18 U.S.C. § 2520 (2006) (wiretapping); 18 U.S.C. § 2707 (2006) (unauthorized disclosure of electronic communications information); 18 U.S.C. § 2710 (2006) (wrongful disclosure of video tape rental or sale records); 18 U.S.C. § 2724 (2006) (unauthorized release of information from state motor vehicle records); 20 U.S.C. § 1095a (2006) (discharge or discipline of employee

## B. The Supreme Court's Development of Restrictions on Punitive Awards

Starting in the 1980s, the business bar undertook a concerted effort to curtail the effects of this system, particularly its ability to generate multimillion dollar awards. The bar's first line of attack wielded the Eighth Amendment, which provides that "excessive fines" shall not be imposed, "nor cruel and unusual punishments inflicted."<sup>34</sup> When the matter reached the Supreme Court, the defendant in a state antitrust action, *Browning-Farris Industries v. Kelco Disposal, Inc.*, urged the Court to hold that the Eighth Amendment applied to punitive damages, thereby prohibiting any award the Court deemed excessive.<sup>35</sup> The Court rejected the argument, holding that the Eighth Amendment applies only to state-imposed punishment, not to cases between private parties.<sup>36</sup>

At the same time, the Court reserved the question whether the Due Process Clause might sometimes prohibit punitive damages above certain levels by "act[ing] as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit."<sup>37</sup> In a concurrence, Justice Brennan (joined by Justice Marshall) explained why due process might well impose such a restriction:

Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, . . . you may take

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whose salary is garnished); 25 U.S.C. § 305e (2006) (misrepresentation of Indian-produced goods); 26 U.S.C. § 7431 (2006) (unauthorized inspection of tax return information); 31 U.S.C. § 3720D (2006) (discharge of employee whose wages are garnished to satisfy U.S. claim); 33 U.S.C. § 1514 (2006) (violation of regulations of deepwater ports, U.S. suit only); 39 U.S.C. § 3018 (2006) (mailing hazardous materials, US suit only); 42 U.S.C. § 300aa-23 (2006) (liability of vaccine manufacturers); 42 U.S.C. § 669a (2006) (improper disclosure of financial information); 42 U.S.C. § 3613 (2006) (discriminatory housing practice); 47 U.S.C. § 338 (2006) (protection of privacy by satellite carrier); 47 U.S.C. § 551 (2006) (protection of cable subscriber privacy); 49 U.S.C. § 507 (2006) (transportation enforcement, actions by Attorney General only); 49 U.S.C. § 5122 (2006) (hazmat transportation, actions by Attorney General only); 49 U.S.C. § 60120 (2006) (pipeline safety, actions by Attorney General only).

34. U.S. CONST. amend. VIII.

35. See *Browning-Farris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275–76 (1989).

36. *Id.*

37. *Id.* at 276–77.

into account the character of the defendants, their financial standing, and the nature of their acts." Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Wolff v. McDonnell*, 418 U.S. 539 (1974), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.<sup>38</sup>

The Court took up this subject in earnest, and ushered in its modern punitive damages jurisprudence, in *BMW v. Gore*.<sup>39</sup> There, an Alabama jury, employing the common-law method of imposing punitive damages, imposed a punitive award of \$2 million on the automobile manufacturer for failing to disclose that a car had been damaged and repainted prior to sale.<sup>40</sup> The \$2 million sum was about 500 times the amount of the underlying harm.<sup>41</sup> Declaring that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose," the Court held that the jury's award was "grossly excessive."<sup>42</sup>

There is obvious tension in this language. The Court's emphasis on "fair notice" is purely procedural. It suggests that if the Alabama Legislature had passed a law prior to the case establishing that any egregious instance of failure to disclose warranted punitive damages of \$2 million or 500 times the underlying harm, then the award would have satisfied due process. On the other hand, the Court's characterization of the award as "grossly excessive" in light of the absence of aggravating factors typically associated with particularly reprehensible conduct is a substantive criticism. It suggests that no amount of fair notice would have allowed the jury to impose such a large punitive award.

The Court also drew comparisons between the jury's award and

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38. *Id.* at 281.

39. 517 U.S. 559 (1996).

40. *Id.* at 599.

41. *Id.* at 583.

42. *Id.* at 574–75.

penalties that the Alabama Legislature had established for similar misconduct. But like other components of its analysis, this comparison was not clearly procedural or substantive. A punitive award's imbalance compared to penalties for similar conduct might show that if the defendant lacked fair notice it could face an award this large. Alternatively, such an imbalance could support a finding that an award is too big in absolute terms.

The Court's decision seven years later, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>43</sup> led most courts and commentators to conclude that the Supreme Court's concerns with punitive damages are substantive in nature. In *State Farm*, the Court confronted a \$145 million punitive verdict that a Utah jury imposed in conjunction with a \$1 million compensatory award for emotional distress a couple suffered while worrying that their insurance company would not cover a claim against them. The Court held that the punitive award was unsustainable.<sup>44</sup> Speaking well beyond the facts of that case, the Court further suggested that at least when compensatory damages are "substantial," then only a low ratio of punitive damages to compensatory damages—perhaps only one-to-one—can satisfy the Due Process Clause.<sup>45</sup> The Court described this rule as imposing a "substantive constitutional limitation[]" on punitive damages.<sup>46</sup>

Still, to the extent that the *State Farm* Court offered justifications for advancing this purportedly substantive rule, it offered *procedural* critiques of Utah's system of awarding punitive damages. The Court emphasized that defendants deserve "fair notice . . . of the severity of punishment that a state may impose"; that juries presented with marginally relevant and inflammatory evidence, as well as "vague instructions" are unable to behave rationally; and, more generally, that "defendants subjected to punitive damages in civil cases [are not] accorded the protections applicable in a criminal proceeding."<sup>47</sup> None of these problems, as a theoretical matter, is insurmountable. Each can be fixed in a way that still leaves tortfeasors and other defendants exposed to large punitive awards.

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43. 538 U.S. 408 (2003).

44. *Id.*

45. *Id.* at 425.

46. *Id.* at 416.

47. *Id.* at 417–18.

## II. THE EXXON CASE

On March 23, 1989, the supertanker *Exxon Valdez* departed Port Valdez, Alaska, loaded with 53 million gallons of crude oil.<sup>48</sup> Captain Joseph Hazelwood, the master of the vessel and a relapsed alcoholic, had spent the day at waterfront bars drinking with crew members.<sup>49</sup> He had consumed between five and nine double vodkas (between fifteen and twenty-seven ounces of 80-proof alcohol),<sup>50</sup> and his blood alcohol level stood at about .241.<sup>51</sup> He was “so drunk that a non-alcoholic would have passed out,”<sup>52</sup> and he faced night voyage through the “icy and treacherous waters of Prince William Sound.”<sup>53</sup>

While passing through the Sound’s commercial fishing waters, which sustained the regional economy and provided a subsistence lifestyle to thousands of Alaska Natives, Hazelwood steered the vessel away from some ice and toward Bligh Reef, a “known and foreseen hazard.”<sup>54</sup> With the reef only minutes away, Hazelwood abandoned the bridge and went down to his cabin.<sup>55</sup> He left control to the third mate—who was “fatigued” on his second consecutive watch—with “vague” orders concerning the “tricky” turn necessary to avoid the approaching reef.<sup>56</sup> With the third mate unable to perform both his own job and Hazelwood’s, the supertanker struck the reef. Eleven million gallons of the vessel’s toxic cargo gushed into the Sound, causing the “most notorious oil spill in recent times”<sup>57</sup> and the “largest oil spill and greatest environmental disaster in American history.”<sup>58</sup>

Thousands of plaintiffs filed suit against Exxon, seeking compensatory and punitive damages under maritime tort law. Eventually, at Exxon’s request, the district court established a mandatory punitive damages class of some 32,000 individuals and businesses, ensuring that any punitive award the jury imposed would be the one and only such award Exxon would have to pay.<sup>59</sup> The district

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48. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1077 (D. Alaska 2004).

49. *In re the Exxon Valdez*, 270 F.3d 1215, 1223 (9th Cir. 2000).

50. *Id.*

51. *In re the Exxon Valdez*, Order No. 265, 1995 WL 527989, at \*5 (D. Alaska Jan. 27, 1995).

52. *In re Exxon Valdez*, 270 F.3d at 1236.

53. *Id.* at 1238.

54. *Id.* at 1222.

55. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2612 (2008).

56. *In re Exxon Valdez*, 270 F.3d at 1223, 1236.

57. *United States v. Locke*, 529 U.S. 89, 96 (2000).

58. *In re the Exxon Valdez*, Order No. 265, 1995 WL 527989, at \*4 (D. Alaska Jan. 27, 1995).

59. *Exxon Valdez*, 270 F.3d at 1225; *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1078 (D. Alaska 2004).

court instructed the jury at trial—consistent with the principles the Supreme Court would later establish in *BMW* and *State Farm*—that it should calibrate any punitive award to the degree of Exxon’s reprehensibility and that it should bear a reasonable relationship to the plaintiffs’ compensatory damages, which totaled roughly \$500 million.<sup>60</sup> The instructions, however, did not require the jury to make any finding beyond corporate recklessness in order to impose punitive damages.<sup>61</sup> Nor did they require the jury to find any particular degree of fault or anything else in order to impose punitive damages at any particular level.<sup>62</sup>

The evidence at trial showed that Exxon, like the rest of the industry, had long known that any spill in Prince William Sound would be catastrophic because the region cradles an extremely valuable fishing industry and is home to thousands of Alaska Natives who engage in a subsistence lifestyle.<sup>63</sup> At the same time, the Sound is quite remote, and Exxon knew that it and other relevant authorities lacked enough clean-up equipment to react to a major spill.<sup>64</sup> The plaintiffs further presented extensive evidence that, notwithstanding having all of this general knowledge, Exxon’s upper management had been aware for years before the spill that Hazelwood had been drinking aboard their ships and had declined to do anything to stop it.<sup>65</sup> Exxon’s executives may have declined to intervene in part because an alcoholic culture pervaded Exxon Shipping Company, or perhaps they simply decided to ignore the risk that Hazelwood presented. In any case, the jury agreed with the plaintiffs that Exxon had acted recklessly<sup>66</sup> and returned a punitive verdict for \$5 billion.<sup>67</sup> The Ninth Circuit later cut the award in half to

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60. At the time of trial, the parties entered into a stipulation agreeing that the amount of compensable harm caused by the spill was between \$432 million and \$768 million. Eventually, the district court quantified the figure at \$513 million. *In re Exxon Valdez*, 490 F.3d 1066, 1089 (9th Cir. 2007). Further refinements and settlements reduced the final figure to \$507.5 million. This figure includes not just compensatory damages recovered at trial, but also payments Exxon made to compensate fisherman after the spill and various settlement payments made to other plaintiffs.

61. See *In re the Exxon Valdez*, Order No. 265, 1995 WL 527989, at \*2 (D. Alaska Jan. 27, 2995).

62. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2614 n.2 (2008). The instructions did, however, give the jury guidance for assessing Exxon’s degree of fault. See *infra* note 157 and accompanying text.

63. Brief for Respondents at 4, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (No. 07–219), 2008 WL 194284.

64. *Id.*

65. *In re Exxon Valdez*, 296 F.Supp.2d 1071, 1077 (D. Alaska 2004).

66. *In re the Exxon Valdez*, Order No. 265, 1995 WL 527989, at \*5 (D. Alaska Jan. 27, 2995).

67. *In re Exxon Valdez*, 296 F.Supp.2d at 1082.

\$2.5 billion.<sup>68</sup>

The Supreme Court granted review to assess, among other things, the legality of the award's size.<sup>69</sup> Because the case was grounded in maritime law, a species of federal common law, the Court claimed the ability to assess the \$2.5 billion award not simply through the lens of defining "the outer limit allowed by due process," but through the quasi-legislative lens of considering public policy—namely, "the desirability of regulating [punitive damages] as a common law remedy."<sup>70</sup> Still, the Court wove much of its constitutional jurisprudence into its analysis. Indeed, the best reading of the Court's opinion is that it saw this case as an occasion to sharpen its critique of the common law system of awarding punitive damages, rather than to develop any new kind of approach to reviewing such awards.<sup>71</sup> The opinion therefore gives especially valuable insight into the Court's motivation for its current regulation of punitive damages.

The Court began by explaining that the problem with the modern common law system for imposing punitive damages is *not* that awards are generally too large or too frequently awarded.<sup>72</sup> Citing various empirical studies, the Court noted that the median ratio of punitive to compensatory damages (about 0.65 to 1) has remained relatively constant over the past several decades.<sup>73</sup> The Court further found no marked increase over the past several decades in the percentage of cases with punitive awards.<sup>74</sup>

"The real problem," the Court concluded, "is the stark unpredictability of punitive awards."<sup>75</sup> The Court cited data indicating that the common law system produces occasional "outlier cases [that] subject defendants to punitive damages that dwarf corresponding compensatories."<sup>76</sup> The data troubled the Court because nothing suggested to it that the outlier cases correspond to particularly egregious behavior.<sup>77</sup> Rather, the Court's intuition was that cases with "strikingly similar facts" were sometimes producing vastly different results.<sup>78</sup>

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68. See *In re Exxon Valdez*, 490 F.3d at 1073.

69. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2609 (2008).

70. *Id.* at 2626–27.

71. Perhaps the best evidence for this statement is the Court's footnote at the end of the opinion that it "may well" have reached exactly the same conclusion as a matter of due process. *Id.* at 2634 n.28.

72. *Id.* at 2624–25.

73. *Id.* at 2625 n.14.

74. *Id.* at 2624.

75. *Id.* at 2625.

76. *Id.*

77. *Id.* at 2625–26.

78. *Id.* at 2626.

Unpredictability is fundamentally a procedural complaint. As the Court put it,

Courts of law are concerned with fairness as consistency . . . . Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.<sup>79</sup>

Having armed itself with a charge to regularize punitive awards, all that was left was to enforce that mandate here. In the Court's view, Exxon's conduct did not involve any "earmarks of exceptional blameworthiness" because it was not intentional or malicious. Nor was it "driven primarily by a desire for gain."<sup>80</sup> Accordingly, the Court held that the award should not exceed the median level of punitive awards by any significant degree.<sup>81</sup> It settled on a 1:1 ratio as a "fair upper limit" for maritime cases lacking elements of exceptional blameworthiness.<sup>82</sup> This analysis resulted in the Court reducing the plaintiffs' punitive award to just over \$500 million.<sup>83</sup>

### III. COMPARING PUNITIVE DAMAGES TO CRIMINAL SENTENCING

Some commentators have complained that the Supreme Court's punitive damages jurisprudence is "markedly inconsistent" with criminal sentencing law.<sup>84</sup> The Court's *Exxon* analysis, however, parallels the critique and solutions of two criminal sentencing reforms: (1) the movement toward determinate sentencing for noncapital offenses, culminating most famously in the Federal Sentencing Guidelines; and (2) the judicial imposition of requirements for guiding juries' determinations of which murderers are selected for capital punishment. Although the Court referenced the first in passing, it did

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79. *Id.* at 2625–27.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 2634.

84. Chemerinsky, *supra* note 11, at 1051 (arguing that the Court has been "markedly inconsistent both in terms of substantive limits and procedural requirements for these types of penalties"); see also Rachel A. Van Cleave, *Mapping Proportionality Review: Still a "Road to Nowhere,"* 43 TULSA L. REV. 709, 723 (2008); James Headley, *Proportionality Between Crimes, Offenses, and Punishments*, 17 ST. THOMAS L. REV. 247, 247–48 (2004).

not even mention the second. But it may well be that the second is the more revealing analogy.

### A. Sentencing Guidelines

Prior to the enactment of the Sentencing Reform Act of 1984, federal law did not impose any constraints on judges' sentencing power, with the exception of establishing (very high) maximum punishments. Defendants convicted of felonies, therefore, frequently found themselves subjected to sentences anywhere from zero to twenty years, or even life, in prison. Judges could impose any length of punishment for virtually any reason, and appellate review was essentially unavailable.

The most influential critique of this system came in 1972 from Marvin Frankel, at the time a federal district judge. He considered "the almost wholly unchecked and sweeping powers" judges had in the fashioning of sentences to be "terrifying and intolerable for a society that professes devotion to the rule of law."<sup>85</sup> Judge Frankel argued that allowing judges to select any length of sentence, without legislative guidance for "locating a particular case within any range," was "prima facie at war with . . . equality, objectivity, and consistency in the law."<sup>86</sup> In the absence of legislators at least "sketch[ing] democratically determined" purposes of sentencing and "rudimentary" guidelines for exercising sentencing discretion, Judge Frankel contended that the federal sentencing system violated the Due Process Clause.<sup>87</sup>

The Supreme Court never had occasion to consider any direct due process challenge to the discretion-laden federal sentencing system. In 1987, Congress obviated the need to do so, enacting the Federal Sentencing Guidelines to address the problem Judge Frankel identified. But one would hardly have known that the Court did not expressly require Congress to revamp the federal sentencing system by reading the *Exxon* opinion; the Supreme Court proceeded effectively as though the Due Process Clause had required the creation of the Guidelines.

The Court began by asserting that the current common-law method of assessing punitive damages closely resembles the pre-Guidelines state of affairs respecting criminal sentencing, except that juries assessing punitive damages typically lack even statutory maximums.<sup>88</sup> That reality, in the Court's view, rendered the common-law method of

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85. FRANKEL, *supra* note 20, at 5. For a collection and summary of similar critiques and studies, see 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.3(b) (3d ed. 2007-08).

86. FRANKEL, *supra* note 20, at 10.

87. *Id.* at 7-8.

88. *See Exxon Shipping*, 128 S. Ct. at 2627-28.

assessing punitive damages intolerable.<sup>89</sup> In the absence of any positive law regulating maritime punitive damages,<sup>90</sup> the Court did exactly what Congress in the Sentencing Reform Act directed the United States Sentencing Commission to do: it aggregated data regarding the actual punishment typically imposed for a class of conduct, and it insisted that all typical cases be punished in the middle of that range.<sup>91</sup>

To be sure, the Court did not expressly hold that the Due Process Clause, as opposed to maritime law, forbids all “outlier” punitive awards imposed under the common law system.<sup>92</sup> But the Court expressly built on its due process holdings in *BMW* and *State Farm*.<sup>93</sup> It found it “instructive” that the federal government and many states, over the past twenty-five years, had replaced their practices of giving judges “relatively unguided discretion to sentence within a wide range” with systems that guide and confine judicial discretion within fairly narrow ranges.<sup>94</sup> It also extolled the Federal Sentencing Guidelines for their role in “reduc[ing] unjustified disparities in criminal sentencing” and for “reach[ing] toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.”<sup>95</sup> It was as if Congress’s creation of the guidelines (around the time several other states took similar steps) formed a sort of mini “constitutional moment,” in which the nation rethought criminal sentencing and concluded that unjustified disparities were simply intolerable.<sup>96</sup>

The implication seems inescapable: the Court’s punitive damages

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89. *See id.* at 2627 (“[T]his feature of happenstance is in the tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries. . . .”).

90. The Court’s strained survey of other statutes allowing punitive damages and other kinds of punitive fines illuminated the oft-disrespected “comparable penalties” guidepost it established in *BMW*. *Compare* *BMW v. Gore*, 517 U.S. 559, 583–84 (1996) with *In re Exxon Valdez* 490 F.3d 1066, 1094–95 (2007) (questioning purpose and importance of guidepost). The Court through that guidepost had been looking not just for a point of comparison for the amount of punishment at issue; it had been groping for some positive legislative enactment to inform its analysis.

91. *See Exxon Shipping Co.*, 128 S. Ct. at 2629. Justices Stevens and Ginsburg dissented because they thought it was unwise for the Court to take this legislative-style approach. They would have restricted their review, in the absence of any positive law on the subject, to whether the award amounted to an abuse of discretion. *See Exxon Shipping*, 128 S. Ct. at 2635–36 (Stevens, J., concurring in part and dissenting in part); *id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part).

92. *Exxon Shipping*, 128 S. Ct. at 2610.

93. *See id.* at 2622, 2625–26.

94. *Id.* at 2628.

95. *Id.* at 2627 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

96. *See* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (setting forth theory of “constitutional moments”).

jurisprudence in general (not just within the realm of maritime law) is aimed at superimposing some minimum level of law on what the Court perceives to be an unjustifiably lawless system. Even assuming that the Court would not feel free to impose quite as strict limits on unstructured state systems as the federal maritime system,<sup>97</sup> the same reasoning infuses both lines of cases. The Due Process Clause—indeed, the rule of law itself—requires civil as well as criminal punishment to be regularized.<sup>98</sup>

This conclusion might seem odd in light of the fact that Justice Breyer, an architect of the Federal Sentencing Guidelines and the Court's chief defender of the Guidelines, dissented from the result in *Exxon*. But Justice Breyer's dissent actually confirms the Court's orientation. Justice Breyer accepted the majority's premise that, as he put it, "there is a need, grounded in the rule of law itself, to assure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished and that will help to assure the uniform treatment of similarly situated persons."<sup>99</sup> He simply disagreed on how to apply that premise. In contrast to the majority, Justice Breyer thought that Exxon's conduct was *not* a "mine-run case of reckless behavior."<sup>100</sup> Thus, in the parlance of the Guidelines, he thought that the lower courts were warranted in allowing an "upward departure" in the case.<sup>101</sup>

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97. This seems to be a safe assumption. The Court described its maritime analysis in *Exxon* as "more rigorous" than its constitutional jurisprudence. 128 S. Ct. at 2629.

98. The Court struck a similar theme (though less explicitly) in the last punitive damages decision it issued prior to *Exxon*. In *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), the Court explicitly restricted its focus to "procedural limitations" on punitive awards and issued limitations on juries' ability to consider defendants' actions against nonparties in assessing punitive damages. The Court described this limitation as necessary "to avoid an arbitrary determination of an award's amount." *Id.* at 1062. Furthermore, some lower courts prior to *Exxon* already had conceptualized the due process line of cases as focusing on regularization. See *Thomas v. iStar Financial, Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007) (finding award excessive because "the jury's award is not in line with the punitive damages awarded in similar cases by this Court or other courts in this Circuit"); *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 322–23 (Ill. 2006) ("In our estimation, the best way to determine whether a given ratio is appropriate is to compare it to punitive damages awards in other, similar cases.").

99. *Exxon Shipping*, 128 S. Ct. at 2640 (Breyer, J., concurring in part and dissenting in part) (citing *BMW v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring)).

100. *Id.* (Breyer, J., concurring in part and dissenting in part).

101. Justice Breyer's increased willingness to defer to the district court's assessment of the defendant's conduct as unusually reprehensible was in keeping with his view in the criminal sentencing realm that appellate judges

## B. Modern Capital Punishment Law

The Supreme Court's *Exxon* analysis also bears a strong resemblance to its treatment of capital punishment laws a generation ago. In 1972—the same year in which Judge Frankel issued his stinging critique of the federal sentencing system—the Court in *Furman v. Georgia*<sup>102</sup> confronted the prevailing system in the states for imposing capital punishment.<sup>103</sup> Under this system, statutes permitted the death penalty for murder and sometimes other serious crimes such as rape or kidnapping.<sup>104</sup> Yet state law did not require death to be imposed in any case.<sup>105</sup> Instead, the law left it to judges or juries to decide which offenders, if any, should be sentenced to death.<sup>106</sup> And as it turned out, those decision-makers sentenced only a small fraction of offenders to death.

Faced with the infrequency of death sentences and, as Justice White famously put it, “no meaningful basis for distinguishing the few cases in which [capital punishment] is imposed from the many cases in which it is not,”<sup>107</sup> the Court held this sentencing system violated the Eighth Amendment. The Court emphatically did *not* hold that capital punishment itself was always constitutionally excessive punishment;<sup>108</sup> just four years later, in fact, it explicitly upheld the practice as applied to murder.<sup>109</sup> But the *Furman* Court held that the Eighth Amendment does not tolerate such harsh punishment to be “wantonly and freakishly imposed.”<sup>110</sup> “[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so

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should defer to district judges' front-line assessments of defendants' conduct. See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6–7; *United States v. Mendez-Colon*, 15 F.3d 188, 190–91 (1st Cir. 1994) (Breyer, C.J.); *United States v. Diaz-Villafane*, 874 F.2d 43, 49–52 (1st Cir. 1994) (Breyer, J., joining opinion of Selya, J.).

102. See *Furman v. Georgia*, 408 U.S. 238 (1972).

103. See *id.*

104. *Id.* at 341 (Marshall, J., concurring).

105. *Id.*

106. *Id.* at 311 (White, J., concurring).

107. *Id.* at 313 (White, J., concurring); see also *id.* at 309–10 (Stewart, J., concurring).

108. *Id.* at 310–11 (White, J., concurring).

109. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

110. *Furman*, 408 U.S. at 310 (Stewart, J., concurring). There was no majority opinion in *Furman*, so the Court's “holding” consisted of the narrowest grounds that garnered a majority: the opinions of Justices Stewart and White. See *id.* at 375.

as to minimize the risk of wholly arbitrary and capricious action.”<sup>111</sup> Indeed, if state law does not channel such discretion, the Constitution forbids capital punishment even for the most atrocious murders.<sup>112</sup>

States have responded to *Furman* and its progeny by codifying various “aggravating factors” designed to distinguish typical murders from those deserving of the possibility of capital punishment.<sup>113</sup> And by operation of the Sixth Amendment’s jury trial clause, juries must find such facts beyond a reasonable doubt.<sup>114</sup>

Although the *Exxon* Court never referred to the *Furman* line of cases, *Exxon’s* analysis bears obvious parallels to *Furman’s* desire to regularize punishment. In fact, in at least one respect, *Furman* should have been a more obvious parallel than the sentencing guidelines: the *Furman* Court, like the *Exxon* Court, was expressly concerned with placing boundless discretion in the hands of *juries*, whereas the sentencing guidelines movement targeted excessive *judicial* discretion. Placing undue discretion in the hands of juries raises concerns regarding arbitrariness in a few particularly acute ways.

First, juries are one-off enterprises. It is in many ways advantageous to use a collection of citizens unjaded by the daily grind of courtroom litigation to pass judgment in individual cases. But juries generally are unable (at least without any legal guidance) to compare a case they are seeing to other cases like it and to decide whether a set of facts is particularly egregious.<sup>115</sup> This disability may be even more

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111. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Gregg*, 428 U.S. at 189) (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court has restricted capital punishment with respect to crimes against individuals to cases in which a homicide occurs. *See infra* at note 191 and accompanying text.

112. *See Maynard v. Cartwright*, 486 U.S. 356, 363 (1988) (“reject[ing] the submission that a particular set of facts surrounding a murder, however shocking they might be, [a]re enough in themselves, and without some narrowing principle to apply to [the] facts, to warrant imposition of the death penalty”).

113. *See, e.g., Tuilaepa v. California*, 512 U.S. 967, 971–72 (1994). As the Court has explained, aggravating circumstances “may be contained in the definition of the crime or in a separate sentencing factor (or both).” *Id.* at 972. One other possible response to a concern over inconsistency in punishment, of course, is to make the punishment at issue mandatory. But the Court has held that because of the unique nature of the death penalty, a legislature cannot make its imposition mandatory for murder or any other basic crime. *See Woodson v. North Carolina*, 428 U.S. 280 (1976). Save possibly “the rarest kind of capital case,” the jury must be given the opportunity to exercise mercy and to spare the defendant capital punishment. *See Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978).

114. *See Ring v. Arizona*, 536 U.S. 584 (2002).

115. *See, e.g., Romero, supra* note 24, at 155; Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL’Y & L. 712, 718 (2000).

pronounced in the realm of corporate misconduct, in which identifiable markers of especially reprehensible conduct may be more elusive than in the context of homicides.<sup>116</sup>

Second, even insofar as juries can be educated through evidence regarding typical kinds of torts or murders, juries are simply not trained, as judges are, to seek and to value legal consistency.<sup>117</sup> While judges are likely to give substantial consideration in sentencing to treating like offenders similarly (at least like offenders that they personally sentence), juries may be more willing to deviate from the norm if they perceive the norm to be off kilter. Indeed, that is part of the reason we have juries, at least with respect to mitigation in the criminal context. For centuries, we have depended on juries to invoke their nullification power when the letter of the law dictates what they believe to be unjust punishment.<sup>118</sup> Given the power, as Judge Friendly once put it, to issue verdicts “in the teeth of both law and facts . . . to prevent punishment from getting out of line with the crime,”<sup>119</sup> there is reason at least to worry that juries will on occasion do the same thing for the opposite reason—that is, issue verdicts that disregard the law to deliver extra punishment that they believe is appropriate.<sup>120</sup>

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116. See *infra* notes 200–94 and accompanying text.

117. See, e.g., Sunstein et al., *supra* note 11.

118. See *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (describing jury’s role as “circuitbreaker in the State’s machinery of justice”); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (discussing jury’s historic role of returning noncapital verdicts notwithstanding the evidence in order to avoid mandatory death sentences that followed from convictions for certain crimes).

119. *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960).

120. See Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (studying actual cases in which judges or juries awarded punitive damages and finding that while each award punitive damages at similar rates and in overall similar amounts, jury awards produce a greater spread and rare outliers). Following the *Exxon* verdict, Exxon funded a number of studies designed to show—and that purportedly do show—that different juries given the same case are prone to render wildly different punitive judgments. See generally CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (University of Chicago Press 2002); David Schkade et al., *Empirical Study: Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000); Hastie, et al., *Juror Judgments in Civil Cases: Effects of Plaintiff’s Requests and Plaintiff’s Identity on Punitive Damages Awards*, 23 LAW & HUM. BEHAV. 445 (1999); Sunstein et al., *supra* note 11. For background on how this body of work came into being, see William R. Freudenberg, *Seeding Science, Courting Conclusions: Reexamining the Intersection of Science, Corporate Cash, and the Law*, 20 SOC. F. 3, 13–19 (2005). Some scholars dispute the value of this research, which is based on mock juries given hypothetical fact patterns. See, e.g., Neil Vidmar, *Experimental Simulations and Tort Reform, Avoidance, Error, and Overreaching in Sunstein et al.’s Punitive Damages*, 53 EMORY L.J. 1359 (2004); Neal Feigenson, *Can Tort Juries Punish Competently?* 78 CHI.-KENT L. REV. 239 (2002) (*Book Review*); Steven Graber, *Punitive Damages and Deterrence of Efficiency-*

Third, juries may be more susceptible than judges to bias. Juries deliberate in private and are by definition immune from any kind of systematic study of their decision making across cases. Thus, even before *Exxon*, the Court openly worried about the possibility that leaving juries with wide discretion “creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”<sup>121</sup> This worry echoes the Justices’ repeated concern in the *Furman* line of cases that affording unguided discretion to juries poses “an unacceptable risk that a sentence will succumb to either overt or subtle racial impulses or appeals.”<sup>122</sup> While legal restrictions on discretion cannot stamp out the potential for discriminatory punishments, such restrictions obviously can keep such impulses in check and limit their effects.

Lest there be any doubt regarding the strength of the parallel here, the dissents in punitive damages cases—like Justice Breyer’s dissent in *Exxon* respecting the parallel to the Federal Sentencing Guidelines<sup>123</sup>—prove the point. The most vocal dissenter from the punitive damages cases invoking the Due Process Clause to invalidate large awards has been Justice Scalia, the same justice who, more than anyone else on the Court, has championed the role of juries in delivering individualized justice.<sup>124</sup> It is also he, more than anyone else on the Court, who continually has criticized the *Furman* line of jurisprudence as

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*Promoting Analysis: A Problem Without a Solution?*, 52 STAN. L. REV. 1809 (2000); Robert J. MacCoun, *Epistemological Dilemmas in the Assessment of Legal Decision Making*, 23 LAW & HUM. BEHAV. 723 (1999). My point here is not to choose sides in this empirical debate, but rather to explain theoretically why the Court might be particularly concerned—whether justified or not—with granting juries unbounded discretion to assign punitive damages.

121. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (O’Connor, J., dissenting)). Some research indicates that juries are not actually biased against business. See VALERIE HANS, *BUSINESS ON TRIAL*, ch. 5–7 (Yale University Press 2000). As with claims that juries are more likely than judges to produce outlier awards, I do not here draw any empirical conclusion in this respect.

122. *Tuilaepa v. California*, 512 U.S. 967, 992 (1994) (Blackmun, J., dissenting); see also *Graham v. Collins*, 506 U.S. 461, 496–97 (1993) (Thomas, J., concurring) (“For 20 years, we have acknowledged the relationship between unguided jury discretion and the danger of discriminatory sentencing—a danger we have held to be inconsistent with the Eighth Amendment.”); *Furman v. Georgia*, 408 U.S. 238, 249–51 (Douglas, J., concurring); *Id.* at 364 (Marshall, J., concurring).

123. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2608 (2008).

124. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584, 610–13 (2002) (Scalia, J., concurring); *Apprendi v. New Jersey*, 530 U.S. 466, 498–500 (2000) (Scalia, J., concurring); *Neder v. United States*, 527 U.S. 1, 30–40 (1999) (Scalia, J., dissenting).

illegitimate and unnecessary.<sup>125</sup> Unlike Justice Breyer, Justice Scalia sees little need for legislative regularization (or, as he has put it, a “bureaucratic realm of perfect equity”).<sup>126</sup> Rather, Justice Scalia believes it is better to let “the people” do as they see fit based on the facts of particular cases. But while Justice Scalia has largely been successful in persuading a majority of the Court to *involve* juries in decision making that leads to punishment,<sup>127</sup> he has not persuaded a majority to *leave* the question to juries’ discretion.

#### IV. THE IMPLICATIONS OF CONSTITUTIONALLY REGULARIZING PUNISHMENT

The convergence between punitive damages jurisprudence and criminal sentencing principles has significant implications. Most importantly, the Supreme Court’s robust body of criminal sentencing jurisprudence allows us to peek into the future and to predict ways in which the Court’s more nascent venture into regulating punitive damages is likely to—or at least should—settle out. The Supreme Court regulates criminal sentencing almost exclusively on procedural grounds; among other things, defendants must have fair notice of potential penalties,<sup>128</sup> juries must be instructed in certain ways,<sup>129</sup> and juries instead of courts must be asked to make certain kinds of factual determinations.<sup>130</sup> But as long as a legislative body has sorted types of

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125. See, e.g., *Ring*, 536 U.S. at 610–13; *Walton v. Arizona*, 497 U.S. 639, 659–70 (1990) (Scalia, J., concurring in part and concurring in the judgment).

126. *Apprendi*, 530 U.S. at 498–99 (Scalia, J., concurring).

127. See *Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi*, 530 U.S. at 498–500.

128. See, e.g., *Apprendi*, 530 U.S. at 478 (defendant must be able to “predict with certainty from the face of a felony indictment” the maximum permissible punishment); *United States v. Granderson*, 511 U.S. 39 (1994) (defendant’s sentence may not be increased pursuant to ambiguous statute because defendants must have clear and unambiguous notice of potential punishments); *Bifulco v. United States*, 447 U.S. 381 (1980); *Busic v. United States*, 446 U.S. 398 (1980); *Simpson v. United States*, 435 U.S. 6 (1978); see also *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (due process prohibits state court from construing a criminal statute in an “unexpected and indefensible” way “by reference to the law which has been expressed prior to the conduct at issue”).

129. See, e.g., *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding juries in capital cases in which prosecutors seek a death sentence on the basis of future dangerousness must be instructed regarding the potential for parole if defendant is sentenced to life imprisonment).

130. See, e.g., *Apprendi*, 530 U.S. at 477 (holding juries must find any fact other than a prior conviction that subjects a defendant to heightened punishment); *Blakely v. Washington*, 542 U.S. 296 (2004) (holding the same in the context of non-advisory sentencing guidelines regimes).

misconduct into some kind of hierarchy and established maximum punishments, a sentencing judge or jury that follows proper procedures in imposing a particular sentence enjoys nearly absolute deference from the Court for its case-specific decisions. If anything, this deference should be even more pronounced when legislative determinations respecting punitive damages supply frameworks for jury verdicts.

Conversely, the Court's application of a rigorous predictability requirement to punitive damages has at least one important implication for criminal sentencing law: it indicates that a number of state sentencing systems resembling the pre-Guidelines federal system are now vulnerable to constitutional attack.

### A. Punitive Damages

Now that the Court has indicated that its punitive damages jurisprudence is motivated by a concern for protecting defendants from unpredictable punitive damages in the same way defendants should be protected from unpredictable criminal punishment, any theoretical constructs that insulate criminal sentences from substantive constitutional infirmity should likewise insulate punitive damages from such infirmity. I will focus here on three such constructs and apply them to punitive damages. First, despite the Eighth Amendment's explicit invitation for courts to disallow "cruel and unusual punishments," the Court treats setting criminal punishments as an almost purely legislative task and defers almost completely to legislative and other deliberative policymaking actors that establish punishment regimes in democratic ways. The Court's punitive damages jurisprudence, contrary to its surface impressions, invites the same kind of dynamic. Second, once a deliberative body has enacted positive criminal sentencing law, the Court allows state and local governments to pursue a wide array of interests or policy goals through widely divergent sentencing systems. The same should be true with respect to punitive damages. Third, as long as a deliberative body has enacted positive law establishing quantified levels of criminal punishment, the Court allows states to impose punishment at almost any level it wishes. The same should be true with respect to punitive damages, even in cases involving substantial compensatory damages, in which the Court has suggested the Due Process Clause most closely regulates the size of punitive awards.<sup>131</sup>

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131. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634 n.28 (2008); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

1. *Encouraging Democratic Development of Law*

The Court's criminal sentencing jurisprudence starts from the premise that legislatures have the "primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme."<sup>132</sup> Accordingly, a foremost goal of this jurisprudence seems to be to push legislatures to make such policy choices, instead of leaving them to the court system. This observation is true not just in terms of setting maximum punishments but also in terms of establishing guidelines for sorting individual cases within the resulting sentencing ranges.<sup>133</sup> Once a legislature sets a statutory level of punishment through the democratic process, the Court defers to it as long as the legislature had a "reasonable basis" for believing that it would "advance the goals of [the state's] criminal justice system in any substantial way."<sup>134</sup> The Court takes the same approach with respect to civil and criminal fines, which resemble punitive damages even more than traditional criminal punishments.<sup>135</sup>

This preference and respect for statutory law in the realm of sentencing and fines—a preference captured to a significant degree in Justice Breyer's concept of "active liberty"<sup>136</sup>—is part of a larger theme in the Court's jurisprudence: the Court sometimes issues constitutional rulings that appear to be substantive prohibitions but that actually are simply entreaties for legislative engagement. The Court, for example, has issued decisions in the context of national security that do not so much foreclose governmental action as they force Congress to step into

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132. *Ewing v. California*, 538 U.S. 11, 28 (2003).

133. Justice White's closing words in *Furman* speak particularly directly to this issue: "In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment." 408 U.S. 238, 314 (1972) (White, J., concurring).

134. *Ewing*, 538 U.S. at 28 (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)). The Court has similarly stated in the context of capital punishment that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

135. See *United States v. Bajakajian*, 524 U.S. 321, 334-37 (1998) (emphasizing that judgments about appropriate size of fines "belong in the first instance to the legislature" and that fines violate the Constitution only if "grossly disproportional" to the conduct at issue).

136. See generally STEPHEN G. BREYER, *ACTIVE LIBERTY* (Vintage 2005).

policymaking debates concerning these delicate matters.<sup>137</sup> The Court even has gone so far on occasion as to invoke the Constitution to invalidate laws in this realm, while expressly reserving the question of whether the very same laws would be constitutional if reenacted in a more carefully considered manner. In *Hampton v. Mow Sun Wong*, for instance, the Court invalidated federal regulations depriving aliens of the ability to work in federal service positions.<sup>138</sup> The Court nevertheless explained that such discriminatory action might be valid if Congress explicitly determined after “a considered evaluation” that it was necessary.<sup>139</sup> The Court has taken similar actions in other areas, disallowing a death sentence for a fifteen year old<sup>140</sup> and invalidating a felon disenfranchisement law.<sup>141</sup> Guido Calabresi describes such rulings as constitutionally requiring legislatures “to take a ‘second look’ with the eyes of the people on it.”<sup>142</sup>

The problem with the current state of affairs with respect to punitive damages is that there is little to no democratically enacted law.<sup>143</sup> Most states lack even a single statute on the books allowing punitive damages in tort cases, much less capping punitive exposure by means of a maximum ratio or dollar amount.<sup>144</sup> And almost all states

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137. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (defending decision holding that the President could not unilaterally establish rules governing detainees in Guantanamo Bay because “[t]he Constitution places its faith in [the] democratic means” of “consultation with Congress”); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that due process requires giving people detained as “enemy combatants” an opportunity to prove that they are being wrongfully detained); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115–16 (1976) (invalidating federal regulations depriving aliens of the ability to work in federal service positions because nothing indicated the President or Congress had given the matter “a considered evaluation”).

138. 426 U.S. 88 (1976).

139. *Id.* at 115.

140. *Thompson v. Oklahoma*, 487 U.S. 815, 857 (1988) (O’Connor, J., concurring) (providing the fifth vote to hold that punishment violated the Eighth Amendment simply because it was unclear whether the legislature intended to make such punishment available).

141. *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding that a felon disenfranchisement law enacted for racially discriminatory reasons was invalid, even though the Constitution allows such disenfranchisement as a general matter).

142. Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991).

143. In this respect, I agree with Leo Romero’s observation that “[t]he critical difference between the Court’s approaches in reviewing punitive damages and criminal sentences for excessiveness is the presence of legislative limits on criminal punishment and the absence of legislative limits on punitive damages awards.” Romero, *supra* note 24, at 140.

144. Rustad, *supra* note 32, at 1370–1417 (fifty-state survey).

lack legislation establishing any kind of hierarchy of fault within the realm of conduct subject to punitive damages.<sup>145</sup> Finally, in contrast even to excessively discretionary sentencing regimes the Court has criticized, decisions to seek punitive damages are typically made by private parties instead of politically accountable public officials.<sup>146</sup>

The Supreme Court seems to think a “second look” is in order. In the meantime, this absence of positive law—and of demonstrable democratic support for extremely large punitive awards—exposes the common-law system not only to charges of unpredictability,<sup>147</sup> but also to the attack that it “is at odds with the central democratic principle that policy questions are decided by the people’s elected representatives,” not by randomly selected juries.<sup>148</sup> Extremely large punitive awards embody and often effectuate judgments concerning the social utility of conduct.<sup>149</sup> Consequently, as Judge Alex Kozinski has argued, such judgments should be made by legislatures. Juries should do no more than sort out factual controversies and apply preexisting legislative judgments to particular cases.<sup>150</sup>

Of course, one could respond that in a democracy in which corporate interests often have an inordinate effect on—if not an outright stranglehold on—the legislative process, it is appropriate (or even necessary) for juries to be able to regulate corporations free and clear of legislation. Legislators with fundraising and other financial concerns, the argument goes, are simply too beholden to corporate interests to be trusted to expose them to the level of punishment they deserve and that is socially desirable.

There are obvious responses to this counterargument, not the least of which is that consumers and other potential plaintiffs actually are fairly well-represented in the legislative process.<sup>151</sup> But the important

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145. *See id.* at 1348–49.

146. *See* Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 919 (2004).

147. *See supra* note 98 and accompanying text.

148. Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, A18; *see also* Romero, *supra* note 24 at 116 (“Punitive damages . . . punish without a societal judgment about proportionality in the many states that have no legislatively imposed limits.”).

149. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007) (noting “the risk that punitive damages awards can, in practice, impose one State’s (or one jury’s) policies (e.g., banning cigarettes) upon other States”).

150. *See* Kozinski, *supra* note 148.

151. *See, e.g.*, Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711, 714 (2006) (noting that “the American Trial Lawyers Association (ATLA) and its state-level affiliates have devoted huge campaign contributions and considerable lobbying skill to fight tort reform bills in state

point for present purposes is that the Supreme Court clearly has come down on the side of preferring legislation. This is so even though the Court has held in other contexts that there is no difference between state legislation and what we have here (at least when state courts uphold punitive verdicts): state-court explications of state law and policy.<sup>152</sup> The Court, in other words, has implicitly rejected the argument that “[g]iven the widespread adoption of legislative schemes to limit the amount of punitive damages awards, any state without such a scheme has, in effect, an implicit legislative endorsement of that state’s common-law scheme for determining the amount of punitive damages.”<sup>153</sup>

Similarly, the Court has clearly rejected the claim of some commentators that the “solution” to any concerns about unpredictability in punitive awards is simply to “provide detailed written instructions” to juries.<sup>154</sup> Such instructions, some commentators argued before *Exxon*, adequately guide a jury’s consideration of a defendant’s conduct and the proper relationship between the underlying harm and any punitive award.<sup>155</sup> But the jury in *Exxon* received such instructions. Not only was the jury (somewhat presciently) instructed on the “very same concepts” later crystallized in the Supreme Court’s due process cases, but it also was given “unusually detailed” guidance for calibrating any punitive award to the level of Exxon’s wrongdoing.<sup>156</sup>

The jury in *Exxon* was told, for instance, that it could consider: (1) whether corporate policy contributed to, or actually prescribed, the wrongdoing; (2) whether corporate policy makers and people with significant duties and responsibilities, or just low-level employees, participated in the wrongdoing; (3) whether several employees or just a limited number played roles in the misconduct; (4) whether Exxon had taken steps to prevent recurrence of the wrongdoing; (5) whether

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legislatures and Congress,” and that “ATLA often has been effective in blocking or watering down conservative tort reform bills”).

152. See, e.g., *Virginia v. Black*, 538 U.S. 343, 364 (2003) (holding that the state supreme court’s approval of jury instructions “is a ruling on a question of state law that is binding on us as though the precise words had been written” into a state statute) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

153. F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique?”*, 60 FLA. L. REV. 349, 385 (2008) (internal citation omitted).

154. Neil Vidmar & Matthew W. Wolfe, *Fairness Through Guidance: Jury Instructions on Punitive Damages After Philip Morris v. Williams*, 2 CHARLESTON L. REV. 307, 318–24 (2008). But see *Romero*, *supra* note 24, at 156 (arguing that jury instructions are inadequate without legislative cap).

155. Vidmar, *supra* note 154, at 318–24.

156. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004). See Jury instructions 30, 35, 36, and 38, reprinted in App. to Brief for Respondents 17a–21a, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

criminal and civil fines Exxon had already paid, coupled with its clean-up costs, mitigated the need for any award that otherwise would be proper; (6) whether the social condemnation Exxon had suffered mitigated the need for any punitive award; and (7) whether a punitive award might be borne by Exxon shareholders.<sup>157</sup> It is not easy to think of additional guidance the district court could have given the jury to aid it in assessing the relative need to punish and deter Exxon's wrongdoing.<sup>158</sup>

But the "law" in the *Exxon* jury instructions came from the court and the parties, not from Congress. Unlike a capital prosecution or a structured criminal sentencing regime, there was no congressionally established structure within which the jury and trial judge were required to exercise their discretion. There was no quantified starting point to use considering all of the potentially aggravating and mitigating circumstances, and there was no stratified range of potential misdeeds in which they might have placed Exxon's conduct. Hence, the Court treated the jury's verdict and the district judge's approval of it as determinations that did not incorporate or reflect any democratically established policy determinations. In order to trigger the Court's practice in its criminal sentencing jurisprudence of deferring to policy determinations concerning how best to punish misconduct, a legislature—not a court or parties—must set the policy guidelines at issue.

## 2. *Pursuing Varied State Interests*

Although it is now plain that the Court intends to view skeptically any punitive award rendered under a pure common law system, the flip side of the Court's preference for legislatively regularizing punishment should mean that it will relax its skepticism when Congress or a state legislature has enacted positive law allowing and governing the punitive award at issue. Indeed, it appears that the Court should afford extreme deference to such legislative judgments. This deference should

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157. *Id.*

158. One commentator has suggested that juries could be instructed regarding typical awards in similar cases as a way of giving them benchmarks for awarding punitive damages. Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 197–99 (2002). *But see* Cass R. Sunstein et al., *supra* note 120 (arguing that such instructions would help reduce, but would not cure, the problem of arbitrariness). Regardless of whether that is feasible in a typical tort case involving reprehensible conduct, it was not an option in *Exxon*, for the oil spill had no real parallel. At any rate, it is difficult to imagine evidence or an instruction like this satisfying the Court in the absence of any legislative imprimatur of the judgments in "similar" cases.

begin with an explicit recognition that legislatures may seek to further a broad array of governmental interests through permitting punitive damages.

In the realm of criminal sentencing, the Court has emphasized that:

The Constitution does not mandate adoption of any one penological theory. A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.<sup>159</sup>

Accordingly, although deterrence and retribution are the most common governmental interests furthered by criminal sentencing, the Court readily deferred in *Ewing v. California* to the California Legislature's judgment that protecting the public safety requires "incapacitating" those with two prior serious violent felony convictions who commit even low-level felonies.<sup>160</sup> The Court similarly deferred in *Harmelin v. Michigan* to the Michigan Legislature's determination that sentences should be tailored particularly to threats it believed that the possession of large amounts of drugs pose to society.<sup>161</sup>

The Supreme Court also appears to readily accept legislative policy goals supporting other systems of awarding non-compensatory damages. In *Exxon*, for instance, the Court noted without an ounce of skepticism that "Congress devised the treble damages remedy for private antitrust actions with an eye to supplementing official enforcement by inducing private litigation, which might otherwise have been too rare if nothing but compensatory damages were available at the end of the day."<sup>162</sup> States frequently defend treble damages in

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159. *Ewing v. California*, 538 U.S. 11, 25 (2003) (internal citations omitted); *see also Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in judgment) ("the responsibility for making these fundamental choices and implementing them lies with the legislature"); *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, [. . .] these are peculiarly questions of legislative policy").

160. 538 U.S. at 25; *see also id.* at 29 (holding that a court must "accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions").

161. *Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring in part and concurring in the judgment).

162. 128 S. Ct. at 2632; *see generally Am. Soc'y of Mech. Eng. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982) (reciting various justifications for antitrust treble damages); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (focusing on private litigation-enhancing role).

consumer protection cases on a similar basis.<sup>163</sup> The Court has never questioned state legislatures' ability to pursue this private litigation-enhancing goal through quasi-punishment in the form of damages over and above compensatory judgments.

What is more, the Court already has taken a step in the realm of punitive damages toward broadly deferring to various state interests. In *BMW of North America v. Gore*, the Court started from the premise that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve."<sup>164</sup> Yet, because the Alabama Legislature had not enacted any legislation allowing or regulating the punitive award there, the Court did not have any occasion to consider any state interest beyond the generalized notions—which it accepted—that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."<sup>165</sup>

There is no reason to think that the Court would not be equally deferential to a state's desire to accomplish something else through a punitive remedy.<sup>166</sup> *Exxon* illustrates how such a situation might arise. There, the plaintiffs sought to justify their multi-billion dollar punitive award in part on the ground that it provided quasi-compensation for certain harms that are not directly actionable under maritime law.<sup>167</sup> Although the quasi-compensatory function of punitive awards has

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163. See, e.g., MASS. GEN. LAWS ANN. Ch. 93A, § 11 (2002); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (2002); *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980) (finding the Texas Legislature provided for treble damages "so that consumers will have incentive to pursue their claims").

164. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996).

165. *Id.*

166. Catherine Sharkey makes a similar point in arguing that states have the power to re-conceptualize punitive damages as "societal damages" and that, if they did, this approach "would seem to survive the retributive-punishment-focused due process constraints of *State Farm*." Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347, 401 (2003); see also *id.* at 353–54.

167. See Brief for Respondents 61–63, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). Punitive awards historically served such a quasi-compensatory function. Indeed, "the whole [common law] doctrine of punitive or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation." *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 586 (1885); see also *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 437 n.11 (2001); Kenneth Redden, PUNITIVE DAMAGES § 2.2 (The Michie Co. 1980) (referencing this history). Common law cases are legion in which punitive damages were allowed because the defendant's conduct caused injuries, most often mental anguish and inexact consequential harm, for which plaintiffs could not recover compensatory damages. See, e.g., *Fay v. Parker*, 53 N.H. 342, 382–84 (1872); *McNamara v. King*, 7 Ill. 432, 436 (1845); *Brown v. Swinefeld*, 44 Wis. 282, 286–89 (1878).

largely (though not entirely) disappeared from modern tort systems,<sup>168</sup> it arguably remains important in maritime law. Through a limitation on the doctrine of foreseeability, maritime law forbids tort plaintiffs from recovering certain economically remote and all intangible (or psychological) injuries that are recoverable in other tort systems.<sup>169</sup> The upshot of maritime law's limited availability of compensatory damages meant that hundreds of millions, if not billions, of dollars of harm were unaccounted for in the *Exxon* plaintiffs' compensatory recoveries.<sup>170</sup>

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168. See *Cooper Indus.*, 532 U.S. at 437 n.11 (“[A]s the types of compensatory damages available to plaintiffs have broadened” to include such things as pain and suffering,” the theory behind punitive damages has shifted toward a more purely punitive . . . understanding.” (internal citations omitted)); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (noting that two plaintiffs recovered \$500,000 each in compensatory damages under Utah tort law for emotional distress related to eighteen months of uncertainty over whether their insurance claim would be paid). Michigan law continues to provide that punitive damages are strictly compensatory in character, their purpose being to compensate plaintiffs in cases of malicious or wanton conduct for their humiliation, outrage, or indignity. See *Veselenak v. Smith*, 327 N.W.2d 261, 264–65 (Mich. 1982); *Bailey v. Graves*, 309 N.W.2d 166, 169 (Mich. 1969); *Joba Constr. Co. v. Burns & Roe, Inc.*, 329 N.W.2d 760, 773 (Mich. Ct. App. 1982). In Connecticut, the sole purpose of punitive damages remains quasi-compensatory, although they are intended to compensate plaintiffs for litigation expenses, not for intangible or otherwise uncompensable harm. See *Triangle Sheet Metal Works, Inc. v. Silver*, 222 A.2d 220, 225 (Conn. 1966); *DeSantis v. Piccadilly Land Corp.*, 487 A.2d 1110, 1113 (Conn. App. 1985).

169. See *Robins Dry Dock & Repair v. Flint*, 275 U.S. 303 (1927); *Getty Ref. & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 833 (3rd Cir. 1985); *Louisiana ex rel. Guste v. M/V Testabank*, 752 F.2d 1019, 1035 (5th Cir. 1985) (Wisdom, J., dissenting).

170. Commercial fishermen, for instance, were unable to recover for the devaluation in their fishing permits to the tune of tens of thousands of dollars per permit. See *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997); Brief for Amici Curiae of Sociologists, Psychologists, and Law and Economics Scholars in Support of Respondents [hereinafter “Social Science Amicus Brief”] 5–6. Other fishermen were unable to recover for “price diminishment in fisheries that were not oiled” or “diminution of market value owing to fear or stigma.” *Exxon Shipping*, 120 F.3d at 167 n.3. Landowners whose land was not oiled were left uncompensated for reductions in their land’s value. *Id.* The tourist industry was unable to recover for the loss of tens of millions in revenue when would-be visitors stayed home after the spill. Social Science Amicus Brief, at 4–5. Perhaps most significantly, residents across the region were unable to recover for any of their profound emotional and psychological harms. See *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1094 (D. Alaska 2004) (noting that “the social fabric of Prince William Sound and Lower Cook Inlet was torn apart,” producing a high incidence of severe depression, post-traumatic stress disorder, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound”). The spill exacted an especially severe psychological toll on Alaska Natives. For these individuals, “subsistence fishing is not merely a way to feed their families but an important part of their culture.” *Id.* at 1078.

The Court brushed aside the plaintiffs' argument for quasi-compensation in a footnote. It refused to consider seriously whether a punitive award may serve such purposes because "the jury instructions in this case did not allow the jury to set punitive damages on the basis of any such consideration."<sup>171</sup> However, it is hard to believe that the Court would disallow a considered legislative policy of allowing plaintiffs to seek punitive damages as quasi-compensation. While some scholars have argued that plaintiffs should not be able to recover money for actual harm through punitive damages,<sup>172</sup> many law-and-economics experts have explained that allowing punitive damages in cases of extreme misconduct "can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm."<sup>173</sup> Awarding damages under such circumstances, in other words, can force wrongdoers to internalize the full range of consequences of their reprehensible conduct, much in the same way that the Michigan law in *Harmelin* sought to force people caught possessing large amounts of drugs to account for the full societal consequences of their actions.<sup>174</sup>

States likewise should be able to pursue more specifically targeted state interests through punitive awards. Again, the facts of *Exxon* provide an apt illustration. In its simplest terms, *Exxon* was a drunk driving case—or, more precisely, a case about a company's failure to prevent a known alcoholic from driving a supertanker. While the Court did not dwell on the precise nature of the company's recklessness, it is noteworthy that some of the states that have enacted legislative caps suspend them in cases involving intoxication.<sup>175</sup> Surely this policy decision is worthy of deference. The Supreme Court has stated in other contexts—for example, in the course of upholding state laws

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171. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 n.27 (2008). The pertinent instructions identified the purposes of punitive damages as "to punish a wrongdoer for extraordinary misconduct" and "to warn defendants and others and to deter them from doing the same." *Id.* (quoting jury instruction 21).

172. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 939 (1998).

173. *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring); see also *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) (noting that "punitive damages are necessary . . . to make sure that tortious conduct is not underdeterred, as it might be if compensatory damages fell short of the actual injury inflicted by the tort"); Thomas Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 12–13, 48–49 (1990).

174. Another way in which a state might seek to allow quasi-compensation, as Catherine Sharkey has posited, would be to permit juries to award punitive damages payable to the state for "societal compensation." Sharkey, *supra* note 166 at 353–54. Such damages likewise "forc[e] cost internalization" of the full consequences of reprehensible conduct. *Id.* at 354.

175. See, e.g., GA. CODE ANN. § 51-12-5.1(f) (2000); MISS. CODE ANN. § 11-1-65(3)(d)(ii) (2002); N.J. STAT. 2A:15-5.14(c) (2000); N.C. GEN. STAT. § 1D-26 (2000).

automatically suspending a person's driver's license if the driver refuses to take a breath-analysis test—that states have a “paramount interest” in combating drunken driving.<sup>176</sup> If Congress were to enact a maritime law allowing heightened punitive awards in cases of intoxication, it is hard to imagine the Court disallowing that assessment.

In the end, the only governmental tactic that may be truly off limits if pursued by a legislative strategy would be purposely subjecting defendants to unpredictable or randomized punitive awards. One might argue that such unpredictability is useful in order to prevent companies from conducting cost-benefit analyses regarding the advisability of wrongful courses of action.<sup>177</sup> But as Justice O'Connor explained in one of the Court's early punitive damages cases:

[t]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely on bias or whim.<sup>178</sup>

### 3. *Establishing Maximum Punishments*

In the criminal sentencing realm, the Court has made clear time and again that “[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.”<sup>179</sup> Indeed,

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176. *Mackey v. Montrym*, 443 U.S. 1, 17 (1979); *see also id.* at 25 (Stewart, J., dissenting) (it “cannot be doubted” that this state interest is “significant”); *Skinner v. Railway Executives Labor Ass’n*, 489 U.S. 602, 620–21 (1989) (discussing the government's strong interest in ensuring safety in transportation through deterring the use of alcohol or drugs on duty); *South Dakota v. Dole*, 483 U.S. 203, 208–09 (1987) (holding that a congressional provision tying federal aid to establishing tough standards for drunk driving was legitimate means of promoting safety on nation's highways).

177. *See Rustad*, *supra* note 32, at 1349–50 (“[I]t is arguable that capping punitive damages cripples the deterrent function of punitive damages because the total punitive liability is predictable.”); Amelia J. Toy, Comment, *Statutory Punitive Damages Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L. J. 303, 335 (1991) (arguing same). An example of a company performing something like this kind of cost-benefit analysis is the notorious Ford Pinto case, in which the automobile manufacturer was aware of a safety hazard in its vehicles but decided not to fix it on the theory that paying damages in lawsuits would be cheaper than fixing the problem. *See Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981).

178. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting).

179. *Solem v. Helm*, 463 U.S. 277, 290 (1983); *see also Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (acknowledging “reluctance to review legislatively

notwithstanding the Eighth Amendment's express prohibition against "cruel and *unusual* punishment,"<sup>180</sup> the Court has said that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, *often beneficial*, result of the federal structure."<sup>181</sup> Courts should be so "reluctant to review legislatively mandated terms of imprisonment" that "successful challenges to the proportionality of particular sentences should be exceedingly rare."<sup>182</sup> As long as a state proffers a "reasonable basis for believing" that the length of a prison sentence advances legitimate state interests, courts should uphold the sentence.<sup>183</sup>

Based on these principles, the Supreme Court has found a prison sentence substantively excessive exactly once in its history. In *Solem v. Helm*, the Court held that imposing a sentence upon a recidivist offender of life without the possibility of parole for uttering a "no account" check violated the Eighth Amendment.<sup>184</sup> At the same time, the Court has upheld a sentence of twenty-five years to life for a "third strike" of stealing \$399 of merchandise from a golf pro shop;<sup>185</sup> a life sentence for a third strike of obtaining \$120.75 by false pretenses;<sup>186</sup> a sentence of forty years in prison for possession with intent to distribute and distribution of nine ounces of marijuana;<sup>187</sup> and a life sentence for a first offense of possessing 672 grams of cocaine.<sup>188</sup> In the more recent of the three strikes cases, the Court upheld a sentence that was at least 12.5 times longer (due to the defendant's recidivism) than the state's maximum punishment for the underlying offense<sup>189</sup>—a measuring stick one might

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mandated terms of imprisonment"); *Weems v. United States*, 217 U.S. 349, 379 (1910) ("The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety.").

180. U.S. CONST. amend. VIII (emphasis added).

181. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment) (emphasis added); *see also Solem*, 463 U.S. at 291 n.17 ("The inherent nature of our federal system" may result in "a wide range of constitutional sentences.").

182. *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam) (internal citations omitted).

183. *Ewing v. California*, 538 U.S. 11, 28 (2003).

184. 463 U.S. 277, 303 (1983).

185. *Ewing*, 538 U.S. at 11.

186. *Rummel v. Estelle*, 445 U.S. 263, 264 (1980).

187. *Hutto*, 454 U.S. at 370.

188. *Harmelin v. Michigan*, 501 U.S. 957, 961 (1991).

189. The defendant's third strike in the case was grand theft. *Ewing*, 538 U.S. at 18. The crime is a "wobbler" under California law, which is punishable either as a misdemeanor or as a felony. If treated as a felony, the offense was presumptively punishable at the time by two years in prison. CAL. PENAL CODE § 489(b) (1999). The offense was punishable by three years if any aggravating

see as roughly equivalent to a punitive-to-compensatory-damages ratio. The Court also has held that once states have statutory mechanisms in place for structuring sentencing decisions, state judiciaries need not perform any kind of proportionality review—not even in capital cases.<sup>190</sup>

To be sure, the Court has taken a less deferential approach to states' determinations respecting which offenders should be subject to capital punishment. The Court has disallowed states' attempts to expand capital punishment with respect to crimes against individuals beyond cases in which a homicide occurs.<sup>191</sup> And even then, it has held that states may not impose the death penalty upon individuals who are juveniles<sup>192</sup> or mentally retarded<sup>193</sup> when they commit their offenses.

But even these decisions—especially the Court's most recent holding in *Kennedy v. Louisiana*—can be seen as deriving primarily from procedural considerations. In *Kennedy*, the Court held that a state may not punish the crime of child rape with the death penalty.<sup>194</sup> Applying its now-familiar two-step Eighth Amendment analysis, the Court determined that (1) the small number of states authorizing such punishment indicated a national consensus against it, and (2) the Court's own independent judgment confirmed that capital punishment was inappropriate for the crime. The first of these considerations demonstrated that the death penalty in this context was random in the sense that offenders in the vast majority of states cannot receive it.<sup>195</sup>

The second consideration, while commonly characterized (and criticized) as hinging on the Court's own perception of proportionality, was grounded in part on a similar concern for consistency. The Court noted that even in Louisiana the death penalty had been "most infrequent[ly]" imposed for child rape.<sup>196</sup> And the Court expressed doubt that, in contrast to homicide, it was possible in this context "to identify standards that would guide [juries] so the penalty is reserved

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factors had been present, *see* CAL. RULES OF COURT 4.421 (2009), but none besides recidivism were. *Ewing*, 538 U.S. at 40.

190. *See* *Pulley v. Harris*, 465 U.S. 37 (1984).

191. *E.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008) (announcing this categorical rule and applying it to crime of rape of a child); *Coker v. Georgia*, 433 U.S. 584 (1977) (barring capital punishment for rape of an adult); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (prohibiting capital punishment for aggravated kidnapping). I should note here that I represented Patrick Kennedy in the United States Supreme Court.

192. *Roper v. Simmons*, 543 U.S. 551 (2005).

193. *Atkins v. Virginia*, 536 U.S. 304 (2002).

194. *Kennedy*, 128 S. Ct. at 2641.

195. *Id.* at 2651–52 (noting that only six states subjected child rape to the death penalty).

196. *Id.* at 2661. Over twelve years, Louisiana juries returned two death sentences for the crime. *Id.* at 2657.

for the most severe cases of child rape and yet not imposed in an arbitrary way."<sup>197</sup> Instead of finding that no state reasonably could conclude that a heinous instance of child rape should be punished by death, Justice Kennedy's opinion seems to conclude that there is simply no way to create any system that would punish the worst child rapes with death in any kind of standardized manner.

It is quite possible that some members of the *Kennedy* majority cast their votes based on a stronger proposition—namely, that someone who commits child rape (or any other non-homicidal crime against an individual) is just not culpable enough to be punished by death. Yet even to the extent that *Kennedy* rests on this idea, it still is not incompatible with the observation that the Court's capital punishment jurisprudence is predominantly non-substantive in nature. Holding that an offender must kill someone before being subject to the death penalty is equivalent to holding, as the Court has indicated a couple of times, that a defendant must act reprehensibly or recklessly in order to be subject to punitive damages.<sup>198</sup> The holding sets a threshold. Such a holding says nothing, however, about the key question of how severely defendants may be punished once their conduct crosses that threshold.

It is not hard to see why the Court has pursued such a substantively deferential approach to legislatively prescribed punishments that are capable of being implemented consistently. As my colleague Pamela Karlan reminded us a few years ago, it is very difficult to find any socially acceptable metric for measuring the seriousness of a crime in an "absolute" sense.<sup>199</sup> People can sometimes agree that certain crimes are more serious than others, but empirical studies show that they "disagree profoundly" over how severely to punish any given crime.<sup>200</sup> This disagreement is hardly surprising. Once we move beyond "an eye for an eye," there is no easy way to convert crimes into terms of punishment—e.g., to determine whether a crime such as second-degree assault should be punished by five or fifteen years in prison. And once we move beyond retribution as the exclusive penological goal, it becomes even more difficult to translate a criminal conviction into an appropriate term of years for the offender.<sup>201</sup> So when a legislature steps in and attempts to establish a hierarchy of crimes and to assign

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197. *Id.* at 2660.

198. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419; *cf.* Smith v. Wade, 461 U.S. 30 (1983) (adopting common law standard of recklessness or callous indifference for cases brought under 42 U.S.C. § 1983).

199. Karlan, *supra* note 146, at 894.

200. *Id.* (discussing James Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 225–26 (1974)).

201. *Id.* at 896.

sentencing values to those crimes, the Court is loathe to second-guess the result of that policy-laden work.

All of this reasoning holds at least as true with respect to punitive damages. It is challenging at the outset to stratify different kinds of corporate wrongdoing. The Court in *Exxon* asserted that Exxon's conduct was not exceptionally blameworthy in part because its decision to leave Hazelwood in command despite knowledge that he was drinking aboard ship was not (1) "driven primarily by a desire for gain" or (2) derived from a sense that it could hide its misconduct should an oil spill occur.<sup>202</sup> Yet a legislature might well have reached exactly the opposite conclusion—namely, that corporate conduct not even driven by a desire for profit (as most if not all corporate decisions are supposed to be) and done in complete awareness that it will have to pay for any harm that occurs is particularly callous and thus particularly reprehensible and in need of deterrence. Certainly, if a legislature deemed individuals who kill in cold blood and in the bright of day to be worse than those who kill clandestinely in order to achieve some kind of gain, one would be hard pressed to categorically disagree.

It is even more difficult to say that any given level of punitive damages would be unreasonable for a legislature to allow.<sup>203</sup> If elected public officials' declarations are any indication, virtually the whole state of Alaska thought it fair to require Exxon to pay five or even ten times the quantified compensatory damages in the case.<sup>204</sup> If Congress has enacted a law permitting punitive damages of up to five times the underlying compensatory damages in maritime cases of corporately enabled drunk driving, it is hard to imagine the Court overriding that assessment.

Indeed, three aspects of the punitive damages landscape render legislative decisions to allow high awards even more worthy of

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202. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008).

203. *Cf.* Cass R. Sunstein et al. at 2078, 2087 (describing the difficulty juries have in agreeing on a dollar amount that is appropriate to punish and deter any given conduct). Perhaps if a legislature sought to impose a purely quasi-compensatory approach to punitive damages, one might be able to pronounce with some degree of confidence that a given award was too high. But to the extent that punishment and other state interests remain in the mix, legislatively determined levels of appropriate awards seem highly worthy of respect.

204. The State of Alaska filed an amicus brief in the Supreme Court supporting the plaintiffs, as did the Alaska Legislative Council (on behalf of the Alaska State Legislature), all living former governors of the State, and Senator Ted Stevens. Sitting governor Sarah Palin stated on the day the Court's decision was announced that she was "very disappointed" in the Court's ruling because it was "not right" or "fair." *See Governor Sarah Palin's Reaction to Exxon Valdez Decision* (CBS television broadcast June 25, 2008), available at <http://www.youtube.com/watch?v=5H-26MOxH34> (last visited Feb. 28, 2009).

deference than decisions to allow long prison sentences. First, the Constitution provides an explicit check against excessive criminal punishment (the Eighth Amendment), whereas it contains no such provision respecting punitive damages.<sup>205</sup> As a matter of constitutional structure, therefore, it would be exceedingly strange, all else being equal, if courts were supposed to review the severity of criminal punishment as rigorously as—let alone less rigorously than—the amount of punitive awards.<sup>206</sup>

Second, and relatedly, it is worth remembering that criminal sentences involve removing people from their families and putting them behind bars for years on end or even killing them. Punitive damages involve forcing a person or entity (usually a corporation) to pay money. It does not belittle the significance of the latter to observe that the former is more serious and deserves closer judicial scrutiny. Just ask an independent businessperson whether she would rather spend years in prison or dole out a large chunk of her corporation's cash reserves.

Third, legislative determinations concerning criminal punishment are more likely to be unduly harsh than those concerning punitive damages. Criminal defendants, as John Hart Ely might observe in this situation,<sup>207</sup> are hardly a powerful or popular constituency. And legislators "face powerful political pressures" (from the public, from prosecutors, and sometimes from victim advocacy groups) that encourage them continuously to "ratchet up sentences."<sup>208</sup> Corporations, by contrast, typically have at least some advocates in a legislature. Accordingly, one would expect corporations to be much more able to achieve temperance in punitive damages legislation.<sup>209</sup> Judicial scrutiny of harsh punitive awards should be less necessary than with respect to long prison sentences.

Nothing in current case law contradicts any of these postulates. The Supreme Court has never invalidated a legislatively authorized punitive award or any other kind of judgment involving enhanced damages on

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205. See *supra* notes 35–36 and accompanying text (noting that the Eighth Amendment does not apply to punitive damages).

206. The same is true with respect to common law and constitutional history, which traditionally have applied a more robust proportionality principle to criminal punishment than to punitive damages. Chemerinsky, *supra* note 11, at 1064–65.

207. See John Ely, *DEMOCRACY AND DISTRUST* (Harvard University Press 1980).

208. Karlan, *supra* note 146, at 890; see also *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (noting "the general popularity of anticrime legislation"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531–33 (2001); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 103 (1997).

209. See *supra* notes 151–152 and accompanying text.

the ground that the damages were too high.<sup>210</sup> Nor has it even expressed the slightest interest in doing so. When the Court in *Exxon* surveyed various kinds of legislatively-created punitive and enhanced damages regimes, the Court took as a given the legitimacy of state statutes allowing ratios of up to five times compensatory damages or treble damages regimes under antitrust, RICO, and patent law.<sup>211</sup> It did so despite that fact that it is hard to say that a bland antitrust violation (which carries a mandatory two-to-one ratio and could result in an award in the hundreds of millions or billions of dollars<sup>212</sup>) is worse than Exxon's conduct leading to the *Exxon Valdez* oil spill.

To be sure, the Court has suggested that the Due Process Clause establishes a one-to-one ratio limit in certain cases involving substantial harm.<sup>213</sup> But it is one thing to say that such a ratio should be a default rule—that is, the presumptive limit in the absence of legislation covering the conduct at issue. It would be wholly another thing to enforce such a one-to-one principle in the face of a considered legislative judgment to the contrary. Doing so would require the Court to swing a wrecking ball not just against numerous state laws allowing punitive awards bearing higher ratios but also against federal antitrust, RICO, and dozens of other regimes allowing treble damages or higher in cases involving substantial harm.<sup>214</sup> Such judicial action would summon distinct and uncomfortable echoes of *Lochner's* era of "economic substantive due process."

Assuming the Court is uninterested or at least unwilling to go there, the question remains how detailed legislative regulation of punitive damages must be in order to trigger the kind of judicial deference that exists respecting criminal sentences. The nature of criminal sentencing law suggests that a legislature need only enact some kind of cap for punitive damages in tort cases. That might be enough, particularly if the cap is a low, single-digit ratio. But it is easy to forget that even when criminal statutes do nothing more than establish maximum sentences, they peg those sentences to fairly particular kinds of conduct (robbery, kidnapping, etc.). Tort systems, by contrast, cover a wide range of disparate conduct—from assault to trespassing to defamation to interference with business expectancies. Thus, legislatures

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210. The three punitive awards the Court has invalidated—in *BMW, State Farm*, and *Exxon*—all came out of purely common law regimes.

211. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2631–32 (2008).

212. *See, e.g., Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 795 (6th Cir. 2002) (upholding \$1.05 billion award).

213. *Exxon Shipping*, 128 S. Ct. at 2634 n.28.

214. *See supra* notes 31–33 and accompanying text (listing federal statutes providing for punitive damages in excess of a one-to-one ratio).

interested in allowing punitive damages above low, single-digit levels—and I see no reason why such a goal would be impermissible—would do well to specify maximum ratios with respect to more finely grained categories of misconduct.

Furthermore, just as in criminal law, one can imagine various kinds of aggravating or mitigating factors that could apply across categories of tortious conduct. A defendant's behavior might involve special levels of malice, it might cause severe collateral harm, or it might be less in need of deterrence because of other kinds of punishment already imposed. Accordingly, legislatures would do well to provide lists of aggravating and mitigating factors to guide juries respecting permissible amounts of punitive damages and to require juries to find aggravating factors before imposing punitive damages above otherwise presumptive thresholds.<sup>215</sup> If capital sentencing jurisprudence is any guide, such aggravating factors need not be terribly precise or narrow. The Court has held that aggravating factors, such as having prior convictions, committing a "cold-blooded" act, and inflicting mental anguish adequately narrow the class of death-eligible offenders.<sup>216</sup>

Alaska law, ironically enough, already follows such a model. It provides that punitive damages generally may not exceed the greater of a three-to-one ratio or \$500,000.<sup>217</sup> Yet if corporate policymakers were aware of the adverse consequences of the misconduct or if the defendant's action was motivated by financial gain, then the Alaska cap on punitive damages rises to the greater of a four-to-one ratio, four times the attempted or achieved financial gain, or \$7 million.<sup>218</sup> Florida law contains a similar hierarchy, and adds that no cap exists when the defendant acted with a specific intent to harm the plaintiff.<sup>219</sup>

These state laws, however, only scratch the surface of what a jurisdiction might do. If Congress or a state legislature believes that the availability of large punitive damages awards in appropriate cases is an

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215. This raises an interesting question as to whether the Seventh Amendment, like the Sixth Amendment, would require juries to find aggravating factors allowing higher punitive awards than are otherwise allowed. *Cf.* *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that Sixth Amendment requires aggravating factors, other than the fact of a prior conviction, to be submitted to a jury and proved beyond a reasonable doubt). At the very least, it seems like a good idea to require juries to find such necessary facts.

216. *See* *Ring v. Arizona*, 536 U.S. 584, 593 (2002) (providing the aggravating factors under Arizona law); *Tuilaepa v. California*, 512 U.S. 967, 973–74 (1994) (cataloging decisions upholding various states' aggravating factors).

217. ALASKA STAT. § 09.17.020(f) (2008).

218. ALASKA STAT. § 09.17.020(g) (2008).

219. FLA. STAT. ANN. § 768.73(1) (2005). For another similar hierarchy, *see* GA. CODE ANN. §§ 51-12-5.1(f) & (g) (2000).

important means of furthering some governmental interest, it could enact a set of guidelines much like some states' criminal sentencing guidelines.<sup>220</sup> Or a legislature could enact a whole "punitive damages reform act." Once it did, it is extremely difficult to imagine the Supreme Court invoking the Constitution to declare any particular award substantively excessive.

## B. Criminal Sentencing

The Supreme Court's merging of punitive damages jurisprudence with criminal sentencing jurisprudence may also have a significant effect on certain sentencing systems. Though it is often forgotten in light of the academic focus on the evolving and lately dramatic story of federal sentencing (and to a lesser extent on the recent movement in many states toward various forms of guideline or presumptive sentencing), many states in the country still follow a general model of granting unfettered sentencing discretion within widely prescribed sentencing ranges. These systems resemble the common law system of awarding punitive damages and effectively retain all of the vices of the old federal system that the Court decried in *Exxon*.

The states that follow a criminal sentencing model that most closely resembles the common law method of assessing punitive damages are the six states that provide for jury sentencing.<sup>221</sup> While there is some variation among these systems, the systems generally allow juries unfettered discretion to select sentences for felonies within broad sentencing ranges. In Virginia, for example, rape is punishable by between five years and life.<sup>222</sup> With respect to crimes that do not carry specific ranges, class two felonies are punishable by between twenty years and life; class three felonies are punishable by between five and twenty years; class four felonies are punishable by between two and ten years; and class five felonies are punishable by between one and ten

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220. This notion was first advanced in Sunstein et al., *supra* note 11, at 2113, 2125; see also Jenny Miao Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793, 813–24 (2006) (advocating creation of punitive damages guideline system mirroring Federal Sentencing Guidelines). No legislature has yet picked up the idea, perhaps in part because none thus far has realized how much substantive flexibility it would have if it did so.

221. The six states are Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004).

222. VA. CODE ANN. § 18.2-6(B) (2004).

years.<sup>223</sup> Virginia and two other states have adopted sentencing guidelines to assist judges when sentencing within these wide ranges following bench trials and guilty pleas, but, curiously enough, forbid juries from being given this information when imposing sentences following jury trials.<sup>224</sup> The three other states that allow jury sentencing likewise give juries no instructions or guidance regarding average or typical sentences for like offenders.<sup>225</sup>

Although precious little in the way of systematic, empirical research has been done respecting the output of these systems, the (predictable) result appears to be a high degree of variation of sentences for similarly situated offenders.<sup>226</sup> In Virginia, less than one-third of jury sentences fall within the guidelines recommendations given to judges.<sup>227</sup> In a study involving one Texas county, judges related “copious evidence of unjustified disparity in jury sentences.”<sup>228</sup> For instance, one Texas judge described a gang rape that gave rise to several separate trials. The juries gave the defendants sentences ranging from a two-year suspended sentence to a forty-year prison term for the one who appeared to be the *least* culpable.<sup>229</sup>

It requires little reflection to see the strong resemblance between this situation and the state of affairs that has given rise to the Supreme Court’s due process jurisprudence regulating punitive damages. Existing legislation is sparse and does not seriously regularize

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223. VA. CODE ANN. § 18.2-10(a–e) (2004). Other states have similarly broad ranges. *E.g.* ARK. CODE ANN. § 5-4-401(a) (2006); KY. REV. STAT. ANN. § 532.060(2) (2006).

224. King & Noble, *supra* note 221, at 888–89; Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 337 (2005); *See, e.g.*, ARK. CODE ANN. § 16-90-803–04 (2006); Stephanie Gardner Holder, *Survey: Criminal Procedure*, 16 U. ARK. LITTLE ROCK L.J. 99 (1994); Robert S. Dierker, 32 MISSOURI PRACTICE: MISSOURI CRIMINAL LAW § 58.8 (2008 update). Based on interviews with judges, prosecutors, and defense lawyers, King and Noble speculate that these states may leave juries “in the dark,” in part, to introduce greater variability and severity into jury sentencing, and thereby to encourage plea bargains. To the extent that is so, such systems raise an even more serious due process question than I pose above. *See supra* notes 178, 179 and accompanying text (describing Court’s punitive damages law forbidding the introduction of arbitrariness in the system for deterrent purposes).

225. Those states are Kentucky, Oklahoma, and Texas. King & Noble, *supra* note 221, at 888–89.

226. King & Noble, *Jury Sentencing in Noncapital Cases*, *supra* note 224, at 351–57 (reciting findings from a study of jury sentences in Virginia and Arkansas); Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. UNIV. J. OF URBAN & CONTEMP. LAW. 3, 28–29, 32 (1994).

227. King & Noble, *Jury Sentencing in Noncapital Cases*, *supra* note 224, at 354.

228. Weninger, *supra* note 226, at 28.

229. *Id.* at 29.

punishment. Sentences are starkly unpredictable. And defendants occasionally receive large, outlier sentences without any apparent explanation. Such defendants, therefore, appear to have a strong argument that their sentences violate the Due Process Clause and thus should be reduced. The same appears true for defendants who receive unusually harsh sentences in states—and there appear to be at least two and perhaps as many as three dozen such states—that afford judges the same kind of unfettered discretion.<sup>230</sup>

To be sure, state systems that allow wide sentencing discretion contain some features that differentiate them from the common law system of awarding punitive damages. Most notably, the criminal statutes always prescribe a maximum sentence, even if it is death or a prison term of life. Criminal trials in states involve publicly accountable prosecutors, who may not urge judges and juries to impose maximum possible punishments as often as plaintiffs' lawyers do.<sup>231</sup> Criminal sentencing law also contains unique post-adjudication components that may smooth out unjustified disparities to some degree. Parole boards are commonly entrusted with the power to release prisoners once they have served portions of indeterminate sentences. Clemency boards and state governors likewise have the power—even if very rarely invoked—to mitigate the severity of outlier sentences. Any serious due process attack on long sentences imposed in indeterminate sentencing systems would need to account for these, and other, realities.

My purpose, here, however, is simply to point out that it should be hard for the Court to avoid applying its new regularization jurisprudence in the context of a well-framed attack on unstructured state sentencing systems. Tens of thousands of offenders per year are sentenced under these kinds of sentencing systems, and their liberty

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230. See Dept. of Justice, Office of Justice Programs, 1996 National Survey of State Sentencing Structures 3–6 (classifying 36 states as having “predominately indeterminate sentencing structure[s],” which tend to allow wide discretion in sentencing); Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington: Practical Implications for State Sentencing Systems*, at 3 (Vera Institute of Justice State Sentencing and Corrections Policy and Practice Review, Aug. 2004) (listing thirteen states as restricting judicial discretion through binding guidelines and twelve others as having advisory or voluntary guidelines, leaving the other twenty-five as purely discretionary systems). It appears that no one has done any recent study to measure variability and sentencing disparities in such a system. The closest thing to such a study appears to be the national statistics compiled across jurisdictions that are mentioned in John F. Pfaff, *The Continued Vitality of Structured Sentencing After Blakely: The Effectiveness of Voluntary Guidelines*, 54 U.C.L.A. L. REV. 235 (2006). Obviously, if my analysis here is right, studies documenting the variability of noncapital prison sentences in states could become extraordinarily important.

231. See Karlan, *supra* note 139, at 919.

surely matters as much as corporations' pocket books. To the extent the Due Process Clause has not been brought to bear on these sentencing systems because solid, statistical evidence documenting unpredictability does not exist—or, even worse, because members of the Supreme Court and the relevant state judiciaries are unaware of the parallels between these systems and the common law system for imposing punitive damages—that should change. If the mission of the Due Process Clause is now seriously to regularize punishment, there is no reason why that mission should be limited to civil cases.<sup>232</sup>

## CONCLUSION

Although the substantive outcome of *Exxon* suggests at first glance that the Supreme Court's constitutional punitive damages jurisprudence may be poised to become quite substantive and muscular, a more careful reading—coupled with a comparison to criminal sentencing proportionality jurisprudence—suggests just the opposite. The Court is concerned with the unpredictability of punitive damage awards, not with their amounts per se. *Exxon* thus sets the stage for the Court's punitive damages jurisprudence to be confined almost exclusively to the realm of procedural due process. The decision leaves it to Congress and state legislatures to ratify the possibility of imposing large punitive awards in appropriate cases and plants the seeds of affording extreme, if not absolute, deference to such democratic determinations.

At the same time, *Exxon* sets the stage for a potential upheaval of many states' systems of imposing criminal punishment. Although the Court has long held that it will defer to state legislatures' determinations concerning the permissible length of prison sentences, *Exxon* indicates that the Court—that is, the Due Process Clause—will no longer tolerate wide and unjustified disparities concerning which individuals receive unusually long sentences. It may be an ironic legacy of the *Exxon Valdez* litigation that the largest corporation in the world, in a one-of-a-kind federal case, litigated to establish a legal principle that brings long-overdue constitutional oversight to harsh sentences that state courts sometimes impose upon utterly typical and unremarkable criminal defendants.

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232. Such claims of arbitrariness or gross disproportionality, of course, could also be cast as Eighth Amendment claims. In this respect, a defendant would basically be arguing that his sentence is cruel and unusual *as measured against other similarly situated offenders in the same state*. It also remains open to states faced with such claims to clamp down on unpredictability by means of state common law, mirroring the Supreme Court's decision to ground the *Exxon* decision in federal maritime law, a species of federal common law.