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Procedural Due Process and Predictable Punitive Damage Awards

Jill Wieber Lens[*]

In Exxon Shipping Co. v. Baker, *the Supreme Court's most recent opinion on punitive damage awards, the Court declared that the real problem with punitive damage awards is their "stark unpredictability." The Court abandoned all hope that common law jury instructions could produce predictable punitive damage awards. Instead, the Court suggested pegging punitive damage awards to compensatory damage awards. So far, analysis of the opinion has been minimal, likely due to the purported maritime law basis of the holding.*

Exxon *should not be overlooked, however, as it signals a resurgence of procedural due process as a basis for challenging punitive damage awards—a type of challenge that the Court has not heard since the early 1990s. Predictability of the amount is no different than fair notice of the likely severity of an award, which procedural due process requires. If common law jury instructions cannot produce predictable punitive damage awards, they also cannot produce awards consistent with the notice procedural due process requires. The* Exxon *Court's pegging solution will not produce predictable awards (and ones that comply with procedural due process) because it relies on compensatory damages, which are inherently unpredictable. As an alternative, this Article suggests looking to restitution, a non-controversial punitive, civil remedy. Basing punitive damages on the defendant's gain would produce predictable awards—as procedural due process requires.*

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I. INTRODUCTION

Ladies and gentlemen of the jury panel, the purpose of punitive damages is "not to compensate the plaintiff for any injury, but to punish the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future."[1] In determining the amount of punitive damages, you "must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong."[2]

In 1991, in *Pacific Mutual Life Insurance Co. v. Haslip*,[3] Justice O'Connor found that these—and all common law—jury instructions violate procedural due process because they "provide[] no meaningful standards to guide the jury's decision to impose punitive damages or to fix the amount."[4] These jury instructions—and common law punitive damages procedures generally—lead to "wildly unpredictable results and glaring unfairness."[5]

1. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (internal quotation marks omitted).
2. *Id.*
3. *Id.*
4. *Id.* at 43 (O'Connor, J., dissenting).
5. *Id.* at 49.

Justice O'Connor's analysis in *Haslip* was a dissent. The majority in *Haslip* found that the common law jury instructions sufficiently constrained the jury's discretion in imposing punitive damages.[6] After *Haslip*, the focus necessarily changed from procedural due process challenges of punitive awards to something else, mainly substantive due process. In the context of damages awards, the difference between procedural and substantive due process is that procedural due process examines the procedures used to impose an award, whereas substantive due process examines the award itself. Although the bases of the Court's holdings in punitive damage cases have not always been entirely clear, since *Haslip*, each of the Court's notable punitive damage opinions has been based on substantive due process.

Almost twenty years after *Haslip*, in *Exxon Shipping Co. v. Baker*,[7] the Court again evaluated common law jury instructions used in imposing punitive damages. In fact, the Court revisited some of the same instructions it had reviewed in *Haslip*. It concluded that common law instructions cannot produce predictable punitive damage awards, and that "stark unpredictability" is the "real problem" with punitive awards.[8] This unpredictability also leads to inconsistency because two cases involving very similar facts can produce dramatically different punitive awards.[9] Although *Exxon* is a Supreme Court case about punitive damages, it has generally been overlooked because it is based in maritime law.[10] The assumption that *Exxon* is not as important because of its maritime-law basis is unfortunate because the opinion signals the resurgence of procedural due process concerns with punitive damage awards.[11] The opinion barely mentions maritime law, and the Court's main focus—predictability—has little to do with maritime law and everything to do with procedural due process. Both predictability and procedural due process are rooted in the rule of law, which requires laws to be specific enough to enable citizens to order their behavior accordingly. Naturally, both predictability and procedural due process require that defendants have some fair warning of the

6. *See id.* at 19 (majority opinion).
7. 554 U.S. 471 (2008).
8. *Id.* at 499.
9. *See id.* at 500–01.
10. *See* discussion *infra* Part IV.A.
11. *See* discussion *infra* Part IV.

amount of the punitive damage award, enabling defendants to order their behavior accordingly.[12]

In *Exxon*, the Court asked whether common law jury instructions can produce predictable punitive damage awards. The majority answered "no." This question of whether common law jury instructions can produce predictable punitive damage awards is no different than asking whether the same instructions can produce awards consistent with the fair notice of likely severity of an award that procedural due process already requires. Surprisingly, the Court has never answered this procedural due process question. But by concluding in *Exxon* that common law jury instructions cannot produce predictable awards, the Court effectually also concluded that common law jury instructions violate procedural due process: if the instructions are incapable of producing predictable awards, they cannot produce awards at a level of severity, (i.e., a likely amount), of which the defendant had fair notice. Further evidence of the procedural due process implications of *Exxon* is its remarkable similarities to Justice O'Connor's dissent in *Haslip*. After *Exxon*, it seems unavoidable that common law jury instructions violate procedural due process due to their failure to produce predictable punitive damage awards and that some reform is necessary.

The Court in *Exxon* offered a concrete solution to fix the unpredictability problem—pegging punitive damages to compensatory damage awards.[13] Unfortunately, this suggestion is inherently doomed because the baseline used by the Court, the compensatory award, is unpredictable.[14] Compensatory damages depend on the plaintiff and her injury, details that the defendant likely does not know before the tort.[15] Further, tort law specifically mandates that the defendant may end up compensating the plaintiff for consequences no reasonable person could have foreseen, thereby precluding predictable awards.[16] Apart from their unpredictability, compensatory damages are not a logical baseline for setting punitive damage awards because the availability of punitive damages does not depend on the amount of compensatory damages awarded.[17]

12. *See* discussion *infra* Part IV.B.
13. *See* discussion *infra* Part IV.D.
14. *See* discussion *infra* Part V.A.
15. *See* discussion *infra* Part V.A.1.
16. *See* discussion *infra* Part V.A.3.
17. *See* discussion *infra* Part V.B.

This Article proposes an alternative reform to make punitive damage awards predictable, as procedural due process requires. It argues that punitive damages should be modeled after another punitive remedy available in tort: restitution.[18] Specifically, the amount of the punitive award should be based on the defendant's gain.[19] Using this measurement will finally create a logical, factual connection between the tortious conduct and the punitive damage award.[20] Flexibility in the measurement, as already exists in restitution, will enable sufficient punishment and deterrence.[21] Most importantly, a gain-based punitive award will improve predictability. Predictability results because, even though awards may differ, the award itself is based on the defendant's tortious conduct, something the defendant comprehends before committing the tort.[22]

Part II of this Article explores the *Exxon* decision generally. Part III explains the distinction between procedural and substantive due process, and argues that each of the Court's opinions since *Haslip* has been based on substantive due process. Part IV explores *Exxon* as a procedural due process-based opinion and its consequences. Part V identifies the irony of *Exxon*—that the Court hopes to achieve predictability, but then suggests a reform that pegs punitive damages to an unpredictable baseline. Part VI then suggests basing punitive damages on the defendant's gain.

II. *EXXON* GENERALLY EXPLAINED

Factually, *Exxon* was based on the *Exxon Valdez* oil spill.[23] The defendant was found to be reckless in retaining a known relapsed alcoholic to captain a tanker carrying crude oil.[24] The jury awarded the plaintiffs $287 million in compensatory damages.[25] The jury also

18. *See* discussion *infra* Part VI.

19. *See* discussion *infra* Part VI.C.

20. *See* discussion *infra* Part VI.C.1.

21. *See* discussion *infra* Part VI.C.2.

22. *See* discussion *infra* Part VI.C.4.

23. Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008).

24. *Id*. at 480.

25. *Id*. The defendant had already spent $2.1 billion in clean-up efforts, paid $25 million in criminal fines and $100 million in restitution, $900 million in claims brought by the United States and Alaskan governments, and $303 million in voluntary settlements with other private parties. *Id*. at 479.

imposed $5 billion in punitive damages,[26] which was later reduced to $2.5 billion.[27]

The Supreme Court granted certiorari to address a challenge to the punitive damage award based on maritime law, which is federal common law.[28] The question before the Court was whether the $2.5 billion punitive award was "greater than maritime law should allow in the circumstances."[29] Put differently, did the award exceed the "bounds justified by" maritime law?[30] The Court explained that these questions required it to explore "the place of punishment in modern civil law and reasonable standards of punishment in administering punitive law."[31] The Court first reviewed the history of punitive damages.[32] The Court then reviewed State regulation of punitive damage awards and remarked that "[d]espite these limitations, punitive damages overall are higher and more frequent in the United States than they are anywhere else."[33] The Court noted that American punitive damages had been a target of criticism.[34] But the Court further noted that such criticism might not be entirely justified, given that studies showed "overall restraint" in the awarding of punitive damages.[35]

Despite this restraint, the Supreme Court concluded that "[t]he real problem, it seems, is the stark unpredictability of punitive damage awards."[36] In reviewing statistics regarding the amounts of punitive damages awarded compared to the compensatory damages in the same cases, "the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories."[37]

26. *Id*. at 481.
27. *Id*.
28. *See id*. at 489.
29. *Id*. at 476.
30. *Id*. at 490.
31. *Id*.
32. *See id*.
33. *Id*. at 496.
34. *Id*. at 497.
35. *Id*. at 499.
36. *Id*.
37. *Id*. at 500. The authors of the study that the Court used in *Exxon* have criticized the Court's consideration of awards with low compensatory damages, which will automatically have a higher ratio between the compensatory and punitive damages. *See* Theodore Eisenberg et al., *Variability in Punitive Damages: Empirically Assessing* Exxon Shipping Co. v. Baker, 166 J. INSTITUTIONAL & THEORETICAL ECON. 5, 12–23 (2010); Catherine M. Sharkey, *The*

Such outliers may not have been problematic if they had resulted from the specific circumstances of the cases that had produced them. Unfortunately though, the system is not producing "fairly consistent results in cases with similar facts."[38] To support this assertion, the Court anecdotally noted that facts nearly identical to those that had produced a $4 million punitive damage award in *BMW of North America, Inc. v. Gore* had also resulted in an award of no punitive damages in another case.[39]

Having identified the unpredictability of punitive damages, the Court then turned to possible reforms to improve predictability. It quickly rejected "verbal formulations[] superimposed on general jury instructions" because "[i]nstructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage (the cost of medical treatment, say) . . . ."[40] Instead, the Court concluded that only a "quantified approach will work."[41] But it declined to suggest a hard cap because "there is no 'standard' tort or contract injury,"[42] and because of the legislature's better ability to set caps and make adjustments for inflation.[43]

According to the Court, the "more promising alternative" is "pegging punitive to compensatory damages using a ratio or maximum multiple."[44] In determining the proper ratio or multiple for this specific case, the Court revisited the facts: it was a "case of reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury."[45] Based on these facts, the Court rejected a 3:1 ratio.[46] The Court also rejected a 2:1 ratio because it concluded that there was no need to provide an incentive to sue due to the large compensatory award.[47]

Exxon Valdez *Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 41–42 (2009).

38. *Exxon*, 554 U.S. at 500.

39. *Id.* at 501.

40. *Id.* at 504.

41. *Id.*

42. *Id.* at 506.

43. *Id.*

44. *Id.*

45. *Id.* at 511.

46. *Id.*

47. *Id.* (explaining that the case involved "staggering damage inevitably provoking governmental enforcers to indict and any number of private parties to sue").

Ultimately, to formulate the appropriate ratio, the Court looked to the median ratio of punitive to compensatory damage awards produced in studies involving hundreds of punitive awards.[48] The Court believed that this median or lower ratio

> roughly express[es] jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards.[49]

The median was .65:1, but the Court defined a 1:1 ratio as a "fair upper limit in such maritime cases."[50]

"Whatever may be the constitutional significance of the unpredictability of high punitive awards,"[51] the Court claimed that that question was not before it. Instead, the Court based its decision on maritime law, a federal common law. Unpredictability is inconsistent with maritime law because of the "implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another."[52] Some lower courts have limited the *Exxon* holding as specific to maritime law;[53] others have viewed *Exxon* as a much broader holding, possibly one with substantive due process constitutional implications.[54] This Article

48. *Id*. at 512–13.

49. *Id*. at 513.

50. *Id*.

51. *Id*. at 502.

52. *Id*.

53. *See, e.g.*, Myers v. Cent. Fla. Inv., Inc. 592 F.3d 1201, 1222 (11th Cir. 2010) ("In *Exxon*, the Supreme Court was quite explicit that it was dealing with maritime law, and not due process of law."); Smith v. Xerox Corp., 584 F. Supp. 2d 905, 915 n.18 (N.D. Tex. 2008) ("*Exxon Shipping* was a maritime common law case, inapplicable here."); Line v. Ventura, 38 So.3d 1, 13 (Ala. 2009) ("We reject [the defendant's] argument in light of the *Baker* Court's explicit limitation of its holding to federal maritime common law."); Modern Mgmt. Co. v. Wilson, 997 A.2d 37, 51 n.17 (D.C. 2010) ("We do not focus on *Exxon* in our analysis because the Court's holding is limited to federal maritime cases.").

54. *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 100 n.9 (D. Mass. 2010) (explaining that the *Exxon* "decision emphasized the dangers of unpredictable punitive damage awards" and "not[ing] that a bedrock principle of the rule of law is that like parties should be treated similarly"); Hayduk v. City of Johnstown, 580 F. Supp. 2d 429, 484 n.46 (W.D. Pa. 2008) ("Although *Exxon* is a maritime law case, it is clear that the Supreme

argues that the *Exxon* decision has constitutional implications, but those implications are based in procedural due process.

III. PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Most of the challenges to punitive damage awards that the Court heard in the twenty years prior to *Exxon* were constitutionally based on the Due Process Clause of the Fourteenth Amendment to the United States Constitution. It states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[55] This Clause has been interpreted to include both procedural and substantive components.[56]

These components are distinct, and the distinction matters, mostly because the effect of a substantive due process violation is relatively limited, whereas the effect of a procedural due process violation is far-reaching. Despite the distinction between the two components, the Court has often intertwined them in its punitive damages cases. Some intertwining is inevitable, given the relationship of the components. Reinforcing the distinction, however, reveals that the Court's post-1993, due process-based punitive damages holdings have imposed substantive, and not procedural, limitations.

A. The Difference Between Procedural and Substantive Due Process

Procedural due process refers to procedures that the government must use when taking an action.[57] "Classic procedural due process issues concern what kind of notice and what form of hearing the government must provide when it takes a particular action."[58] In addition to providing "citizens notice of what actions may subject them to punishment," requiring certain procedures "also helps to assure the uniform general treatment of similarly situated persons

Court intends that its holding have a much broader application.").

55. U.S. CONST. amend. XIV, § 1.

56. Not all Supreme Court Justices share the view that due process consists both of procedural and substantive components; Justice Scalia, for example, denies the existence of substantive due process. *See generally* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting) (recognizing the validity of a procedural due process challenge to a punitive award, but no substantive due process basis).

57. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 523 (2d ed. 2002).

58. *Id.*

that is the essence of law itself."[59] If procedural due process is the only challenge to a particular action, then the State has the power to take that particular action, but procedural due process governs what procedures the State must follow in taking the action.

Substantive due process, on the other hand, "asks whether the government has an adequate reason for taking away a person's life, liberty or property" and, more plainly, "looks to whether there is a sufficient justification for the government's action."[60] If a particular governmental action violated substantive due process, the procedures it used in taking that action are irrelevant because the State simply lacks power to take such an action.

In reverse order, in the punitive damages context, substantive due process "imposes substantive limits 'beyond which penalties may not go.'"[61] Generally speaking, punitive damages serve and are justified by the State's interests in punishment and deterrence. However, because the State's interests are not limitless, a punitive award can be substantively unconstitutional if it does more than is justified by the State's interests.[62] Substantive due process review of a punitive damage award looks to whether the particular award is excessive, meaning it does more than is justified by the State's interests in punishment and deterrence. If the award is excessive, it is unconstitutional, regardless of the procedures used in imposing it.[63]

Procedural due process concerns about punitive damages are based on the procedures used in imposing the damages and are "typically concerned with giving fair notice and a fair hearing."[64] A punitive award may or may not be substantively excessive, but it is unconstitutional if imposed without proper procedures.[65]

59. *BMW,* 517 U.S. at 587 (Breyer, J., concurring).

60. CHEMERINSKY, *supra* note 57, at 524.

61. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993) (quoting Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907)).

62. *BMW*, 517 U.S. at 568 (majority opinion).

63. *See* Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited After* Philip Morris v. Williams, 10 U. PA. J. CONST. L. 1147, 1152 (2008).

64. *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 400 (2008); Scheuerman & Franze*, supra* note 63, at 1152 ("Procedural due process requires that there be safeguards such as instructions to the jury to guide their discretion, and judicial review to ensure the reasonableness of the awards."(quoting CHEMERINSKY, *supra* note 57, at 523–24)).

65. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 52 (1991) (O'Connor, J., dissenting) ("Even a wholly irrational process may, on occasion, stumble upon a fair result.").

The consequences of substantive and procedural due process reviews of punitive damage awards also differ. If an award violates substantive due process, that specific award is unconstitutional; the consequences of the finding of constitutional invalidity are limited to that specific award. But if an award violates procedural due process, the specific award is unconstitutional—and "*any* award of punitive damages rendered under these procedures, no matter how small the amount, is constitutionally infirm."[66] A finding that an award violates procedural due process thus essentially mandates reform of procedures used in imposing punitive damages in general.[67]

B. Classifying the Court's Opinions as Procedural or Substantive

The Court's early punitive damage opinions reflect this distinction between procedural and substantive due process. Over time, however, the distinction became muddled and the two concepts have become almost intertwined in the Court's decisions. This is not surprising because of the relationship between the two components. Reviewing the distinction reveals that the Court has relied only on substantive due process in invalidating punitive damage awards in its most recent cases.

1. Early challenges based on procedural due process

In *Haslip*,[68] the Court heard its first procedural due process challenge to a punitive damage award and found no violation.[69] The Court reviewed the common law method for assessing punitive damages, which empowers the jury to determine the amount of damages to be awarded, subject to review by the trial and appellate court.[70] The Court noted that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[71] But the instructions at issue, which explained that the purposes of punitive damages are "to punish the defendant" and to "protect[] the public by [deterring] the defendant

66. *Id*. at 43–44.

67. *See id*. at 64 (speculating that the majority in *Haslip* found no procedural due process violation "because it perceives that such a ruling would force us to evaluate the constitutionality of every State's punitive damages scheme").

68. 499 U.S. 1 (1991).

69. *See id*. at 23–24.

70. *See id*. at 15.

71. *Id*. at 18.

and others from doing such wrong in the future," and that the jury should consider the nature of the wrong in setting the amount of damages, sufficiently constrained the jury's discretion.[72] Evaluating the whole of all of the procedures in place, including appellate review,[73] the Court found that the defendant "had the benefit of the full panoply of Alabama's procedural protections" and thus determined no procedural due process violation occurred.[74]

Justice O'Connor dissented, concluding that Alabama's procedures violated procedural due process because they provided no "meaningful standards to guide the application of its laws."[75] Justice O'Connor explained that a basic purpose of procedural due process is to ensure that the government can impose burdens on people only in accordance with law, thus requiring that law include standards for enforcement and for determining consequences.[76] Alabama's jury instructions gave the jury discretion in awarding punitive damages and setting their amount, "but suggest[ed] *no* criteria on which to base the exercise of that discretion."[77] And any post-verdict review of the amount could not solve the problem because it would not test the procedures used to determine the amount.[78]

Shortly after *Haslip*, the Court upheld another punitive damage award in *TXO Production Corp. v. Alliance Resources Corp.*[79] The defendant made another procedural due process challenge, this time based on lack of fair notice—that the defendant lacked notice that the punitive award would end up being 526 times larger than the compensatory damage award.[80] The Court concluded that the only notice required by procedural due process was of the possibility of damages; thus, notice of the possible punitive damage award due to the heightened culpability of the conduct satisfied the defendant's due process rights.[81] Justice O'Connor had already expressed her

72. *Id.* at 19 (second alteration in original). The instructions also told the jury to consider "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.*

73. *See id.* at 20–21.

74. *Id.* at 23.

75. *Id.* at 44 (O'Connor, J., dissenting).

76. *Id.* at 45.

77. *Id.* at 44.

78. *See id.* at 43.

79. 509 U.S. 443 (1993).

80. *Id.* at 453.

81. *Id.* at 465–66. In 1994, the Court again addressed the procedural protections

disagreement with the distinction between notice of an award and notice of the amount of an award in *Haslip*, interpreting procedural due process to require notice of the amount.[82]

2. Veering into substantive due process

TXO also included a substantive due process challenge—that the award was excessive.[83] Both sides presented possible tests to determine whether an award is excessive, but the Court refused to adopt either.[84] The Court further explained that "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity."[85] Although the Court did not do so, it noted that "there are persuasive reasons for suggesting that the presumption should be irrebuttable."[86]

Specific to the award, the Court noted that the 526:1 disparity between the punitive and compensatory damages was significant, but it was not that significant considering the potential harm the defendant's conduct could have caused nonparties.[87] In light of that potential harm, the award was not excessive and was constitutional.[88]

necessary to protect a defendant's rights in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994). The protection at issue was judicial review of a punitive award. Acknowledging that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts," the Court found that "[j]udicial review of the amount awarded [is] one of the few procedural safeguards" that guards against the chance of juries basing awards on bias, emotion, or prejudice. *Id.* at 432. Thus, Oregon's denial of judicial review of a punitive award violated the defendant's procedural due process rights. *Id.* The Court's last mention of procedural protections occurred in *Cooper Industries, Inc. v. Leatherman Tool Group*, where the Court mandated de novo appellate review of punitive damage awards. 532 U.S. 424, 434–36 (2001). The Court made clear that this was required by procedural due process in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003).

82. *Haslip*, 499 U.S. at 44 (O'Connor, J., dissenting).

83. Also evidencing the substantive due process basis of the challenge and opinion is Justice Scalia's dissent. *See supra* note 56. Justice Scalia found no due process violation because the defendant received sufficient procedural protections. *TXO*, 509 U.S. at 470 (Scalia, J., dissenting). He dissented because he does not believe that the Due Process Clause includes any substantive limitations on punitive damages. *Id.* ("I do not accept the proposition that [the Due Process Clause] is the secret repository of all sorts of other, unenumerated, substantive rights . . . .").

84. *TXO*, 509 U.S. at 455–57 (majority opinion).

85. *Id.* at 457.

86. *Id.*

87. *Id.* at 460.

88. *Id.* at 462.

3. Intertwining the procedural and substantive due process issues

After *TXO*, the due process basis of the Court's holdings became less clear.[89] The Court's holdings in the ensuing cases included both procedural- and substantive-looking language.

a. BMW—*procedural or substantive?* In 1996, the Court reversed a punitive damage award in *BMW of North America, Inc. v. Gore*.[90] The jury had imposed a $4 million punitive damage award for the defendant's failure to disclose minimal repairs done to a car that was sold as new; the compensatory damages awarded in the case were only $4000.[91]

Besides being the Court's first reversal of a punitive damage award, the most important development from *BMW* was the Court's articulation of the three constitutional guideposts for use in reviewing punitive damage awards. According to the Court, the guideposts have dual purposes. First, analysis of the guideposts reviews whether an award is "grossly excessive" and too arbitrary to be constitutional[92]—a substantive due process question. Second, the analysis indicates whether the defendant "receive[d] fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose"[93]—a procedural due process question. Briefly, the three guideposts are: (1) the level of reprehensibility of the defendant's conduct,[94] (2) the ratio

89. *See* Jeremy T. Adler, *Losing the Procedural Battle but Winning the Substantive War: How* Philip Morris v. Williams *Reshaped Reprehensibility Analysis in Favor of Mass-Tort Plaintiffs*, 11 U. PA. J. CONST. L. 729, 745 (2009) ("In the Court's more recent punitive damages cases, the distinction between post-verdict substantive due process review of punitive damages awards and pre-verdict procedural due process requirements has often been far from clear."); Scheuerman & Franze, *supra* note 63, at 1152, 1157–59 (explaining that "the Court itself has blended the concepts" of procedural and substantive due process); Neil Vidmar & Matthew W. Wolfe, *Fairness Through Guidance: Jury Instructions on Punitive Damages After* Philip Morris v. Williams, 2 CHARLESTON L. REV. 307, 320 (2008) ("[T]he distinction between procedural and substantive justice is sometimes elusive even to trained lawyers and judges . . . .").

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

91. *Id*. at 565.

92. *Id*. at 574–75.

93. *Id*. at 574.

94. *Id*. at 575.

between the amount of punitive and compensatory damages,[95] and (3) criminal and/or civil sanctions for comparable conduct.[96]

Despite the mention of both due process concepts in the opinion, most commentators interpreted *BMW* as a substantive due process case for various reasons.[97] First, the opinion mentioned this procedural "fair notice . . . of the severity" language only once, in the same paragraph where it introduced the guideposts.[98] After this mention, the Court did not return to procedural ideas.

Second, the Court did not discuss any of the procedures that were in place in imposing the punitive award in *BMW*. Despite announcing a presumption of the substantive validity of a punitive award if proper procedures are in place in *TXO*, and even suggesting in *TXO* that the presumption be "irrebutable,"[99] the *BMW* Court did not address how the procedures were insufficient, and instead skipped ahead to addressing the award itself. Justice Breyer wrote a separate concurrence, which Justices O'Connor and Souter joined, to explain why that presumption was overcome: "The standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results. . . . [A]lthough the vagueness of those standards does not, by itself, violate due process, see *Haslip*, . . . it does invite the kind of scrutiny the Court has given the particular verdict before us."[100]

A third reason that negates the possibility of *BMW* being procedurally based is that the guideposts address only substantive

95. *Id*. at 580. The Court later mentioned that "single-digit ratio[s]" are most likely to comply with due process. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

96. *BMW*, 517 U.S. at 583–84.

97. *See* Colby, *supra* note 64, at 403–04 (stating that "[t]he Court's real problem with the punitive damages awarded in *BMW* was that it was too large, not that it was unexpected," meaning that the damage award violated substantive due process); Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 453 (2004) (describing *BMW* and the guideposts as based in substantive due process). Further support for the notion that *BMW* is a substantive due process case is found in the fact that Justice Scalia dissented because he disagreed with the majority's use of substantive due process in the case. *See BMW*, 517 U.S. at 598–99 (Scalia, J., dissenting) (recognizing the validity of a procedural due process challenge to a punitive award but not a substantive due process basis).

98. *BMW*, 517 U.S. at 574 (majority opinion).

99. TXO Prod. Corp. v. Alliance Res. Corp. 509 U.S. 443, 457 (1993).

100. *BMW*, 517 U.S. at 588 (Breyer, J., concurring). As an example, Alabama's jury instruction "does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damage awards." *Id*.

concerns. As an initial matter, the guideposts are for use in post-verdict review of punitive awards: "*Post hoc* review tests only the amount of the award, not the procedures by which that amount was determined."[101]

Additionally, the guideposts do not address fair notice. If notice were the issue, reprehensibility would be relevant because a defendant would likely be on notice that an award will be greater if conduct is highly reprehensible. The guidepost does not concern notice, however, and instead dictates that the amount of the award is substantively limited by the level of reprehensibility of the conduct.[102] Similarly, if notice were the issue, the ratio guidepost would concern the defendant's pre-existing knowledge of the punitive award's likely ratio to the compensatory award or the amount of the compensatory award. But instead, the comparison matters only post-verdict; it looks at how much greater the punitive award is than the compensatory award.[103]

The third guidepost, the criminal sanctions for comparable conduct, comes closest to reflecting notice concerns.[104] But again, the guidepost focuses on substantive concerns—criminal sanctions are relevant because courts "should 'accord substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[105] The Court expanded on these substantive concerns in its next punitive damages case after *BMW*, *State Farm Mutual Insurance Co. v. Campbell*: "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State

101. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting); *see also id*. at 52–53 (explaining that post-verdict review "'*does not really address the issue*'" of whether the procedures used to determine the amount of the award provided the defendant fair notice of the award ahead of time (quoting Charter Hosp. of Mobile, Inc. v. Weinberg, 558 So.2d 909, 915 (1990)).

102. *BMW*, 517 U.S. at 575 (majority opinion).

103. *See id*. at 580–82 (explaining that a higher ratio may be appropriate if a "particularly egregious act has resulted in only a small amount of economic damages" or if "the injury is hard to detect"); *see also infra* Part V.A.3 (arguing that using compensatory damages as the baseline allows only post-trial predictability).

104. Some notice-like language is included in this guidepost. The Court mentions criminal sanctions from other states and concludes that none of these out-of-state statutes would provide a defendant with "fair notice" of a "multimillion dollar penalty." *BMW*, 517 U.S. at 584.

105. *Id*. at 583 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

views the wrongful action."[106] Criminal sanctions are relevant not because a defendant would expect an analogous punishment in the form of punitive damages, but because they provide a substantive comparison.

Although the Court introduced the guideposts as resolving whether the defendant received fair notice of the likely severity of the punitive award, the guideposts really act only as a substantive limitation, just like the other limitations created in *BMW* and *State Farm*. Namely, in *BMW*, the Court created a substantive limitation by clarifying that a punitive award cannot punish a defendant for conduct committed in another state.[107] In *State Farm*, the Court created an additional substantive limitation by clarifying that punitive damages cannot punish a defendant for conduct dissimilar to whatever the defendant did to the plaintiff.[108]

b. Philip Morris—*procedural or substantive?* Just as in *BMW*, the Court integrated both substantive and procedural due process ideas in *Philip Morris USA v. Williams*.[109] *Philip Morris* involved a punitive damage award that, conceivably, punished the defendant for harming non-parties—people other than the plaintiff—in the lawsuit. The Court found this to violate due process and spent much time crafting the holding as based in procedural due process: "We hold that such an award would amount to a taking of 'property' from the defendant without due process."[110] The solution, according to the Court, is

106. 538 U.S. 408, 428 (2003). The Court focused only on the substantive differences between the amounts when comparing them: "The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud[,] . . . an amount dwarfed by the $145 million punitive damages award." *Id*. *BMW* and *State Farm* are the only two cases in which the Court has applied the guideposts in a constitutional review of a punitive award.

107. *BMW*, 517 U.S. at 572 ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."). The punitive damage award in *TXO* likely also encompassed punishment for out-of-state conduct because evidence of such conduct was introduced at trial. *See supra* note 80 and accompanying text. *BMW* likely overrules *TXO* in this respect.

108. *State Farm*, 538 U.S. at 423.

109. 549 U.S. 346 (2007).

110. *Id*. at 349. Within its description of the constitutional limits of punitive damage awards, the Court specifically mentions procedural concerns: "Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice' . . . of the severity of the penalty that a State may impose . . . ." *Id*. at 352 (quoting *BMW*, 517 U.S. at 574).

some procedure to ensure that the jury does not punish the defendant for harming non-parties.[111]

Despite the procedure-looking language in *Phillip Morris*, just as with *BMW*, many believe *Philip Morris* was based on substantive due process grounds—substantively prohibiting a punitive damage award from punishing the defendant for harm caused to nonparties.[112] This interpretation is correct as none of the Court's purported procedural-based problems hold up.

If the constitutional problem with the award is that it was imposed using insufficient procedures, what process was lacking? One alleged absent protection was an opportunity for the defendant to defend itself against claims of harm to non-parties.[113] The Court, however, pointed to no ruling by the trial court that practically precluded the defendant from presenting such evidence. Further, if this defect had been merely procedural, the Court should have remedied it by providing the defendant with the opportunity to defend itself against these claims. The Court's solution, however, was to prohibit punishment for harming non-parties.

Another procedural problem, according to the Court, was that "permit[ting] punishment for injuring a nonparty victim would add a near standardless dimension" to the jury's determination of the amount of punitive damages.[114] This echoed early procedural due process concerns in *Haslip* regarding the amount of jury discretion in setting award amounts. Again, though, if this defect were procedural, the Court could have fixed it by requiring the lower court to define limits within which nonparty victims could be considered. Instead, the Court prohibited any punishment for harming non-parties.

111. *Id*. at 357.

112. *See* Adler, *supra* note 89, at 745 (arguing for a substantive due process component of the *Philip Morris* decision); Erwin Chemerinsky, *Foreword: The Constitution and Fundamental Rights*, 18 U. FLA. J.L. & PUB. POL'Y, at xii (2007) (listing *Philip Morris* as a substantive due process case); Keith N. Hylton, *Due Process and Punitive Damages: An Economic Approach*, 2 CHARLESTON L. REV. 345, 371 (2008) (explaining that *Philip Morris* imposes a substantive limit and that "[t]he use of procedural due process language . . . was somewhat inappropriate and at worst insincere"); Scheuerman & Franze, *supra* note 63, at 1150, 1157–59 (describing the *Philip Morris* decision as imposing a substantive limit on punitive damages).

113. *Philip Morris,* 549 U.S. at 353–54.

114. *Id*. at 354.

A more general, notice-based procedural concern would be that the defendant lacked notice that the punitive award could include punishment for conduct to non-parties. But this defendant had such notice. That is why the defendant asked for a jury instruction prohibiting punishment for harm to non-parties.[115] The problem in *Philip Morris* could not be lack of notice.

Therefore, none of the Court's purported procedural due process bases hold water. While the appeal was based on the refusal of a jury instruction prohibiting punishment for harming non-parties, this lack of instruction was simply the method of preserving trial error for appeal.[116] Although the Court's holding mandates a jury instruction,[117] the involvement of a jury instruction does not always implicate a procedural due process basis. Just as in *BMW*, despite the procedure-looking language, *Philip Morris* was based on substantive due process.

4. Why the intertwining of procedural and substantive due process?

There are multiple possible explanations for the Court's intertwining of procedural and substantive due process. A cynical possibility is that the Court does not want to invoke substantive due process any more than necessary.[118] Perhaps the procedural due

115. *Id*. at 350–51.

116. Arguably, the defendant did not properly preserve its error for appeal. *See id*. at 362–63 (Ginsburg, J., dissenting).

117. *Id*. at 356–57 (majority opinion) (holding that jury instructions must tell a jury that it cannot "punish for the harm caused others"); *see also* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 588 (2011) (concluding that *Philip Morris* is based on procedural due process because Justice Kennedy "is talking about *how* the jury reached its decision on the punitive damages award (i.e. what evidence the jury was allowed to consider), rather than how big the award was"). Professor Gash's conclusion is based on Justice Kennedy's statement that "[d]ue process does not permit courts . . . to adjudicate the merits of other parties' hypothetical claims . . . [because it] creates the possibility of multiple punitive damages awards for the same conduct." *Id*. (quoting State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003)). Although the quote discusses the possibility that the jury may have considered other potential claims against the defendant, Justice Kennedy's discussion may have also been based on the substantive limits of punitive damages—they must be personalized to what the defendant did to the specific plaintiff, and inclusion of punishment for harm to nonparties is thus excessive.

118. *See* Colby, *supra* note 64, at 401–05 (explaining that the Court intentionally disguises substantive due process decisions as procedural due process decisions because it is "ashamed of the substantive due process doctrine's very existence"); *see also* Vikram David Amar, *Business and Constitutional Originalism in the Roberts Court*, 49 SANTA CLARA L. REV. 979, 982–83 (2009) (suggesting that labeling *Philip Morris* as procedural, "(not quite convincing, to me at least)," swayed Justices Roberts and Alito to join the opinion and "to

process "fair notice" language in *BMW* legitimizes the substantive due process holding.

The more likely reason why the Court has intertwined the two violations, however, is that they are obviously related. Every substantive due process violation likely involves a procedural issue. In *BMW*, the Court was clearly concerned about the amount of the punitive award and its encompassing punishment for out-of-state conduct,[119] but these issues necessarily also involved "*how* the jury reached its punitive damages award," which is procedural.[120] In *State Farm*, punishing for dissimilar conduct violated substantive due process,[121] but the case also necessarily involved procedures because no jury instruction prohibited the jury from punishing the defendant for dissimilar conduct. In *Philip Morris*, the punitive award may have punished the defendant for harming non-parties, a possibility given that no jury instruction prohibited it.[122] Substantive violations are more likely to occur if no procedure is in place to prevent them.[123]

Similarly, all substantive due process violations are necessarily fixed through procedures.[124] As Justice Thomas explained in his *Philip Morris* dissent, a "procedural rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages."[125]

The Court has developed a pattern of announcing a substantive restriction in one case and then mandating the jury instruction to

sleep a little easier"); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1038–39 (2009) ("Perhaps in order to keep the Chief Justice and Justice Alito from defecting, Justice Breyer took [great] pains in *Philip Morris* to ground his opinion in the procedural rather than the substantive aspect of the Due Process Clause . . . .").

119. *See supra* notes 90–107 and accompanying text.

120. Gash, *supra* note 117, at 586.

121. *State Farm*, 538 U.S. at 423.

122. *Philip Morris*, 549 U.S. at 351.

123. Conversely, substantive due process violations are less likely to occur if the procedures in place are proper. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993) ("Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity.").

124. *See* Scheuerman & Franze, *supra* note 63, at 1159–60 (stating that *Philip Morris* mandated the adoption of "procedural protections" to limit the chance of using the defendant's harming non-parties as a basis of punishment in punitive damage awards); *see also* Colby, *supra* note 64, at 405–06 (illustrating that the Constitution provides a substantive free speech right in defamation cases through a jury instruction prohibiting liability without evidence of actual malice).

125. *Philip Morris*, 549 U.S. at 361 (Thomas, J., dissenting).

help ensure that restriction in the next case. For example, in *State Farm*, the Court mandated that jury instructions inform the jury that it cannot punish the defendant for its out-of-state conduct,[126] the substantive limitation created in *BMW*.[127] Similarly, *Philip Morris* mandated that lower courts adopt some procedural protections to prevent punitive damages from encompassing the defendant's harm to nonparties,[128] another substantive limitation on punitive damages arguably created in *State Farm*.[129] These proper procedures will (hopefully) prevent the substantive due process violation; once the jury is instructed that it cannot punish the defendant for its out-of-state conduct, the punitive damage award should not include punishment for such conduct. Practically, if the jury is so instructed, it should be difficult for the defendant to show on appeal that an award included punishment for out-of-state conduct.[130]

A possible test to tell the difference between a substantive- and procedural-based limitation is to focus on why the award is problematic. Is it because it punishes something it should not? Put another way, ask if the punitive damage award would be permissible if the defendant were on notice of what the punitive damage award would encompass. For instance, if a defendant were on notice that a punitive award would encompass punishment for dissimilar conduct and the defendant had an opportunity to try to mitigate evidence of that conduct, would the award still violate the defendant's rights? If so, the dissimilar conduct issue is substantive.

126. *State Farm*, 538 U.S. at 422 ("A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."); *see also* Scheuerman & Franze, *supra* note 63, at 1154 ("*State Farm* did not explicitly direct that all of the substantive limits be provided to the jury.").

127. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996).

128. *Philip Morris*, 549 U.S. at 355 (majority opinion).

129. *See* Adler, *supra* note 89, at 745 ("When the Court in *Philip Morris* contemplated whether a *jury* could directly punish for potential harm to nonparties, the Court looked to *State Farm* (a substantive due process decision) . . . ."); Sheila B. Scheuermann, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 902 (2008) (interpreting *State Farm* as "suggest[ing] that it was improper to punish for harm to others").

130. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 456–57 (1993) ("Assuming that fair procedures were followed, a judgment that is a product of that process [the process of a jury award that includes the selection of impartial jurors, collective deliberation of the jurors based on evidence presented through the judicial process, a trial judge upholding the award, and the State Supreme Court of Appeals unanimously affirming the award] is entitled to a strong presumption of validity.").

Applying this test to the punitive award in *Philip Morris*, which conceivably included punishment for harm to nonparties,[131] is illustrative. If the defendant had been given notice that it could be punished for harming nonparties, and had the opportunity to defend itself against allegations of harming nonparties, would an award encompassing injury to non-parties violate the defendant's rights? Such notice would fix any procedural due process problem. Nevertheless, the defendant's substantive due process rights would still be violated—the award still punishes the defendant for injury to non-parties. *Philip Morris* substantively prohibits this multiple punishment possibility notwithstanding sufficient notice.[132] Regardless of the clarity of the procedural protections, the State's interests do not justify punishing a defendant for harming nonparties.

This example illustrates that the procedural and substantive limitations on punitive damage awards are not difficult to distinguish if one focuses on why the award is problematic by pretending that the defendant was on notice of the alleged defect. And it is important to make the distinction because of the consequences resulting from the two different violations. If only a substantive violation occurred, the punitive award at issue is unconstitutional. If instead a procedural violation occurred, not only is the award at issue unconstitutional, but any award issued under those procedures is also unconstitutional.[133]

131. *Philip Morris*, 549 U.S. at 355.

132. *See id*. at 356–57 (explaining that the defendant in *Philip Morris* arguably had this notice, which explains why it requested a jury instruction to preclude the possibility of punishment for harming nonparties).

133. The distinction also has practical implications. First, certain members of the Court might be willing to entertain true procedural due process challenges but not substantive due process violations—mainly Justices Scalia and Thomas. Second, Professor Jim Gash recently suggested that the Court may not be willing to hear future substantive due process claims. *See* Gash, *supra* note 117 at 584–89; *see also* Petition for Writ of Certiorari at 31, Wyeth LLC v. Scofield, 131 S. Ct. 3028 (2011) (No. 10-1177), 2011 WL 1155235, at *31 ("Members of this Court have famously expressed divergent views as to the propriety of reviewing the excessiveness of punitive damages."). The Court's disinclination to further substantive due process review of punitive damages is not as powerful as it seems, however, given that the Court can easily recraft a substantive due process violation into a procedural due process violation—as it did in *Philip Morris*. *See supra* Part III.B.3.b. But if Professor Gash is correct and the Court is disinclined to further substantive due process review, then review of any awards imposed under proper procedures is precluded. This returns the Court to a presumption of the validity of an award if imposed under proper procedures. *See TXO*, 509 U.S. at 457 ("Assuming that fair procedures were followed, a judgment that is a product of

Careful examination of the distinction between the procedural and substantive based limitations also reveals that the Court had not heard a procedural due process-based challenge to common law punitive damage jury instructions for almost twenty years. That changed in *Exxon*.

IV. *EXXON* AS A PROCEDURAL DUE PROCESS HOLDING

Forget what you know about *Exxon*. Now pretend that you were told that the Court declared that punitive damages are too unpredictable and that the Court wants reform so that potential tortfeasors can know the consequences of their behavior. What would you guess is the basis of the opinion? Probably not maritime law.

The obvious choice is procedural due process—the law that guarantees fair notice. *Exxon* predictability is no different than the fair notice that procedural due process requires; both concepts originate from the rule of law and require the same extent of notice. *Exxon* builds on the Court's prior procedural due process holdings. In *Exxon*, the Court concluded that generalized, common law jury instructions cannot produce predictable punitive damage awards. Necessarily, the same instructions cannot produce awards consistent with the fair notice of severity that procedural due process requires. To achieve the required predictability, *Exxon* suggests a pegging solution.

A. Whatever Exxon *Is, It's Not Maritime Law*

In *Exxon*, the Court states that it is "reviewing a jury award for conformity with maritime law."[134] But very little of the opinion itself even mentions maritime law, much less analyzes it. From the very beginning of the punitive damages analysis, the Court explains that the case requires it to explore its "understanding of the place of punishment in modern *civil* law and reasonable standards of process in administering punitive law"[135]—as opposed to the place of punishment in modern maritime law.

that process is entitled to a strong presumption of validity.").

134. Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008).

135. *Id.* at 490 (emphasis added); *see also* Jeff Kerr, Exxon Shipping Co. v. Baker*: The Perils of Judicial Punitive Damages Reform*, 59 EMORY L.J. 727, 758 (2010) (explaining that the Court did not cite to "maritime cases or principles").

The analysis then turns to the history of punitive damages in *all* cases.[136] The Court mentions the overall higher frequency of punitive awards in the United States as compared to England, Canada, and Australia,[137] and also mentions that American punitive damages are the target of criticism.[138] The Court then reviews studies of *all* punitive damage awards and declares them to be starkly unpredictable.[139] The Court offers anecdotal evidence of two cases with strikingly similar facts producing vastly different punitive awards.[140] These cases were not based on maritime law.[141]

The Court explains that unpredictability is problematic because "[c]ourts of law are concerned with fairness as consistency,"[142] and because of the "unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another."[143] These courts of law and the system to which the Court referred are not limited to maritime law. Also, the Court does not mention that concerns about predictability, fairness, or consistency are somehow heightened in maritime law.[144]

In evaluating possible reforms, the Court first reviews jury instructions. The examples included in the opinion are state law instructions.[145] Maritime law is federal law, and federal circuits have patterned punitive damage jury instructions for maritime law,[146] but the Court did not evaluate those. The Court reviewed the possibility of setting hard caps on punitive damages, but declined to do so partly because no "standard" tort injury exists, something that should not have hampered the Court in defining maritime law violations.[147] The Court settled on a 1:1 ratio of punitive to

136. *Exxon*, 554 U.S. at 490.

137. *Id*. at 496–97.

138. *Id*. at 497.

139. *Id*. at 499.

140. *Id*. at 500.

141. *Id*.

142. *Id*. at 499.

143. *Id*. at 502.

144. *Id*. at 471–75. But see Kerr, *supra* note 135 at 766–67, for a discussion that these concerns are heightened in maritime law.

145. *Exxon*, 544 U.S. at 503–04.

146. *See, e.g.*, 5TH CIR. PATTERN JURY INSTRUCTIONS-CIVIL NO. 4.10 (2006); 11TH CIR. PATTERN JURY INSTRUCTION-CIVIL NO. 6.1 (2005).

147. *See supra* note 42 and accompanying text.

compensatory damages based on that ratio's proximity to the median in studies of punitive damage awards imposed in state courts.[148] Because maritime law is federal law,[149] these studies likely did not include maritime law cases.[150]

Aside from introducing the case as being based in maritime law, the Court mentions maritime law just twice. One mention is that Clean Water Act daily fines confirm the propriety of the 1:1 punitive to compensatory damages ratio.[151] The second mention is to explain its active involvement in developing maritime law and thus justify its setting the 1:1 limit instead of Congress.[152] Neither of these mentions is relevant to unpredictability analysis, and they do little to convince the reader of a maritime law basis. The *Exxon* Court's purported maritime law basis for its concern about unpredictability is nonsensical.

B. Predictability Is No Different than Procedural Due Process

Unpredictability is not problematic because of maritime law — it is problematic because of procedural due process. "Unpredictability

148. *Exxon*, 554 U.S. at 512–13.

149. Federal courts have exclusive jurisdiction over common law maritime law cases. 28 U.S.C. § 1333 (2006). In 1915, Congress passed the Jones Act, which provided a negligence cause of action for seamen who suffer personal injuries. A seaman's claim based on the Jones Act may be brought in state court, and the defendant's ability to remove is limited to preserve the seaman's forum choice. 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3677 (4th ed. 2011).

150. Bridgeport Harbor Place I, LLC v. Ganim, 2008 WL 4926925, at *12 n.13 (Conn. Super. Ct. 2008) ("It is noted that although the Supreme Court's decision in *Exxon Shipping* concerned federal maritime law, the Court reached its holding by analyzing and relying on punitive awards in state court civil trials."). The types of cases included in the study cited by the Court in *Exxon* do not seem to include any based in maritime law. *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 278–80 (2006); *see also* THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 2001: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001 (2004); CAROL J. DEFRANCES & MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1996: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996 (1999); STEVEN K. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 6 (1995).

151. *Exxon*, 554 U.S. at 513–14.

152. *Id.* at 508 n.21 (explaining that "modern-day maritime cases . . . support judicial action to modify a common law landscape largely of our [the Court's] own making" despite Congress's involvement in creating maritime law remedies).

is fundamentally a procedural complaint."[153] Although not expressly making a procedural due process argument, even the defendant in *Exxon* recognized this, citing *Haslip* in its predictability discussion.[154] Both procedural due process and *Exxon* predictability originate from the rule of law ideal. To fulfill that ideal, both procedural due process and predictability mandate that a defendant be provided fair notice of the likely amount of the punitive award.

1. Origins in the rule of law

The classic conception of the "rule of law" is encapsulated in the phrase "a government of laws, and not of men."[155] The essence of this phrase is that "something other than the mere will of the individuals deputized to exercise government powers must have primacy," and that something is laws.[156]

Not just any laws will do, however. The laws must be "in a form that does instruct"[157] and must be predictable so that they "provide the keys to their effectuation."[158] The predictability of laws enables people to foresee how the government will act under circumstances, enabling people to plan their lives consistent (or inconsistent) with the rules.[159] The predictability envisioned in the rule of law is not

153. Jeffrey L. Fisher, *The* Exxon Valdez *Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 16 (2009).

154. Petition for Writ of Certiorari at 25, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2007) (No. 07-219), 2007 WL 2383784, at *25 ("[T]he same considerations of 'size and recurring unpredictability' have led state courts and legislatures to impose caps should lead the Court to set a limit here." (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (Kennedy, J., concurring))). The relevant question posed in the defendant's petition for writ of certiorari stated: "Is this $2.5 billion punitive damages award, which is larger than the *total* of all punitive damages awards affirmed by all federal courts in our history, within the limits allowed by . . . constitutional due process?" *Id.* at i. Although the question does not mention "substantive," it references the size of the award, which is a substantive concern. Also, the argument within the petition focuses on excessiveness because the amount of fines and costs already imposed on the defendant had fulfilled the state's interests in punishment and deterrence. *Id.* at 27. Similarly, the defendant argued that the Ninth Circuit erred in applying the constitutional guideposts, which are substantive limitations. *Id.* at 28–30.

155. RONALD A. CASS, THE RULE OF LAW IN AMERICA 2 (John Hopkins Univ. Press 2001) (quoting MASS. CONST. of 1780).

156. *Id.* at 3.

157. *Id.* at 5.

158. *Id.* at 7.

159. *Id.* at 7, 8 (explaining that the rule of law enables "a knowledgeable party to anticipate the manner in which a rule will be applied without knowing particulars about the individuals who will interpret and enforce the law"); *id.* at 11 (explaining that rule of law "allow[s] individuals to plan their lives"); JOSE MARIA MARAVALL & ADAM PRZEWORSKI,

exact, but sufficient to enable this planning.[160] Also necessary to predictability is that the laws be general and neutral.[161] General laws apply not only to individual cases, but to entire classes of cases.[162] Neutral laws apply to everyone in the same way.[163]

Another characteristic of predictability is that the law must be external so that each public official is bound by it.[164] Again, the decision should not change depending on the decision maker. Aside from enhancing predictability, the externality of law increases legitimacy because the decision maker is not able to "define the scope of the power to be exercised and the terms on which it is being exercised."[165] People trust the government more knowing that its power is confined by external authority, and that trust better enables the government to function.[166]

The predictability envisioned in the rule of law concept is the same end that both procedural due process and *Exxon* predictability attempt to achieve. One way procedural due process does so is the void-for-vagueness doctrine, which requires specificity in laws.[167] This specificity provides "fair warning to the public regarding what conduct may trigger government intrusion."[168] Without this specificity, the result of enforcement of laws would be unpredictable

DEMOCRACY AND THE RULE OF LAW 2 (2003) ("[The] rule of law makes it possible for people to predict the consequences of their actions and, hence, to plan their lives."); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1169 (1997) ("[C]itizens must be able to understand what the law requires in order to structure their private behavior in accordance with it."); *see also* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008) (explaining that conceptions of the rule of law emphasize predictability and that predictability enables freedom because "[k]nowing in advance how the law will operate enables one to plan around its requirements").

160. CASS, *supra* note 155, at 11.

161. *Id.* at 9.

162. *Id.*

163. *Id.* at 10.

164. *Id.* at 17 ("The assurance that any official decision maker will comply with externally generated authority should tend to increase predictability.").

165. *Id.* at 18.

166. Stephen Holmes, *Lineages of the Rule of Law*, *in* DEMOCRACY AND THE RULE OF LAW, *supra* note 159, at 40 ("[I]t makes a difference if the public believes that rules are being enforced fairly . . . .").

167. Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1510 (2007) (describing the void-for-vagueness doctrine as the courts' response to the "legislative circumvention of the rule of law through vaguely defined crimes").

168. *Id.* at 1511.

and citizens would be unable "to order their behavior"[169] accordingly. The same lack of specificity and resulting unpredictability also hurts the legitimacy of the law.

Exxon similarly seeks predictability.[170] Justice Souter's description of predictability in *Exxon* specifically seeks to enable a potential tortfeasor to look ahead "with some ability to know what the stakes are in choosing one course of action or another."[171] Indeed, Justice Souter wants the next potential tortfeasor to know that she will face a similar punishment if she acts similarly.[172] Only once potential tortfeasors have this information will they be able to plan their lives accordingly. Such predictability should also improve the legitimacy of the punitive damages system, which the *Exxon* Court notes is heavily criticized.[173]

2. Procedural due process and Exxon *require the same extent of notice*

To fulfill their rule of law origins, procedural due process and *Exxon* predictability necessarily both require notice of the likely amount of the punitive award. Without notice of the likely amount, citizens would lack fair warning of the extent of the likely governmental response to tortious conduct. Similarly, without notice of the likely amount, citizens would be unable to make intelligent decisions because of their inability to weigh the stakes of those decisions.

The Supreme Court has made clear that procedural due process requires notice of the likely amount. The Court dictates that citizens are entitled to two-fold fair notice — "not only of the conduct that will subject [them] to punishment, but also of the severity of the

169. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting). Professor Fisher also noted the connection between procedural due process and the rule of law. *See* Fisher, *supra* note 153, at 19 ("The Due Process Clause—indeed, the rule of law itself—requires civil . . . punishment to be regularized.").

170. Justice Breyer noted the connection between *Exxon* and the rule of law in his concurrence. "Like the Court, I believe 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." Exxon Shipping Co. v. Baker, 554 U.S. 471, 525 (2008) (Breyer, J., concurring in part and dissenting in part).

171. *Id*. at 502 (majority opinion).

172. *Id*.

173. *Id*. at 497.

penalty that a State may impose."[174] Notice of possible punishment alone would not fulfill the purpose of procedural due process, to allow people to order their behavior, especially given the inconsistency in the amounts of punitive damage awards.[175] Moreover, notice of possible punishment alone would not fulfill procedural due process's rule of law origins. Procedural due process must also require that a person be given fair notice of the likely severity of the award, meaning its amount. Only then are citizens truly provided fair warning of the likely government response.

Specific to *Exxon* predictability, the Court also envisions defendants being able to predict the amount of the punitive award. Only then would defendants be able to, practically, understand the stakes of a decision to commit tortious conduct. The fact that the Court envisions defendants being able to predict the amounts of the awards is also evidenced by the Court's emphasis on the unpredictable amounts of punitive damages.

True, the language of what procedural due process and *Exxon* predictability require differs. Procedural due process requires "fair notice of severity" and *Exxon* refers to predictability. Historically, however, the Court has often referred to "predictability" within procedural due process contexts. In *Haslip*, a procedural due process case, the Court cited to previous Supreme Court opinions in which it had labeled punitive damages as "unpredictable,"[176] and referred to the damages as "wholly unpredictable amounts."[177] Similarly, Justice O'Connor's dissent noted the connection between procedural due process and predictability—that common law jury instructions produce "unpredictable results" and that reforms required by procedural due process would make damages more predictable.[178]

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

175. Professor Cass discusses the possible inconsistencies between the rule of law concept and the current punitive damage system. *See* CASS, *supra* note 155, at 119–30. He believes that the current punitive damage system is "cause for concern" because of its seemingly inconsistent results. *Id.* at 99, 124. As an example, he points to *BMW of North America v. Gore*, which resulted in a $4 million punitive award, and another case with similar facts that resulted in no punitive damages. *Id.* at 124. The Court also pointed to these cases in *Exxon*. *See infra* Part IV.B.3. Justice O'Connor similarly pointed to inconsistent punitive damage awards in similar cases in her *Haslip* dissent. *Haslip,* 499 U.S. at 61–62 (O'Connor, J. dissenting).

176. *Haslip*, 499 U.S. at 12 (majority opinion) (quoting Newport v. Fact Concerts, Inc., 453 U.S. 247, 270–71 (1981); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

177. *Id.* (quoting *Gertz*, 418 U.S. at 350).

178. *Id.* at 49, 59 (O'Connor, J., dissenting).

Plus, predictability and fair notice of severity are really the same thing; one is not possible without the other. Fair notice of severity, as required by procedural due process, can exist only if the award is predictable, as envisioned in *Exxon*. If the award is predictable, then the defendant had fair notice of its severity; if unpredictable, fair notice of severity is impossible. One cannot achieve a system that produces punitive awards of which the defendant would have notice without also achieving a system that produces predictable punitive awards. Logically, one can only have notice of the amount of an award if the award is predictable.

C. Do Common Law Jury Instructions Violate Procedural Due Process?

Despite their similar origins and required extent of notice, there is a conceptual problem with thinking of *Exxon* predictability as based in procedural due process. In *Haslip*, the Court determined that common law jury instructions do not violate procedural due process. If predictability is the same as procedural due process, the Court in the *Exxon* decision should similarly have found no problem with common law jury instructions. Obviously though, the Court did find a problem with the instructions —that they cannot produce predictable punitive damage awards. The easy answer to this conceptual problem is that the Court's interpretation of what procedural due process's fair notice component requires in the punitive damages context has changed since *Haslip*; the result in *Exxon* reflects that change.

Haslip and *TXO* were the last Supreme Court cases in which a defendant challenged jury instructions and other procedures in place based on procedural due process.[179] In both cases, the Court found no violation. But in both cases, the Court assumed that "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct."[180] Procedures to provide

179. In *Haslip*, the defendant argued that it lacked fair notice of the penalty and that the jury instructions were "hopelessly vague as to (i) under what circumstances punishment is deserved, (ii) the relative degree of punishment to be imposed, and (iii) the range within which punishment might properly be imposed." Brief for Petitioner, *Haslip*, 499 U.S. 1 (No. 89-1279), 1990 WL 511306, at *9–10. Similarly, in *TXO*, the defendant complained that its procedural due process rights were violated because it lacked "advance notice that the jury might be allowed to return such a large award." TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 463 (1993).

180. *TXO*, 509 U.S. at 465–66.

notice of the severity, i.e., the amount of damages, were not required.

This is no longer good law. *BMW* expressly states that procedural due process requires procedures providing notice of the severity of the award.[181] The Court said the same in *Philip Morris*: "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant" of the required fair notice of the extent of the penalty.[182] This change from notice of the possibility of a punitive award to notice of the likely amount of the award is necessitated by procedural due process's rule of law origins.[183]

Although *BMW* announced this change and *Philip Morris* confirmed it, neither of these cases, was based in procedural due process.[184] Thus, the Court as a whole has never addressed expressly whether common law jury instructions are consistent with the fair notice of likely severity of an award that procedural due process requires.

One Justice has, however. In her *Haslip* dissent, Justice O'Connor viewed procedural due process as requiring notice of both the possibility and severity of punitive damages, as the Court now does. Using this view, Justice O'Connor, and found a procedural due process violation because no procedure sufficiently cabined the jury's discretion.[185] She explained that the jury instructions'

> vague references to "the character and degree of the wrong" and the "necessity of preventing similar wrong" do not assist the jury in making a reasoned decision; they are too amorphous. They restate

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

182. Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007).

183. See discussion *supra* Part IV.B. The Court did not explain why it changed its stance on what procedural due process requires, nor did the Court even acknowledge a change occurred. In *BMW*, the Court explained that "[e]lementary notions of fairness" require fair notice of the severity of the penalty. *BMW*, 517 U.S. at 574. As authority, the Court cited multiple criminal cases involving procedural due process violations based on a defendant's lack of notice of the extent of a penalty. *Id.* at 574 n.22. The Court explained that "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against 'judgments without notice' afforded by the Due Process Clause . . . is implicated by civil *penalties*." *Id.* Why the Court did not feel the same in *Haslip* and *TXO* is unknown, but the only way to fulfill the rule-of-law purposes of procedural due process is to interpret fair notice to include notice of the likely amount of the penalty.

184. *See supra* Part III.B.3.a–b.

185. Pac. Mut. Life Ins. Co. v. Haslip, 449 U.S. 1, 44 (1991) (O'Connor, J., dissenting).

> the overarching principles of punitive damages —to punish and deter—without adding any meaning to these terms.[186]

She also explained that Alabama's jury instructions "encourage[d] . . . unpredictable results."[187]

Justice O'Connor's *Haslip* dissent also noted the inconsistency in punitive awards resulting from the inadequate procedures. As described by Justice O'Connor, Alabama's system "impos[ed] disproportionate punishment and . . . subject[ed] defendants guilty of similar misconduct to wholly different punishments."[188] As evidence of this disproportionate punishment, Justice O'Connor pointed to anecdotal evidence of two Alabama cases involving substantially similar misrepresentations regarding insurance coverage and involving comparable compensatory damages.[189] Despite the similarities, one jury awarded $21,000 in punitive damages and another awarded $2.49 million.[190] Any actual consistency among punitive awards produced through Alabama's system was, according to Justice O'Connor, "purely fortuitous."[191]

Under the guise of maritime law, the *Exxon* Court revisited this question of whether common law jury instructions, including the very same Alabama instruction that Justice O'Connor examined,[192] sufficiently cabin the jury's discretion and produce punitive awards in amounts of which defendants have fair notice. The *Exxon* Court substituted the word "predictability" for procedural due process's

186. *Id*. at 48.

187. *Id*. at 43.

188. *Id*. at 59; *see also id*. (explaining that the state has "no legitimate interest in maintaining in pristine form a common-law system that imposes disproportionate punishment and that subjects defendants guilty of similar misconduct to wholly different punishments").

189. *Id*. at 50.

190. *Id*.

191. *Id*. at 51.

192. The instruction was Alabama's, telling the jury to consider "the character and degree of the wrong as shown by the evidence, and [the] necessity of preventing similar wrong" in determining the amount of damages. *Id*. at 48; *see also* Exxon Shipping Co. v. Baker, 554 U.S. 471, 504 (2008). Jury instructions have not changed much since *Haslip*. As of 2008, ten states "continue to use model instructions comparable to the 'skeletal guidance' approved . . . in *Haslip*." Scheuermann & Franze, *supra* note 63, at 1169. These traditional common law instructions detail the purposes of punishment and deterrence purposes of punitive damages and do little else. Also as of 2008, another eight states use instructions very similar to those approved in *Haslip* and also allow the jury to consider the defendant's wealth. *Id*. at 1170–75. Over thirty states use tests instructing the jury to consider multiple factors, many of which are related to the constitutional guideposts. *Id*. at 1176–88.

"fair notice of the severity" language and, like Justice O'Connor, answered no.

Justice O'Connor's *Haslip* dissent looks like a blueprint for the *Exxon* majority opinion. Like Justice O'Connor, the majority in *Exxon* concluded that jury instructions like the ones at issue in *Haslip*, which explain the purposes of punitive damages, do not lead to predictable punitive damage awards.[193] The majority in *Exxon* also noted the resulting inconsistency: juries are not producing "fairly consistent results in cases with similar facts."[194] As evidence of this inconsistency, Justice Souter—exactly like Justice O'Connor almost twenty years before—pointed to anecdotal evidence. This time, Justice Souter looked to the *BMW* case, where the jury imposed $4 million in punitive damages.[195] A "second Alabama case with strikingly similar facts produced 'a comparable amount of compensatory damages' but 'no punitive damages at all.'"[196] There is little doubt that the *Exxon* majority would agree with Justice O'Connor's conclusion in *Haslip* that any actual consistency among punitive awards is because of dumb luck.[197]

The ability of common law jury instructions to cabin the jury's discretion marks the one place that the *Exxon* majority departs from Justice O'Connor's *Haslip* dissent. Justice O'Connor was optimistic and believed that jury instructions could be reformed to solve the problem and "assist juries to make fair, rational decisions."[198] After almost twenty years of states' experimentation with punitive damage jury instructions, no such optimism is present in *Exxon*. Officially, the *Exxon* Court abandoned hope "that verbal formulations, superimposed on general jury instructions are the best insurance against unpredictable outliers. Instructions can go just so far in promoting system consistency when awards are not tied to

193. *Exxon*, 554 U.S. at 499.

194. *Id.* at 500.

195. *Id.*

196. *Id.*

197. The Court also noted that it was not aware of any scholarly work showing consistency among punitive awards. *Id.* at 501.

198. Pac. Mut. Life Ins. Co. v. Haslip, 449 U.S. 1, 52 (1991) (O'Connor, J., dissenting). Specifically, she advocated that the jury should be instructed on various factors—the amount of harm the defendant's conduct caused, the degree of reprehensibility, any profit motive, the defendant's financial position, the costs of litigation, any criminal sanctions imposed on the defendant, and any other civil actions against the defendant for the same conduct. *Id.* at 51–52.

specifically proven items of damage (the cost of medical treatment, say) . . . ."[199]

If state common law punitive damage jury instructions are incapable of cabining the jury's discretion enough to produce punitive awards that are predictable to the defendant, it is difficult to see how the same instructions sufficiently cabin the jury's discretion to produce awards of which the defendant had notice—the fair notice of severity that procedural due process requires. Practically, that seems impossible.[200] If jury instructions are incapable of producing predictable awards, as the Court clearly concluded in *Exxon*, then they also cannot produce awards at a severity level of which the defendant had notice—thus violating procedural due process.[201]

D. Exxon*'s Solution to Achieve Predictability (Fair Notice of the Severity)*

After rejecting the possibility of jury instructions producing predictable punitive awards, the Court narrowed down the possible reforms to one—pegging punitive damages to compensatory damages. The appropriate multiple of punitive damages to compensatory damages depends on the facts of the case. In *Exxon*, the defendant was not malicious or financially motivated.[202] The

199. *Exxon*, 554 U.S. at 504; *see also* Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 156 (2008) ("Although instructions play a valuable role in guiding the jury's determination of the punishment that the misconduct deserves and can focus the jury on the relevant factors that affect the amount of punishment, jury instructions do not limit the amount of a punitive damages award in the absence of a cap.").

200. *See* Fisher, *supra* note 153, at 18 ("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. But the Court expressly built on its due process holdings in *BMW* and *State Farm*.*"*). The Court does explain in *Exxon* that predictability-based restrictions are "more rigorous" than the constitutional limit. *Exxon*, 554 U.S. at 506.

201. Professor Fisher argues that the *Exxon* regularization of punishment mandate applies to both civil and criminal punishment, meaning states are constitutionally required to adopt something similar to the federal sentencing guidelines. Fisher, *supra* note 153, at 42–46 (explaining his purpose 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"). My point is crafted similarly—after *Exxon*, it should be hard for the Court to avoid finding that state common law punitive damage jury instructions violate procedural due process given its holding that the same instructions are incapable of producing predictable punitive awards.

202. *Exxon*, 554 U.S. at 513.

defendant's conduct also resulted in substantial compensatory damages,[203] meaning a high punitive award was not necessary to incentivize the suit. Based on these facts, the defendant was on notice that a punitive damage award imposed would be roughly equal to the compensatory damage award.[204] Put another way, the defendant lacked notice that the award would exceed the substantial compensatory damage award.

It is important to note that the Court did not suggest looking at specific prior awards in making the factually based ratio determination,[205] although some have inaccurately interpreted *Exxon* this way.[206] For example, the Eighth Circuit reduced a Missouri punitive damage award based on a prior award from a Wisconsin case that the defendant had cited in its appellate brief.[207] The "citation of this case implies that [the defendant] would have had notice that its conduct could lead to" punitive damages in the same amount as in the Wisconsin case.[208]

But the Court did not look to prior awards in *Exxon* and prior awards should not control fair notice for numerous reasons. First, this type of analysis puts the cart before the horse—it forces consistency and inappropriately assumes that the prior awards are

203. *Id*. at 480–81.

204. *See id*. at 512–13.

205. Realistically, a comparison to specific prior awards was likely impossible because the case involved the greatest environmental disaster ever (at the time, unfortunately, until the BP Oil Spill). *See* Anne C. Mulkerin, *BP's Oil Spill Bill Could Dwarf Exxon's* Valdez *Tab*, N.Y. TIMES, May 3, 2010, http://www.nytimes.com/gwire/2010/05/03/03greenwire-bps-oil-spill-bill-could-dwarf-exxons-ivaldezi-91298.html?pagewanted=all (explaining that many analysts are using "*Exxon Valdez* as the barometer for what BP is likely to pay").

206. Alexandra B. Klass, *Punitive Damages After* Exxon Shipping Company v. Baker*: The Quest for Predictability and the Role of Juries*, 7 U. ST. THOMAS L.J. 182, 192–93 (2009) ("[S]ince *Exxon*, courts have carefully surveyed prior opinions reviewing punitive damages verdicts to ensure their ratios and punitive damage awards are in line with those prior cases.").

207. *See, e.g.*, JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 877 (8th Cir. 2008).

208. *Id*. The Eighth Circuit's finding is also interesting because it raises issues of whether predictability is subjective or objective. *See id*. Justice Souter's definition of predictability seems specific to the tortfeasor—that he must have some ability to understand the stakes of his decision. *See Exxon*, 554 U.S. at 513 n.27. Similarly, the Eighth Circuit mentions that the specific defendant had notice. *See JCB*, 539 F.3d at 877. At the same time, the Eighth Circuit's finding is not true subjective predictability because the citation was years after the tortious conduct. Still, it seems fair to impute notice of the Wisconsin case to the defendant given the citation. But without the citation, would it be fair? *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997), is a staple in first-year law school property and/or tort classes, but non-law students are likely not aware of it and reasonably so.

sound.[209] It is likely that most prior comparison awards were awarded without procedures in place to ensure their predictability.[210] Second, forcing consistency among punitive awards "can overshadow the jury's determination of the facts of the case,"[211] which is the reason the Court has discouraged comparisons historically.[212] The Court's opinions still evidence a private law conception of punitive damage awards, meaning the punitive award should reflect the facts of the particular case.[213] Last, forcing consistency among awards would eliminate the jury's current role in assessing punitive damages based on the specific facts of the case.[214] The Court did not want this. In defining a predictable penalty, the Court specifically deferred to juries and noted that a median ratio illustrates "jurors' sense of reasonable penalties" when conduct is merely reckless and

209. *Cf.* Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 344 (2006) ("Perhaps the reviewing court could evaluate the [pain and suffering] award in terms of its comparability with prior awards for similar injuries. But this approach inappropriately assumes that prior awards are constitutionally sound.").

210. Mandating consistency among awards would also create additional practical problems. For instance, what kind of prior awards can be used in the comparison? Is it limited to awards from the same jurisdiction? Must the prior award have been reviewed by an appellate court? Must that appellate court be the Supreme Court? Must the award have been affirmed in a reported case? Must that review have involved constitutional challenges? Does the court conducting the comparison first need to evaluate whether the prior award was proper? Although a prior comparison award is a final judgment, some sort of review of the prior award seems necessary. If there is any basis upon which the prior award was improper, then consistency is not desired. Any challenges to the prior award would be collateral attacks by a third party, as time for direct appeal would likely have passed. If the court grants the collateral attack and declines to use the prior award for the comparison, what happens to the continued viability of that prior award as between the original parties?

211. Klass, *supra* note 206, at 196.

212. *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457–58 (1993) ("[A] jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.").

213. *See generally* Jill Wieber Lens, *Punishing for the Injury: Tort Law's Influence in Defining the Constitutional Limitations on Punitive Damage Awards*, 39 HOFSTRA L. REV. 595, 625–35 (2011).

214. *See* Klass, *supra* note 206, at 201 ("[T]he Court has identified a problem—unpredictability—that cannot be easily addressed without fundamentally altering the role of juries in meting out civil justice."). The only practical way for juries to reach consistent awards is for them to base awards on prior awards, but evidence of prior awards is likely inadmissible. *See id.* at 191–92 ("Such information about completely different cases is likely inadmissible under the rules of evidence and thus juries and lower courts are unable to remedy the problem the Supreme Court has now identified.").

compensatory damages are substantial.[215] *Exxon* does not signal a shift to forcing consistency among awards or otherwise ending the jury's role in assessing punitive damages.

Instead, *Exxon* predictability is defined by the facts. If the potential tortious conduct is reckless but would cause a substantial amount of damage, the defendant is on notice of a punitive damage award roughly equal to the compensatory damage award. Presumably, this also means that if the potential conduct is malicious and likely to cause a substantial amount of damage, the defendant is on notice that the punitive damage will likely exceed the compensatory damage award—but maybe not by much given the Court's commentary that a higher ratio is usually only proper if the compensatory damages are minimal.[216] Accordingly, if the planned conduct is malicious but likely to cause only insubstantial damage, the defendant is on notice that the punitive damage award will likely greatly exceed the compensatory award.[217]

V. THE IRONY OF *EXXON*: THE UNPREDICTABLE BASELINE

Although the Court's desire to improve the predictability of punitive damages is clear in *Exxon*, the Court's proposed pegging solution is fundamentally flawed. It cannot achieve predictable

215. Exxon Shipping Co. v. Baker, 554 U.S. 471, 513 (2008).

216. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

217. The similarities between the constitutional guideposts and *Exxon* predictability have prompted some lower courts to think that predictability is a substantive limitation, citing *Exxon* next to *BMW* and *State Farm* as if the cases state the same thing. *See, e.g.*, John Hancock Life Ins. Co. v. Perchikov, No. 04 CV 98 (NG) (MDG), 2010 WL 185007, at *4–5 (E.D.N.Y. Jan. 15, 2010); Perez-Farias v. Global Horizons, Inc., No. CV-05-3061-RHW, 2009 WL 1011180, at *5 (E.D. Wash. Apr. 15, 2009); Weinstein v. Prudential Prop. & Cas. Ins. Co., 233 P.3d 1221, 1274 (Idaho 2010). The Supreme Court recently denied certiorari in *Wyeth LLC v. Scofield*, in which the petitioners argued that the Court's holding in *Exxon* indicates that "when a court awards a substantial amount in compensatory damages, it would violate due process to award an even greater amount in punitive damages." Petition for Writ of Certiorari at 23, Wyeth LLC v. Scofield, 131 S.Ct. 3028 (2011) (No. 10-1177), 2011 WL 1155235. Despite the similarities between the guideposts and *Exxon*, predictability is a procedural limitation. Practically though, solving unpredictability may also eliminate substantive due process concerns. Suppose that after *Exxon* the defendant could and still wanted to challenge the punitive damage award on substantive due process grounds. The level of reprehensibility was low, only a 1:1 ratio existed between the substantial compensatory damages and the punitive award, and the award was at least somewhat consistent with the criminal sanctions for comparable conduct. Using the Court's definition of predictability, an award would likely either be unpredictable and substantively excessive, or predictable and not substantively excessive. The Court's definition of predictability, however, cannot achieve predictable punitive damage awards. *See* discussion *infra* Part V.

awards because it uses an unpredictable baseline—the compensatory award.[218] Tort law mandates the unpredictability of compensatory damages through personalization and specific doctrines. Further, a compensatory damage baseline is not logical given the limited connection between the plaintiff's injury and the availability of punitive damages.

A. The Unpredictable Nature of Compensatory Damages

Compensatory damages are unpredictable because their amount depends on the specific plaintiff, her circumstances, and her injury—all details that a defendant likely does not know before committing a tort. And even if a defendant were well-versed in the plaintiff's circumstances, tort law sometimes specifically mandates compensation for consequences that no reasonable person could have foreseen, much less the defendant. At most, a compensatory damage baseline enables post-trial predictability, which is not really predictability at all.

1. Mandatory personalization to the specific plaintiff

The aim of compensatory damages is to put the injured plaintiff "in a position as nearly as possible equivalent to his position prior to the tort."[219] Necessarily, the amount of compensatory damages depends on the specific circumstances of the injured plaintiff. If the specific plaintiff has $60,000 in past medical expenses and more likely than not will need another surgery costing $50,000, her compensatory damages will total $110,000—because that is what she suffered. If the specific plaintiff used to make $1 million in salary before the injury and now cannot work, the calculation of her future lost wages will look to that prior $1 million salary. The amount of all

218. In a prior Article, I argued that the Court's use of compensatory damages as a baseline is proper because of tort law's influence on the Court's substantive constitutional analysis of punitive damage awards. *See* Lens, *supra* note 213, at 633–35. If the aim is predictability, however, compensatory damages are an improper baseline.

219. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1977); *see also* Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999) ("The purpose of tort damages in Anglo–American law is to compensate the wronged party for damage or injury caused by the defendant's conduct. The goal of awarding damages is to repair the wronged party's injury, or at least, to make the wronged party whole as nearly as may be done by an award of money."(internal citations omitted)); DeNike v. Mowery, 418 P.2d 1010, 1012 (Wash. 1966) (explaining that the fundamental purpose of tort law is to make the plaintiff as nearly whole as possible through pecuniary compensation).

compensatory damages, whether they are medical expenses, lost wages, pain and suffering, or emotional distress, is based on the plaintiff's specific circumstances.

The defendant's conduct therefore has minimal relevance to the amount of compensatory damages. True, battery based on shooting someone likely causes greater compensatory damages than battery based on throwing a pencil at someone (although even this is not guaranteed). But outside the comparison of such extremes, the tortious conduct itself has little bearing, and two identical tortious conducts can result in vastly different amounts of compensatory damages. One plaintiff shot in the leg may have relatively small medical expenses because she recovered from surgery well, and may lack lost future wages because her job involves sitting at a desk, which she is still fully able to do. Another plaintiff shot in the leg, however, may have large medical expenses due to unsuccessful surgeries, and may have dramatic lost future wages because the plaintiff was a professional athlete and can no longer play. The first shooting defendant will pay little in compensatory damages, and the second will pay a large amount. The similarity of the tortious conducts is irrelevant—the compensatory damages must differ to ensure each plaintiff is returned to the same place in which he would have been if no tort had occurred.

The amount of compensatory damages awarded depends on details about the specific plaintiff—details that the defendant likely will not know before committing the tortious conduct.[220] One of those unknown details is a plaintiff's pre-existing conditions. The eggshell plaintiff rule famously mandates compensation for damages worsened due to a plaintiff's pre-existing condition,[221] even though the extent of the injury is unforeseeable.[222] As an example, if a

220. *See* Shanin Specter & Charles L. Becker, *The* Exxon *Decision: Another Bad Call on Punitive Damages*, 238 LEGAL INTELLIGENCER 7 (Nov. 18, 2008) ("[T]he court failed to recognize that one part of the equation—compensatory damages—are inherently unpredictable, as they depend on the harm suffered by the plaintiff.").

221. 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 11.1 (3d ed. 2011) ("An injured person is entitled to recover full compensation for all damages that proximately result from a defendant's tortious act, even if some or all of the injuries might not have occurred but for the plaintiff's preexisting physical condition, disease, or susceptibility to injury.").

222. *See, e.g.*, *id.* ("The foreseeability to the defendant that the plaintiff might be injured by his or her conduct does not affect liability, as the defendant must take the victim as the defendant finds him or her."); *see also* Brandner v. Hudson, 171 P.3d 83, 88 (Alaska 2007) (explaining that the "eggshell plaintiff" rule mandates that the defendant pays compensatory

plaintiff has a heart condition making her more susceptible to stress, a simple assault based on scaring the plaintiff may end up causing a heart attack. The defendant will pay damages based on causing that heart attack even though it was unforeseeable.

Another detail that a defendant likely will not know about a plaintiff is his financial condition, to which the eggshell plaintiff rule also applies. Thus, if the defendant's conduct deprives a plaintiff of her $2 million per year earning capacity, the defendant is liable for that loss—even if the defendant is unaware of the plaintiff's earning potential and thus could not have foreseen the extent of the compensatory damages.[223]

Even if a defendant is well-versed in his plaintiff's medical and economic conditions, the defendant has little ability to know the likely amount of compensation for intangible, noneconomic harms like pain and suffering. Empirical research has shown that, when organized based on severity of physical injury, the accompanying pain and suffering injuries properly reflect that severity; so the pain and suffering award for loss of an eye is greater than the award for temporary burns.[224] However, within the same category of severity of injury, the study found great variability.[225] "Much of this variation may legitimately reflect claimants' precise individual circumstances, as the tort system intends."[226] Each plaintiff is different; "[t]wo persons apparently suffering the same pain from the same kind of

damages based on the plaintiff's entire injury "caused or aggravated" by the defendant's conduct even though the extent of injury "may have been unusual or unpredictable"); Schafer v. Hoffman, 831 P.2d 897, 902 (Colo. 1992) ("The thin skull [a.k.a. eggshell plaintiff] doctrine declares that foreseeability of plaintiff's injuries is *not* an issue in determining the *extent of injury* suffered . . . ." (emphasis added)).

223. *See Schafer*, 831 P.2d at 902 ("[The] shabby millionaire rule declares that foreseeability is not an issue in determining *the extent of damages* that the injuries cause.").

224. *See* Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 921, 924 (1989).

225. *See id.* at 923 ("Within an individual severity level, the highest valuation can be scores of times larger than the lowest."). "Although the median, and even mean, awards in a given category may be considered relatively reasonable, the seemingly uncontrolled variability of awards is cause for concern . . . ." *Id.* at 924. This analysis is similar to the Court's in *Exxon*, finding that the median punitive award in the cases studied was reasonable, but the outliers were troubling. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 499–500 (2008). Many have questioned whether *Exxon* also applies to pain and suffering damages. *See, e.g.*, Sharkey, *supra* note 37, at 45 ("Surely, the same unpredictability that taints the jury's punitive damages decision-making process would surface in the jury's determination of noneconomic compensatory damages . . . .").

226. Bovjberg et al., *supra* note 224, at 923.

injury might in fact be suffering respectively pains differing much in acuteness, depending on the nervous sensibility of the sufferer."[227] Differences among plaintiffs, however, do not entirely explain the variability in the amounts of pain and suffering compensatory damages.[228] Another contributing factor is that the damages "have no economic referent and no widely agreed-on means of determination."[229] Awarding noneconomic pain and suffering damages has "rendered the degree of a potential defendant's exposure almost completely unknowable *ex ante*."[230]

2. Mandatory compensation of the unforeseeable in intentional torts

Regardless of how much research a defendant does on his victim pre-tort, the research could not encompass all aspects of compensatory damages. Tort law mandates compensation for the unpredictable consequences of a defendant's intentional tortious conduct, the type of tortious conduct most likely to trigger the availability of punitive damages.[231] As between an injured plaintiff

227. Rael v. F & S Co., 612 P.2d 1318, 1325 (N.M. Ct. App. 1979) (Sutin, J., concurring in part and dissenting in part) (citing Herb. v. Hollowell, 154 A. 582, 584 (1931)); *see also* Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 576 (Cal. Ct. App. 1998) ("The only person whose pain and suffering is relevant in calculating a general damage award is the plaintiff.").

228. *See* Bovjberg et al., *supra* note 224, at 923.

229. Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858, 862–63 (1999).

230. *Id.* at 863. In addition to pain and suffering damages, another type of damage in tort that arguably encompasses the unforeseeable is consequential damages, meaning those damages that are a consequence of the defendant's tortious conduct, but not a direct result thereof. Tort law uses a less strict, foreseeability-based restriction in defining consequential damages:

> Under either a tort or a contract standard, the foreseeability of the consequences is a factor. However, the test derived from *Hadley* imposes a more restrictive foreseeability limitation. To be recoverable under the *Hadley* test, consequential damages must be so likely that "it can fairly be said" both parties contemplated these damages as the probable result of the wrong at the time the tort occurred. Under the tort standard, damages need only be reasonably foreseeable.

Vanderbeek v. Vernon Corp., 50 P.3d 866, 870 (Colo. 2002).

231. *See* Baker v. Shymkiv, 451 N.E.2d 811, 813 (Ohio 1983) ("Intentional trespassers are within that class of less-favored wrongdoers."). In negligence cases, where punitive damages are generally not available because of the defendant's lessened culpability, duty and proximate cause elements work to limit the defendant's liability to only those consequences that a reasonable person would have foreseen. *See* Seidel v. Greenberg, 260 A.2d 863, 871 (N.J. Super. Ct. Law Div. 1969) ("[W]here intentional acts are involved . . . it is clear that the rules of causation are more liberally applied to hold a defendant responsible for the consequences of his acts.").

and a culpable defendant, the culpable defendant should bear the burden of compensating the unforeseeable.[232]

As an example, if a plaintiff suffers a heart attack and dies as a result of the defendant's trespass on the plaintiff's property, the defendant is liable in compensatory damages for the plaintiff's death despite the unforeseeability of the heart attack.[233] As another example, the doctrine of transferred intent specifically mandates that a defendant can be liable for battery (e.g., for shooting someone) and must pay compensatory damages based on the battery, even if the defendant intended only to scare the person.[234] Similarly, the defendant would also be liable for battery to a second person if he injured the second person even though he intended only to commit an assault against another person.[235] Transferred intent mandates that a defendant will pay compensatory damages to a plaintiff, about which she did not know, for a tort she did not mean to commit. No amount of research could make these damages knowable to the defendant.

3. At most, a compensatory damage baseline enables post-verdict "predictability"

Because of personalization and mandatory compensation of the unforeseeable, the first moment at which the defendant can know the compensatory damage award is when the jury verdict is announced. At that point, the defendant could evaluate the amount of damages with the reprehensibility of his conduct, determine the likely ratio, and then calculate the likely amount of punitive damages. Hopefully the defendant could do this quickly, given that the punitive award would likely be announced shortly after. Sarcasm aside, this is not the pre-tortious predictability that would enable defendants to order their behavior.

A more limited predictability of the likely ratio between the punitive and compensatory damages, as opposed to a predictable

232. *See Baker*, 451 N.E.2d at 813 ("[T]he courts are confronted with an innocent victim and an intentional wrongdoer, and hence it is not surprising that the interest of the victim in obtaining full compensation is placed above the interest of the wrongdoer in protecting himself against potentially speculative damage awards." (quoting Columbus Fin., Inc. v. Howard, 327 N.E.2d 654, 659 (Ohio 1975) (internal quotation marks omitted)).

233. *See id.* at 813–14.

234. *See Seidel*, 260 A.2d at 872.

235. *See id.*

award, is also possible only post-trial.[236] This is because the "predictable" ratio depends on the amount of compensatory damages. In *Exxon*, the court used the substantial amount of compensatory damages to determine that no more than a 1:1 ratio was appropriate.[237] If the next case involves reckless conduct and a small amount of compensatory damages, a 1:1 ratio is likely not proper because of that smaller compensatory award, which lacks as much inherent punitive effect. Thus, even if the *Exxon* Court merely envisioned that the ratio—not the amount—would be predictable, even the ratio is not predictable until after the jury announces the compensatory award.

B. The Illogic of Compensatory Damages as the Baseline

Even if compensatory damages were predictable, they still would not be a logical baseline to which to peg the punitive award. First, the rationales for awarding compensatory damages have no connection to the reasons why punitive damages are available and awarded. Second, compensatory damages do not objectively reflect the reprehensibility of the defendant's conduct.

The purposes of punitive damages are to punish and deter. They are available only when punishment and deterrence are needed—if the defendant acts maliciously or with some heightened culpability. Although the existence of compensatory damages is what enables tort law to punish,[238] the compensatory damage award—both historically and today—has little connection to the punitive damage award,[239] despite the Court's emphasis on a mathematical

236. Given the unpredictable nature of compensatory damages, maybe what the Court meant in *Exxon* is that a defendant should be able to look ahead and know the likely ratio between punitive and compensatory damages; maybe predictability only refers to the likely ratio. This does not, however, seem to be specific enough to meet Justice Souter's description of predictability, which envisions that a potential tortfeasor be able to look ahead "with some ability to know what the stakes are in choosing one course of action or another." Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008). Knowing that the likely ratio will be 2:1 still could mean that the amount of punitive damages would be $1 billion or $10,000 depending on the compensatory award, precluding a true understanding of the "stakes."

237. *Id.* at 514–15 (applying a 1:1 ratio due to the defendant's low degree of reprehensibility and affirming that the ratio "is not too low" because of the substantial compensatory damage award).

238. *See* Lens, *supra* note 213, at 601–04.

239. *Exxon*, 554 U.S. at 491 ("[P]unitive damages were a common law innovation untethered to strict numerical multipliers . . . .").

relationship.[240] This lack of connection is apparent given that compensatory damages alone cannot trigger punitive damages; otherwise they would be available for mere negligence.[241] It is possible that a plaintiff's compensatory damages may be higher if the defendant acts maliciously, but not necessarily.[242] *BMW* is an example of minimal compensatory damages despite intentional and knowing fraudulent tortious conduct.[243]

Similarly, objectively, "killing another is viewed as more serious than severely injuring a person."[244] Criminal law reflects this:

> [P]unishment schemes reflect this hierarchy of wrongfulness by punishing a homicide much more severely than an assault with intent to commit murder, even though the conduct and culpability that produced the death or injury are the same. As a result, two defendants who commit the same act with the same culpability of intent to kill will receive different punishment depending on whether their victims die or live.[245]

Amounts of compensatory damages, on the other hand, do not reflect this objective assessment. A young, severely injured plaintiff's compensatory damages will likely exceed the compensatory damages for a similarly injured older person. The young plaintiff has a longer life expectancy, meaning future decades of compensable lost wages, medical expenses, and pain and suffering; the older plaintiff's compensatory damages will be smaller simply because of the shorter life expectancy. Similarly, the compensatory damages based on the wrongful death of five people may actually be less than the compensatory damages for the death of one person if the five deceased people were older and retired and the one deceased person was young and gainfully employed.

240. Sharkey, *supra* note 37, at 28 ("The Court itself has fueled this heightened attention to ratios.").

241. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1029 (2007) ("[T]he fact that a common-law penalty is based on a ratio cannot be an argument for its fairness.").

242. *See* Romero, *supra* note 199, at 137 ("Because the amount of compensatory damages measures the harm done, the ratio [of punitive to compensatory damages] guidepost may produce a punitive damages award that does not reflect the reprehensibility of the defendant's conduct.").

243. *See supra* text accompanying notes 90–91.

244. Romero, *supra* note 199, at 135.

245. *Id.*

If "the harm caused by wrongful conduct should figure in measuring reprehensibility,"[246] the way to do so is not to evaluate that harm based on the compensatory damages. As a reform to punitive damages, Professor Romero advocates legislatively set ratios based on the type of case. For instance, in personal injury/death cases, the legislature might cap punitive damages at thirty times the compensatory damages or $20 million, whichever is greater.[247] Professor Romero believes that such limits "would reflect society's judgments about the right proportion of punishment to misconduct."[248] But this assumes that compensatory damage awards reflect society's objective judgment about the extent of harm, which is not true.[249] The only thing a compensatory damage award reflects is the particular plaintiff and his injury. Thus, compensatory damages as a baseline will not achieve punitive awards "commensurate with the wrongful conduct."[250]

VI. RESTITUTION AS A MODEL TO CRAFT A PREDICTABLE, CIVIL PUNITIVE DAMAGE AWARD

If the goal is to create predictable punitive damage awards, as procedural due process requires, the plaintiff's compensatory damage award cannot be involved. Suggested alternative reforms have

246. *Id*.

247. *Id*. at 157. Professor Fisher also suggests legislatively-set ratios. *See* Fisher, *supra* note 153, at 41–42.

248. Romero, *supra* note 199, at 157.

249. Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 290 (2009) ("If punitive damages are based on compensatory damages, then when a defendant's misconduct kills or injures a poor person—i.e., someone whose death or injury triggers smaller compensatory damages under conventional valuation models—the punitive award will be lower than an award for the same misconduct committed against a wealthy person.").

250. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting); *see also* Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1426 (2009) ("Using a multiplier approach would, in many cases involving risk of injury, just exacerbate much of the extant arbitrariness in the context of compensatory damages."). For the arbitrariness of compensatory damages, Professor Markel cites to Geistfeld, *supra* note 209, at 342 (noting that plaintiffs "with similar pain-and-suffering injuries often are awarded significantly different amounts of damages"). Professor Geistfeld's conclusion, which cites to the Bovberg study, *supra* note 224, says too much. The study concluded that plaintiffs with similarly severe physical injuries—not similar amounts of pain and suffering—are often awarded significantly different pain and suffering damage awards. *See* Bovbjerg, *supra* note 224, at 924. Some of this disparity properly reflects the plaintiffs' individual circumstances. *See supra* notes 226–227 and accompanying text.

included statutorily defined monetary fines and pegging punitive damages to the defendant's net worth, but these non-civil-looking reform suggestions are problematic. A less obvious alternative, proposed by this Article, is to borrow from restitution. Restitution is a forgotten civil remedy based on the defendant's gain. On top of a compensatory damage award based on the plaintiff's injury, the defendant could be subject to punitive damages measured by the defendant's gain.[251] Basing punitive damages on the defendant's gain will produce the predictability that *Exxon* seeks and procedural due process requires.

A. Non-Civil-Looking Reforms to Craft a Predictable Punitive Award

Exxon signals a need to revisit procedures used to impose punitive damages, especially because reform to achieve predictability is likely constitutionally required. Two possible methods that may achieve predictability include legislatively defined awards or pegging the award to the defendant's wealth.

1. Legislatively defined awards

Professor Jeffrey Fisher reads *Exxon* as demonstrating that the Court "clearly has come down on the side of preferring legislation" to set punitive damage awards.[252] Although defined awards using ratios to compensatory damages cannot achieve predictability, defined monetary ranges based on the tortious conduct could. Before the tort, the defendant could look to the defined ranges and

251. The use of the word "gain" in this Article refers only to that common sense evaluation of what the defendant expected to gain through the tortious conduct. It is not so specific as to mean net income or gain, meaning income minus expenses.

Professor Gail Heriot suggested that, instead of punitive damages, restitution should be used to reach the "difficult-to-deter defendants," meaning those defendants whose gains from the tortious conduct exceeded the plaintiff's losses. *See* Gail Heriot, *Civilizing Punitive Damages: Lessons from Restitution*, 36 LOY. L.A. L. REV. 869, 882 (2003). She argued that restitution was preferable because it has the theoretical "virtue of providing a level of deterrence . . . sufficient to make the rational defendant regret his actions," and because it better addressed those cases where deterrence was necessary—which is not every case in which the defendant acted reprehensibly. *Id.* at 882. Professor Heriot did not address the punishment purposes of punitive damages, or how restitution could serve those purposes. This Article proposes that punitive damages remain available only if the defendant's conduct is reprehensible, and that the measure of those damages should be the defendant's gains—producing a predictable, civil punitive damage.

252. *See* Fisher, *supra* note 153, at 29.

have a good idea of the amount of punitive damages he could face if sued.

The Court mentioned this possibility in *Exxon*, but rejected it because of practical limitations. Just as there is no standard tort injury,[253] there is no standard tortious conduct. Should the award for battery always be more severe than the award for torts causing economic harm?[254] Even if the battery caused only minor physical damage and the fraudulent misrepresentation caused millions of dollars in compensatory damages?

Even within the same tort, each case has different facts. The legislation would necessarily be generalized, perhaps defining an award for all fraudulent misrepresentations. But a fraudulent misrepresentation can involve the value of a coffee cup just as easily as it can involve the value of complicated (and expensive) investments. Very few would think that the punishments should be the same in both cases, but the facts of individual cases are lost when categorically defined awards are used.

Even if the legislature could devise set punitive damages based on the type of tortious conduct, these damages would bear little resemblance to civil remedies. Compensatory damages, another civil remedy, are tied to the plaintiff and her injury. Dissimilarly, punitive damages, if based on a legislatively defined amount, would lack any factual connection to the case or the specific tortious conduct that triggered their availability. Instead, the amount of the award would be based on a (perhaps arbitrary) determination by the legislature that punitive damages for fraudulent misrepresentation should be between $50,000 and $100,000. Even *Exxon* reflects a desire to avoid this disconnect.[255] It at least maintains a connection between

253. Exxon Shipping Co. v. Baker, 554 U.S. 471, 506 (2008).

254. Professor Fisher addressed this problem as follows:

> 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.

See Fisher, *supra* note 153, at 41. Another factor making legislative involvement difficult is that courts, as the controllers of common law, can recognize new torts. For instance, products liability claims originated through judicial creations. If a court were to recognize a new tort claim, no law would exist to govern punitive damage liability for that new tort claim until the legislature acted.

255. *See* Lens, *supra* note 213, at 633–35 (explaining how the Court returned to the specific facts of the case, mainly the plaintiff's injury, in describing how best to make punitive

the punitive award and the facts of the case, although it does so through the unfortunate use of the compensatory award as a baseline.

2. Pegging to the defendant's wealth

Professor Dan Markel suggests that "retributive damages" be some multiple of the defendant's net worth.[256] More specifically, Professor Markel proposes that the legislature or sentencing commission devise a scale of approximately twenty reprehensibility levels and their accompanying multiples.[257] The individual jury would choose the level that applies to the defendant.[258] The jury would then apply that multiple to the individual defendant's wealth or corporate defendant's value to determine the punitive award. For example, a "finding of two on the scale could lead to a retributive damages award of 1 percent of the defendant's net wealth, and a finding of twenty could lead to a penalty of 10 percent of the defendant's net wealth."[259]

Many courts already allow the jury to consider the defendant's wealth in setting the amount of punitive award. This may fulfill the punishment aspect of punitive damages—ensuring that "wealthier tortfeasors should be punished, like all people, in a manner that adequately communicates to them that their risk-imposing, wrongful behavior is not subject to a price but rather a sanction."[260]

damages predictable).

256. Professor Markel proposes a pluralistic system of "punitive" damages allowing three types: deterrence damages based on cost-internalization, retributive damages, and victim vindication aggravated damages. *See* Markel, *supra* note 250, at 1403–04. A pluralistic approach is appropriate because "[d]ifferent cases present different problems; not every case requires pursuit of any of these purposes." *Id*. The discussion of Markel's reprehensibility scale applies only to retributive damages, which Markel introduced to achieve the "public's interest in retributive justice." *See* Markel, *supra* note 249, at 246. In a previous article, I argued that tort law's injury requirement has influenced the Supreme Court's limitations on punitive damages and that those limitations reflect a private law conception of punitive damages. *See* Lens, *supra* note 213 at 638–40. Necessarily, a punitive damage award cannot constitutionally reflect the public's interests. *Id*.

257. Markel, *supra* note 249, at 287.

258. *Id*. at 288.

259. *Id*. at 289.

260. Dan Markel, *Punitive Damages and Private Ordering Fetishism*, 158 U. PA. L. REV. 283, 291 (2010); *see also* Annotation, *Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award*, 87 A.L.R. 4TH 141 (1991) (explaining that evidence of defendant's finances will ensure that the damage award does not "exceed[ ] the necessary level of punishment").

Considering the defendant's wealth can also ensure adequate deterrence—making the award high enough to remove any incentive to commit the tortious conduct.[261]

Professor Markel's solution seems to achieve predictability.[262] Assuming that wealth or corporate value was well-defined, this baseline is very much knowable to the defendant when deciding whether to commit the tortious conduct.[263] And if the legislature-defined reprehensibility levels included examples as Professor Markel envisions,[264] the defendant should be able to evaluate where his potential tortious conduct falls.

Nevertheless, Professor Markel's solution suffers from the same logic-based problems as the Court's *Exxon* suggestion. A defendant's wealth is an arbitrary baseline—like compensatory damages, a defendant's wealth has no connection to why punitive damages are available or imposed. If a defendant commits battery, she deserves punishment because she committed battery; her wealth does not make her any more or less deserving of punishment.[265] Even the

Professor Markel assumes that higher punitive damage awards are necessary for wealthier people to fully communicate societal disapproval of their action; a $10,000 punitive award may sufficiently express disapproval to a poor person, but not to a wealthy person. But criminal sentences do not need to vary based on the defendant's wealth. A long-term imprisonment sentence communicates to all people, wealthy or poor, the objective view of the severity of the conduct. Aside from general moral concerns, this is why people view murder as worse than robbery. There similarly should be no need to increase a punitive damage award to ensure an adequate communication of disapproval. Wealthy and poor people do not receive different messages regarding the severity of the conduct based on the amount of the punitive award. But they may interpret the level of deterrence differently. If not high enough, a punitive award may not deter a wealthy person.

Even if wealth should be relevant to ensure an adequate communication of disapproval, the idea that a wealthy defendant will "feel" a punishment more if it is based on wealth is debatable. Chances are that a rich defendant can more easily part with one percent of his net worth than a poor defendant, who may be crippled by a one percent punishment.

261. Annotation, *Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award*, 87 A.L.R. 4th 141 (1991) (explaining that evidence of defendant's finances will ensure that the award is high enough to preclude the defendant from "absorb[ing] . . . the award with little or no discomfort").

262. This statement is specific to Markel's measure of retributive damages.

263. Markel, *supra* note 249, at 287 (concluding that his proposed "scaling approach would enhance . . . fair notice"); *see also* Markel, *supra* note 250, at 1402–03 ("The scheme described above furnishes potential defendants with little basis for complaining that the amount or award of retributive damages is a surprise, since the standards that would be applied to them are no different than the guidelines that have now become familiar in many jurisdictions when assessing criminal liability and sentencing.").

264. Markel, *supra* note 250, at 1401.

265. *See* Romero, *supra* note 199, at 131 ("[W]ealth has nothing to do with the

current use of wealth in jury instructions is for setting the amount—not in determining whether punishment is appropriate.

Because of its lack of connection to why punitive damages are available and imposed, using the defendant's wealth as a baseline is about as arbitrary as a legislature defining a $100,000 punitive award for fraud. This is forced predictability, as opposed to an award predictably reflecting the defendant's tortious conduct that made punitive damages available in the first place.

B. A Refresher on Restitution

Turning back to civil remedies to find a possible model for reform, tort law already recognizes a remedy that reflects the defendant's tortious conduct—restitution, a "relatively neglected and underdeveloped" civil remedy.[266] Simply put, restitution is based on the defendant's gain.[267] Could punitive damages be similarly based on the defendant's gain? But restitution is not punitive—or is it? Much overlap exists between restitution and punitive damages, especially in how courts alter the measurement of the defendant's gain based on the defendant's culpability.

wrongfulness of conduct . . . ."); Michael I. Krauss, *"Retributive Damages" and the Death of Private Ordering*, 158 U. PA. L. REV. 167, 177 (2010) ("If a person is to be punished, it should be for what she had done, not for who she is, even if she is a large corporation."); *see also* State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

266. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989); *see also* Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 977 (2011) (explaining that restitution is "subject to professional misunderstanding on every level"). Professor Laycock explains the three meanings of restitution: (1) as substantive law providing a claim for unjust enrichment, (2) as a remedy based on the defendant's gain, or involving returning specific property to the plaintiff, and (3) as restoring to plaintiff her losses. *See* Laycock, *supra*, at 1279–83. This third concept of restitution is commonly used in criminal statutes, requiring "criminals to make restitution to their victims." *Id*. at 1282–83. This restitution label is unfortunate because "restitution of what the plaintiff lost is simply compensatory damages." *Id*. All references to restitution in this Article are to the civil remedy based on the defendant's gain.

267. *See* Laycock, *supra* note 266, at 1286 ("For substantive claims not dependent on the [substantive] law of restitution—such as those based in ordinary torts and breaches of contract—plaintiff generally has an election. Plaintiff can always claim his own damages; alternatively, he can usually claim defendant's gain."). A form of restitution also exists in criminal law. *See id*. at 1282–83.

1. Restitution is not compensatory

The purposes of restitution differ from the purposes of compensatory damages. Damages seek to compensate the plaintiff for his losses and are thus measured by those losses.[268] Restitution seeks to deprive the defendant of "those gains that do not belong to him in good conscience,"[269] and is thus measured by those gains. The extent of the defendant's gains can easily exceed the plaintiff's losses, providing the plaintiff money in excess of her losses—thus providing something more than the amount necessary to compensate her. This extra amount is sometimes called a windfall.[270] Restitution does not fit into the compensatory category of remedies because of this windfall.

2. Punitive purposes?

Even though it is not compensatory, restitution is also not commonly thought of as a punitive remedy—"[t]he mere recovery of defendant's profit in a wrongful transaction is not by itself punitive . . . ."[271] But there is overlap. "Both deter. A court measures both restitution and punitive damages to deflect potential defendants from profitable misconduct by taking a defendant's benefit or profit."[272] Supposedly, the difference is that punitive damages also punish: "The Court determines the difference between restitution and punitive damages by considering how much deterrence to mete out and whether, in addition, the defendant ought to be punished."[273] But "skilled lawyers can sometimes use claims for

268. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION, HORNBOOK SERIES § 4.1(1), at 369 (2d ed. 1993).

269. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION, PRACTITIONER TREATISE SERIES, § 4.5(5), at 655 (2d ed. 1993).

270. *See* Laycock, *supra* note 266, at 1281 (awarding defendant's profits to the plaintiff does not "restor[e] anything that plaintiff once had or ever would have had"). The only other remedy available in tort capable of providing the defendant a windfall is punitive damages.

271. DOBBS, *supra* note 269, § 4.5(5), at 655; Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429, 1432–33 (2004) ("A second related theory notes that punitive damages may resemble restitution. In some cases, juries appear to determine the extent of the benefit that defendant reaped by its wrongful conduct and to assess that amount as punitive damages. While not compensatory, the recovery also is not exactly punitive.").

272. Rendleman, *supra* note 266, at 999.

273. *Id*. Some states prohibit the recovery of both restitution and punitive damages. *See* DOBBS, *supra* note 269, § 4.5(5), at 655. But this may be due to historical reasons more than

restitution as a back door method for collecting punitive damages . . . . [C]laims for restitution might lead to essentially punitive awards."[274]

In *TruGreen Companies, L.L.C. v. Mower Brothers, Inc.*,[275] the Utah Supreme Court noted the similarity between restitution and punitive damages and refused to allow restitution gain-based relief in a breach of contract action.[276] The court explained: "[A]s a policy matter, we do not wish to adopt a remedy for breach of contract that punishes the breaching party."[277] This is also why Utah law prohibits the recovery of punitive damages for breach of contract, even if intentional.[278] Viewing restitution as no different than punitive damages, the court rejected "any measure of damages that punishes a breaching party."[279]

The overlap between restitution and punitive damages and the ability to use restitution as an alternative to punitive damages is even more apparent given that courts alter the measurement of a defendant's gains depending on the level of reprehensibility.[280] The new Third Restatement of Restitution acknowledges the viability of such alterations, setting out different rules for the measurement of the gain depending on whether the defendant is an innocent recipient, unconscious wrongdoer, or "conscious wrongdoer."[281]

shared purposes. *See* Rendleman, *supra* note 266, at 1003.

274. *See* Paul T. Wangerin, *Restitution for Intangible Gains*, 54 LA. L. REV. 339, 346 (1993) (citing Laycock, *supra* note 266, at 1288–90)).

275. 199 P.3d 929 (Utah 2008).

276. Numerous courts have limited the restitutionary recovery to the amount of compensatory damages when restitution is sought for breach of contract (either by using the contract price as the fair market value of the benefit conferred, or by limiting the recovery to the contract damages). Contract law does not allow any sort of damages that provide a windfall to the non-breaching party. Courts have not similarly limited the recovery in tort. Maybe this is because tort law does allow a type of damage that provides a windfall—punitive damages.

277. *TruGreen*, 199 P.3d at 933.

278. *Id.*

279. *Id.*

280. This is contested among courts. *See* Rendleman, *supra* note 266, at 1005.

281. *See e.g.*, RESTATEMENT (THIRD) OF RESTITUTION § 49 cmt. a (2011) (acknowledging that the choice between different measures of the gain from nonreturnable benefits "turn[s] chiefly on the innocence or blameworthiness of the defendant"); *id.* § 50 (defining the gain measurement for innocent recipients); *id.* § 51 (defining the gain measurements for conscious wrongdoers and defining the gain measurements for unconscious wrongdoers).

Outside of the Restatement, "distinctions based on culpability have considerable support in the cases."[282]

A classic illustration of the relevance of culpability in measuring the gain is *Olwell v. Nye & Nissen, Co.*, where the defendant took the plaintiff's egg-washing machine for its own use.[283] In measuring the gain, the court was unsatisfied with using either the fair market or rental value of the machine.[284] Neither option punished the defendant for its deliberate choice to steal the machine or deterred him from stealing again; to the contrary, the measures would encourage stealing because it would be less expensive than purchasing.[285] Instead, the court looked to the amount that the defendant saved: the cost of hiring workers to clean the eggs.[286] In order to sufficiently punish and deter the defendant, the court measured the defendant's gain as these savings and awarded an amount almost triple the fair market value of the machine.[287]

Restitution also includes a second level of recovery, what the Third Restatement labels "supplemental enrichment."[288] Supplemental enrichment is the amount of profit or other gains that the defendant earned by virtue of his unjust enrichment.[289] Once

282. Laycock, *supra* note 266, at 1289 ("The more culpable defendant's behavior, and the more direct the connection between the profits and the wrongdoing, the more likely that plaintiff can recover all defendant's profits."); *see also* DOBBS, *supra* note 268, § 4.5(1) at 425 ("When in doubt about which of two restitutionary measures is appropriate, the serious nature of conscious wrongdoing will at times justify the court in imposing the more radical measure.").

283. 173 P.2d 652, 652 (Wash. 1946).

284. *Id.* at 654. The reasonable rental value and fair market value of the machine are somewhat similar to the amount of the plaintiff's injury—how much the plaintiff lost by the defendant's choice to steal the machine instead of buying or renting it from the plaintiff, although neither are truly damages because the plaintiff was not seeking to sell the machine.

285. *See* DOBBS, *supra* note 269, § 4.5(5), at 655 ("[R]estitution helps remove incentives for tortious conduct by denying the defendant the hope of gain . . . .").

286. *Olwell*, 173 P.2d at 653–55.

287. *Id.* The estimate of the fair market value of the machine is based on plaintiff's offer to sell the machine to defendant for $600. *Id.* at 653. The lower court instead granted restitutionary relief totaling $1,560 based on the costs saved in not hiring workers to clean the eggs. *Id.*

288. *See* RESTATEMENT (THIRD) OF RESTITUTION § 53(1) (2011) (explaining that supplement enrichment can include "interest, rent, or other measure of use value").

289. As an example, if the defendant converted the beneficiary's funds and then earned $1 million by reinvesting, the beneficiary can recover both the amount that the defendant stole and the $1 million earned. *Id.* § 53(2)–(3) (making a conscious wrongdoer liable for non-remote consequential gains, meaning those "profits realized through the defendant's subsequent dealings with such an asset").

again, the defendant's culpability factors into the measure of the defendant's supplemental enrichment, including what to deduct from those profits.[290] Probably the most commonly claimed deduction is that a portion of the profits is attributable to the defendant's own efforts.[291]

> The court must determine which part of the profit results from the defendant's own independent efforts and which part results from the benefits provided by the plaintiff. . . . The allocation of the burden of establishing such approximation, and degree of specificity of proof required, may be affected by such factors as the seriousness of the defendant's wrongdoing . . . . Where the relative contributions of the two parties are inseparable or untraceable, there should be no recovery of profits by the plaintiff unless the defendant is a very serious wrongdoer.[292]

290. *Id.* § 53 cmt. a ("[T]he decision to hold the recipient liable for supplemental enrichment frequently turns on distinctions of fault."); *id.* § 51(5) (explaining that in calculating deductions and credits to the defendant's profits, "the court may apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, as reason and fairness dictate, consistent with the object of restitution"). As examples, some courts do not allow any deduction for overhead costs attributable to and income taxes associated with the profits if the defendant's wrongdoing was willful. *See, e.g.*, Saxon v. Blann, 968 F.2d 676, 681 (8th Cir. 1992); Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 515 (9th Cir. 1985). Even the courts that allow the deduction particularly scrutinize the claimed overhead and profits; otherwise, the remedy "would offer little discouragement" to the wrongdoers. Hamil Am. Inc. v. GFI, 193 F.3d 92, 107 (2d Cir. 1999) (allowing deduction of overhead costs despite willful infringement, but mandating that the lower court require the defendant to establish the link between the overhead expenses and the profits with "particular rigor"). Specific to income taxes, the federal rule is that willful infringers are not allowed to deduct the amount of taxes paid on the profits. L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co., 277 U.S. 97, 99–100 (1928). The federal courts are split regarding whether the same limitation applies to less culpable defendants. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 487–88 (9th Cir. 2000).

291. DOBBS, *supra* note 268, § 4.5(3), at 435 ("Even the wilful wrongdoer should not be made to give up that which is his own; the principle is disgorgement, not plunder. . . . But sometimes courts have deviated from this[,] . . . a deviation that combines justice with punishment."); *see also* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION, HORNBOOK SERIES § 4.3, 242–43 (1st ed. 1973) ("Even a wrongdoer probably ought not be to deprived of values added to property by his own wit, experience or hard work, unless the court makes a conscious decision to impose punitive damages.").

292. EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc., 900 P.2d 113, 120–21 (Colo. 1995) (internal citations omitted). Notably, in *EarthInfo*, the court actually imposed the burden of apportionment on the plaintiff due to "the nature and extent of the breach as well as the other relevant factors." *Id.*

Under this analysis, even if it looks as if a defendant's efforts contributed to all of the profits, the plaintiff will still recover the defendant's profits if the defendant was very culpable and blameworthy.[293] Depending on the defendant's culpability, courts have discretion to make the defendant—and do make the defendant—pay more than he profited.[294]

C. Basing Punitive Damages on the Defendant's Gain

Despite restitution's punitive quality,[295] it has not been the subject of criticism like punitive damages, and defendants seldom complain about restitution awards. Specific to possible procedural issues, defendants generally do not complain that the amount of the award was unexpected or unpredictable. And how could it be? It is based on the conduct for which the defendant is liable.

Punitive damages could similarly be based on the defendant's gain. This gain-based measurement for punitive damages produces a personalized punitive damage award for each case, particularly tailored to the defendant's tortious conduct. The possibility of flexible measurement of the gain, already recognized in restitution, also enables sufficient punishment and deterrence. And most importantly, this gain-based measurement enables predictability to the defendant because of the actual factual connection between the amount of damages and the tortious conduct.

1. Creating a factual connection between the punitive award and the tortious conduct

The two purposes of punitive damages are to punish and deter.[296] These purposes themselves, however, provide little guidance on how to translate them into dollar figures. Under the current system, instructing the jury to consider the need to punish and deter—or even to consider the nature of the wrong—translates, unfortunately, into punitive awards that have no relationship to the tortious conduct.

293. *Id.*

294. DOBBS, *supra* note 268, at 277 ("In the profit cases taken as a whole, one or two things stand out. One is that some of the cases opt for a very harsh rule that takes from the defendant considerably more money that he has profited.").

295. Rendleman, *supra* note 266, at 981–83.

296. Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008).

The Court acknowledged this factual disconnect between punitive damages and the actual case in *Snepp v. United States.*[297] The government sued Frank W. Snepp III, a former CIA agent who had published a book based on his experiences as a CIA agent.[298] The publication of this book breached Snepp's employment contract and constituted a breach of fiduciary obligation.[299] In discussing the government's possible remedies, the Court explained:

> No one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable. Nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain.[300]

Instead of punitive damages, the Court granted the government's requested restitutionary remedy based on the profits that Snepp earned through publishing the book.[301] The Court declared that the requested restitution-based remedy was the "most appropriate . . . for Snepp's acknowledged wrong."[302] The Court specifically preferred a restitution, gain-based measure to right the wrong rather than punitive damages.[303]

The reason for that preference is the factual connection between the amount of the defendant's gain and the remedy. No such factual connection exists between the facts of the case and punitive damage awards currently. The Court also recognized this in *Exxon Shipping Co. v. Baker*, lamenting that jury instructions would not achieve predictable punitive damage awards unless punitive damages were tied to a fact in the case.[304]

297. 444 U.S. 507 (1980).

298. *Id.* at 508.

299. *Id.*

300. *Id.* at 514.

301. *Id.*

302. *Id.*

303. Rendleman, *supra* note 266, at 1001. Notably, the restitution award did not include any discount based on Snepp's contribution to writing the book. *Id.* at 1001 n.124. This is rather harsh given that Snepp's only "wrong" was that he did not seek pre-publication clearance from the government; the book did not include any classified information. *Snepp*, 444 U.S. at 509. The lack of classified information is why the appellate court denied the constructive trust, leaving the government to pursue nominal damages and the possibility of punitive damages. *Id.*

304. Exxon Shipping Co. v. Baker, 554 U.S. 471, 504 (2008) (explaining that jury

To connect punitive damages to the facts in individual cases, punitive damages could, like restitution, be based on the defendant's gain. Basing punitive damages on the defendant's gain "has the ability to limit awards to a fixed, rational amount."[305] The amount is rational both because of this factual connection and because basing punitive damages on the amount of the defendant's gain fulfills both the punishment and deterrence purposes of punitive damages. This is already evident from restitution, where courts are not shy to use restitution to achieve punitive and deterrent effects.[306]

More specific to punishment within the context of punitive damages, the defendant's gain may directly reflect the reprehensibility of the conduct; financial motivation renders conduct more reprehensible.[307] But even when the defendant was not financially motivated, the gain represents the tortious conduct and provides a measurement tailored to that tortious conduct. And specific to deterrence, the Supreme Court described the restitutionary relief in *Snepp* as specifically tailored to achieve deterrence.[308] Basing the punitive award on the gain helps remove the incentive to commit the conduct.[309] Scholars have similarly

instructions cannot achieve predictability and consistency as long as punitive damage "awards are not tied to specifically proven items of damage").

305. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 (1996) (Breyer, J., concurring).

306. *See supra* Part VI.B.2.

307. *Exxon*, 554 U.S. at 494.

308. *Snepp*, 444 U.S. at 515 ("Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk.").

309. *See* DOBBS, *supra* note 269, § 4.5(5), at 655 ("[R]estitution helps remove incentives for tortious conduct by denying the defendant the hope of gain . . . ."). In weighing the potential gain versus losing the potential gain through punitive damages, the defendant may also consider that the chance of one day paying those punitive damages is less than 100%—the plaintiff may not ever discover the defendant's tort, choose not to sue, etc. *See infra* notes 318–320 and accompanying text. The cost-internalization theory of punitive damages, proposed by A. Mitchell Polinsky and Steven Shavell, factors this reduced chance of being caught in its measurement of punitive damages designed to achieve deterrence by "multiply[ing] a punitive award in order to make up for the number of times that a tortfeasor gets away with harming people without having to pay any damages." Keith Hylton, *Reflections on Remedies and* Philip Morris, 27 REV. LITIG. 9, 14 (2007). The Court's prohibition on punishing for harm to non-parties in *Philip Morris* limits this theory to the chance that the tortfeasor would get away with harming the specific plaintiff. *See* Markel, *supra* note 250, at 1408 ("To my mind, the better reading of *Philip Morris* finds that cost internalization's future is impeded but not destroyed."). The cost-internalization theory, with this post-*Philip Morris* limitation, is another type of damage available in Professor Markel's pluralistic system.

Practically, it may not be in the defendant's best interests to guesstimate the chance of being sued. This depends on many factors, including whether the plaintiff is litigious and

recognized the relevance of the defendant's gain to the deterrence purpose of punitive damages.[310] Gain-elimination theories survive *Philip Morris*, which prohibits punishment for harm to non-parties, as long as the gain is limited to the gain made from the conduct to the specific plaintiff.[311] Not surprisingly, measurements of the gain are similarly limited in restitution.

As an example of a possible measurement of gain-based punitive damages, take the facts of *Philip Morris*. The plaintiff smoked for many years and brought suit against the defendant due to injuries that resulted from smoking. The defendant's tortious conduct was basic fraud—selling cigarettes while failing to disclose the associated health risks.[312] Using a gain-based measure of punitive damages, the defendant's punitive award would be based on the gains it made in selling cigarettes to the plaintiff. A punitive award based on the gain earned in selling cigarettes to the plaintiff is specifically tailored to the facts of the case—unlike the $79.5 million the jury awarded in the case.[313] An award based on the defendant's gain is no longer unusual or speculative.

the amount of compensatory damages—neither of which the defendant likely knows before committing the tort. *See supra* Parts V.A.1.–V.A.2. Because of the unpredictability of suit, this Article does not propose multiplying the gain-based punitive award based on the chance of suit. Neither did the Court in *Snepp*, where it found that the restitution award is "tailored to deter those who would place sensitive information at risk" without addressing the chances of being caught. *Snepp*, 444 U.S. at 515.

310. Professor Keith Hylton advocates a gain-elimination theory of punitive damages, which dictates that the award cannot be "less than the profit earned by the offender from some offensive act" if the conduct at issue is not socially desirable. Hylton, *supra* note 309, at 14–15. If the defendant's gain is $500 and the plaintiff's losses total $100, the punitive award should total $400. *Id.* at 14. The goal of gain elimination is complete deterrence, meaning to deter the defendant and others from committing similar conduct. *Id.* at 15, 19–20. If the conduct is generally socially desirable, Professor Hylton advocates the cost internalization theory proposed by A. Mitchell Polinsky and Steven Shavell. *Id.* at 15.

311. Hylton, *supra* note 309, at 28 (acknowledging that the Court was not persuaded by his gain elimination theory in *Philip Morris*); *cf.* Markel, *supra* note 250, at 1410 (arguing that the cost internalization theory could survive *Philip Morris* if "the operative questions" are changed to "what harm did the defendant cause this case's plaintiff(s), and what is the likelihood that the defendant would escape having to pay for that harm to this case's plaintiff(s)").

312. Philip Morris USA v. Williams, 549 U.S. 346, 349–50 (2007).

313. *Id.* at 351.

2. But would it punish and deter enough?

"[E]mpirical studies show that [people] 'disagree profoundly' over how severely to punish any given crime. . . . Once we move beyond an 'eye for an eye,' there is no easy way to convert crimes into terms of punishment."[314] The same could be said for how much deterrence is necessary, which can differ depending on the utility of the conduct.[315] A punitive damage award could be five dollars. Even this amount punishes and deters the defendant, but few would think that a five-dollar punitive-damage award is sufficient—it does not punish enough and/or is not large enough to deter.

The same problem will likely exist for punitive damages based on the defendant's gain. Within his retributive damages scheme basing the award on a fraction of the defendant's net worth, Professor Markel advocates additional gain-stripping if necessary. Gain-stripping alone, however, would be inadequate according to Markel because it merely returns the defendant to the pre-tort status quo and thus "does not adequately communicate the wrongness of his action."[316] Simply returning to pre-tort status would likely fail to sufficiently deter some from committing tortious conduct a second time.

Similarly, some have criticized the Supreme Court's emphasis on predictability in *Exxon* based on the thought that making punitive damages predictable will inherently limit their deterrent effect.[317]

314. Fisher, *supra* note 153, at 38.

315. *See* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 443 (1998) (advocating different measurements for deterrence-based punitive damages based on the utility of the defendant's conduct).

316. Markel, *supra* note 249, at 296 ("The gain-stripping penalty should be treated distinctly from the reprehensibility-based fine."); *see also* Ward v. Taggart, 336 P.2d 534, 538 (Cal. 1959) ("Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer. . . . Such damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained." (citations omitted)); Kelly, *supra* note 271, at 1433 (explaining that getting "restitution . . . large enough to be punitive . . . may involve aggregating the restitution claims of many persons"); Henry Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 YALE L.J. 14, 35 (1982) ("[P]unitive damages offer a better corrective than does restitution. . . . Unlike restitution, punitive damages can be tailored to produce a given level of deterrence.").

317. *See, e.g.,* Klass, *supra* note 206, at 198 ("It is the unpredictability of punitive damages that in some instances, at least, gives them their greatest deterrent effect."); Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. ST. THOMAS L.J. 1, 19 (2009) ("[T]he possibility of a large but randomized sanction may also deter a potential

This assumption is debatable. In a different context, the Supreme Court acknowledged that unpredictability actually weakened possible deterrent effects—finding that the haphazard application of Federal Rule of Civil Procedure 11, which imposes sanctions for frivolous litigation, diminished its intended deterrent effect.[318] Punitive damages are imposed only if the plaintiff actually sues the defendant, gets to trial, establishes liability, establishes that the defendant acted with the requisite intent to make punitive damages available, convinces the jury to use its discretion to award punitive damages, and then the jury awards some amount. Even the Supreme Court thinks awards are unpredictable.[319] This unpredictability may actually weaken any deterrent effect; "many parties will probably ignore the tiny possibility of a crushing financial loss, like the chance of being hit by lightning."[320]

Regardless, any emphasis on a punitive award sending a strong enough disapproval message or deterring enough cannot overwhelm the defendant's constitutional right to fair notice of the likely severity of the award.[321] Further, this emphasis is likely not as significant to the Supreme Court as most think. Every Supreme Court opinion on punitive damages since *BMW* has effectually made damages smaller,[322] necessarily reducing the message of disapproval and

miscreant."). Basing punitive damages on the defendant's gain is subject to the same criticism. *See Klass*, *supra*.

318. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 392–93 (1990). In other aspects of tort law, sometimes consequences are not imposed because they are deemed too unpredictable to create any real deterrent effect. *See* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 565–67 (1985); W. Jonathan Cardi, Randy Penfield & Albert H. Yoon, *Does Tort Law Deter?* 24 (Wake Forest Univ. Legal Studies, Working Paper No. 1851383, 2011), *available at* http://ssrn.com/abstract=1851383 (explaining results of recent survey of deterrent effects of possible civil liability and damages and criminal sanctions, which showed that "subjects proved just as likely to take risks when primed that they might be sued and might have to pay damages . . . as when they were told expressly that they could not possibly suffer criminal or civil consequences").

319. Exxon Shipping Co. v. Baker, 554 U.S. 471, 499 (2008).

320. Sugarman, *supra* note 318, at 567; *see also* Cardi et al., *supra* note 318 ("Existing social science literature tells us that the certainty of sanctions plays a strong role [in] their effectiveness as a deterrent . . . .").

321. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) (rejecting argument that punitive damage awards must remain unpredictable to sufficiently deter because although "the State has a strong interest in punishing wrongdoers . . . it has no legitimate interest in maintaining in pristine form a common-law system that imposes disproportionate punishment and that subjects defendants guilty of similar misconduct to wholly different punishments").

322. *BMW*, *State Farm*, and *Philip Morris* all narrow the scope of what punitive damages

possible deterrent effect. *Philip Morris*, especially, ensures smaller punitive damage awards by prohibiting punishment for harm to nonparties. After *Exxon*, it is not even clear that the Court intends punitive damages to express disapproval. The Court discounted any relationship between punitive damages and moral condemnation, instead describing a punitive award as merely that amount the defendant should consider when determining whether to commit the tortious conduct.[323] The number one concern in establishing measurements for punitive damages is predictability, and not in making them large enough to be "effective."

Any thought that a gain-based measure would be ineffective because it simply returns the defendant to her pre-tort status is overly simplistic. As illustrated in restitution, there is more than one way to measure gain. *Olwell* illustrated three different methods based on the defendant's stealing of the egg-washing machine: the fair market value of the machine, the rental value of the machine, and the defendant's saved costs. The facts of the case, mainly the defendant's culpability, determined the proper measure—the saved cost. The gain-based restitution award made the defendant worse off than he was before stealing the machine.

This same flexibility can exist in basing punitive damages on the defendant's gain. It will be up to the parties to present alternative measurements to the jury. As an example, in *BMW*, the defendant misrepresented that a car was new when it had actually been repaired. Under this Article's proposal, the plaintiff may suggest a punitive award in the amount that the defendant made in the sale of the car to the plaintiff, over $40,000.[324] To counter, the defendant could suggest an amount based on the difference between the sale price of the car and the sale price had it been accurately represented as repaired, which was $4000.[325] The jury can then evaluate those

can punish, necessarily meaning punitive damage awards will be smaller. *BMW* prohibits punishment for out-of-state conduct, *State Farm* prohibits punishment for dissimilar conduct, and *Philip Morris* prohibits punishment for harm to nonparties. *See generally* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003); Philip Morris USA v. Williams, 549 U.S. 346 (2007).

323. *See* Klass, *supra* note 206, at 198 ("[T]he defendant can simply build those punitive damages into the cost of pursuing the conduct in question.").

324. *See BMW*, 517 U.S. at 564. This gain does not include deductions based on the cost to produce the car, but such a deduction is not necessarily required; the jury could choose to take that deduction if it wanted. *Id.*

325. *Id.*

alternative measurements based on the circumstances of the case, including the defendant's culpability. The gain-based punitive award is also awarded on top of the compensatory award, further emphasizing the severity of the total consequences of the tortious conduct.[326] Whichever measure the jury chooses, however, it will not be arbitrary—it will relate directly to the defendant's conduct.[327]

3. Potential measurement issues

Restitution is available in tort in any case in which the facts allow it, meaning in cases in which the defendant has a gain. That is not all torts.[328] So how would punitive damages work under this proposal in cases in which there is no such gain?

Exxon is one of these cases. Justice Souter classified the defendant's conduct in allowing a known relapsed alcoholic to captain the tanker as "profitless to the tortfeasor."[329] At the time of the crash, the tanker was carrying fifty-three million gallons of crude oil to the lower forty-eight states.[330] Certainly, losing eleven to thirty-two million gallons of crude oil did not cause the defendant to make a profit.

But it is still possible to find a gain based on this tortious conduct, a lesson learned from the variety of methods available to measure gain for purposes of assessing restitution damages. The gain could be based on the amount the defendant saved in not hiring a new captain, or in building a single hull tanker.[331] To suggest a larger amount, the plaintiff may point to the amount the defendant would have made in selling the oil in the tanker that crashed. This gain is what motivated the defendant to put the tanker in the water in the

326. *See* Heriot, *supra* note 251, at 881 (arguing that "[i]n the ordinary tort case," requiring a defendant to pay compensatory damages alone "will ordinarily be enough to deter him from his wrongful conduct in the future").

327. *See id.* at 883 ("Unlike punitive damages, however, restitution is not open-ended.").

328. The most typical tort claims that involve fact patterns ripe for restitution involve the defendant taking the plaintiff's property, whether by fraud, embezzlement, or conversion. DOBBS, *supra* note 269, §4.1(1) at 553.

329. Exxon Shipping Co. v. Baker, 554 U.S. 471, 511 (2008).

330. *Id.* at 476–77.

331. "By building single hull tankers," instead of double hull tankers, "the company saved about two million dollars per ship" even though single hull tankers also meant that "in the event of a major collision . . . oil would be discharged directly into the sea." Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—the Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 673 (1995).

first place—and to not bother to make sure its captain was fit. Thus, even in situations that the defendant was not specifically financially motivated to commit the tortious conduct, just as the *Exxon* defendant did not expect to profit from retaining a relapsed alcoholic captain, the context of the defendant's conduct provides possible bases for measuring the gain.

Studies show that "the beneficiaries of punitive damages are often business plaintiffs suing business defendants."[332] Even when specific financial motivation is not present, these business contexts can provide bases for measuring the gain. In an employment discrimination case, did the employer make any gains traceable to the harassed employee? Or, did the employer save any expenses in not having to hire a replacement employee? Either option could serve as the gain. In a defamation case,[333] the gain could be the profits made selling the material containing the defamatory statement.

Some torts, however, do not involve either financial motivation or a business/commercial context, like the traditional intentional torts of battery and assault. How then does one value the defendant's gain?[334] First, it is important to understand these "intentional tort" cases make up an insubstantial portion of the cases in which punitive damages are awarded. According to the U.S. Bureau of Justice Statistics' Civil Justice Survey of State Courts, in 2005, "intentional tort" cases made up only sixteen percent of all cases in which punitive damages were awarded by juries.[335] And this sixteen percent includes more than just battery or assault—intentional tort is defined as "personal injury or property damages caused by the unauthorized use or control of another's personal

332. Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 SUFFOLK U. L. REV. 855, 866 (2010).

333. *Id.* at 863 tbl.1 (analyzing U.S. Bureau of Justice Statistics' Civil Justice Survey of State Courts data based on 2005 jury-produced punitive awards and concluding that punitive damages were awarded in almost half of the "slander, libel, defamation" cases in which the damages were sought).

334. *See* Laycock, *supra* note 266, at 1287 ("Many wrongful acts are destructive; they harm plaintiff without benefiting defendant.").

335. Vidmar & Holman, *supra* note 332, at 864 tbl.2.

property."[336] So a portion of even these cases may be especially ripe for a gain-based measure if they involve the taking of property.

Still, some of these intentional torts will be motivated by pure emotion and committed within a context not providing any basis for measuring the gain. What if the defendant shoots the plaintiff simply because she wants to? How do we measure the gain based on this type of sick motivation and pleasure attained through the shooting?[337]

One possibility is to try to quantify the defendant's pleasure. Putting a number on this intangible gain is really no different than the jury putting a number on the plaintiff's intangible losses, like pain and suffering.[338] For instance, let the jury evaluate how much pleasure the defendant derived from the shooting or how much the shooting was worth to her. Translated a bit more concretely, how much would the defendant have paid to make the tort happen? Relevant evidence would include the defendant's motivation and her overall financial situation; less wealthy defendants would lack the means to pay as much as wealthier defendants. Using the evidence, the jury would put a number on the defendant's intangible gain earned from committing the tort and that number would be the amount of punitive damages.

336. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 11 (2008), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=554 (defining intentional torts). The same publication based on 2001 case data shows that conversion, an intentional tort involving property damage, was included within the "intentional tort" definition in the 2005 publication. *See* THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2001 (2004), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=559 (separately listing statistics for intentional tort and conversion cases).

The defendant's use of the plaintiff's property may easily provide a measurable gain. Notably, the "intentional tort" category did not include "fraud," which the BJS categorized as a "contract case" despite the category being made up of torts, including "claim[s] of negligent or intentional misrepresentation of a person, product, or service within a legal contract." LANGTON & COHEN, *supra* note 336. Using the BJS data, twenty-eight percent of the "fraud" cases included a request for punitive damages, and the juries awarded damages in thirty-seven percent of these cases. Vidmar & Holman, *supra* note 332, at 862–64 tbls. 1, 2.

337. *See* Wangerin, *supra* note 274, at 358 ("How can the sick pleasure reaped from sexual or racial harassment be quantified?").

338. Courts have not warmed to the idea of restitution based on intangible gains because of the measurement problem. "[T]he quantification problem that seemingly inhibits courts from awarding remedies for intangible gains does not trouble them whatsoever when it comes to awarding remedies for intangible losses." *Id.* at 356.

4. Finally—a predictable punitive damage

Any potential reform of punitive damages must achieve predictable awards. A gain-based punitive damage measure provides this predictability because of the factual connection it creates to the case—and more specifically, a factual connection based on the defendant's own conduct. The predictability of such an award is apparent based on the current use of the same measure in restitution.

The defendant's gain is knowable to the defendant. Assuming a rational actor, at the same time the potential tortfeasor is evaluating the potential consequences of the tort, the defendant is also evaluating the expected gains. Why commit the tort? What does the defendant expect to get or accomplish through committing the tort?

The punitive damage award is then based precisely on that gain. In *Snepp*, for example, the defendant published a book based on his CIA experiences without obtaining the required pre-publication clearance. Presumably, the defendant was at least partially motivated to publish the book by his desire to earn income. Even if this was not the specific motivation, the defendant knew he would make profits from publishing the book. The defendant thus lacked any valid complaint that the amount of the restitution award was unpredictable; to the contrary, it was tailored specifically to the tortious conduct.

True, the defendant may not know the exact amount of gains pre-tort. But that type of precision is not required. Neither due process nor *Exxon* predictability requires notice of the exact amount. Procedural due process requires only "fair" notice of the likely severity. Similarly, *Exxon* predictability envisions providing the defendant only with "some ability" to look ahead. And Justice Souter's focus on the federal criminal sentencing guidelines,[339] which provide ranges as opposed to set sentences,[340] demonstrates that his conception of predictability does not require knowledge of specific dollar amounts.

But the defendant in *Snepp* did know he was committing a wrong,[341] and the restitution award he faced was based precisely on that wrong. Under the current procedures in place, any punitive damages awarded in *Snepp* likely would have no relationship to the

339. Exxon Shipping Co. v. Baker, 554 U.S. 471, 504 (2008).

340. *Id.* at 504–06.

341. Snepp v. United States, 444 U.S. 507, 508 (1980).

tortious conduct,[342] leaving ample room for a defendant to be blindsided by the amount. But the defendant in *Snepp* was not blindsided because the award was based on his tortious conduct.

Predictability is possible despite the necessary variability in measuring the gain. In *Snepp*, no adjustment was made based on the defendant's contributions to the book.[343] Although the defendant may not think this is substantively fair, there is still little room for procedural complaint. Again, he knew that his conduct was improper, and the punitive award was tailored specifically to that tortious conduct.

Borrowing from a famous restitution case, the egg-washing machine thief in *Olwell* stole the machine because it did not want to buy its own. The defendant knew that it was saving itself the expense of buying or renting a machine, or from hiring employees to do the washing without a machine. The court reviewed possible restitution awards based on a fair market value of the machine, the fair rental value of the machine, or the costs saved in not having to hire employees. All these possibilities related back to exactly why the defendant committed the tort and the tort itself. Even though these awards were different amounts, each of these awards was predictable to the defendant because they were all based on the theft of the egg-washing machine.

Restitution awards are predictable to the defendant because they are based on their tortious conduct; punitive damages based on the defendant's gain would similarly be predictable. Using the facts of *BMW*, before the tort, the defendant planned to sell the car without disclosing the repairs. At trial, the plaintiff likely would have argued for a gain-based punitive damage award totaling the $40,000 the defendant made in the sale of the car, whereas the defendant likely would have advocated a more limited $4000 award. Despite this variation, predictability exists because both numbers are traceable back to the defendant's tortious conduct—deceit in selling the car.

Using tortious conduct as the basis for the punitive award even provides predictability in cases where the defendant experiences only an intangible gain from committing the tort. The punitive award would be based on this intangible gain, not unlike the jury's determination of a plaintiff's pain and suffering.

342. *Id.* at 514.

343. Rendleman, *supra* note 266, at 1001 n.124.

Acknowledging that pain and suffering compensatory damages are unpredictable, the intent of this Article is not to suggest switching to yet another system that will also produce unpredictable awards. The reasons that pain and suffering compensatory damages are unpredictable do not also apply to measurements of intangible gain.

First, part of why pain and suffering damages are unpredictable is because they are based on the plaintiff and her injury.[344] The defendant likely has no pre-existing knowledge of the plaintiff's pre-existing medical conditions or pain tolerance; the damages are based directly on these unknowable facts.[345]

The defendant's gain, on the other hand, is knowable to the defendant before he commits the tort. The defendant may not know exactly how the jury will measure the gain, just as the defendant in *Olwell* may not have known that restitution would be based on saved costs instead of the fair market value of the machine. But the defendant does know the tortious conduct. And the punitive damage award the defendant may later face will be based on that tortious conduct.

The second reason that pain and suffering compensatory damages are unpredictable is because they lack an economic reference point. The plaintiff can testify regarding his pain and suffering, but he is not competent to value it economically. There is no market to value the price of people enduring massive injuries and the accompanying pain and suffering. And aside from the measurement problem, truly no amount of money can fix a plaintiff's pain and suffering and make him whole.[346]

Again, this reason does not apply to valuing the defendant's intangible gain as it is easier to put a number on the amount of the defendant's intangible gain. The defendant sought something from

344. Bovbjerg et al., *supra* note 224, at 923 (acknowledging that some of the variation in pain and suffering awards given to plaintiffs suffering similar physical injuries "may legitimately reflect claimants' precise individual circumstances, as the tort system intends").

345. This factual connection to the plaintiff's actual injury also helps legitimize the damages. The amount of punitive damages currently lacks any factual connection to actual injury, hurting the legitimacy of such damages. A gain-based punitive damage measure would create a factual connection, helping increase the legitimacy of these damages.

346. *See* Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 375 (2006) (suggesting that the recovery for intangible losses was not historically linked to making the plaintiff whole and that this link should not hamper reform efforts).

committing the tort and would have paid some amount to make the tort happen.[347] Although not legal, there is a market for buying services to commit torts. The defendant's testimony and other evidence of the circumstances surrounding the defendant's tortious conduct can be used to evaluate how much that particular defendant would have paid a third party to commit the tort he/she committed, thereby providing a reliable basis for assessing the punitive damage award amount.

A gain-based measure for punitive damages, even if the gain is intangible only, "is not open-ended."[348] It is instead constrained by the defendant's tortious conduct and the gain achieved through that conduct. This factual constraint makes the damages predictable to the defendant, as *Exxon* and procedural due process require.

Basing punitive damages on the defendant's gain will not only provide predictability, but will also create a consistent measurement for all defendants. Defendants currently face this same measurement in restitution and there is little, if any, complaint of inconsistent results among awards.

True, two similarly situated defendants committing the same tortious conduct may end up paying different amounts of punitive damages under this Article's proposal. But, awards will be identical if the gains are identical, like in the two *BMW* decisions the Court mentions anecdotally in *Exxon*.[349] Further, consistency does not mandate identical awards: even *Exxon* admits so. The next tortfeasor should not automatically face the same punishment as the original because circumstances will likely differ. Each punitive damage award should reflect the specific circumstances. This is likely at least one of the reasons that the Court's predictability analysis in *Exxon* did not simply force consistency based on prior awards.[350]

Importantly, though, any variations in punitive damage awards will properly reflect the different facts of cases, and more specifically, the different gains. Each case involves different facts and different

347. Essentially, by committing the tort himself, the defendant has saved costs, just like the defendant in *Olwell*.

348. Heriot, *supra* note 251, at 883 (arguing that restitution is preferable to punitive damages because restitution "fits into the civil system with far more grace than punitive damages").

349. Exxon Shipping Co. v. Baker, 554 U.S. 471, 500–01 (2008).

350. *See* Part IV.D (exploring the Court's analysis of predictability using the particular facts of the *Exxon* Valdez Oil Spill).

torts;[351] defendants' expected gains differ, so differing awards are still legitimate. The inconsistency is appropriate just as restitution awards must be inconsistent to ensure that no defendant retains a gain that he should not have retained, or just as compensatory damage awards must be inconsistent to achieve full compensation. The measurement—the defendant's gain—will remain constant. Any variation should reflect different tortious conducts, and this measurement will achieve these proper variations.

VII. CONCLUSION

In 1991, Justice O'Connor spotted a procedural due process violation in the use of common law jury instructions for imposing punitive damages.[352] When speculating why the rest of the Court did not agree with her, she explained that maybe "the Court is reluctant . . . because it perceives that such a ruling would force [it] to evaluate the constitutionality of every State's punitive damages scheme."[353] In that sense, substantive due process challenges to punitive damages are easier; a finding that an award is unconstitutional affects only that award. But substantive review of due process awards is piecemeal and an inefficient way to achieve reform.

Fast forward to 2008 and it seems that a majority of the Court now agrees with Justice O'Connor. The reluctance is still there, which explains why the Court purported to base *Exxon* in maritime law (without really discussing it). Regardless of the word games, the Supreme Court concluded in *Exxon* that common law jury instructions are incapable of producing predictable punitive awards.

Predictability is no different than fair notice of severity. The roots of both concepts are traceable to the rule of law and both necessarily require notice of the likely amount for which the plaintiff will be liable. The dramatic similarities between the *Exxon* opinion and Justice O'Connor's procedural due process-based *Haslip* dissent also show the procedural relevance of predictability. It is a mistake to overlook *Exxon*. Common law jury instructions are incapable of producing predictable awards; they are similarly incapable of producing awards that are at a level of severity of which the

351. *Exxon*, 554 U.S at 506.

352. Pac. Mut. Life Ins. Co. v. Haslip, 449 U.S. 1, 43 (O'Connor, J., dissenting).

353. *Id.* at 64.

defendant had notice—as procedural due process has required since *BMW*. Like any procedural due process-based reversal of punitive damages, the Court's *Exxon* holding has far-reaching consequences. Not only is the specific award in *Exxon* invalid, but all awards imposed using the same jury instructions are invalid.

Reform is necessary to produce predictable punitive awards. The Supreme Court's suggestion in *Exxon* will not do so because of its use of compensatory damages as a baseline. Compensatory damages are dependent on the plaintiff, her circumstances, and her injury. Even if the defendant had extensively researched his plaintiff, compensatory damages for intentional torts specifically mandate compensation of unforeseeable consequences. Even if the damages were predictable, the compensatory damage baseline is still illogical given the lack of connection between the damages and tortious conduct.

Fortunately, tort law already recognizes a punitive remedy that could and should be the basis for reform. Restitution, a civil remedy based on the defendant's gain, is overlooked, just like *Exxon*. The way that courts alter the gain measurement in light of culpability shows that restitution serves the same purposes as punitive damages—punishment and deterrence. Punitive damages should similarly be based on the defendant's gain. The flexibility in measuring gains means the damages have the ability to achieve sufficient punishment and deterrence. And, importantly, the amount of punitive damages would finally have a factual connection to the case, making them predictable to the defendant—as *Exxon* and procedural due process require.