COMPENSATION AND PUNISHMENT UNDER THE GENERAL MARITIME LAW

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*Professor of Law, Charleston School of Law, Charleston, South Carolina. I am deeply indebted to the excellent work of Mr. Julius Hines of Charleston, South Carolina, whose paper "*Punitive Damages in Maritime Cases: Cleaning Up After Exxon Shipping Co. v. Baker,"* appeared in the program materials for the June 25-27, 2009 meeting of the Southeastern Admiralty Law Institute, at Ch. 10, and to the exhaustive research of Mr. Geoffrey Wendt, a recent graduate of the Charleston School of Law, which will be the feature article in an upcoming edition of The Maritime Law Bulletin of the Charleston School of Law, entitled "The Fog of Uncertainty Enshrouding Punitive Damages in Maritime Law." I am also deeply indebted to my research assistant, Mr. Hal Robinson, without whose excellent and timely research, the paper would not have been possible.

INTRODUCTION

As the Supreme Court acknowledged in the majority opinion in *Exxon Shipping Company et al v. Baker*,[1] "awarding damages beyond compensatory damages" is a very old idea. Virtually all provisions for such exemplary damages are based on a judgment that there are some situations where fundamental justice calls for more than just repairing the actual harm caused by acts that are repugnant and blameworthy enough to justify punishment of the perpetrator. Ancient examples of this idea usually involve some of the same elements common to modern punitive damages law: the unjustifiable, malicious and egregious nature of the acts in question; the pursuit of profit as at least one of the motives for the act; the relative disparity between the wealth and power of the perpetrator and the victim. When the principles of law call for going beyond mere repair of actual loss and includes a punitive component, it has been thought possible that the punitive component could even include capital punishment, in essence a death sentence for a really bad civil wrong.[2]

This strikes many as going too far, and supports the idea that this non-compensatory, punitive effort of civil-law remedies should have limits. This paper discusses such limits within the field of general maritime law, and the relationship of these limits to possible Constitutional restrictions as well.

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[1] Exxon Shipping Company v. Baker, 128 S. Ct. 2605, 2620 (2008) [hereinafter Baker]. The Supreme Court recognized the time-honored goals of "punishment for extraordinary wrongdoing" and to "deter from any such proceedings in the future," and American law has recognized that punitive damages are totally distinct from compensatory damages, rather than being some kind of "subterfuge for compensation" not allowed by normal compensatory damages rules. *Id.* at 2620-21, n. 8. The Court clearly limited the award of punitive damages under Maritime Law to the two classic purposes of punishment and deterrence:

> Regardless of the alternative rationale over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct. *Id.* at 2621.

The Court in Baker referred to both ancient and medieval legal codes that embraced the concept of punitive or retributive damages. *Id.* at 2620.

[2] According to the Old Testament, the Prophet Nathan told a parable to King David designed to condemn him for sending the husband of a woman he desired to his death in battle, so that he would be free to pursue her. The parable recounts how a man who had great riches and "exceeding many flocks and herds", took from a poor man's "one little ewe lamb", which was the poor man's only possession. He did so to use the poor man's lamb to feed a guest so that he would not diminish his own flock:

> And David's anger was greatly kindled against the man and he said to Nathan, "As the Lord liveth, the man that has done this thing shall surely die. And he shall restore the lamb four-fold, because he did this thing, and because he had not pity". And Nathan said unto David, "Thou art the man." II Samuel, Ch. 12, v. 5-7. (Holy Bible, King James Version)

Here we find compensatory damages, elevated times four because of the blameworthiness of the perpetrator, and retributive justice of a non-compensatory kind, death.

I. Previous Litigation

On the evening of March 24, 1989, Captain Joseph Hazelwood was taking a supertanker, the Exxon Valdez, out of Prince William Sound, Alaska. He ordered the vessel to sail in a direction that avoided patches of thick ice, but which put the vessel in a path to Bligh Reef. This maneuver would require a last minute turn to avoid the reef. Yet two minutes before the required turn, Captain Hazelwood left the bridge and went to his cabin after putting the vessel on auto pilot. Though Captain Hazelwood was the only mariner aboard who was licensed to navigate these particular waters, on his departure from the bridge he ordered the third mate to make the turn. He did not do so, and the vessel grounded on the reef, spilling some eleven million gallons of oil into Prince William Sound.[3]

Captain Hazelwood returned to the bridge and made a failed attempt to get the vessel off the reef. The Coast Guard arrived quickly, and discovered Captain Hazelwood loaded with alcohol.[4]

Exxon paid some $2.1 billion in cleanup costs, plus $25 million in fines and $900 million to restore damaged natural resources. Private parties commenced numerous lawsuits, some of which Exxon settled for $303 million. The remaining civil cases, which included commercial fisherman, Native Alaskans and landowners seeking compensatory damages for loss of livelihood and property, as well as punitive damages, were consolidated, and the district Court granted Exxon motion to certify a class of some 32,000 plaintiffs seeking punitive damages.

The trial was conducted in three phases. In Phase I, the jury heard evidence that Hazelwood was reckless, and that Exxon was reckless in their failure to monitor or restrain Captain Hazelwood, despite knowing that he was a relapsed alcoholic.[5]

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[3] Baker, *supra* n. 1, at 2612-13.

> Two minutes before the required turn, however, Hazelwood left the bridge and went down to his cabin in order, he said, to do some paperwork. This decision was inexplicable. There was expert testimony that, even if their presence is not strictly necessary, captains simply do not quit the bridge during maneuvers like this, and no paperwork could have justified it. And in fact the evidence was that Hazelwood's presence was required, both because there should have been two officers on the bridge at all times and departure left only one, and because he was the only person on the entire ship licensed to navigate this part of Prince William Sound. To make matters worse, before going below Hazelwood put the tanker on auto pilot speeding it up, making the turn trickier, and any mistake harder to correct.
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> As Hazelwood left, he instructed the remaining officer, third mate Joseph Cousins, to move the tanker back into the shipping lane once it came abeam of Busby Light. Cousins, unlicensed to navigate in those waters, was left alone with helmsman Robert Kagan, a non-officer. For reasons that remain a mystery, they failed to make the turn at Busby Light, and a later emergency maneuver attempted by Cousins came too late. The tanker ran aground on Bligh Reef, tearing the hull open and spilling eleven million gallons of crude oil into Prince William Sound.

[4]

> "After Hazelwood returned to the bridge and reported the grounding to the Coast Guard, he tried but failed to rock the *Valdez* off the reef, a maneuver which could have spilled more oil and caused the ship to founder. The Coast Guard's nearly immediate response included a blood test of Hazelwood (the validity of which Exxon disputes) showing a blood-alcohol level of .061 eleven hours after the spill. Supp. App. 307sa. Experts testified that to have this much alcohol in his bloodstream so long after the accident: Hazelwood at the time of the spill must have had a blood-alcohol level of around .241, Order 265, p. 5, at 256a, three times the legal limit for driving in most States." Baker, *supra* n. 1, at 2613.

The district Court instructed the jury that Exxon could be held liable for their own recklessness,[6] or for the recklessness of a "managerial employee" such as Hazelwood, a status that Exxon did not contest.[7]

At Phase II of the trial, the jury awarded $287 million in compensatory damages to commercial fishermen.[8] In Phase III, the jury considered the acts and omissions of Exxon management that may have contributed to the spill, after which they assessed $5 billion in punitive damages against Exxon and $5,000.00 against Captain Hazelwood.[9]

After intermediate appeals and remands, the Ninth Circuit upheld the managerial employee liability rule, but reduced the punitive damage award against Exxon to $2.5 billion.[10]

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5 "Exxon knew that Hazelwood had completed a 28 day alcohol treatment program during his employment, and that he had dropped out of a follow-up program and quit going to Alcoholics Anonymous meetings. There was also evidence that Hazelwood drank with Exxon officials, and that he drank heavily on the night the *Exxon Valdez* sailed."

"Exxon presented no evidence that it monitored Hazelwood after his return to duty or considered giving him a shoreside assignment. Witnesses testified that before the *Valdez* left port on the night of the disaster, Hazelwood downed at least five double vodkas in the waterfront bars of Valdez, an intake of about 15 ounces of 80-proof alcohol, enough 'that a non-alcoholic would have passed out.'" Baker, *supra* n. 1, at 2612.

6 "The jury was not asked to consider the possibility of any degree of fault beyond range of reckless conduct. The record sent up to us shows that some thought was given to a trial plan that would have authorized jury findings as to greater degrees of culpability, see App. 164, but that plan was not adopted, whatever the reason; Baker does not argue this was error." Baker, *supra* n. 1, at 2613, fn. 2.

7 "In Phase I the jury heard extensive testimony about Hazelwood's alcoholism and his conduct on the night of the spill, as well as conflicting testimony about Exxon officials' knowledge of Hazelwood's backslide. At the close of Phase I, the Court instructed the jury in part that "a corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee or corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." App. K to Pet. For Cert. 301a.

The Court went on that "[a]n employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business. *Ibid* Exxon did not dispute that Hazelwood was a managerial employee under this definition, *see* App. G; *id*. at 264a, n. 8, and the jury found both Hazelwood and Exxon reckless and thus potentially liable for punitive damages, App. L, *id*. at 303a." Baker, *supra* n. 1 at 2613-14.

8 This was reduced by deducting "released claims, settlements and other payments" to $19,590,257.00. Most of the Native Alaskans in the class settled for $20 million, and those in this class who opted out settled for about $2.6 million.

9 "In Phase III, the jury heard about Exxon's management's acts and omissions arguably relevant to the spill. *See* App. 1291-1320, 1353-1367. At the close of evidence, the Court instructed the jurors on the purposes of punitive damages, emphasizing that they were designed not to provide compensatory relief but to punish and deter the defendants. *See* App. To Brief in Opposition 12a-14a. The Court charged the jury to consider the reprehensibility of the defendant's conduct, their financial condition, the magnitude of the harm, and any mitigating facts. *Id.* at 15a. The jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon." Baker, *supra* n. 1 at 2614.

10 On appeal, the Court of Appeals for the Ninth Circuit upheld the Phase I jury instruction on corporate liability for acts of managerial agents under Circuit precedent. *See* In re Exxon Valdez, 270 F.3d at 1236, citing Protectus Alpha Nav. Co. v. North Pacific Grain Growers, Inc. 767 F.2d. 1379 (9th Cir. 1985). With respect to the size of the punitive damages award, however, the Circuit remanded twice for adjustments in light of this

Exxon applied for certiorari on three issues: (i) the basis for derivative punitive damages, (ii) preemption of punitive damages by the federal Clean Water Act, and (iii) whether maritime law or Due Process limits the recoverable amount of punitives. The Court accepted all but the Due Process issue.[11] The final opinion of the Supreme Court failed to resolve the first issue, [12] held that punitive damages were not preempted by the Clean Water Act,[13] and announced limits on the recovery of punitive damages under maritime law.

This paper primarily concerns this last issue - the limits on punitive damages which the Supreme Court will impose in a case falling within admiralty jurisdiction. We will also consider how Due Process considerations may return to alter this particular rule for awarding punitive damages which the *Baker* Court announced.

III. The *Baker* Opinion: General maritime law and Due Process Limits on Punitive Damages.

Court's Due Process cases before ultimately itself reducing the award to $2.5 billion. *See* 270 F.3d at 1246-47, 472 F.3d. 600, 601, 625 (2006) (per curium), and 490 F.3d 1066, 1068 (2007). Baker, *supra* n. 1 at 2615

[11] "We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, whether the Clean Water Act (CWA), 85 Stat. 816, 33 U.S.C. § 1251 *et seq.* (2000 ed. and Supp. V), forecloses the award of punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law." Baker, *supra* n. 1 at 2614

[12] Because Justice Alito recused himself because of ownership of stock in Exxon, the remaining justices numbered only eight, which split 4-4 in this issue.

"The Court is equally divided on this question, and '[i]f the judges are divided, the reversal cannot be had, for no order can be made.' Durant v. Essex Co., 7 Wall, 107, 112, 19 L. Ed. 164 (1869). We therefore leave the Ninth Circuit's opinion undisturbed in this respect, though it should go without saying that the disposition here is not precedential on the derivative liability question." Baker, *supra* n. 1, at 2611

In any case, the inability to determine which basis for Exxon's liability the jury relied on (Exxon's own recklessness or that of their managerial Employee), the Court would probably have remanded this issue has they been able to form a majority.

Baker emphasizes that the Phase I jury instructions also allowed the jury to find Exxon independently reckless, and that the evidence for fixing Exxon's punitive liability at Phase III revolved around the recklessness of company officials in supervising Hazelwood and enforcing Exxon's alcohol policies, Thus, Baker argues, it is entirely possible that the jury found Exxon reckless in its own right, and in no way predicated its liability for punitive damages on Exxon's responsibility for Hazelwood's conduct. Brief for Respondents 36-39.

The fact remains, however that the jury was not required to state the basis of Exxon's recklessness and the basis for the finding could have been Exxon's own recklessness or just Hazelwood's. Any error in instructing on the latter ground cannot be overlooked, because " when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on a permissible or an impermissible ground, the judgment must be reversed and the case remanded." Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 11, 90 S. Ct. 1537, 26 L. Ed.2d 6 (1970). Baker, *supra* n. 1, at 2615

[13] Baker, *supra* n. 1, at 2616-19. The passage of the federal Oil Pollution Act of 1990 changes this preemption landscape significantly. The rule governing preemption of an established rule of common law by statute requires that the statute directly address the precise issue to be preempted. United States v. Texas, 507 US 529, 534 (1993): "In order to abrogate a common law principle, the statute must speak directly to the issue addressed by this common law." In context this means that there must be some express "congressional intent to occupy the entire field of pollution remedies." Baker, *supra* n. 1, at 2619. The Clean Water Act does not do so.

After the Supreme Court's *Baker* decision, there are some things we know about limits on punitive damages, and some things we don't.

We know (for the time being) that there is no longer any question about whether punitive damages can be recovered under general maritime law.

We also now know that the line of cases resting on the express or implied statutory preemption of non-pecuniary damages, which would logically include punitives, do not prevent recovery of punitive damages covered by both such statutes and a free-standing, joinable general maritime law claim.[14] In *Atlantic Sounding Inc. v. Townsend,*[15] the Supreme Court undercut the

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[14] A broken line of cases and statutes had produced uncertainty over when punitive damages might be available. *See* Wendt**,** "The Fog of Uncertainty Enshrouding Punitive Damages in Maritime Law", pp. 21-39, noted in credits preceding footnotes for this article. The Harrisburg, 119 US 199 (1886) denied the child and widow of a seaman a cause of action for wrongful death based on vessel negligence, Later, The Osceola, (1903) denied a seaman a cause of action for injuries based on vessel negligence. This ultimately inspired the enactment in 1920 of the Death in the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-08 (2006), and the Jones Act in 1920, 46 U.S.C. § 30104-30105 (2006).

By express language in the DOHSA and by interpretation of the Jones Act, damages for anyone killed in the high seas and damages for employer/vessel negligence causing the death or injury of a seaman were restricted to compensatory damages. Since the Jones Act covered only seaman's negligence actions, plaintiff's lawyers quickly began exploring the possibilities for non-pecuniary damages under causes of action distinct from negligence, specifically claims for unseaworthiness and wrongful failure to pay maintenance and cure. The Supreme Court's response to some of these attempts was negative. In Mobil Corp. v. Higginbotham, 436 U.S. 618 (1978) the Court denied recovery for loss of society (non-pecuniary) for the high seas death of a helicopter passenger, relying on the pecuniary limit contained in DOHSA. In Miles v. Apex Marine Corp, 498 U.S. 19 (1990), the mother of a deceased seaman killed due to the negligence of the son's employer and the unseaworthiness of the vessel sought loss of society (non-pecuniary) from the employers. The Supreme Court said no, based on the Jones Act limits in seaman v. employer or seaman v. vessel suits which restricted plaintiff to pecuniary loss. In other words joining a general maritime law clause for unseaworthiness with a Jones Act negligence claim would not permit the plaintiff to add on any non-pecuniary damages to the Jones Act negligence pecuniary losses. "[T]he Court reasoned that it could not create more expansive remedies under the judicially created general maritime law wrongful death action where its application overlaps with coverage of the DOHSA and the Jones Act." Wendt, op.cit, 129. The Court's objective was to promote uniformity. Lower Courts extended this uniformity objective to other claims, such as wrongful failure to pay maintenance and cure, refusing to allow punitive damages for this seaman's remedy. Guevara v. Maritime Overseas Corp., 59 F.3d 1496(5th Cir. 1995). The Eleventh Circuit's rejection of this "overlap" limit on punitives (that the Jones Act restricts all seaman's claims to pecuniary loss) has been eroded by the Supreme Court. Atlantic Sounding Co. v. Townsend, 496 F.3d 1282 (11th Cir. 2007). The Guevara case was abrogated by the decision of the U.S. Supreme Court in Atlantic Sounding, infra n.15, as was Glynor v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995).

The ongoing issue has been whether, Mr. Wendt stated, whether the mere overlap between a cause of action based on the general maritime law, which Baker proves can still support a claim for punitives, and a federal statute restricting recovery to pecuniary loss, will neuter the general maritime law punitive damages claim. This is particularly significant in Jones Act claims, which restrict the seaman's claim against his employer to a negligence cause of action, whereas the DOHSA is genuine geographical prohibition, covering all wrongful death claims. Now, Atlantic Sounding has resolved the issue, and clearly rolled back the "uniformity/overlap" restriction on punitives that are based on claims and remedies established in the general maritime law preceding the effective date of such arguably preemptive statutes.

[15] Atlantic Sounding, Inc. v. Townsend, 129 S. Ct. 2561 (2009).

line of cases that allowed a broad preemptive effect from federal statutes that either expressly or by interpretation limited damages in certain cases to pecuniary or compensatory loss. In Atlantic Sounding, Justine Thomas joined the more "liberal" block (Stevens, Souter, Ginsburg and Breyer) in upholding punitive damages for wrongful, willful failure to pay maintenance and cure, which was joined with the plaintiff's cause of action for negligence under the Jones Act and for unseaworthhiness under general maritime law. Justice Alito dissented, joined by Chief Justice Roberts, and Justices Scalia and Kennedy. Justice Scalia had also dissented along with Thomas (and Ginsburg) in the State Farm case (2003), on the grounds that the Due Process clause of the Fourteenth Amendment does not constrain punitive damages awards under state law. This indicates that Justice Thomas is the strongest supporter of punitives among the Courts "conservative" wing, since he alone in that group was unwilling to support the "preemption by overlap" concept of preemption. The defendant's employer in Atlantic Sounding also filed a declaratory judgment action seeking to resolve its liability under maintenance and cure. The Courts below relied on Hines v. J.A. LaPorte, Inc.[16] and held that plaintiff could recover punitives for wrongful failure to pay maintenance and cure. The Supreme Court majority in Atlantic Sounding, per Justice Thomas, agreed. The majority opinion lays to rest any argument that the Jones Act repealed or preempted any remedies available before its passage in 1920.[17] The real import of Atlantic Sounding is that the preservation of "preexisting remedies" includes not only the basis for liability, but also recoverable damages. The Atlantic Sounding majority interpreted the Court's former decisions, including Vaugh v.Atkinson[18], as authorizing true punitive damages. The majority opinion finessed the impact of Miles v. Apex Marine, Corp., 498 U.S. 19 (1990), holding that a general maritime law claim for wrongful death of a seaman would not support a claim by the seaman's surviving mother for loss of society or loss of future income (non-pecuniary loss), since the Jones Act limited recovery in wrongful death cases to pecuniary loss.[19] Since the Jones Act (and D.O.H.S.A.) preceded the recognition of a General maritime law cause of action for wrongful death in 1970, the majority reaffirmed the admonition in Miles, *supra,* to look primarily to these legislative enactments for policy guidance. *Id.* The majority based its decision not to extend this "policy guidance" to the general maritime law remedy of maintenance and cure and the availability of punitive damages under general maritime law because these pre-dated the Jones Act, and the Jones Act was not intended to affect pre-existing remedies. In other words, Congress spoke in 1920 to the issue of damages recoverable for wrongful death where there was no applicable general maritime law remedy. Hence, subsequent common law developments relating to wrongful death would be subject to the pecuniary loss restrictions in the Jones Act and (and D.O.H.S.A.) because the subject of recoverable damages for wrongful death was one to which "Congress had spoken directly."[20] Thus, Miles controls only subsequently developed principles of maritime law, not those established before 1920. Thus the seaman's cause of action, the maintenance and cure claim, includes both the standards for liability and the recoverable damages. The dissents in Atlantic Sounding would give Miles a broader application, and relied on the argument that the Jones Act (1920) incorporated the FELA (1908) for liability and damages rules, and that cases before 1920 had determined that no punitives were available under FELA. The practical effect of Atlantic Sounding is that this restriction in the Jones Act to pecuniary loss recovery applies in death cases

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16 820 F.2d 1187 (11th Cir. 1987).

17 Atlantic Sounding, 129 S. Ct. at 2570: The Jones Act creates a statutory cause of action for negligence, but it did not eliminate *preexisting remedies* available to seamen for a separate common-law cause of action based on a seamen's right to maintenance and cure. (emphasis added).

18 369 U.S. 527 (1962).

19 Atlantic Sounding, at 2572.

20 *Id.* at 2573.

only, and not to any pre-1920 established maritime causes of action or applicable "remedies," i.e. damages.

The majority in *Baker* also endorsed the principal that a statue can provide one remedy within a defined field of law without eliminating other valid remedies that provide differing forms of relief. The Court approvingly quoted their opinion in United States v. Texas, 507 U.S. 527, 534 (1993) for the proposition that, for a statute "to abrogate a common law principle, the statute must speak directly to the question addressed by the common law . . ." or contain a "clear indication of congressional intent to occupy the entire field . . . " [21] This position is in accord with the Atlantic Sounding majority, which restricts any inferential preemptive effect of federal statutes.

Next, we know that the Court's decision in *Baker* was based on the Court's authority to promulgate general maritime law rules "in the manner of a common law Court" and that this was the Constitutional and jurisdictional basis of the *Baker* opinion[22], whereas the Court's previous decisions limiting punitive damages were based on Due Process of law.[23] We do not know for sure

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[21] Baker, *supra* n. 1, at 2614. *See* n. 11*; supra*.

[22] Baker, 128 S. Ct. 2605, 2626 (2008); U.S. Constitution Art. III, § 2, extending "The judicial power . . . to all cases of admiralty and maritime jurisdiction". 28 U.S.C. §1333.

The Court was clear that the announced limits on punitive damages were strictly based on the federal court's decisional authority over general maritime cases.

> Finally, Exxon raises an issue of first impression about punitive damages in maritime law, which falls within federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result. *See* U.S. Const., Art. III § 2, cl. 1; *see, e.g.*, Edmonds v.Compagnie Generale Transatlantique, 443 U.S. 256, 259, 99 S. Ct. 2753, 61 L. Ed.2d 521 (1979) ("Admiralty law is judge-made law to a great extent"); Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61, 79 S. Ct., 468, 3 L. Ed.2d 368 (1959) (constitutional grant "empowered the federal courts….development of [maritime] law"). Our review of punitive damages today then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with the Court as a source of judge-made law in the absence of a statute. Baker, *supra* n. 1, at 2626.

[23] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Cooper Industries, Inc v. Leatherman Tool Group, Inc., 532 U.S. 434 (2001); State Farm Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003). The Court in State Farm directed courts reviewing the limits on punitive damages under Due Process to consider (1) "the degree of the reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 2624-25; 2633-34.

State Farm was 6-3 opinion authored by Justice Kennedy, and was based on the Due Process clause of the Fourteenth Amendment. After proving that State Farm's decision to deny a claim was based on a nationwide scheme to cap payments under polices it had issued, the jury awarded $2.6 million in compensatory damages and $145 million in punitives. The trial court reduced these awards to $1 million compensatory and $125 million punitives. Both plaintiffs and State Farm appealed . The Utah Supreme Court sought to apply the U.S. Supreme Court's Due Process standards in BMW of North America, Inc.v. Gore, 517 U.S. 559, 574 -75 (2001), and sustained the awards. The Supreme Court granted certiorari, and in their State Farm majority opinion held that the Due Process clause of the Fourteenth Amendment imposes limits on state authority to award punitive damages and impose criminal penalties. State Farm, 538 U.S. at 417. The Court emphasized the broad discretion that juries have under restrictions defining the parameters of possible punitive awards under state law, and the fact that a civil case does not afford a defendant the same degree of protection applicable in criminal cases. They identified the main problem with such awards as their unpredictability,

why this was so, but since educated guesses are in order, this separation of general maritime law from Due Process could have some real consequences.

Of particular interest is the way in which the previous Due Process cases restricting punitive damages awarded under state law intersect with the Court's opinion in *Baker*. The alignment of the Justices on the Due Process case sheds light on the "common law" approach used in *Baker*.[24] In BMW of North America v Gore (1996), Justices Stevens, O'Conner, Kennedy, Souter and Breyer supported limiting state punitive awards under the Due Process Clause, while Justices Scalia, Thomas, Ginsburg and Rehnquist, C.J. opposed. Justice Ginsburg's dissent (joined by Chief Justice Rehnquist) was based in part on the belief that the majority approval "unnecessarily and universally

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just as they did later in Baker. Applying the principles in Cooper, *supra*, the Court stated that Due Process dictates that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose." BMW, 538 U.S. at 417. The court allowed that the "reprehensibility" of the defendant's conduct is "the most important indicium of the reasonableness of a punitive damages award. State Farm, 538 U.S. at 418.

Curiously the Court on State Farm objected to the proof that the practice of planned denial of legitimate claims which affected the plaintiff was demonstrated in part of proof that showed that State Farm was doing this nationwide, and not just in Utah:

> The Utah Supreme Court's opinion makes it explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed [sic] toward the Campbell's. State Farm, 538 U.S. at 420.

Whatever one's opinion about punitives, this seems sufficiently counter-intentive to rank State Farm as an exemplar of Supreme Court juris prudence. The plaintiffs bolstered their case by showing the defendant's actions were not "an isolated incident", which the Court in State Farm clearly states as one of the criteria for "reprehensibility" (the widespread practice being worse than an "isolated incident). State Farm, 538 U.S. at 419. However, in Campbell, this showing undercuts the plaintiff's award because the conduct in question concerned other people outside the State of Utah. The plaintiffs in State Farm undercut their case by showing that the defendant's conduct "was not a local anomaly." *Id.* at 420. The Court expressed concern that the defendant's conduct "may have been lawful when it occurred" and that to employ proof of such conduct in Utah would in effect allow the law of Utah to invade the sovereignty of other states where this conduct "may have been legal." *Id.* at 421.

Typically, the Court allows the grandiose and the hypothetical to defeat the real. Does this mean that the scope of defendant's conduct must concern only intra-state acts? Obtusely, the Court stated that the practices pursued by State Farm in other states "bore no relation to the Campbell's harm," *Id.* at 423 which concerned the bad-faith refusal to pay a claim pertaining to the wrongful death of the plaintiff in Utah.

The Court did affirm that, under Due Process standards, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy Due Process." *Id.* at 424. The Court left us hanging as to exactly what would qualify a case as one of these few, and did preserve the principal that truly enormous damages might call for a restriction of punitives to a 1/1 ratio.

> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with Due Process where 'a particularly egregious act has resulted in only small amount of economic damages.' Ibid.; *see also* ibid. (positing that higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, the a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff. *Id.* at 425.

[24] *BMW. of North America v Gore*, 517 U.S. 559, 606 (1996).

ventures into territory traditionally within the State's domain…".[25] Justice Scalia and Thomas agreed. Thus we begin with a 564 majority in favor of Due Process limitations. In the next Due Process case, Chief Justice Rehnquist bowed to stare decisis and joined the BMW majority.[26] Justice Thomas wrote a concurrence, joined by Justice Scalia in which he made it clear that he concurred only because the Cooper case offered no opportunity for overruling *BMW v Gore*, stating: "I continue to believe that the Constitution does not constrain the size of punitive damages awards… For this reason, given the opportunity, I would vote to overrule BMW. This case, however, does not present such an opportunity."[27] Justice Ginsburg dissented, leaving a 6 to 3 majority in favor of Due Process restriction in state awards. The last Due Process case decided by the court preserved the 6 to 3 majority[28] Since the courts last Due Process opinion in 2003, three of the 6 Justice majority have been replaced. Chief Justice Rehnquist and Justices O'Conner and Souter have been replaced by Chief Justice Roberts and Justices Alito and Sotomayor. Of the Justices on record in the Due Process issue, we thus have a perfect balance: three for and three against (Justice Kennedy, Breyer and Stevens for; Justices Thomas, Scalia and Ginsburg against). Additionally we now have three "wild cards", any two of which will determine the fate of Due Process limits on state punitives. No one can predict whether a case providing an opportunity to revisit the issue will come before the court while the composition holds. But if it does, it seems likely that Justices Alito and Roberts would join the three persistent votes against such limits (Justices Thomas, Scalia and Ginsburg), since they may be inclined toward the "states' rights" resistance to Fourteenth Amendment intrusions into state law. We don't know what Justice Sotomayor will do, but it looks like the current Due Process limits on state punitives could fall to a 5 to 4 or 6 to 3 majority. Nothing in *Baker* suggests any defection on the part of Justices Thomas, Scalia or Ginsburg, since the basis for *Baker* was the Court's general maritime law decisional authority. A more logical and consistent approach in *Baker* would have been to use the Due Process guarantees in the Fifth Amendment, since the court already had a developed body of precedent under the Fourteenth Amendment Due Process clause. These Due Process principles under the Fifth Amendment should be no different from those developed under the Fourteenth Amendment. Clearly, the court in *Baker* could not form a majority around Due Process limits, and could gain the support of the 3 persistent "no" votes in Due Process only by employing a different constitutional theory- the general maritime law. Thus, there is no reason to think that the hostility to Due Process limits on punitives has lost any of the potency. So the days of Fourteenth Amendment restrictions on state punitives may be numbered. If so, this would leave the general maritime law providing the only surviving Constitutional restrictions on punitive damage awards.

Next, we don't know the precise legal basis for awarding derivative punitive damages.[29] The range of different answers to this question in previous state and federal cases is vast. Options could include pure respondeat superior, where the principal would be liable for the egregious acts of his agent acting within the scope of this employment. Other variants concern some possible requirement for the involvement of the principal in the agent's egregious acts. At one extreme, the imposition of punitives could depend upon some "strict complicity" by the principal in authorizing,

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25 *Del*., at 598.

26 *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 US 424 (2001).

27 *Id*., at 443.

28 *State Farm Mutual Automobile Insurance Co. v Campbell* 538 US 408 (2003).

29 The Court's 4-4 split on this issue simply left standing the Ninth Circuit's ruling in, In re Exxon Valdez, 490 F.3d 1066 (9th Cir. 2007). Though it was not possible to tell from the record which basis for liability the jury used the Ninth Circuit approved of both basis presented. *See* n. 10, *supra*.

sanctioning, or approving of the agent's misconduct.[30] Such a requirement focuses on the conscious intent of the principal to have the agent cause the harm.

Alternatively, could the principal be less than knowing and reckless, and be simply negligent in promulgating some safety protocol, or be negligent in the enforcement of such a protocol that is in place? Such a standard would not focus on the actual knowledge and intent of the principal, but would rather rest on demonstrable norms, customs and practices applicable to particular activities. Expert testimony about business or industry norms would become useful.

Additionally, could we have a standard that imposes punitives in situations that do not address the knowledge or intent or action of the principle at all, but rather focuses on the status of the agent with regard to the principal? The Ninth Circuit approved of a rule allowing punitives for egregious conduct of the agent if the agent has some significant role or status in the organization of the principal. Since most of these cases involve derivative corporate liability for the acts of an agent, the acts of the agent should significantly "represent" the corporate principal. Among alternatives, the Ninth Circuit upheld an award based on the egregious conduct of a "managerial agent."[31]

Next, we don't know what impact the *Baker* opinion will have outside of maritime cases. We also don't know the interplay between general maritime law and Due Process limits on punitives. It appears that both lines of cases employ a set number of factors relevant to the size of a permissible award. The greater number of factors focuses on the defendant and his knowledge and conduct. The Court in *Baker* addressed various levels of blameworthiness and sought guidance in both the Second Restatement and relevant state statutes (though state law would have to be compatible with the overall principles of general maritime law to be relevant in Admiralty cases).[32]

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30 In Lake Shore & M.S. Rwy. Co. v. Prentice, 147 U.S. 101 (1873), the Supreme Court in a non-maritime case vacated an award of punitives based on pure respondeat superior and announced a rule that would impose derivative liability only where the employer directly countenance or participated in the agent's misconduct, as well as where the employer knowingly and recklessly hired an unfit person. *Id.* at 108-116 (the "strict complicity" rule).

31 See n. 10, *supra*.

32 "Under the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it. *See e.g.*, 2 Restatement § 500, Comment a, pp 587-588 (1964) ("Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of a harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so"). Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure. See 4 *id.*, § 908, Comment *e*, p. 466 (1979) ("In determining the amount of punitive damages, ...the trier of facts can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer . . . "); *cf.* Alaska Stat. § 09.17.020(g) (2006) (higher statutory limit applies where conduct was motivated by financial gain and its adverse consequences were known to the defendant); Ark. Code Ann. § 16-55-208(b) (2005) (statutory limit does not apply where the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage). Baker, at 2621-22.

Thus the standard of fault requires something above ordinary negligence either for the agent or the principal, through

The Court acknowledged other factors which a Court reviewing a punitive damages award could consider, and which do not directly relate to the knowledge or conduct of the defendant. In so doing, the Court referred to the cases dealing with Due Process. Such factors include the degree of difficulty in detecting the defendant's responsibility, that is the likelihood of detection, and the smallness of the compensatory damages award:

> Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it), *see e.g.*, BMW of North America, Inc. v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L. Ed.2d 809 (1996) ("A higher ratio may also be justified in cases In which the injury is hard to detect"), or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue), *see e.g. ibid.* ("[L]ow awards of compensatory damages may properly support a higher ratio….if, for example, a particularly egregious act has resulted in only a small amount of economic damages "); 4 Restatement § 908, Comment c, p.465 ("Thus an award of nominal damages…is enough to support a further award of punitive damages, when a tort,…is committed for an outrageous purpose, but no significant harm has resulted"). And, with a broadly analogous object, some regulatory schemes provide by statute for multiple recovery in order to induce private litigation to supplement official enforcement that might fall short if unaided. *See, e.g.* Reiter v. Sonotone Corp., 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L. Ed.3d 931 (1979)[33]

Also, the "largeness" of compensatory damages can have the reverse effect of "smallness".[34] The majority in *Baker* suggested that the line of cases dealing with the excessiveness of punitive awards under Due Process may be lingering in the background, and in the case of truly enormous compensatory damages, a 1/1 ratio that is normally required under Due Process, save in a "few" cases, may return.

> "The Court's response to outlier punitive damages awards has thus far been confined by claims at the constitutional level and our cases have announced Due Process standards that every award must pass. *See, e.g.*, State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425, 123

"gross negligence" may suffice.

> The prevailing rule in American courts also limits punitive damages to cases of what the Court in *Day*, *supra*, spoke of as "enormity," where defendant's conduct is "outrageous"…, owing to "gross negligence," "willful, wanton, and reckless indifference to the rights of others," or behavior even more deplorable. (citations omitted) *Id.* at 2621, citing Day v. Woodworth, 13 How. 363, 14 L. Ed. 181 (1852). For the historical variations in state rules and limits on punitive awards, see *Id.* at 2621-22. For rules in other select nations, *see Id.* at 2623-24.

[33] Baker, *supra* n. 1, at 2622.

[34] Baker, *supra* n. 1, at 2626.

> S. Ct. 1513, 155 L.Ed.2d 585 (2003); Gore, 517 U.S., at 574-576, 116 S. Ct. 1589. Although "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *Id.* at 582, 116 S.Ct. 1589, we have determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy Due Process, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the Due Process guarantee,"

Yet the Court took great pains to make clear that their opinion in *Baker* was separate from former opinions concerning Due Process limits on punitives under state law. The Court stated:

> "Today's enquiry differs from Due Process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by Due Process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard. Our Due Process cases, on the contrary, have all involved awards subject in the first instance to state law. *See, e.g., id.* at 414,123 S. Ct. 1513(fraud and intentional infliction of emotional distress under Utah law); *Gore, supra,* at 563, and n. 3, 116 S.Ct.1589 (fraud under Alabama law); TXO*, supra,* at 452, 113 S.Ct. 2711 (plurality opinion) (slander of title under West Virginia law); Haslip, 499 U.S. at 7, 11 1 S. Ct. 1032 (fraud under Alabama law). These, as state-law cases, could provide no occasion to consider a "common-law standard of excessiveness," Browning-Ferris industries, 492 U.S. at 279, 109 S. Ct. 2909, and the only matter of federal law within our appellate authority was the Constitutional Due Process issue.
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> Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of a statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just 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. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. [35]

Of all the considerations affecting the award of punitive damages under general maritime law, the Court singled out uncertainty as the main problem.

> The real problem, it seems is the stark unpredictability of punitive awards. [36]

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[35] Baker, supra n. 1, at 2626; *see also* n. 12, *supra*. Since the meaning of "due process" under the Fourteenth Amendment (applicable only to the state) and under the Fifth Amendment (applicable only to the federal government) is logically the same, it is significant that the Court did not simply apply the Fourteenth Amendment jurisprudence to the Firth Amendment. Since Justices Scalia and Thomas did not agree that there are any Fourteenth Amendment limits on punitives, the only way to form a majority to limit them had to rest on something other than a Constitutional principle.

[36] Baker, supra n. 1, at 2625

This problem with uncertainty moved the Court to reject admonitory or "verbal" approaches to limiting damages[37] and opted instead for a "quantitative" one. Discussing vague, verbal exhortations to a jury authorized under the law of several jurisdictions, the *Baker* majority linked its identification of the main problem with punitive awards – uncertainty – to one practical way of rendering such awards at least more predictable.

> "These examples leave us skeptical formulations, superimposed on general Jury instructions, are the best insurance against unpredictable outliers. Instructions can go just so far in promoting systematic consistency when awards are not tied to specifically proven items of damage (the cost of Medical treatment, say), and although judges in the Sates that take this approach may well produce just results by dint of valiant effort, our experience with attempts to produce consistency in the analogous business of criminal sentencing leaves us doubtful that anything but a quantified approach will work.[38]

After reviewing the move from "indeterminate" sentences under criminal law to more precise guidelines, which the Court viewed as a good analytical comparison, the *Baker* majority signaled that future judicial review of awards would be done under standards comparable to federal criminal sentencing guidelines.[39] Significantly the Court also suggested that limits on punitives under the general maritime law will be "more rigorous" than those required by the Constitution.[40]

The Court rejected the approach, used by some states, of having an absolute dollar cap on punitives, [41] and indicated that the ratio to compensatory damages approach under general maritime law was the same as that under the Court's Due Process decisions, citing their most recent opinions in that area.[42] Given the Court's explicit holding that the limits on punitive damages announced in

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[37] Baker, supra n. 1, at 2626

[38] Baker, supra n. 1, at 2628

[39] This federal criminal law development, with its many state parallels, strongly suggests that as long 'as there are no punitive damages guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary.' Baker, supra n. 1, at 2628-29.

[40] "This is why our better judgment is that eliminating unpredictable outlying punitive awards *by more rigorous standards* than the constitutional limit will probably have to take the form adopted in those states that have looked to the criminal-law pattern." Baker, supra n. 1 at 2629 (emphasis added).

[41] Even if such a cap was expressly made adjustable to account for future inflation, the Court thought it best to leave inflation to the jury, and employ a set of 'quantitative' limits in the punitive award.

[42] "And of course the potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our Due Process analysis." *See, e.g.*, State Farm, 538 U.S. at 425, 123 S. Ct. 1513; Gore, 517 U.S. at 580, 116 S. Ct. 1589. Baker, supra n. 1, at 2629.

The Court again anchored its holding to the fact that it was acting as a "common law court" in an admiralty case, there rejecting any criticism that such a mechanical, quantitative approach looks too much like

> legislation. Traditionally, courts have accepted primary responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive damages awards, it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative. Baker, *supra* n. 1, at 2630.

Similarly, the Court stated:

Baker were not based on the Due Process clause of the Fourteenth Amendment but rather were based on this Court's authority over general maritime law, we can be certain that this separation of the Constitutional source of these rules was not done for the purpose of allowing punitive damage awards in maritime cases to exceed the limits mandated by Due Process. While it is true that the Due Process clause of the Fourteenth Amendment applies only to the states, it does embody broad fundamental principles commonly applied to all governmental action, and represents what is probably the single-most important concept of constitutional government prevailing since the Magna Carta emerged in 1215 A.D. We can also safely assume that the Court did not intend the two separate restraints on punitive damages, one under "common law" admiralty standards and another under the Fourteenth Amendment, to be identical. The explicit separation would serve no purpose if that were so. We also know that the fragile majority of five intended to restrict punitive damages and not enlarge them. Therefore, it is reasonable to conclude that the members of the Court amenable to restricting punitive damages could not form a majority doing so based on Due Process of law under the Fifth Amendment. Justices Scalia and Thomas dissented from the Court's imposition of Due Process limits on punitives in *Campbell* (2003), infra. Their willingness to impose limits on punitive thus depended entirely in finding some Constitutional basis for doing so other than Due Process. Justice Ginsburg not only dissented in *Campbell*, but also in *Baker*, where she stated that such limits were inappropriate even under general maritime law, and that Congress, not the Court, should determine such limits. Justices Scalia and Thomas were thus critical to the majority of five in *Baker*. If the Court was to achieve a majority limiting punitives in *Baker*, which required the support of Justices Scalia and Thomas to accomplish, some agreeable ban other than Due Process had to be found, and general maritime law provided the solution. Additionally, such a decision based on Due Process would eventually have the broadest possible application at both the state and federal level. Also, a decision based on Due Process would require a highly visible change of opinion about the meaning and content of the Constitution, rather than a discretionary common law decision in an area committed to the Court's authority by the Constitution, which gives the Court jurisdiction over this subject matter area – admiralty and maritime law. Thus a majority could be formed around restrictions that could more readily be subject to change whenever a future majority of the Court decides to lower or raise the limits on punitive damages in maritime cases.

Also, under the Court's approach in *Baker*, only one area of the law would be subject to such restrictions, rather than every area. The effects of such limits would thus be contained, as well as being subject to easy revision. Thus, the conclusion seems inevitable that the majority in *Baker* was a coalition that was formed to permit limitations in punitive damages under maritime law that are more restrictive than those set by the constitutional outer limits of Due Process, so long as the scope of such limitations is confined to maritime cases.

The Court in *Baker* clearly indicated that this should be the principal impact derived from separating Due Process and General maritime law. The Court in *Baker* stated:

> This is why our better judgment is that eliminating unpredictable

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> "History certainly is no support for the notion judges cannot use numbers. The 21 year period in the rule against perpetuities was a judicial innovation, and so were exact limitations periods for civil actions, sometimes borrowing from statutes, but often without any statutory account to draw on. And of course, adopting an admiralty-law ratio is no less judicial than picking one as an outer limit of constitutionality for punitive awards." *Id.* (citations omitted).

> punitive *awards by more rigorous standards than the constitutional limit* will probably have to take the form adapted by those States that have looked to the criminal law pattern of qualified limits. *Baker*, 128 S. Ct. at 2629. (emphasis added)

The Court found that using a ratio of compensatory to punitive damages is the preferred way of rendering punitive awards more certain, since the "sentencing guidelines" or "set fines" approach used in criminal sanctions would be unpractical because there is no evident standard for setting a specific dollar cap on punitives.

It also arguably makes sense to leave decisions about the scope of punitive damages sufficiently open-ended and broad, setting only the Constitution's outer limits under a Due Process analysis, so that other sovereigns in the federal system – the states – can make their own decisions about the merits of such unusual damages.

Where does this leave us? The answer depends upon the composition of the Court in the future. Because the resistance to setting Due Process limits has come from both so-called "wings" of the Court, it seems unlikely that the replacement of Justice Souter will have much impact on the future limits on punitive damages under Due Process standards or under General maritime law. Thus the bulk of the "conservative wing of the Court will probably have no interest in elevating the principles announced in *Baker* to Constitutional status.[43]

The three dissenters in *State Farm* opposed Due Process limits on state law punitive damages awards on the grounds that the Due Process Clause provides no protection against excessive punitive damages awards.[44] Justice Scalia and Thomas (joining Justice Ginsberg) will predictably resist any further expansion of Due Process limits. Two of these justices, Scalia and Thomas, apparently joined *Baker* majority solely because the decision was confined to maritime cases. Chief Justice Rehnquist is now replaced by Chief Justice Roberts, who took no part in the Court's Due Process cases on punitives. Chief Justice Roberts joined Justice Alito, Scalia and Kennedy dissenting from the Court's decision to permit punitives for wrongful failure to pay maintenance and cure to a Jones Act seaman in *Atlantic Sounding*. Perhaps Chief Justice Roberts and Justice Alito would join the three *State Farm* dissenters and form a majority of five to retreat from Due Process restrictions on punitives. This seems unlikely; but time will tell.

So most all of the certain impact of *Baker* will involve general maritime law limits on punitive damages. The Court's majority opinion on this point raises some interesting questions. Thus, we have to make an assessment of the level of culpability represented by the defendant's conduct, which could range all the way from intentional and malicious acts at the top of the scale, to "some culpability" down at the bottom.[45] We must assume that, at the very least, an agent's conduct must rise above ordinary negligence before punitives could be awarded. So some elevated fault by the agent within the extremes described above will be required.

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43 State Farm Mutual Automobile Ins. Company v. Campbell, 538 U.S. 408, 433-37 (2007).

44 *Id.* at 426-37.

45 The bottom of the scale is represented by the original Supreme Court decision that started all of this, The Amiable Nancy, 16 U.S 546 (1818), which allowed recovery against a principal for the acts of an agent where the principal participated in the wrongful acts "in the slightest degree". *Id.* at 558. This issue blends into the question of standard for derivative liability.

Further, since all the discussions thus far have involved fact situations when the principal has at least "some culpability", it is unlikely that a pure respondeat superior rule for punitives (egregious acts if the agent acting within the scope of his employment) will ever emerge in general maritime law.

It does appear that the approach to limiting punitives pursued by the Court under maritime law and under Due Process are extremely similar. Though the standards for derivative liability remain unsettled, both the Due Process and the maritime property damage cases imply a very similar scaled approach to the assessment of fault by the wrongdoer. Both Due Process and the maritime rule adhere to a presumptively applicable 1/1 ratio between compensatory and punitive damages.

In other words, the 1/1 ratio is based on both general maritime law policy (as in *Baker*) and Due Process. If this is so, the various factors listed by the Court to support departure form the 1/1 ratio under maritime law policy may not permit a departure from a 1/1 ratio required by the Constitution where compensatory damages are huge. With regard to Due Process, the *Baker* majority says that where there are "substantial compensatory damages, "…then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limits of *the Due Process guarantee*."[46] And the majority separately lists the factors that might factually distinguish a case from *Baker* so as to permit departure *under general maritime law* from the 1/1 ratio. These factors are:

(1) Was the defendant's conduct in intentional or malicious?
(2) Does the case involve personal physical harm as opposed to harm to property?
(3) Doe this case involve a highly egregious (malicious or intentional) act, which results only in insubstantial compensatory damages?
(4) Was the wrongdoing of a type that is hard to detect?
(5) Was the defendant's conduct both highly egregious *and* motivated by a desire for profit?[47]

Still the conceptual problem remains: If factors one through five above can individually or collectively permit a departure from the 1/1 ratio governing the "*Baker* type" of case (mere recklessness by a managerial employee), these factors nevertheless probably cannot permit an upward adjustment above that permitted by Due Process limits, assuming these limits are the same for the Fifth Amendment and the Fourteenth Amendment. They can only permit an upward adjustment to the Due Process limits on both the state and federal governments. This limit may be the 1/1 ratio in *all* cases where there are extensive, enormous actual damages. In other words, the holding in *Baker* requires a 1/1 ratio in factually similar maritime cases, but permits an upward adjustment in maritime cases unlike *Baker* of 9/1 or sometimes more in "exceptional cases", but the size and scope of the harm may make the 1/1 ratio *Constitutionally* required across the board. Remember, the court in *Baker* suggested that the 1/1 ratio in large-damage cases reaches "the outermost limit of the Due Process guarantee." Since *Baker* involved only property and economic interests, perhaps eliminating "unpredictable" awards (under the *Baker* rules, punitive damages awards would be "predictable" in the sense that the amount of compensatory damages would always be the upper limit) is desirable and would provide sufficient deterrence. At the same time,

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[46] Baker, *supra* n. 1, at 2634.
[47] Baker, *supra* n. 1, at 2626-27.

the value of the person, or life, may be ranked above the value of property, and thus merit a higher penalty when personal injury or death results from egregious behavior. *Baker* deals only with property, and it would be logical to argue for a different upper limit for harm to the person.

How would this issue come up? Conceivably, we could have a case where wake damage affects both property (a dock) and the person (someone on the affected dock). Would this support a greater than 1/1 ratio for punitive damages for the personal/injury/death, but limit the dock owner damages to the *Baker* ratio?

Suppose the person injured or killed also owned the dock affected by wake damage due to egregious behavior of a vessel operator. Does the upper Due Process limit on punitives for personal harm constitute the practical upper limit for plaintiff's punitive damages claim, or can there be two awards, one for the personal harm and one for harm to property? If both Due Process Clauses set an upper limit on punitive damages for one egregious episode, this cannot be. But what if the dock owner and the injured person are different? Or suppose the persons injured or killed are numerous enough to form a class, and the dock owner is a separate entity. Suffice it to say that separating the principles limiting punitive damages in property cases governed by maritime law and personal injury or death cases governed by maritime law (both types of cases having the same deterrence/punishment objectives) should be based on some rational goal. The majority opinion on limits to punitive damage awards seems to be limited to fact situations like *Baker*, a case of reckless behavior causing damage to economic interests.[48] Just what maritime law (as opposed to Constitutional Due Process) would allow in an injury or death cases is not known. And just what limits may apply in maritime cases involving a higher level of egregious conduct, such as malicious and intentional harm caused by a managerial agent, is not known for either property damages or the personal harm tort cases. Outside of the limits of the *Baker* facts, Justice Souter's majority opinion clearly preserved punitive awards above the 1/1 ratio. In cases where the defendant's conduct exceeds recklessness and the damage is the person instead of property, punitives could go as high as a single digit ratio (9/1) in all "but the most exceptional cases". (for which a 10/1 or greater ratio would presumably be permitted). This adjustment or limit to punitive damages presumably applies to cases where the defendant's conduct is much more egregious than that of Exxon or Captain Hazelwood (recklessness), such as intentional or malicious harm. In other words, the upper limit is adjusted by reference to the defendant's conduct alone. However, if the case involves "substantial" compensatory damages, then the 1/1 ratio *may* return to put an upper limit on punitive damages simply because of the size, scope or value of the damages, rather than the defendant's conduct.[49]

Does this mean that a defendant, whose conduct is both intentional and malicious and results in enormous, as opposed to relatively small or limited damages, is benefitted by a cap on punitive damages not available to those who cause only a small amount of damages? The greater the harm, the greater the limit on recoverable punitives? Remember that the majority of the Court in *Baker* tied the return to 1/1 ratio made possible by the extent or enormity of the compensatory damages to Due Process, and not the maritime law/common law limits applicable to the *Baker* facts. This limit is based on a Constitutional standard, and not on common law type decisional policy reasoning which attends general maritime law jurisdiction.

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[48] Baker, supra n. 1, at 2633.

[49] *Id*.

Some obvious questions come to mind. Why should the presence of admiralty jurisdiction limit damages under a general maritime law policy to less than what the Constitution would permit in a non-maritime case?

Why should the Constitutional rules providing upper limits on punitive damages reappear in cases involving great damages to limit the recoverable punitive damages to 1/1 ratio, even where the *Baker* general maritime law factors would permit a departure from the 1/1 ratio? In other words, does the sheer enormity of the damages itself limit recoverable damages as a Constitutional matter? The answer appears to be yes. All in all, the adoption of a 1/1 ratio cap on punitives in large-damage cases is arguably a reasonable way to achieve the Court's primary goal-predictability. And if compensatory damages are by definition huge, then the maximum allowable punitive damages will also be huge. This hardly seems unfair to plaintiffs.

We seem to have arrived at an interlocking set of rules which vary according to case type, as defined by the defendants conduct, and the amount of actual damages. These categories are worth considering because, in most cases, any entity capable of inflicting damages as huge as those in *Baker* will likely be one that possesses vast physical and material instrumentalilities. ExxonMobil comes to mind, with its worldwide operations involving massive amounts of machinery and vast amounts of movable goods (oil, etc.) capable of causing harm if not properly controlled or contained. With entities as vast and powerful as Exxon, damages caused by their operations can clearly be geographically and economically seemingly without limit. Certainly in a situation where no one's conduct was intentional or malicious, even the financial responsibility for huge compensatory damages can be severe enough to threaten the entity's existence. In such a case where compensatory damages could exhaust a defendant's resources, the issue of punitive damages seems moot. Where potential liability for actual damages are large but bearable, the upper limit of the 1/1 ratio could present what is essentially a "double damages" rule, and avoid destroying the defendant.[50] And where actual damages are enormous the potential punitive damages would also be enormous, even under the *Baker* 1/1 ratio. Certainly in the "Baker type" of case – unintentional harm to property, both fairness and economic considerations, and the policy of punishment and deterrence seem to validate the sliding scale of punitive damages which culminate a "double actual damages" rule as recovery where actual damages are enormous. But how do these rules apply outside the limits of the "Baker type" of case? A rough estimate of the types of cases that are conceivable and an application of the combined maritime law and Due Process rules is helpful. The categories of case types include those from the "extreme worst" to the "least bad." They are:

1. The extreme worst: intentional and malicious action causing harm, motivated solely by profit. A case where a large and powerful defendant intentionally and maliciously causes extensive physical harm to a great number of persons (bearing in mind that the determination of what the defendant entity "intends" or "does" maliciously is a function of the personal responsibility, agency and vicarious liability rules employed). For example, a "managerial agent," such as a ship's captain, intentionally rams the QE.2 at full speed into the boardwalk at Bar Harbor, Maine, killing

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[50] As a legal rather than a practical matter, the financial status of a defendant is not considered unless Fourteenth Amendment standards adopted by the Court. In a second Circuit case in which then Judge Sotomayor joined, the Court of Appeals stated:

> "First, to date, the defendant's financial statue has occupied the place in the Supreme Court's due process review. Second, the Court has said that 'the most important indicium of the award's reasonableness, is the degree of reprehensibility of the defendant conduct." Motorola Credit Corp., et al v. Uzan et al, 507 F 3rd 74, at 85 (2nd Cir 2007).

over 750 people. Also suppose that the potential violent and dangerous personality of the captain was known and sanctioned by high level corporate officials of the corporate principal defendant. In addition, vast damage is done to the infrastructure of the harbor, and the incident imports extensive economic loss as a result (commercial fisherman, etc.). Would the "substantial" scale of the damages limit recoverable punitives to the 1/1 ratio in both maritime and non-maritime claims under Due Process rules? The problem seems to be that departure from the *Baker* 1/1[51] ratio based on factual differences seems to be permitted only in cases involving smaller or "unsubstantial damages", since a case involving "substantial" or huge damages seems to be subject to an across-the-board Due Process-type 1/1 limit.[52]

On the face of it, it is hard to imagine that such a case could even exist. There simply is not much profit in intentionally killing off a large number of people through some hard-to-detect strategy. However, we do have a numerous, worldwide networks of sometimes loosely allied organizations that collectively form a global, homicidal and genocidal death cult devoted to stealthily killing off as many different-minded people as possible, though religion rather than profit, is the primary goal. This has been their professed motive. These people have fared fairly well in the Courts and the current governmental administration in obtaining a favorable response to their Due Process claims. It seems that profiteers might do worse.

In fiction and the movies, we have seen outfits like Devlin-McGregor Pharmaceuticals which suppressed damaging evidence that their new kidney treatments drug risked killing off lots of people. ("*The Fugitive*"). Still, it is really hard to imagine that a corporate CEO or board member would find such a plan to be an attractive long-term profit model, given the compensatory and punitive downside to such a business strategy. The final fate of big tobacco following a long and sustained policy that was, at least indifferent to the risks of their profit making activity, does speak well of such a policy.

These factors authorize a trier of fact to be instructed in such a way that their award can be subject to some predictable judicial review. Perhaps special verdicts that touch the levels of culpability or "blameworthiness" are advisable, so as not to occasion a remand when the jury's award based on several permissible basis makes the basis actually relied on by the jury unclear. Presumably the higher levels of culpability can justify higher awards than the lower levels.

2. Next to the worst: Recklessness type 1: Conduct that is not intentional or malicious, but is comprised of acts deliberately taken with knowledge of an elevated risk to another.

3. The least worst: Acts taken without actual knowledge of an elevated risk to another, but under circumstances where a reasonable person would be aware of such risk.[53]

The categories or case types listed above focus primarily on the defendant's conduct and knowledge. Other factors can define other case types which implicate different adjustments in allowable punitives. These include:

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51 Baker, *supra* n. 1 at 2632-34

52 Baker, *supra* n. 1 at 2634

53 See ---- 17, supra and authorities cited therein. Though the Supreme Court spoke in such terms, in reality the distinction here between (A) and (B) is an elusive metaphysical one which a jury will use to push the worst category for the defendants it genuinely dislikes.

4. The difficulty of detecting the defendant's harmful acts. Hard to detect, secretive acts can merit an upward adjustment to the 1/1 ratio.

5. Cases where the actual compensatory damages are small. This permits an upward adjustment to the golden ratio, especially the higher we go on factors 1 – 3 dealing with the defendant's conduct, knowledge and state of mind.

6. Cases where the actual compensatory damages are large. This can apparently justify a Return to the 1/1 ratio for really huge, widespread harm, both under Due Process and general maritime law. Since the Due Process cases and the maritime cases claim this 1/1 ratio as the norm in cases that are not exceptional in the sense that the defendant's conduct rises to the level one on the badness scale, and/or the defendant's conduct is secretive, then a departure may be permitted based on the factors not directly tied to defendant's conduct: the size of the actual damages, which could support either an up or down adjustment. Significantly, if maritime law calls for a "more rigorous" review of punitive awards under maritime law than under Due Process, as the *Baker* majority has suggested then it should be even harder in a maritime case to exceed the 1/1 ratio applicable in Due Process cases where there are enormous damages. The facts in the *Campbell* case dealing with Due Process limits under Due Process indicate that the burden on a party seeking to exceed the 1/1 ratio is very severe, at least in an economic loss as opposed to personal injury cases. Recall that the facts in *Campbell* were almost as bad as you can get for a defendant, in that they involved an intentional, nationwide effort to detect schemes to deliberately avoid valid contractual obligations owed to countless persons, all for the purpose of increasing profits.

III. **Conclusions and Questions**

A. The Supreme Court's separation of maritime law and Due Process limits on punitive damages bears watching. We know that, as a practical matter we probably can not award more damages under the general maritime law than Due Process would permit under state law, or under possible Fifth Amendment restrictions on federal action. If the limiting principles are virtually the same, the practical effect of the separation would be to permit under state law the imposition of less punitive damages under maritime law than Due Process would allow. If the Supreme Court in the future decides to do this, they should come up with a reason connected with admiralty and maritime law for doing so (protecting maritime commerce and commercial entities from ruinous cost burdens, etc.) If the limits at the same for both, why bother? As we have seen, restriction of the scope of *Baker* to maritime jurisdiction may just have occurred to permit the formation of a majority by adding those Justices who would accommodate some limitation, so long as it was not universally applicable. The interchangeable citation of maritime and Due Process cases perhaps suggests that the de facto limits for both Maritime Law and Due Process will be roughly the same for the time being.

Thus, the rules governing punitive damages liability under both Due Process and General maritime law restraints contain several distinct components. These are:

(a) Defendant-related facts, that is those facts bearing upon the defendant's state of mind and conduct. Naturally, facts describing a defendant's conduct are relevant to the defendant's state of mind and intent. The use of such facts differs in cases involving an individual defendant and a corporate or organizational defendant. What the corporation knew and intended as a legal matter is determined by the rules attributing knowledge and intent to the corporation, as opposed to that solely of an individual affiliated with the corporation. Pure respondeat superior is the broadest of all such attributive rules, since the corporation under this rule is deemed to know of and intend every act by an employee acting within the scope of their employment.

Various other narrower rules require a higher factual showing, such as proof that some formal internal decision or policy-making component of the company (the Board of Directors, the Governance Committee, etc.) either formulated or sanctioned the acts causing damage to the plaintiff. Under this type of rule, the proper internal organ within the corporation must at least be conscious of the potential harm that may result from acts carried out for the corporation, and have either intended the harm, or in the common-sense judgment of the fact-finder, have passed on an unreasonable risk of harm to those potentially affected by the corporate acts.

For the individual, this knowledge, state of mind or intent issue is a much less complicated legal issue, since individuals are presumed to know and intend that which results as a normal and foreseeable consequence of their acts. A slightly broader rule regarding corporate or organizational responsibility can be seen in the "managerial agent" rule applied by the Ninth Circuit in *Baker*. Other defendant-related factual considerations are: (i) the secretiveness of defendant's acts, and the difficulty that parties affected by these acts would have in discovering them; (ii) the motive of the defendant in carrying out its acts, such as a desire for profit which overrides concern for the well-being of those affected by corporate or individual acts.

(b) Consequential facts not solely or necessarily related to the defendant's state of mind or acts. An example would be the extent of the ultimate damage caused by the defendant's acts, in terms of dollar value and/or in terms of number of people affected. As we have seen, this factor actually has the potential of proportionately reducing a defendant's total liability for punitives under Due Process constraints. Under Due Process limits, a 1/1 ratio between compensatory and punitive damages will likely be a very hard ceiling in both maritime and non-maritime cases that do not involve personal harm, since the facts in *State Farm* were about as bad as you can get in a purely economic harm case, and the Court nevertheless counseled adherence to the 1/1 ratio.

(c) Plaintiff related facts: These include (a) the number of persons damaged and (b) the relative economic or financial disparity between the defendant and the plaintiffs.

The most that can be said is that artful and skillful plaintiff and defendant lawyers will orchestrate and argue their cases in predictable ways, using framework described above. The pattern suggested by the Court's Due Process and general maritime law cases seems to suggest that, for now, the 1/1 cap will be hard to break in cases involving only monetary or financial loss. Physically damaging or lethal personal injury may be

another story. Producers of physically harmful or lethal products (tobacco, carcinogenic or lethal side effects, etc.) should not take too much comfort from the resilience of the 1/1 cap in commercial cases.

B. The *Baker* holding is confined to property damage cases involving the recklessness (not malice or international acts) of the defendant. The 1/1 ratio is thus the norm for this type of case. When and how much that ratio may be revised upward is not clear. The factors justifying a departure from the golden ratio mainly concern the conduct of the defendant. Assuming we are not concerned with derivative liability, these factors should be the sole means of adjusting an award.

C. Next, the Supreme Court appears to have pulled back from the scattered line of cases that permitted preemption of general maritime law remedies by implication or by some presumed policy to preempt based on a federal statute. Instead either the precise question addressed by the general maritime law cause of action and remedy must be identical to that addressed by a federal statute, or congress must make its preemptive intent explicit. It seems reasonable to conclude that, since the Jones Act contains no "area preemption" language, and since the issue addressed by the Jones Act is recovery for negligently caused harm, the subjects or issues addressed by the two other seaman's causes of action at general maritime law – was the vessel unseaworthy, or did the employer fail to pay maintenance and cure, or recklessly or unreasonably fail to do so are all very different things. The Jones act clearly does not speak to the central issues addressed by these general maritime law causes of action. Thus the remedies attending the general maritime law claim, including punitive damages, can probably still be recovered either in a separate or a joined action.

D. Next, we will have to await clarification from the Court on the standard for derivative liability. Astute commentators have argued forcefully for a standard in between "strict complicity" and pure respondent superior; one compatible with the original opinion in *The Amiable Nancy* requiring "some culpability" on the part of the principal before punitives could be assessed based on an agent's conduct.[54] This could be used alternatively with some other rule focusing on the agent rather than the principal, such as the "managerial agent" favored by the Second Restatement and the Ninth Circuit in their final opinion on the *Exxon Valdez* disaster. It seems safe to say that a case fitting within the facts of *Baker* (a "managerial agent" committing reckless but not intentional acts and a principal with "some complicity" negligently failing to reign in the agent) will safely support an award. Whether the reckless acts of a managerial agent alone, even without any complicity in the part of the principal will be enough, must await future decisions. It does seem clear, however, that the 1/1 ratio is firmly anchored to the Baker type of case.[55] Citing the

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[54] *See* Wendt, supra n. 14, at pp. 59 – 66; SC CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995).

[55] Contrasting state awards for more seriously egregious conduct that set a ratio higher than 1/1, the Court repeated its adherence to the 1/1 ratio as the benchmark in the particular type of case represented by Baker.

> "Judgments may differ about the weight to be given to the slight majority of 3:1 States, but one feature of the 3:1 schemes dissuades us from selecting it here. With a few statutory exceptions, generally for intentional infliction of physical injury or other harm, *see, e.g.* Ala. Code § 6-11-21(j) (2005); Ark. Code Ann. § 16-55-208(b) (2005), the States with 3:1 ratios apply them across the board (as do other states using different fixed multipliers). That is, the upper limit is not directed to cases like this one, where the tortious action was worse than negligent but less than malicious, exposing the tortfeasor to certain regulatory sanctions and inevitable damage actions; the 3:1 ratio in these States also applies to awards in quite different cases involving some of the most egregious conduct, including malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's gain. We confront, instead, a case of reckless action, profitless to the tortfeasor, resulting

prevalence of the 1/1 ratio governing punitives under Due Process standards, the Court clearly signaled a desire not to exceed that standard, and recognized that the ratio under Due Process in routine cases (not intentional or malicious acts for profit, etc.) is also the outside limit on maritime cases.[56]

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in substantial recovery for substantial injury. Thus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case. We thus treat this case categorically as one of recklessness, for that was the jury's finding." Baker, *supra* n. 1, at 2631-32.

"Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that 1"1 ratio, which is above the median award, is a fair upper limit in such maritime case." Baker, *supra* n. 1, at 2634.

[56] "Indeed any argument for more generous punitive damages in maritime cases would call into question the maritime applicability of the constitutional limit on punitive damages as now understood, for we have tied that limit to a conception of punitive damages awarded entirely for a punitive, not quasi-compensatory, purpose." Baker, *supra* n. 1, at 2633.

Justice Stevens concurred in Parts I, II, and III of the majority opinion but dissented in the 1/1 outside limit announced in Part IV, preferring to review awards granted and sustained by court's below under an abuse of discretion standard. Baker, *supra* n. 1, at 2134. Justice Ginsburg and Breyer also dissented from Part IV leaving a majority of 5 to 3 in this critical issue. After nominee Sotomayor replaces Justice Souter, if she were to side with the three dissenters on the issue of limits on punitives, and Justice Alito returned to join the remaining four justices favoring the majority approach in Baker, they would still leave the new "quantitative" approach resting on a 5/4 majority. Given the fact that Justice Alito's dissent from the majority awarding punitive damages in Atlantic Sounding was based on an historical readings of congressional enactments
dealing with seaman (the Jones Act particularly), it could be that his approach to general maritime law in cases involving facts not addressed by federal statutes would be more open to the award of punitive damages, would his approval to state cases implicating the Due Process clause. To the extent that the opinions of Justices Scalia, Thomas and Ginsburg dissenting from the impositions of Due Process restrictions on punitive damages awards under state law were based on a reluctance to extend federal intervention into matters traditionally governed by state law, perhaps Justice Alito might be inclined to

join the Scalia – Thomas – Ginsburg block against Due Process limits. If he did so, and Justice Sotomayor, unlike her predecessor Justice Souter, was inclined to reject such limits, then a majority of five could be formed to abandon the Due Process limits altogether. Who can say?