THE COSTS OF LITIGATION: A PROPOSAL TO AMEND FEDERAL RULE OF APPELLATE PROCEDURE 39(a)(4)

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In 2009, the Ninth Circuit Court of Appeals wrote the concluding chapter in the Exxon Valdez litigation, which had spanned more than twenty years from the date of the oil spill on March 24, 1989. The concluding chapter related to appellate costs. Over the course of the nearly two decades of appellate litigation, Exxon paid approximately $70 million in costs, the majority of which went to secure a bond on the original $5 billion in punitive damages. The Ninth Circuit had to determine whether the plaintiffs should pay any of these costs. The U.S. Supreme Court was silent on the issue, and the applicable Federal Rule of Appellate Procedure—Rule 39(a)(4)—merely directed the judges to award costs "only as the court orders." The result: an angry dialogue between the majority, which thought each party should shoulder its own costs, and the dissent, which would have the plaintiffs pay most of Exxon's costs. This Article proposes that the current costs rule in mixed result cases provides insufficient guidance and that it should be amended so that courts know what to analyze in apportioning costs. In particular, this Article advocates that the rule be amended to provide that, in the ordinary case, each party bear its own costs, but where that would prove inequitable, courts should consider a variety of factors including the following: (1) which party prevailed, (2) the public interest, (3) the parties' ability to pay, (4) the parties' arguments and positions throughout the litigation, (5) attempts to settle, (6) the reasonableness of the costs, (7) the amount of costs, (8) federal statutes in related areas, (9) related state-court rules, and (10) the interests of justice.

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I. INTRODUCTION: OVERVIEW OF THE *EXXON VALDEZ* CASE[1] AND THE RULE GOVERNING APPELLATE COSTS

The grounding of the Exxon Valdez oil tanker in Prince William Sound, Alaska, in March 1989 caused an environmental disaster that has captured headlines for the past twenty years.[2] The resulting spill proved the worst environmental disaster in the history of the United States, at least until it was surpassed in May 2010 by the British Petroleum spill.[3] Eleven million gallons of

1. I worked on the costs issue raised in *Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077 (9th Cir. 2009), while clerking for the Honorable Mary M. Schroeder of the United States Court of Appeals for the Ninth Circuit during the 2008–09 term. Watching the judges struggle to apply Rule 39(a)(4) of the Federal Rules of Appellate Procedure, which merely directs judges to award costs in mixed result cases "only as the court orders," convinced me that more guidance should be given to appellate judges tasked with apportioning costs. FED. R. APP. P. 39(a)(4). Accordingly, after I finished my judicial clerkship, I began this Article. It does not expose the judges' thought processes in *Exxon Valdez* itself, but rather uses the judges' decision in *Exxon Valdez* as a vehicle for exploring possible amendments to Rule 39(a)(4).

2. March 24, 2009 marked the twentieth anniversary of the Exxon Valdez oil spill. Editorial, *Lessons of the Exxon Valdez*, N.Y. TIMES, Mar. 23, 2009, at A20. Media outlets are once again mesmerized by the devastating effect of the Exxon Valdez oil spill now that the spill from the British Petroleum offshore rig "spreads ominously in the Gulf of Mexico." William Yardley, *Community's Recovery Still Incomplete After Exxon Valdez Spill*, N.Y. TIMES, May 6, 2010, at A22.

3. The Supreme Court has called the Exxon Valdez spill the "most notorious oil spill in recent times" and the "largest oil spill in United States history." United States v. Locke, 529 U.S. 89, 94, 96 (2000); *see also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2632 (2008) (stating that Exxon Valdez spill caused "staggering damage"); Adam Liptak, *Damages Cut Against Exxon in Valdez Case*, N.Y. TIMES, June 26, 2008, at A1 ("The Exxon Valdez spill was the worst in American history, damaging 1,300 miles of shoreline, disrupting the lives and livelihoods of people in the region and killing hundreds of thousands of birds and marine animals."). The Supreme Court's characterization of the Exxon Valdez spill as the "largest oil spill in United States history remained accurate until May 2010, when the ruptured British Petroleum well became the worst oil spill in U.S. history. *See* Katie Howell, *Ruptured BP Well Tops Valdez as Worst U.S. Spill*, N.Y. TIMES, May 27, 2010, http://www.nytimes.com/gwire/2010/05/27/27greenwire-ruptured-bp-well-tops-ivaldezi-as-worst-

crude oil[4] devastated the livelihoods of more than 30,000 individuals and businesses, and they in turn banded together to pursue a punitive damages class action against Exxon that was, in the words of the former Chief Judge of the Ninth Circuit, Mary M. Schroeder, "epic."[5]

In stark contrast to the fanfare given to the oil spill itself and to the punitive damages litigation that followed,[6] scant attention has focused on the most recent chapter of the Exxon Valdez saga, the epilogue involving appellate costs.[7] On June

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us-spi-83754.html (stating that estimates indicate the Deepwater Horizon oil spill is largest in United States' history).

4. *Lessons of the Exxon Valdez*, *supra* note 2.

5. *Exxon Valdez*, 568 F.3d at 1079.

6. A short chronology of litigation might help those unfamiliar with this "epic" punitive damages litigation. In 1996, a jury awarded $5 billion in punitive damages to the plaintiffs. Exxon Valdez Oil Spill Litigation Timeline 15, www.faegre.com/webfiles/Exxon%20Valdez%20Oil%20Spill%20Litigation%20Timeline.ppt (last visited Oct. 18, 2010). After some additional wrangling before the district court and Ninth Circuit involving motions for a new trial, the Ninth Circuit ultimately remanded the case to the district court in 2001 because of the Supreme Court's pronouncements regarding the due process limitations on punitive damages awards. *Id*. at 16–20. The next year, December 2002, the district court remitted the punitive damages award to $4 billion. *Id.* at 21. Exxon took the case back to the Ninth Circuit and, in 2003, the Ninth Circuit remanded to the district court to reconsider the amount of punitive damages in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003), in which the Supreme Court held that punitive damages of a single-digit ratio with respect to compensatory damages are more likely to comport with due process. *Exxon Valdez Oil Spill Litigation Timeline*, *supra*, at 22. On remand, the district court found that $5 billion in punitive damages was not excessive and did not violate due process, but remitted the award to $4.5 billion on other grounds. *In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004), *vacated,* 472 F.3d 600 (9th Cir. 2007). Exxon appealed to the Ninth Circuit yet again and, in late 2006, the Ninth Circuit reduced the punitive damages to $2.5 billion. *Exxon Valdez Oil Spill Litigation Timeline*, *supra*, at 25. Exxon took the case to the United States Supreme Court. *Id.* at 26. In 2008, that Court further reduced the punitive damages to $507.5 million, setting the stage for the costs litigation and this Article. *Exxon Shipping Co.*, 128 S. Ct. at 2634.

7. "Costs include all those expenses of litigation which one party has to pay to the other." Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 849 (1929).

> The costs that can be recovered under Rule 39 include the following:
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> (1) the docketing fee; (2) the cost of producing "necessary" copies of briefs, appendices, or copies of records authorized by Rule 30(f); (3) the cost of reproducing exhibits pursuant to Rule 30(e); (4) the costs incurred in the district court in the preparation of the record; (5) the cost of securing the reporter's transcript if needed to determine the appeal; (6) the premiums paid for supersedeas or other bonds to preserve rights pending appeal; and (7) the fee for filing the notice of appeal.

16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3985 (2009 update) (footnotes omitted); *see also* 28 U.S.C. § 1920 (West Supp. 2010) ("A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."). As will be seen later in this Article, the issue of costs tends to become contentious when a party secures a bond before perfecting its appeal. *See Exxon Valdez*, 568 F.3d at 1081 ("Costs have become a point of contention in this case because of the size of the supersedeas security bond that Exxon posted to sustain its appeals, and also because of the length of time the case has taken to reach what we hope is now its conclusion. Thus, Exxon's total costs approach $70 million."); *see also* Emmenegger v. Bull Moose Tube Co., 324 F.3d 616, 627 (8th Cir. 2003) (affirming partial cost of bond premiums); Republic Tobacco Co. v. N. Atl.

15, 2009, the Ninth Circuit Court of Appeals issued a ruling regarding the appellate costs and interest incurred during the pendency of the appellate litigation.[8] Some newspapers picked up the story, but those that did tended to focus on the interest issue, not costs.[9] The former issue, however, is less interesting from a scholarly perspective because the Ninth Circuit has a robust jurisprudence covering when and how to apportion interest; there is no such guidance regarding costs.

It is hardly surprising that less ink has been spilled regarding the appellate costs (or even interest) in the Exxon Valdez litigation than on the $5 billion punitive damages award.[10] Appellate costs hardly hold the allure that punitive damages do. When the Exxon Valdez punitive damages litigation came before the United States Supreme Court, the majority noted the international firestorm surrounding punitive damages awards.[11] In contrast, when the Court agreed to award Exxon its costs before that Court,[12] the Justices did not note any similar uproar surrounding appellate costs. That is because there was none. The Supreme Court's different treatment of the punitive damages and costs issues reflects their relative importance to the Court and, probably, to the legal community: the Court's punitive damages opinion spans more than thirty pages; the costs ruling, only one page.

Although the Supreme Court neatly cabined punitive damages awards in maritime cases to a maximum one-to-one ratio with respect to compensatory

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Trading Co., 481 F.3d 442, 450 (7th Cir. 2007) (affirming cost of bond premiums).

8. *Exxon Valdez*, 568 F.3d at 1080 (stating that post-judgment interest runs from the date the damages were "meaningfully ascertained" (quoting Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 518 F.3d 1013, 1017–18 (9th Cir. 2008))). The Ninth Circuit panel awarded the plaintiffs interest at the statutory rate on the $507.5 million punitive damages judgment from the date of the original jury verdict, reasoning that the damages were "meaningfully ascertained" at that time despite the large reduction that the United States Supreme Court later imposed. *Id.* at 1080–81. This Article does not explore the interest issue in the Exxon Valdez litigation.

9. *See* Elizabeth Bluemink, *Exxon Agrees to Pay Spill Interest*, ANCHORAGE DAILY NEWS, June 30, 2009, at A1 (discussing both interest and costs, but focusing on interest, as is clear from title of article); *Exxon Owes Interest on Valdez Award*, BOSTON GLOBE, June 16, 2009, Bus., at 6 (mentioning only interest portion of litigation, not costs). The interest issue probably garnered more attention because the interest on the remitted punitive damages award amounted to approximately $500 million. Bluemink, *supra*. The costs, although substantial for costs, pale by comparison.

10. Indeed, the academic literature has paid scant attention to appellate costs in general. In the seminal article of four-score years ago, Arthur Goodhart combed the literature and noted that, "In America, . . . the subject of costs seems to be a minor one." Goodhart, *supra* note 7, at 851. When Goodhart published his article in 1929, he found that "[a] search through the index of periodicals show[ed] that not a single article of any importance ha[d] been written on this subject, and only five American references [were] given." *Id.* It seems that not much has changed in the intervening decades.

11. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2623–24 (2008). *See generally* Jessica J. Berch, *The Need for Enforcement of U.S. Punitive Damages Awards by the European Union*, 19 MINN. J. INT'L L. 55 (2010) (regarding international enforcement of U.S. judgments containing punitive damages).

12. Rule 43.2 of the United States Supreme Court governs the award of costs before that Court in cases that have been reversed or vacated. It provides as follows: "If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders." SUP. CT. R. 43.2. Accordingly, it is unsurprising that the Supreme Court granted Exxon its costs: the Supreme Court vacated the judgment, and so unless the Court had reason to "otherwise order[]," Exxon was entitled to its costs pursuant to the Supreme Court's default rule.

damages,[13] the Court did not provide any formula, or give any guidance at all, for awarding and apportioning appellate costs.[14] The Supreme Court did award Exxon all of its $14,324 in costs before that Court, but it was silent regarding how the Ninth Circuit should apportion the approximately $70 million of appellate costs[15] that Exxon had incurred during the pendency of the appellate litigation before the Ninth Circuit.

Federal Rule of Appellate Procedure 39(a) ("Rule 39" or "Appellate Rule 39") sets forth the controlling rule regarding the apportionment of costs in United States Courts of Appeals.[16] Its sections distinguish between cases in which there is a clear winner and loser, a "prevailing party," and those cases involving a mixed result in which neither party wins everything on appeal.[17]

Subsections (a)(1), (a)(2), and (a)(3) of Rule 39 dispose of the straightforward cases in which one party prevails completely on appeal. These subsections require the federal appellate court reviewing the case to award costs to the winner, subject only to the broad condition "unless the law provides or the court orders otherwise."[18] Under subsection (a)(1), "if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise."[19] Appellate Rules 39(a)(2) and (a)(3) also award costs to the winning party: "[I]f a judgment is affirmed, costs are taxed against the appellant,"[20] and, conversely, "if a judgment is reversed, costs are taxed against the appellee."[21] Although these sections do allow an appellate court to exercise its discretion by "order[ing]

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13. *See Exxon Shipping Co.*, 128 S. Ct. at 2633 (holding that punitive damages equaling compensatory damages is a "fair upper limit" in maritime cases involving reckless behavior).

14. *See generally id.* (declining to discuss appellate costs).

15. Order of Costs, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (June 25, 2008) (No. 07-219), *available at* http://www.scotusblog.com/wp-content/uploads/2009/06/exxon-judgment.pdf .

16. This Article will review each subsection of Rule 39(a) regarding the apportionment of appellate costs. For ease of reference, the text of section (a) is set forth in this footnote in its entirety.

> The following rules apply unless the law provides or the court orders otherwise:
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> (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
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> (2) if a judgment is affirmed, costs are taxed against the appellant;
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> (3) if a judgment is reversed, costs are taxed against the appellee;
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> (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

FED. R. APP. P. 39(a).

17. Even before the Federal Rules of Appellate Procedure governed the apportionment of costs on appeal, "federal judges assumed they possessed the inherent power to award costs." Furman v. Cirrito, 782 F.2d 353, 354 (2d Cir. 1986) (citing 10 WRIGHT & MILLER, *supra* note 7, § 2665 (2d ed. 1983)). These courts awarded costs to the prevailing party, even if the winner was a defendant. *Exxon Valdez*, 568 F.3d at 1086–87 (Kleinfeld, J., concurring in part and dissenting in part); Goodhart, *supra* note 7, at 853. Contrast this with the American rule regarding attorneys' fees under which even the prevailing party is generally left to shoulder its own fees.

18. FED. R. APP. P. 39(a). This proviso applies to all subsections of Rule 39(a).

19. *Id.* at 39(a)(1). When an appeal is dismissed, the lower court's judgment remains in effect, and the appellee is the "winner" of the now-defunct appeal. Accordingly, it makes sense that the appellant pays the appellee's costs if the appellate court dismisses the appeal.

20. *Id.* at 39(a)(2).

21. *Id.* at 39(a)(3).

otherwise," they set forth a "strong presumption in favor of awarding costs to the prevailing party" and make "such an exercise of discretion unlikely."[22] As should be apparent, these subsections of Rule 39(a) generally require a circuit court to determine which party prevailed and to award costs to that party.[23] These subsections seem to require appellate courts to tax all the costs against the losing party and do not afford discretion to divide costs between or among the parties in amounts less than the whole.[24]

However, not all cases have clear winners and losers—that is, not all result in a complete affirmance, reversal, or dismissal.[25] In these mixed result cases, when

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22. *Exxon Valdez*, 568 F.3d at 1086 (Kleinfeld, J., concurring in part and dissenting in part); *see also* 16AA WRIGHT & MILLER, *supra* note 7, § 3985 ("Even if Rule 39(a)'s default framework applies in a given case, the court has discretion to depart from that framework. For example the parties themselves may have contracted out of Rule 39(a)'s default framework. Further, equitable and public-policy factors may influence the court's exercise of its discretion; it has been said, for example, that 'a combination of equitable considerations, turning on the state of the law at the time of the district court judgment and the nature of the litigation itself' can govern a court's decision about costs. The court may deny recovery and allow each party to bear its own costs. It may award costs to the prevailing party but only in part. Indeed it may require the successful party to pay the costs of the losing party." (footnotes omitted) (quoting Rural Housing Alliance v. U.S. Dep't of Agric., 511 F.2d 1347, 1349 (D.C. Cir. 1974) (Bazelon, C.J., concurring))). Although not mentioned by Wright and Miller, other equitable and public-policy considerations might include whether the law was modified on appeal, whether the case involved unusually high costs, whether one of the parties lacked the economic means to bear the costs, and whether the party that lost the case was pursuing the litigation in the public interest.

Other treatises covering the issue of costs also note that the prevailing party may be denied its costs. *See, e.g.*, 20 C.J.S. *Costs* § 181 (2009) ("On the other hand, even though one party emerges as a clear victor from an appeal, there is no requirement that [costs] be awarded to that party. If the court is of the opinion that to exact costs from the unsuccessful party would not, under the circumstances of the case, be fair, right, or just, the prevailing party will not be allowed costs, and the appellate court may deny costs to both sides in it discretion, or order that each party bear its own costs on appeal." (footnotes omitted)). Principles of fairness also affect some state-court decisions. In *Dippold v. Cathlamet Timber Co.*, the Oregon Supreme Court exercised its discretion to deny costs to the prevailing party because of equitable considerations. 193 P. 909, 913 (Or. 1920), *superseded by statute*, WASH. REV. CODE ANN. §§ 4.28.080, 4.28.185 (West 2010). The Oregon court determined that it lacked jurisdiction to hear the case and that the lower court had lacked jurisdiction too. *Id.* Accordingly, the court dismissed the case. *Id.* Nonetheless, because the defendant-appellant had failed to raise the jurisdiction issue earlier—and thereby lighten the courts' workload and the parties' costs—the court refused to award the successful defendant-appellant its costs, despite its complete success on appeal. *Id.*

23. Under the neutral language of Rule 39, a prevailing defendant, just like a prevailing plaintiff, may receive its costs on appeal. Courts have awarded defendants their costs in accordance with this language. *E.g.*, Emmenegger v. Bull Moose Tube Co., 324 F.3d 616, 626–27 (8th Cir. 2003); Republic Tobacco Co. v. N. Atl. Trading Co., 481 F.3d 442, 448–49 (7th Cir. 2007). Contrast this with 42 U.S.C. § 1988, which the Supreme Court has interpreted to allow an award of attorneys' fees to a prevailing defendant only if "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983).

24. Presumably, the court can "order[] otherwise" and thereby divide the costs between the parties, but the defaults set forth in Rule 39 do not allow such flexibility absent the court's exercise of that discretion to "order[] otherwise."

25. The Supreme Court also issues "GVRs," orders in which the Court grants certiorari because of a change in the law, vacates the lower court's decision, and remands for further proceedings without any determination regarding the propriety of the lower court's decision. *See, e.g.*, Lawrence v. Chater, 516 U.S. 163, 166 (1996) (acknowledging the Court's power to issue GVR order). Although the appellant has momentarily "won" because the lower court's decision is not in effect, ultimately the appellant may lose because the lower court may find that the Court's jurisprudence does not affect the lower court's

"a judgment is affirmed in part, reversed in part, modified, or vacated," Rule 39(a)(4) instructs federal appellate court judges that "costs are taxed only as the court orders."[26] The only guidance given to an appellate court is the redundant directive to award costs "as the court orders." That seems to say, "do what you think is right."[27] The Second Circuit has explicitly recognized the vast discretion accorded under Rule 39(a)(4): "Because we are affirming in part . . . the judgment of the District Court, we may tax the costs of this appeal as we see fit."[28] Neither the text of Rule 39(a)(4) nor the commentary that follows the Rule suggests how an appellate court should exercise that discretion when it apportions costs. Although the other three subsections of Rule 39 award costs to the winner of the appeal—subject, of course, to a contrary statute or court order[29]—subsection (a)(4) does not speak in terms of a prevailing party, probably because in a mixed result case there is no obvious winner or loser.

This Article discusses how circuit courts actually order costs in mixed result cases and explores how they should order costs. It begins descriptively by reviewing the differing approaches taken by the majority and the dissent in the *Exxon Valdez* costs case. The Article then reviews 39(a)(4) cases from other circuits to see how other federal courts of appeals have handled the unfettered

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previous reasoning. In that instance, even costs before the Supreme Court seem inappropriate, and thus—pursuant to Supreme Court Rule 43.2—the Court should "otherwise order[]" and decline to award either party its costs.

26. FED. R. APP. P. 39(a)(4). The proviso from Rule 39(a) that the court may "order[] otherwise"—the defaults of Rule 39(a)(1), (a)(2), and (a)(3) notwithstanding—also appears to apply to Rule 39(a)(4). Thus, in mixed result cases, "costs are taxed only as the court orders," *id.*, unless "the court orders otherwise." *Id.* at 39(a). Discretion is layered on top of discretion in these cases.

27. When judges are left to do what they think is right, they may retreat to their ideological and political preferences. Judge Richard Posner has said,

> It is no longer open to debate that ideology (which I see as intermediary between a host of personal factors, such as upbringing, temperament, experience, and emotion—even including petty resentments toward one's colleagues—and the casting of a vote in a legally indeterminate case, the ideology being the product of the personal factors) plays a significant role in the decisions even of lower court judges when the law is uncertain and emotions aroused.

Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 48 (2005). Assuming that Judge Posner is correct, then the indeterminate rule announced in Appellate Rule 39(a)(4) regarding costs on appeal may allow judges to retreat to their ideologies and political preferences.

28. Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545, 561 (2d Cir. 2003) (citing FED. R. APP. P. 39(a)(4)). Such wide-ranging discretion may be "contrary to the general American conception of a judiciary bound by fixed rules." Goodhart, *supra* note 7, at 877. Back in 1929, Goodhart suggested that it would "be possible to adopt a modified system of substantial costs which, while limiting to some extent the discretionary element, would nevertheless prevent the abuse of the legal process which follows from the American system." *Id.* Goodhart noted that one way to constrain discretion is to enact rules requiring taxation of costs against the losing party. *Id.* at 878. Of course, in mixed result cases, both parties are simultaneously winners and losers, so Goodhart's suggestion—like Federal Rule of Appellate Procedure 39(a)(4)—provides little guidance in this situation.

29. It seems that the court would consider equitable factors, such as ability to pay and the public-interest nature of the litigation, but the Rule does not clarify whether courts should consider these sorts of factors. See *infra* Part VI for this author's proposal for an amendment to Rule 39 that takes equitable considerations into account.

discretion that Rule 39(a)(4) confers on them. After reviewing these federal cases, the Article examines state rules regarding the apportionment of appellate costs in mixed result cases to discern whether any of these rules provides better guidance than does Rule 39(a)(4).

The second half of this Article turns prescriptive. Part V proposes possible amendments to Rule 39(a)(4)[30] and analyzes the advantages and disadvantages of various amendment options, using *Exxon Valdez* and other costs cases to explore the potential results under the proposed rules. After testing these alternatives, this Article concludes by recommending an amendment to Federal Rule of Appellate Procedure 39(a)(4).

Amending Rule 39(a)(4) in the manner suggested in Part VI of this article will help guide the courts and foster meaningful—but constrained—dialogue regarding the criteria for awarding appellate costs. Otherwise, each circuit, each panel, and indeed each judge may order costs according to whims and feelings. In the words of the Second Circuit, courts of appeals will award costs "as [they] see fit."[31] Such unfettered discretion is unwise. Parties factor in the cost of continuing litigation when deciding whether to pursue an appeal. The difficult task of estimating costs becomes more difficult if appellate costs are apportioned in mixed result cases however a court happens to see fit. Such unfettered discretion is also unnecessary. An amendment to Rule 39(a)(4) can ensure that both courts and litigants understand the considerations that will bear on the apportionment of costs, even in cases having no clear winner or loser.

II. *EXXON VALDEZ V. EXXON MOBIL CORP.*

In the usual case, it makes sense that the allocation of costs takes up a relatively insignificant portion of the appellate opinion. Costs are generally rather low. Exxon's costs, however, approached $70 million because, before appealing the original punitive damages judgment, Exxon obtained letters of credit to secure payment of the $5 billion judgment to the plaintiffs.[32] Appellate costs include "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal."[33] Exxon maintained these letters of credit for more than a dozen years, from the time of the original jury award in 1996 through the United States Supreme Court decision in 2008 and the Ninth Circuit's final determination of costs and interest in 2009. The premiums accrued on the letters of credit for more than a decade, resulting in the unusually high costs of approximately $70

30. An amendment to the Federal Rules of Appellate Procedure is necessary because there is little Supreme Court oversight with respect to appellate costs for several reasons. Costs are usually low, so there is little incentive for parties to petition the Supreme Court for certiorari and even less incentive for the Court to accept review. In addition, the Court has its own rules regarding the apportionment of costs, so when it apportions costs, it is not interpreting the rules that bind the courts of appeals. *But cf.* Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1085 (9th Cir. 2009) (Kleinfeld, J., concurring in part and dissenting in part) ("The Supreme Court awarded costs in favor of Exxon against the plaintiffs, even though it rendered a split decision that left the plaintiffs with up to 10% of their victory. The majority does not follow the Supreme Court's determination." (footnote omitted)).

31. *Stewart Park & Reserve Coal.*, 352 F.3d at 561 (citing FED. R. APP. P. 39(a)(4)).

32. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1081 (9th Cir. 2009).

33. FED. R. APP. P. 39(e)(3).

million.[34] The high costs involved in *Exxon Valdez* meant that the Ninth Circuit panel faced with the apportionment question had to issue more than the usual one-liner regarding costs. Instead, the panel wrote a lengthy costs decision in which the dialogue between the judges in the majority and the dissenting judge highlighted the deficiencies of Federal Rule of Appellate Procedure 39(a)(4).[35]

In the underlying punitive damages case, the Supreme Court greatly reduced the original judgment in favor of the plaintiffs' class from $5 billion to $507.5 million.[36] While nominally this left plaintiffs as the prevailing party because they secured a judgment against Exxon, many viewed the opinion as a stunning victory for Exxon.[37] Judges Schroeder and Thomas did not agree, opining that neither side emerged the "clear winner" from the *Exxon Valdez* appeal.[38] In any event, because the United States Supreme Court had vacated the previous judgments against Exxon, Rule 39(a)(4) applied to the costs issue.[39] Accordingly, appellate costs would be awarded "as the court order[ed]."

The plaintiffs urged the Ninth Circuit to exercise its discretion by requiring the parties to bear their own costs, just as the circuit had done in an earlier appeal in the same case.[40] In 2001, the Ninth Circuit had ordered the Alaska District Court to remit the punitive damages award to some unspecified amount and, in the concluding lines of its opinion, had required each party to bear its own costs arising from the appeal.[41] The plaintiffs argued that in 2008, as in 2001, no clear victor emerged; as in 2001, the punitive damages award was reduced, not eliminated. According to the plaintiffs, as in the 2001 case, the court had no reason to shift costs between the parties because neither side had emerged the winner and nothing suggested error in the reasoning underlying the 2001 split-costs ruling.[42]

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34. *See Exxon Valdez*, 568 F.3d at 1081.

35. *Compare id.* at 1081–82, *with id.* at 1082–90 (Kleinfeld, J., concurring in part and dissenting in part) (demonstrating disagreement over assignment of appellate costs). The dialogue between the majority and dissent also highlighted the deficiencies in the Supreme Court's remand order, which provided no guidance to the Ninth Circuit regarding the division of appellate costs.

36. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 (2008).

37. *Exxon Valdez*, 568 F.3d at 1090 (Kleinfeld, J., concurring in part and dissenting in part); *see also* Editorial, *Exxon, Pay Up*, ANCHORAGE DAILY NEWS, July 2, 2008, at B6 ("Let's be clear. Exxon Mobil won this case.").

38. *Exxon Valdez*, 568 F.3d at 1081.

39. Recall that, under the Federal Rules of Appellate Procedure, a vacated judgment is treated as a mixed result case, possibly because, on remand, the lower court may come to the same conclusion it had previously reached. FED. R. APP. P. 39(a)(4). That is not true in the United States Supreme Court, where a vacated judgment is treated as a win for the appellant. SUP. CT. R. 43.2.

40. Plaintiffs' Memorandum with Respect to Post-Judgment Interest and Costs at 9–13, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182, 04-35183).

41. *In re* Exxon Valdez, 270 F.3d 1215, 1254 (9th Cir. 2001) ("The judgment is affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. Each party to bear its own costs."). The court said little regarding costs beyond its conclusion that each party must bear its own.

42. *Id.* The plaintiffs also argued that the 2001 costs ruling was still in effect as the law of the case. Plaintiffs' Response to Exxon's Memorandum with Respect to Post-Judgment Interest and Costs at 13, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182, 04-35183) ("The [2001] opinion expressly stated that '[e]ach party [is] to bear its own costs.' That order is now the law of the case and no longer subject to challenge." (second and third alterations in original)). This argument is flawed because the Supreme

Exxon countered that the circumstances in 2008 differed markedly from those present in 2001.[43] In the 2001 opinion, the Ninth Circuit did not reduce the punitive damages award to a particular amount, and so it was unclear, at least at that point, which of the two parties had truly prevailed in that round of appellate litigation. In 2008, however, when the United States Supreme Court remanded the case to the Ninth Circuit, the Court ordered a ninety percent reduction in punitive damages, which, according to Exxon, signaled its victory in the appellate litigation.[44] Exxon therefore contended that it was the prevailing party, entitled to all—or at least ninety percent—of its costs.[45] Exxon pointed out that ninety percent of the costs of its bond corresponded to the premiums that Exxon had "wrongfully" paid during the pendency of the appeal.[46] Finally, Exxon noted that the Supreme Court had awarded Exxon its full costs, $14,324, under Supreme Court Rule 43.2, which provides that "[i]f the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders."[47] Because the Supreme Court awarded Exxon its costs, Exxon contended that the Ninth Circuit should do so as well.[48]

The Ninth Circuit panel split two to one over the issue of appellate costs.[49] The majority required each party to bear its own costs.[50] The dissent believed that

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Court vacated the lower court judgments. However, the plaintiffs' argument that the circumstances in 2008 resemble the circumstances in 2001—and that the Ninth Circuit should therefore follow its previous decision rendered under similar circumstances—has merit because like cases should be treated alike.

43. Answering Brief of Defendants-Appellants Addressing Appellate Costs and Post-Judgment Interest at 6–8, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182, 04-35183).

44. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 (2008) ("[W]e take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount. We therefore vacate the judgment and remand the case for the Court of Appeals to remit the punitive damages award accordingly." (citation omitted)).

45. Answering Brief of Defendants-Appellants Addressing Appellate Costs and Post-Judgment Interest, *supra* note 43, at 1–10.

46. *Id.* at 8–9. "Wrongfully" paid because if the Alaska District Court could have divined in 1996 that the Supreme Court would restrict punitive damages in maritime cases to a one-to-one ratio with compensatory damages, then Exxon would have secured a letter of credit on only $507.5 million of punitive damages, rather than $5 billion. Of course, if the original punitive damages judgment had been $507.5 million, it is possible that Exxon would not have appealed the case at all, and perhaps Exxon would have incurred no appellate costs. If that could be shown to be true, should the plaintiffs have to pay 100% of Exxon's costs?

47. SUP. CT. R. 43.2. Note the difference between this rule and Appellate Rule 39(a)(4). Supreme Court Rule 43.2 provides clear guidance to the Supreme Court: if the Court vacates a judgment, the appellant receives its costs. Under these same circumstances, Appellate Rule 39(a)(4) directs that costs be awarded by the courts of appeals "only as the court orders." There is no default requiring taxation of costs against the appellee. FED. R. APP. P. 39(a)(4).

48. Brief of Defendants-Appellants Addressing Appellate Costs and Post-Judgment Interest at 8, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182, 04-35183) ("If the Supreme Court believed Exxon did not prevail, it would have declined to award costs to Exxon under Rule 42.1, but the Court instead concluded the opposite, and treated Exxon as the prevailing party . . . . This Court should do the same."). Exxon's argument is flawed. It appears that the Supreme Court was simply following its cost-apportionment rules, in particular Supreme Court Rule 43.2, and was not necessarily making a determination regarding Exxon's status as a prevailing party.

49. The plaintiffs did not request apportionment of their costs. Plaintiffs' Memorandum with

the plaintiffs should pay all their own costs in addition to ninety percent of Exxon's costs.[51]

Authoring the opinion, Judge Mary Schroeder, joined by Judge Sidney Thomas, reviewed the entire course of the appellate litigation before concluding that the court should not shift costs between the parties. The majority noted the "hard-fought, even relentless, battle Exxon waged to avoid any liability for punitives,"[52] and reasoned that a ninety percent reduction in damages did not necessarily correspond to a ninety percent win.[53] After all, Exxon had not won ninety percent of the appellate litigation or ninety percent of the issues raised in the appeals. For example, Exxon had argued that it had no responsibility for punitive damages at all under the vicarious liability standard.[54] The Supreme Court divided evenly on that issue, leaving in place the Ninth Circuit's 2001 holding on that matter.[55] Accordingly, Exxon did not prevail on that issue. Exxon also urged the Supreme Court to find punitive damages preempted under the Clean Water Act or, alternatively, to find the award unconstitutionally high under the Due Process Clause.[56] The Supreme Court rejected the preemption argument[57] and excluded the Due Process argument from the grant of certiorari.[58] Accordingly, Exxon did not prevail on these two issues. The Supreme Court did, of course, entertain Exxon's argument for reduced punitive damages under maritime law, and the Court decreased the award by ninety percent under that theory.[59]

In light of this history, the majority concluded that "neither side is the clear winner."[60] The majority further explained its reason for refusing to reapportion costs between the parties:

> The defendant owes the plaintiffs $507.5 million in [punitive damages]—according to counsel at oral argument the fourth largest punitive damages award ever granted. Yet that award represents a reduction by 90% of the original $5 billion [punitive damages

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Respect to Post-Judgment Interest and Costs, *supra* note 40, at 12 ("Because this Court's 2001 decision dictates the proper outcome here, plaintiffs do not seek to recover their own costs.").

50. *Exxon Valdez*, 568 F.3d at 1082.

51. *Id.* at 1085–86 (Kleinfeld, J., concurring in part and dissenting in part).

52. *Id.* at 1081 (majority opinion).

53. *Id.* at 1081–82.

54. *Id.* at 1081.

55. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2615–16 (2008).

56. Plaintiffs' Reply Memorandum with Respect to Post-Judgment Interest and Costs at 9–10, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182, 04-35183).

57. *Exxon Shipping Co.*, 128 S. Ct. at 2618.

58. *See id.* at 2615 (excluding due process from issues on which Court granted certiorari). The Supreme Court may have refused to take the due process issue on certiorari because the $2.5 billion in remitted punitive damages was only five times greater than the $507.5 million in compensatory damages. The Supreme Court has generally sanctioned punitive-to-compensatory ratios of nine-to-one or less. *E.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003). Law review articles have characterized *State Farm* as creating a nine-to-one punitive-to-compensatory damages bright-line limit. *E.g.*, *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 324 (2003); Berch, *supra* note 11, at 66–67.

59. *Exxon Shipping Co.*, 128 S. Ct. at 2619–20, 2634.

60. *Exxon Valdez*, 568 F.3d at 1081.

> judgment]. In light of this mixed result, and mindful that the equities in this case fall squarely in favor of the plaintiffs—the victims of Exxon's malfeasance—we exercise our discretion by requiring each party to bear its own costs.[61]

The majority cited analogous instances in which the Ninth Circuit had required each party to bear its own costs on appeal in cases in which the court had upheld an award of punitive damages, but reduced it in amount.[62] Ultimately, the equities of the case persuaded the majority, who thought that the equities fell "squarely in favor of the plaintiffs."[63]

Judge Kleinfeld dissented.[64] He took a narrower view of the litigation, focusing on the immediately preceding punitive damages and costs decisions of the United States Supreme Court, not on the issues raised by the parties throughout the appeals or even raised by the parties before—but not decided by—the Supreme Court. The dissenting judge concluded that Exxon won its appeal because the Supreme Court reduced the punitive damages judgment by a total of $4.5 billion from the original jury award.[65] As Judge Kleinfeld memorably described the aftermath of the Supreme Court's decision, "[t]he champagne corks that popped after the Supreme Court reversed us were doubtless on Exxon's side, not the plaintiffs[']."[66]

The dissent was also persuaded by the fact that the Supreme Court awarded costs to Exxon.[67] Judge Kleinfeld noted, "[w]hat persuades me that we are abusing our discretion is the Supreme Court's exercise of its discretion in this case" to award Exxon its approximately $14,000 in costs.[68] In Judge Kleinfeld's view, the

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61. *Id.*

62. *Id.* (citing Mendez v. San Bernardino, 540 F.3d 1109, 1133 (9th Cir. 2008); Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coal. of Life Activists, 422 F.3d 949, 967 (9th Cir. 2005); Bains LLC v. Arco Prods. Co., 405 F.3d 764, 777 (9th Cir. 2005); *In re* Exxon Valdez, 270 F.3d 1215, 1254 (9th Cir. 2001)).

63. *Id.*

64. A legal realist might say that the different results reached by the majority and the dissent stem from the different ideologies of the judges. The more liberal judges, Judges Schroeder and Thomas, appointed respectively by Presidents Carter and Clinton, voted to help the plaintiffs by refusing to impose any of Exxon's hefty costs on them; the more conservative judge, Judge Kleinfeld, appointed by President George H.W. Bush, sided with big business. But even if the result evinces an ideological or philosophical split, it is one facilitated by Rule 39(a)(4)'s open-ended directive that appellate courts can award costs however they please when apportioning costs in mixed result cases (and by the Supreme Court's lack of guidance regarding costs in the remand order).

65. *Exxon Valdez,* 568 F.3d at 1083 (Kleinfeld, J., concurring in part and dissenting in part).

66. *Id.* at 1090; *see also* Editorial, *Exxon, Pay Up*, *supra* note 37 ("Let's be clear. Exxon Mobil won this case."). Additional champagne corks may have been popped by plaintiffs' rights groups, however, because in *Exxon Shipping Co. v. Baker*, the Supreme Court refused to take up Exxon's invitation to disallow punitive damages entirely in cases governed by maritime law or in cases involving vicarious liability. 128 S. Ct. 2605, 2616, 2625 (2008). Here again, one's view of the "winner" in the *Exxon Valdez* case depends on how broadly one reviews the litigation.

67. *Exxon Valdez*, 568 F.3d at 1086 (Kleinfeld, J., concurring in part and dissenting in part).

68. *Id.* But if the Supreme Court's award of 100% of the costs to Exxon reveals the Court's views of the merits of the "prevailing party" issue, one questions why Judge Kleinfeld would have awarded Exxon only 90% of its costs and not 100%. In *Furman v. Cirrito*, the Second Circuit awarded the then-prevailing plaintiffs all of their costs because the Supreme Court had done so. 782 F.2d 353, 355–56 (2d Cir. 1986). Why would Judge Kleinfeld have done differently? At least part of the answer lies in the vast discretion

Supreme Court had declared Exxon the winner, and to the winner go the costs. Because Exxon achieved a ninety percent reduction of punitive damages over the course of the lengthy appellate litigation, Judge Kleinfeld would have awarded Exxon ninety percent of the costs Exxon paid to secure the bond.[69]

The *Exxon Valdez* costs issue did not go away quietly, likely because the appellate rule governing the apportionment of costs leaves so much room for disagreement regarding its proper application. It provides no guidance for determining how the court should exercise its discretion to "order" costs. On June 29, 2009, Exxon filed a petition for rehearing, or rehearing en banc, with the Ninth Circuit, arguing that the panel majority (1) incorrectly declined to find that Exxon was the prevailing party entitled to costs; (2) failed to follow the United States Supreme Court's ruling with respect to costs; and (3) improperly declined to follow costs rulings from other circuits.[70]

Did the majority or the dissent correctly apportion costs in *Exxon Valdez*? Was the majority correct in examining the equities of the case and the long history of appellate litigation, or did the dissent properly focus on the most recent portion of that history? Rule 39(a)(4), as currently written, offers no answers. Perhaps the very lack of guidance in the Rule explains why the Ninth Circuit declined Exxon's invitation to hear the case en banc.[71] Moreover, it is not clear that either the majority or the dissent abused its discretion in determining costs. After all, Rule 39(a)(4) seems to allow appellate courts to award costs in any manner they "see

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Rule 39(a)(4) confers on judges, which allows different judges to come to different conclusions even in highly analogous factual settings, or apparently even in identical ones.

69. *Exxon Valdez*, 568 F.3d at 1085–86 (Kleinfeld, J., concurring in part and dissenting in part) ("Because Exxon won 90% percent [sic] of its case and paid 90% of the $60.6 million to hold onto money it ultimately did not owe, Exxon ought to recover 90% of its allowable supersedeas bond costs. The $60.6 million was the price of Exxon's train ticket to victory. The rules, in place with little change for many centuries, say that a party that wins on appeal is entitled to have the loser reimburse the price of that train ticket.").

70. Exxon's Petition for Rehearing or Rehearing En Banc at 8–17, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182 & 04-35183). Academics have also noted potential conflicts between the Ninth Circuit's decision in *Exxon Valdez* and other circuits' decisions regarding costs in mixed result cases. "The circuits are divided on whether a court of appeals may require parties to bear their own costs under Fed. R. App. P. 39(a)(4) where there is 'no clear winner' on appeal." Jack H. Friedenthal et al., 2009 Update Memo to CIVIL PROCEDURE: CASES AND MATERIALS (10th ed. 2009), at 4 (July 30, 2009), WESTACADEMIC.COM, http://www.westacademic.com:80/Professors/ProductDetails.aspx?productid=143586&tab=1 (follow "2009 Memo" hyperlink). These authors contend that the Ninth Circuit's decision in *Exxon Valdez* "is at odds with cases from the Seventh and Eighth Circuits involving a district court's divided cost award." *Id.* (citing *Exxon Valdez*, 568 F.3d 1077; Republic Tobacco Co. v. N. Atl. Trading Co., 481 F.3d 442 (7th Cir. 2007); Emmenegger v. Bull Moose Tube Co., 324 F.3d 616 (8th Cir. 2003)). As the majority in *Exxon Valdez* stated, however, these three decisions are not "at odds" because the Seventh and Eighth Circuits were upholding district court awards under an abuse of discretion standard. *Exxon Valdez*, 568 F.3d at 1081–82. Nonetheless, the possible tension between various rulings regarding costs underscores the desirability of a clearer rule regarding costs in mixed result cases.

71. Order Denying Exxon's Petition for Rehearing or Rehearing En Banc, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182 & 04-35183). It may also explain why Exxon, after initially requesting that the Ninth Circuit stay the mandate so that Exxon could pursue the matter before the United States Supreme Court, ultimately agreed to pay the remaining amount and stipulated to the entry of the mandate. *See* Stipulated Motion to Lift Stay of Mandate, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182 & 04-35183); *see also* Mandate Issued, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182 & 04-35183).

fit," bounded only by some notion of judicial propriety.[72] This wide discretion hardly promotes the lauded "Rule of Law," the bedrock of the American legal system.[73] *Exxon Valdez* thus lays bare why Rule 39(a)(4) needs to be amended to provide guidance to appellate courts in apportioning costs on appeal.

III. OTHER CIRCUIT COURTS' INTERPRETATIONS OF RULE 39(a)(4)

The Ninth Circuit's opinion in *Exxon Valdez* is unusually lengthy for a decision regarding appellate costs. Most such decisions find their place in a few lines at the end of an opinion that focuses on another matter or in a separate, often unpublished, order. A few other circuit courts of appeals, however, have grappled with the issue of costs in the more expansive manner of *Exxon Valdez*, and this Article now examines those decisions to see how those courts have dealt with the unlimited directive in mixed result cases to award costs "as the court orders."

A. Furman v. Cirrito

In *Furman v. Cirrito*,[74] the Second Circuit tackled the issue of appellate costs and concluded that the court must determine which party prevailed in the appellate litigation and award all costs to that party.[75] On January 10, 1984, the United States District Court for the Southern District of New York dismissed the plaintiff's complaint in a civil RICO action.[76] The plaintiff appealed to the Second Circuit, which affirmed the judgment and awarded costs to the successful defendants.[77] The plaintiff took the case to the United States Supreme Court, which vacated the Second Circuit's affirmance of the district court's judgment.[78] The Supreme Court awarded costs to the now-successful plaintiff and remanded the case for further proceedings.[79]

As part of these further proceedings, the Second Circuit reexamined the issue of appellate costs.[80] The court reviewed the purposes of awarding costs[81] and explained that costs should not be imposed either to punish or to deter

72. Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545, 561 (2d Cir. 2003).

73. *Cf.* Goodhart, *supra* note 7, at 877 ("To allow the judge or the taxing Master such wide discretion [in awarding costs] as is inherent in the English system would be contrary to the general American conception of a judiciary bound by fixed rules.").

74. 782 F.2d 353 (2d Cir. 1986).

75. *Furman*, 782 F.2d at 354–55. Of course, in many situations, this reasoning begs the question: Who is the prevailing party?

76. *Id.* at 354.

77. *Id.* So far, the Second Circuit's cost ruling is uncontroversial. The defendant won in the district court, and this win was affirmed on appeal. Rule 39(a)(2) of the Federal Rules of Appellate Procedure provides that "if a judgment is affirmed, costs are taxed against the appellant," unless the court orders otherwise. FED. R. APP. P. 39(a)(2). The Second Circuit appropriately awarded costs to the defendant at that time because the court affirmed the district court's order dismissing the case.

78. *Furman*, 782 F.2d at 354.

79. *Id.*

80. Obviously, the previous ruling—awarding costs to the defendant—could not stand. The Supreme Court had vacated the Second Circuit's previous ruling, including the award of costs.

81. *Furman*, 782 F.2d at 354–55.

meritorious litigation.[82] Instead, costs "are awarded solely to reimburse the prevailing party for a part of his litigation expenses. Public policy considerations militate against allowing costs to be exacted as an 'undue barrier to litigation.'"[83]

Because the court believed that costs should only be awarded to "reimburse the prevailing party," the Second Circuit identified the prevailing party in the appellate litigation.[84] Inasmuch as the Supreme Court had awarded the plaintiff costs before that Court, the Second Circuit reasoned that the Supreme Court had implicitly determined that the plaintiff was the prevailing party.[85] As a result, the Second Circuit felt bound to award costs to the plaintiff as well.[86]

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82. *Id.* at 354 (citing Hygienic Chem. Co. v. Provident Chem. Works, 176 F. 525, 527–28 (2d Cir. 1910)).

83. *Id.* (quoting Larchmont Eng'g v. Toggenburg Ski Ctr., 444 F.2d 490, 491 (2d Cir. 1971)); *see also id.* at 355 ("[T]he losing party pays the winner's costs, unless the court orders otherwise."). For further information regarding public policy considerations in awarding costs, see *supra* note 22 and *infra* Part VI.

84. *Furman*, 782 F.2d at 354. Rule 54(d) of the Federal Rules of Civil Procedure directs district courts to determine which party "prevailed" before awarding costs. FED. R. CIV. P. 54(d). Rule 39(a)(4) of the Federal Rules of Appellate Procedure does not use the term "prevailing party," so at least textually it is difficult to discern why the *Furman* court thought its duty was to decide which party prevailed (although it is a logical starting point, if not inexorable). FED. R. APP. P. 39(a)(4). Judge Kleinfeld, in his dissent in *Exxon Valdez,* similarly looked to which party prevailed and explained why he did so, despite the fact that Rule 39(a)(4) does not use the term "prevailing party." Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1086–87 (9th Cir. 2009) (Kleinfeld, J., concurring in part and dissenting in part) ("[O]ur legal system . . . has, for the better part of a millennium, awarded costs to prevailing plaintiffs, and for about half a millennium to whichever party prevailed." (footnotes omitted)); *id.* at 1087 ("Costs go to the 'prevailing party.'"); *see also* 16AA WRIGHT & MILLER, *supra* note 7, § 3985 ("The general principle established by Rule 39(a) is that the prevailing party on the appeal is entitled to costs as a matter of course unless the law provides or the court orders otherwise." (footnotes omitted)). However, Wright and Miller do note that "[i]f the result on appeal is anything other than a dismissal, reversal or affirmance, then Rule 39 provides no default starting point," *id.*, probably because no party clearly "prevailed" in those situations. So although it makes sense to determine which party prevailed in cases involving a dismissal, affirmance, or reversal, Rule 39(a)(4) does not require the same analysis in mixed result cases.

85. *Furman*, 782 F.2d at 355–56. The opinion does not reflect why the Second Circuit felt bound to follow the Supreme Court's ruling with respect to costs. The Supreme Court's rule provides: "If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders." SUP. CT. R. 43.2. The Court of Appeals' Rule provides that if the judgment is vacated, costs are taxed "only as the court orders." FED. R. APP. P. 39(a)(4). Accordingly, when the Supreme Court vacates an opinion, the default rule provides that the appellant receives its costs before that Court, but no such default rule guides the United States courts of appeals. *See Exxon Valdez*, 568 F.3d at 1081 ("To bolster its position [that it is the winner in this litigation], Exxon points to the fact that the Supreme Court awarded Exxon its costs. But the default rule before the Supreme Court is that when the lower judgment is vacated, the petitioner gets costs 'unless the Court otherwise orders.' Rule 39 contains no such presumption: when a judgment is modified, 'costs are taxed only as the court orders.'" (citation omitted)).

86. *Furman*, 782 F.2d at 356; *see also* 16AA WRIGHT & MILLER, *supra* note 7, § 3985 ("In most circumstances, reversal of the court-of-appeals decision [by the United States Supreme Court] should be followed by an award of costs in the court of appeals to the party that ultimately prevailed in the Supreme Court."). Wright and Miller's statement is uncontroversial. A reversal is governed by Federal Rule 39(a)(3), which provides that "if a judgment is reversed, costs are taxed against the appellee." FED. R. APP. P. 39(a)(3).

Furman suggests that the reviewing court should follow the Supreme Court's ruling on costs, if any, and should determine which party prevailed.[87] *Furman*, however, was a relatively easy case. The Supreme Court handed the plaintiff a total victory, at least up to that point in the litigation.[88]

But what should happen when neither side can legitimately claim complete victory? The answer to this question has been left to other courts, as described below.

B. Quaker Action Group v. Andrus

In *Quaker Action Group v. Andrus*,[89] the D.C. Circuit faced a situation in which each party had landed some good punches during the five rounds of appellate litigation, but neither party had scored a knockout.[90] The D.C. Circuit exercised its discretion to award partial costs to the plaintiffs in the case.[91] What is notable is how quickly the D.C. Circuit dispatched of the costs issue and how little the court wrote to justify its exercise of discretion on the issue. The decision regarding costs in the five appeals spans just half a page.[92]

Quaker Action Group had already come before the D.C. Circuit four times for review.[93] The D.C. Circuit ruled that the plaintiffs prevailed in the first three rounds of review; accordingly, the court awarded the plaintiffs all of their costs associated with those appeals.[94] With respect to the fourth appeal, the court found that the plaintiffs were the "predominantly prevailing party" and awarded them seventy-five percent of their costs for that action.[95] In awarding the plaintiffs seventy-five percent of their costs, the court did not engage in a determination of what percentage of the case the plaintiffs had won in the fourth appeal.[96] The

87. See *supra* note 84 for a brief discussion of why appellate courts should not simply assume they must look to which party prevailed in a mixed result case governed by Rule 39(a)(4) of the Federal Rules of Appellate Procedure.

88. Even the dissent in *Exxon Valdez* acknowledged the potential difference between the total victory in *Furman* and the partial victory in *Exxon Valdez*. *See Exxon Valdez*, 568 F.3d at 1087 (Kleinfeld, J., concurring in part and dissenting in part) ("The only distinction that could arguably be drawn between *Furman* and our case is that *Furman* was not a decision that left each side with something.").

89. 559 F.2d 716 (D.C. Cir. 1977) (per curiam).

90. *See Quaker Action Grp.*, 559 F.2d at 719 (awarding thirty percent of costs to plaintiff and remanding for "appropriate" order).

91. *Id.*

92. *Id.*

93. *Id.* at 718 n.1.

94. *Id.* at 719. If the plaintiffs had won these appeals in their entirety and the appellate litigation had ended at the conclusion of the third round of review, the plaintiffs would have been entitled to all their costs under the Federal Rules of Appellate Procedure, provided that the court did not order otherwise. *See* FED. R. APP. P. 39(a)(2).

95. *Quaker Action Grp.*, 559 F.2d at 719.

96. *Id.* Contrast this with Judge Kleinfeld's dissent in *Exxon Valdez*, which matched up the percent by which Exxon had reduced the punitive damages award to the percentage of Exxon's costs that the plaintiffs would have to pay. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1085–86 (9th Cir. 2009) (Kleinfeld, J., concurring in part and dissenting in part). The D.C. Circuit's "parity" approach—while non-mathematical—comports with the Supreme Court's refusal to divide the number of issues prevailed upon by the total number of issues in 42 U.S.C. § 1988 attorneys' fee cases. *See* Hensley v. Eckerhart, 461

court simply stated, "[a]s to *Quaker Action IV*, there were some respects in which the government prevailed. However, we think that plaintiffs were the predominantly prevailing party. We have concluded that plaintiffs shall recover 75% of the costs incurred on the appeal in *Quaker Action IV*."[97]

Finally, in the fifth appeal, the court dismissed *sua sponte* two of the plaintiffs' points on appeal, but granted the plaintiffs some relief on the grounds that they had identified a defect in the district court's order.[98] The court concluded that the plaintiffs should receive thirty percent of their costs in that appeal because the court "agreed substantially although not entirely with plaintiffs."[99] In this portion of the costs opinion, the D.C. Circuit again declined to explain why it awarded that particular percentage of the plaintiffs' costs.[100]

Thus, the D.C. Circuit exercised its discretion to award partial costs to the partial winner.[101] But the court did not determine the precise percentage of the case that the prevailing party "won" or order costs in proportion to the percent won.[102] It did, however, award more costs in those appeals in which the plaintiffs won more, giving some sense of parity: In the first three appeals, the plaintiffs won everything, and they received all of their costs; in the fourth appeal, the plaintiffs were the "predominantly prevailing party," and they received seventy-five percent of their costs; and in the fifth appeal, the plaintiffs lost two of their contentions on appeal, but nonetheless "substantially" won, so they received thirty percent of their costs.[103]

U.S. 424, 435 n.11 (1983) (stating that courts should not apply "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" (internal quotation marks omitted)).

97. *Quaker Action Grp.*, 559 F.2d at 719. Should readers conclude from this that that the plaintiffs won seventy-five percent of the issues on appeal or that they received a seventy-five percent increase in their damages? Or did the court just "see fit" to award that percentage of costs? *See* Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545, 561 (2d Cir. 2003) (noting that where the court is affirming in part and reversing in part, the court may tax costs as it "see[s] fit"). If the court saw fit to award that percentage, why that percentage and not some other percentage, and what stops other courts from awarding different amounts under substantially similar or even identical circumstances?

98. *Quaker Action Grp.*, 559 F.2d at 718–19.

99. *Id.* at 719. Why did the appellate court award thirty percent of the plaintiffs' costs? Is losing two issues but winning one issue like winning one-third of the appeal, which is close to thirty percent? If so, why not award one-third? And why not look at this from the flip-side, which indicates that in the fifth appeal, the defendant won two-thirds of the case and is, accordingly, the prevailing party entitled to at least some of its costs, perhaps sixty-seven percent of them (if one follows a mathematical approach)?

100. *See id*. at 719 (stating plaintiffs should recover thirty percent of costs, but failing to provide justification for this conclusion).

101. *See id*. (stating court "agreed substantially although not entirely with plaintiffs").

102. *See id.* (deciding plaintiffs "substantially" won, but not stating precise percentage of case won by plaintiffs).

103. *Id.*

C. Emmenegger v. Bull Moose Tube Co. *and* Republic Tobacco Co. v. North Atlantic Trading Co.

Other appellate cases regarding costs speak to the apportionment of costs by district courts, not to costs awarded by appellate courts in the first instance.[104] Rule 54(d) of the Federal Rules of Civil Procedure, which generally governs the apportionment of costs in district courts,[105] directs costs to the prevailing party unless a federal statute, a rule, or the court provides otherwise.[106] When a district court apportions bond premiums, however, it follows Appellate Rule 39.[107] The Seventh Circuit has explained how the circuit court reviews a district court's exercise of discretion under Appellate Rule 39 as follows:

> Few cases have discussed how Rules 39(a) and 39(e) work together, but we have held that a district court has broad discretion to deny costs to a successful appellee under Rule 39(e). In *Guse*, the Court said that "unless . . . the court orders otherwise" language in Rule 39(a) confirms that a district court may, in its sound discretion, depart from the default awards set out in Rule 39(a)(1)-(3) when assessing costs under Rule 39(e). We believe that similar discretionary language found in Rule 39(a)(4) affords district courts broad discretion to allocate costs where, as here, an appellate court modifies a district court's judgment.[108]

When the district court determines which party prevailed and awards costs accordingly, the reviewing court of appeals will not disturb the district court's conclusion absent an abuse of discretion.[109] "Abuse" itself is a high standard. But the Seventh Circuit indicated that there must be a clear abuse: the district court has "broad discretion," which the appellate court will not disturb absent an abuse of that discretion.

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104. The "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal" are "taxable in the district court for the benefit of the party entitled to costs under this rule." FED. R. APP. P. 39(e), (e)(3). In *Emmenegger v. Bull Moose Tube Co.*, the defendant moved the Court of Appeals for the Eighth Circuit to tax the costs of the bond premiums to the plaintiffs, but the court "directed the Company to take its request to the District Court." 324 F.3d 616, 626 (8th Cir. 2003); *see also* Republic Tobacco Co. v. N. Atl. Trading Co., 481 F.3d 442, 445 (7th Cir. 2007) ("On September 15, 2004, NATC moved this Court to award NATC the costs, approximately $1.1 million, that it incurred by securing the judgment to the extent it exceeded $3 million. The Court denied NATC's motion, stating, 'Any request for costs associated with [NATC's] supersedeas bond should be directed to the district court.'" (alteration in original)). In *Exxon Valdez*, to the contrary, the Ninth Circuit panel did not direct Exxon to take its costs request to the district court. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1081–82 (9th Cir. 2009).

105. FED. R. CIV. P. 54(d).

106. *Id.* at 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."). Rule 54(d) makes it explicit that a district court must determine which party prevailed.

107. *See, e.g.*, *Republic Tobacco Co*., 481 F.3d at 449.

108. *Id.* (omission in original) (citation omitted).

109. *See Emmenegger*, 324 F.3d at 626–27 (reviewing district court's award of costs under deferential abuse of discretion lens); *Republic Tobacco Co.*, 481 F.3d at 449 (same). It stands to reason that, if the Supreme Court were to take on certiorari a court of appeals' costs case (or a court of appeals' affirmance of a district court's cost case), the Court would also review for abuse of discretion, which further underscores why the change to Rule 39(a)(4) must come from an amendment to the Rule itself rather than a pronouncement from the Supreme Court.

In *Emmenegger v. Bull Moose Tube Co.*,[110] the Eighth Circuit held that the district court did not abuse its discretion in awarding costs to the defendants for the premiums spent to secure a supersedeas bond.[111] The district court had awarded costs for the portion of the supersedeas bond securing the part of the judgment that the appellate court erased.[112] Because the purpose of the appeal was to reduce the large damages award, the district court determined that the defendants had prevailed, even though they did not entirely eliminate the damages award.[113]

In *Republic Tobacco Co. v. North Atlantic Trading Co.*,[114] the Seventh Circuit upheld a district court's award of costs for bond expenses when the defendant's appeal successfully decreased the amount of damages from $18.6 million to $3 million.[115] The court suggested that it might have been more accurate to award the amount spent to secure the $15 million portion of the judgment that the appellate court had reduced.[116] Nonetheless, in light of the deferential standard of review and the district court's broad discretion in the first instance, the Seventh Circuit refused to disturb the district court's determinations.[117] Accordingly, the defendants received the entire amount spent to secure and maintain the $18.6 million bond.[118]

D. Brief Summary of the Costs Cases

As one might suspect because of the lack of guidance offered by Rule 39(a)(4), courts have resorted to differing approaches toward apportioning costs. The *Exxon Valdez* majority examined the entire course of litigation and determined that neither party prevailed.[119] Even after the reduction to $507.5 million, the plaintiffs still garnered the fourth largest punitive damages award ever granted.[120] Nonetheless, Exxon's punitive damages liability had plummeted by ninety percent from the original award of $5 billion. The majority accordingly

110. 324 F.3d 616 (8th Cir. 2003).

111. *Emmenegger*, 324 F.3d at 626–27.

112. *Id.*

113. *Id.* at 627. Cases under 42 U.S.C. § 1988 determine the prevailing party in the same manner. *See, e.g.*, Stivers v. Pierce, 71 F.3d 732, 751 (9th Cir. 1995) ("If the plaintiff is only partially successful in seeking the relief, and achieves only some of the benefit sought by the litigation, he is still considered the prevailing party."); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." (internal quotation marks omitted)). So do cases under 42 U.S.C. § 2000e-16(a). *See, e.g.*, Hashimoto v. Dalton, 118 F.3d 671, 677 (9th Cir. 1997) (stating that party "need not prevail on every issue, or even on the 'central issue' in the case to be considered the prevailing party.").

114. 481 F.3d 442 (7th Cir. 2007).

115. *Republic Tobacco Co.*, 481 F.3d at 445–50.

116. *Id.* at 449.

117. *Id.* at 449–50.

118. *Id.* at 451.

119. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1081 (9th Cir. 2009).

120. *Id.*

concluded that each side should bear its own costs.[121] The dissent in *Exxon Valdez* looked at the percentage of damages reduced and would have awarded the defendant that precise percentage of its costs paid to secure the bond.[122] In contrast, the *Furman* court found a single prevailing party and gave that party all of its costs,[123] while in *Quaker Action Group*, the D.C. Circuit determined who prevailed and then awarded some costs to that party, though not in proportion to the percentage of victory.[124] Finally, in *Emmenegger* and *Republic Tobacco*, the circuit courts took a hands-off approach, sending the costs issues to the district courts and then upholding the district courts' awards of costs under the deferential abuse of discretion standard of review.[125]

Appellate Rule 39(a)(4) seems to allow these varied methods of apportioning costs. After all, the courts deploying these approaches obviously found them appropriate. These approaches evidence courts' differing applications and interpretations of the phrase "as the court orders."[126]

IV. STATE RULES GOVERNING APPELLATE COSTS

The state rules governing apportionment of costs on appeal tend to offer no more guidance to their courts in mixed result cases than Rule 39(a)(4) offers to the federal circuit courts of appeals. In fact, approximately half the states direct that the award of costs lies within their appellate courts' complete discretion, at least in mixed result cases.[127]

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121. *Id.* at 1082.

122. *Id.* at 1085–86 (Kleinfeld, J., concurring in part and dissenting in part).

123. Furman v. Cirrito, 782 F.2d 353, 355–56 (2d Cir. 1986).

124. Quaker Action Grp. v. Andrus, 559 F.2d 716, 719 (D.C. Cir. 1977) (per curiam).

125. Republic Tobacco Co. v. N. Atl. Trading Co., 481 F.3d 442, 449–50 (7th Cir. 2007); Emmenegger v. Bull Moose Tube Co., 324 F.3d 616, 626–27 (8th Cir. 2003).

126. FED. R. APP. P. 39(a)(4).

127. *See* ALA. R. APP. P. 35(a) (providing for costs "only as ordered by the court" in mixed judgment cases); ALASKA R. APP. P. 508(c) ("In cases of partial affirmance and partial reversal, the court will determine which party, if any, shall be allowed costs."); CAL. R. OF CT. 8.278(a)(3) ("If the Court of Appeal reverses the judgment in part or modifies it . . . the opinion must specify the award or denial of costs."); COLO. APP. R. 39(a) ("[I]f a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court."); DEL. R. SUP. CT. 20(d) ("[C]osts shall be allowed as ordered by the Court."); HAW. R. APP. P. 39(a) ("[C]osts shall be allowed only as ordered by the appellate court."); ILL. SUP. CT. R. 374(a) ("[C]osts shall be allowed only as ordered by the court."); IND. R. APP. P. 67(C) ("[T]he recovery of costs shall be decided in the Court's discretion."); MASS. R. APP. P. 26(a) ("[C]osts shall be allowed only as ordered by the appellate court."); MISS. R. APP. P. 36(a) ("[C]osts shall be allowed only as ordered by the court which decided the case."); NEV. R. APP. P. 39(a)(4) ("[I]f a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders."); N.C. R. APP. P. 35(a) ("[I]f a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court."); N.D. R. APP. P. 39(a)(4) ("[I]f a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders."); OHIO R. APP. P. 24(A) ("[T]he party liable for costs is as follows: . . . (4) If the judgment appealed is affirmed or reversed in part or is vacated, as ordered by the court."); PA. R. APP. P. 2741(5) ("If an order is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court."); S.C. APP. CT. R. 222(a) ("When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court."); TENN. R. APP. P. 40(a) ("[I]f a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the appellate court."); UTAH R. APP. P. 34(a) ("[I]f a judgment or order is

Some state rules, however, do provide more guidance than "as the court orders" or other similar statement granting unbounded discretion.[128] These rules

affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court."); VT. R. APP. P. 39(a) ("[I]f a judgment is affirmed or reversed in part, costs shall be allowed only as ordered by the Court."); VA. R. SUP. CT. 5:37(a) ("[I]f a judgment is affirmed in part or reversed in part, or is vacated, costs shall be allowed as ordered by this Court."); W. VA. REV. R. APP. P. 24(a) ("[I]f a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the Court.").

128. ARIZ. REV. STAT. § 12-341(2009) ("The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law."); *id.* § 12-342 ("A. On an appeal by the party against whom judgment was given in the court below, if the judgment of the appellate court is against him, but for a lesser amount, he shall recover costs in the appellate court, but shall be adjudged to pay costs in the court below. If the judgment of the appellate court is against him for the same or greater amount than in the court below, the adverse party shall recover costs in both courts. B. On an appeal by the party in whose favor judgment was given in the court below, if the judgment of the appellate court is in his favor for a greater amount, he shall recover costs in both courts. If judgment of the appellate court is in his favor but for the same or less amount than in the court below, he shall recover costs in the court below and pay costs in the court above."); ARK. R. SUP. CT. & CT. APP. 6-7(c) (costs awarded "according to the merits of the case."); CONN. R. APP. P. 71-2 ("[C]osts shall be taxed to the prevailing party . . . ."); FLA. R. APP. P. 9.400(a) ("prevailing party"); GA. CODE ANN. § 9-15-1 (2009) ("[T]he party who dismisses, loses, or is cast in the action shall be liable for the costs thereof."); IDAHO APP. R. 40(a) ("prevailing party"); IOWA R. APP. P. 6.1207 ("All appellate fees and costs shall be taxed to the unsuccessful party, unless otherwise ordered by the appropriate appellate court."); KAN. SUP. CT. R. 7.07(a) ("as justice may require"); KY. R. CIV. P. 72.13 ("[C]osts shall be borne by the unsuccessful party or parties . . . ."); LA. CODE CIV. P. Art. 1920 ("Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause. Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable."); ME. R. APP. P. 13(a) ("Costs shall be taxed against the unsuccessful party unless the Law Court otherwise directs. When a judgment is affirmed in part, costs shall be allowed only as ordered by the Law Court."); MD. R. 8-607(a) ("Unless the Court orders otherwise, the prevailing party is entitled to costs."); MICH. CT. R. 7.219(A) ("Except as the Court of Appeals otherwise directs, the prevailing party in a civil case is entitled to costs."); MINN. R. CIV. APP. P. 115.05 ("Costs and disbursements may be taxed by the prevailing party . . . ."); MO. SUP. CT. R. 77.01 ("In civil actions, the party prevailing shall recover his costs against the other party, unless otherwise provided in these rules or by law."); MONT. R. APP. P. 19(3)(a) ("Costs on appeal will be awarded to the prevailing party . . . . In the event that a dispute arises over which party has prevailed, that dispute, as well as the matter of costs, shall be resolved by the district court."); NEB. REV. STAT. § 25-1933 (2008) ("When a judgment, decree or final order is reversed, vacated or modified, the court may render judgment for all costs against the appellee or appellees or some of them, or may direct that each party pay his own costs or apportion the costs among parties or direct that judgment for costs abide the event of a new trial as, in its discretion, the equities of the cause may require."); N.H. R. SUP. CT. 23 ("[C]osts shall be allowed to the prevailing party . . . ."); N.J. CT. R. 2:11-5 ("prevailing party"); N.M. R. APP. P. 12-403A ("party prevailing"); N.Y. C.P.L.R. § 8107 (2010) ("The party in whose favor an appeal is decided in whole or in part is entitled to costs upon the appeal . . . ."); OKLA. STAT. tit. 12, § 978 (2010) ("[W]hen reversed in part and affirmed in part, costs shall be equally divided between the parties."); OR. R. APP. P. 13.05(2) ("prevailing party"); *id*. at 13.05(3) ("[T]he appellant or petitioner (or cross-appellant or cross-petitioner, as appropriate) is the prevailing party only if the court reverses or substantially modifies the judgment or order from which the appeal or judicial review was taken. Otherwise, the respondent (or cross-respondent, as appropriate) is the prevailing party."); R.I. GEN. LAWS § 9-22-20 (2010) ("In all appeals, the court appealed to, on rendering judgment therein, may award costs for or against the appellant or appellee, or for neither of them, or may apportion the costs among the parties appellant and appellee, according to the circumstances of the case, and as shall appear equitable."); S.D. CODIFIED LAWS § 15-6-54(d)(1) (2009) ("prevailing party unless the court otherwise directs"); TEX. R. APP. P. 43.4 ("prevailing party"); WASH. R. APP. P. 14.2 ("A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review . . . . If there is no substantially prevailing party on review, the commissioner or clerk will not

tend to allow awards of costs to the prevailing party or substantially prevailing party,[129] or as justice or equity requires.[130] Whatever the rule of the state, it has no direct bearing on the resolution of the issue in federal courts. In *Burlington Northern Railroad Co. v. Woods*,[131] the United States Supreme Court held that the federal rule regarding costs governs in diversity cases, so federal courts do not currently receive any guidance even from the rules of the state in which the district court sits, and certainly the state rule has no direct effect on non-diversity cases.[132]

Although the state rules identified in footnote 129 facially provide better guidance to their courts than Appellate Rule 39(a)(4) provides to federal circuit courts of appeals, in practice these rules may not help courts apportion costs with any greater ease, uniformity, or regularity than federal courts do under Rule 39(a)(4). Despite the fact that Appellate Rule 39(a)(4) only requires federal circuit courts to award costs and does not direct how they should do so, federal courts nonetheless look to the overall merits of the case,[133] to who prevailed in the appellate litigation,[134] and to the equities of the case.[135] These are the same considerations set forth in several state rules that constrain state-court discretion in the apportionment of costs.[136] Accordingly, in some respects, a more specific federal rule may not necessarily change how circuit courts award costs.

Nonetheless, an amended federal rule may guide the courts and lend credibility to their determinations in apportioning costs because the judges could point to a rule or constraining principle that requires them to "review the merits of the case" or "review the equities" or "determine who prevailed." An amended rule also provides predictive value for litigants, who have an interest in knowing

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award costs to any party."); WIS. STAT. ANN. § 814.08(1) (2010) ("[I]f affirmed in part and reversed in part, the court may award the costs or such part thereof as is just to either party."); WYO. R. APP. P. 10.04 ("[W]hen [a judgment or order is] reversed in part and affirmed in part, the court may apportion the costs between the parties in such manner as it deems equitable . . . .").

129. Who would be the prevailing party, or even the substantially prevailing party, in a prospective overrule case: The party who "won" the case or the party who changed the law for future litigants?

130. *See, e.g.*, ARK. R. SUP. CT. & CT. APP. 6-7(c) (merits); KAN. R. SUP. CT. 7.07(a) (justice); NEB. REV. STAT. § 25-1933 (2008) (equities); R.I. GEN. LAWS § 9-22-20 (2009) (equities).

131. 480 U.S. 1 (1987).

132. *Burlington N.*, 480 U.S. at 7–8.

133. *Id.* In *Exxon Valdez*, the dissent looked at the percentage by which the United States Supreme Court had remitted the judgment against the defendant. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1085–86 (9th Cir. 2009) (Kleinfeld, J., concurring in part and dissenting in part).

134. *See* Furman v. Cirrito, 782 F.2d 353, 355 (2d Cir. 1986) (determining that plaintiffs prevailed on appeal); Quaker Action Grp. v. Andrus, 559 F.2d 716, 719 (D.C. Cir. 1977) (per curiam) (determining that plaintiffs prevailed in all appeals, but with varying degrees of success).

135. *Exxon Valdez*, 568 F.3d at 1081 (noting that "the equities in this case fall squarely in favor of the plaintiffs").

136. In practice, federal courts of appeals may have to look outside the rule when awarding costs. If, for example, the majority in *Exxon Valdez* had simply stated that each party must bear its own costs, citing Rule 39(a)(4), surely commentators would say that the majority had abused its discretion by failing to explain such a result. Although costs are taxed "only as the court orders," the court seemingly must explain why it taxes costs in a particular manner. This may help account for why the federal courts' reasoning mirrors the state rules' requirements.

what they risk by pursuing an appeal. This Article will now review three of the more interesting—and descriptive—state rules regarding costs, which come from Oregon, Arizona, and Washington. These rules do more than direct their courts to apportion costs in any manner they see fit, and they do more than tell their courts to determine which party prevailed. These rules define who prevailed, making it easier for the courts to apportion costs—even in mixed result cases—and for parties to predict how costs might be assigned at the resolution of the appellate litigation.

A. Oregon

Oregon's courts seem to apportion costs with relative ease, perhaps because of the specificity of Oregon Rule of Appellate Procedure 13.05. Like many other trial and appellate rules governing costs, Rule 13.05 requires that costs be awarded to the prevailing party; but the Oregon rule does not end with that open-ended directive to figure out which party prevailed. Instead, the rule defines what it means to prevail. An appellant prevails "only if the court reverses or substantially modifies the judgment or order"; otherwise, the appellee is the prevailing party.[137] Although what constitutes a "substantial" modification of a judgment remains open to dispute, Oregon's robust costs rule provides its courts with more direction than Rule 39(a)(4) provides the federal appellate courts, and more guidance than rules that direct courts to discern which party prevailed without describing what it means to prevail.[138]

Application of Oregon Rule 13.05 would have provided a rather easy answer to the circuit court judges struggling to rationally apportion the massive costs in *Exxon Valdez*.[139] Although it is not clear which party "won" the appeal, it is clear

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137. Rule 13.05 of the Oregon Rules of Appellate Procedure defines "prevailing party" in the following manner:

> When an allowance of costs is dependent on identification of a party as a prevailing party, the appellant or petitioner (or cross-appellant or cross-petitioner, as appropriate) is the prevailing party only if the court reverses or substantially modifies the judgment or order from which the appeal or judicial review was taken. Otherwise, the respondent (or cross-respondent, as appropriate) is the prevailing party.

OR. R. APP. P. 13.05(3). Oregon's courts seem able to follow the clear guidance set forth in the rule. *See, e.g.*, Yamaha Store of Bend, Or., Inc. v. Yamaha Motor Corp., 806 P.2d 123, 127 (Or. 1991) ("In this case, defendant was deemed to be the 'prevailing party,' because it obtained a 'substantial modification' of the lower court judgment by reducing plaintiffs['] damages on appeal by $71,074.35 on the price discrimination claim and by $25,858.01 on the breach of contract claim." (citing OR. R. APP. P. 13.05)). The jury had awarded $25,858.01 for the breach of contract claim and an equal amount for the price discrimination claim. Yamaha Store of Bend, Or., Inc. v. Yamaha Motor Corp., 798 P.2d 656, 661 n.11 (Or. 1990). The trial court tripled the award for the price discrimination claim (to $77,574.03) and then offset that amount by $29,391—the amount the parties stipulated that the plaintiff owed Yamaha for parts—for a net recovery of $48,183.03. *Id.*

138. *See, e.g.*, Benjamin Franklin Sav. & Loan Ass'n v. Dep't of Revenue, 801 P.2d 771, 782 n.20 (Or. 1990) ("We do not allow costs and disbursements to either party on this appeal. Taxpayers did not obtain a 'substantial modification' of the tax court's judgment which could entitle them to such an award . . . ."). *But see* Voelz Oil & Land Survey, Inc. v. Or. State Fire Marshall, 907 P.2d 251, 253 (Or. Ct. App. 1995) (stating that statute does not require finding of "substantial modification" for court to award costs).

139. That Oregon's rule would have made quick work of *Exxon Valdez* does not necessarily mean

(absent the one-too-many law school hypothetical) that Exxon achieved a substantial modification of the underlying judgment—a ninety percent reduction in punitive damages to be precise. Accordingly, Exxon would be awarded all of its appellate costs under the Oregon Rule 13.05.[140] Perhaps more important than the outcome is the fact that the judges would have had something concrete to point to when awarding costs, obviating the need for the potential en banc activity followed by the later-abandoned petition for certiorari,[141] and the parties would have been able to predict their liability for costs when pursuing their numerous appeals.

B. Arizona

Arizona guides its courts in awarding costs by statute rather than by rule. As in many jurisdictions, Arizona courts grant costs to the prevailing party. But, like Oregon, Arizona does not leave its courts without guidance as to what it means to prevail in appellate litigation. Arizona Revised Statutes section 12-342 describes what it means to "prevail" for purposes of awarding costs:

> A. On an appeal by the party against whom judgment was given in the court below, if the judgment of the appellate court is against him, but for a lesser amount, he shall recover costs in the appellate court, but shall be adjudged to pay costs in the court below. If the judgment of the appellate court is against him for the same or a greater amount than in the court below, the adverse party shall recover costs in both courts.[142]
>
> B. On an appeal by the party in whose favor judgment was given in the court below, if the judgment of the appellate court is in his favor for a greater amount, he shall recover costs in both courts. If judgment of the appellate court is in his favor but for the same or less amount than in the court below, he shall recover costs in the court below and pay costs in the court above.[143]

Because the statutes so clearly define which party has prevailed, Arizona's appellate courts can easily resolve costs cases in a uniform manner.[144]

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that the rule would have led to the right result. As Justice Stevens memorably noted in *Burnham v. Superior Court*, "[p]erhaps the adage about hard cases making bad law should be revised to cover easy cases." 495 U.S. 604, 640 n.* (1990) (Stevens, J., concurring).

140. Oregon's rule would have also dispatched of some of the other circuit court cases with relative ease. In *Furman*, the appellant clearly won a substantial modification in the Supreme Court and so would have been entitled to costs. See *supra* Part III.A for a discussion of *Furman*. In *Emmenegger* and *Republic Tobacco*, the appellants achieved substantial modifications of the judgments against them, so they too would have received their costs. See *supra* Part III.C for a discussion of *Emmenegger* and *Republic Tobacco*.

141. *See* Order Denying Exxon's Petition for Rehearing or Rehearing En Banc, *supra* note 71 (regarding denial of Exxon's petition for rehearing and rehearing en banc); Stipulated Motion to Lift Stay of Mandate, *supra* note 71 (regarding Exxon's subsequent withdrawal of its request to stay the mandate while petitioning for certiorari).

142. ARIZ. REV. STAT. § 12-342(A) (2009).

143. *Id.* § 12-342(B).

144. *See, e.g.*, Assocs. Fin. Corp. v. Walters, 486 P.2d 797, 798 (Ariz. 1971) ("In the instant case the appeal from the trial court was by Associates Finance, the party against whom judgment was rendered in the trial court, and the decision of the Court of Appeals was also against that party, but for a lesser

Like Oregon's rule, Arizona's statutes would have made quick work of the vexing cost issue in *Exxon Valdez*.[145] Because Exxon succeeded in having the punitive damages award reduced, Arizona's statutes would have labeled Exxon the prevailing party. Accordingly, Exxon would have been entitled to all of its appellate costs without a further, more complicated, inquiry.[146]

C. Washington

Washington's rules also provide robust guidance to its courts when faced with apportioning costs on appeal. Washington courts have specifically noted that, for purposes of determining costs, "[p]revailing party is not the standard."[147] This makes sense because, as this Article has recounted, identifying a prevailing party may be difficult and may lead to different answers depending on the scope of the appellate litigation or the issues that a court of discretionary review decides to hear.[148] Instead, Washington Rule of Appellate Procedure 14.2 directs its courts to determine which party "substantially prevail[ed] on review."[149] By recognizing that it can be difficult to ascertain which party actually prevailed on appeal, the Washington rule gives its courts more leeway to determine which party raised issues of "arguable merit" and which party has the "ability to pay" any award of costs.[150]

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amount. Under these circumstances, the provisions of A.R.S. § 12-342, subsec. A apply . . . ."); Dixon v. Feffer, 327 P.2d 994, 997–98 (Ariz. 1958) (finding that where judgment in favor of sellers of prefabricated building was reduced on appeal by value of item contracted for but not provided, defendant buyers are awarded their costs pursuant to A.R.S. §12-342(A)); Food Jobbers, Inc. v. Ellis, 251 P.2d 651, 653 (Ariz. 1952) ("The trial court is directed to reduce its judgment [to] $109[;] defendant to have its costs on appeal."); Lundberg v. Bolon, 194 P.2d 454, 460 (Ariz. 1948) (reducing plaintiff's judgment by $96 and awarding appellate costs to defendant); T.H. Props. v. Sunshine Auto Rental, Inc., 728 P.2d 663, 665–66 (Ariz. Ct. App. 1986) ("Since Sunshine has succeeded in this appeal in reducing the amount of the judgment, TH is not the prevailing or successful party and is not entitled to attorney's fees under its lease or A.R.S. § 12-341.01(A). It would be anomalous to award appellee its attorney's fees in the face of A.R.S. § 12-342 which mandates the award of costs to the appellant by virtue of the reduction of the judgment. The judgment is modified by reducing the amount of the judgment to the sum of $3,142.50 and the judgment is affirmed as modified." (footnote omitted) (citations omitted)).

145. Again query whether this easy result for the court produces the just resolution of the issue. See *supra* note 139.

146. Exxon's quest for costs would be controlled by section 12-342(A) of the Arizona Revised Statutes, which would allow Exxon to recover costs in the appellate court but pay costs in the court below. Is the premium paid to secure a supersedeas bond only an appellate cost? Perhaps there is more wiggle room in this statute than might be apparent at first glance.

147. Bush v. Cliffe, No. 62124-6-I, 2009 WL 1178478, at *5 (Wash. Ct. App. May 4, 2009) (citing *In re* Marriage of Rideout, 77 P.3d 1174, 1183 (Wash. 2003)).

148. In *Exxon Valdez*, the majority and dissent vehemently disagreed over which party prevailed in the appeal. See *supra* Part II for further discussion of the case.

149. WASH. R. APP. P. 14.2.

150. *Bush*, 2009 WL 1178478, at *5 ("Cliffe requests attorney fees and costs on appeal under RCW 26.09.140 and RAP 14.1. This court has discretion to award fees on a child support appeal after considering the arguable merit of the issues raised on appeal and the parties' relative ability to pay. Prevailing party is not the standard. Under RAP 14.1(d) and 14.2, an appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. Bush's appeal lacks merits and we agree with the trial court that his ability to contribute appears to be excellent. Fees and costs on appeal are awarded to Cliffe." (citations

Under Washington Rule 14.2, the *Exxon Valdez* cost issue should have been relatively easy to resolve. Although one can question whether Exxon "prevailed" because it remained liable for the fourth largest punitive damages judgment ever awarded,[151] Exxon surely substantially prevailed in that it succeeded in reducing the $5 billion punitive damages judgment to a "mere" $507.5 million. Moreover, Exxon raised issues of more than "arguable merit," including an issue of first impression for the United States Supreme Court regarding the availability of punitive damages in maritime cases—an issue on which Exxon prevailed by limiting punitive damages to a maximum one-to-one ratio with respect to compensatory damages.[152]

D. Conclusion Regarding State Rules

Oregon, Arizona, and Washington have all found ways to provide guidance or curtail discretion in the award of appellate costs.[153] These states' rules or statutes may, however, constrain discretion too much, especially in those cases that would have been described by Rule 39(a)(4) as "mixed result" cases, those in which there is no clear winner or loser. In practical terms, the results of costs determinations in these states might be easily ascertained, might comply with the governing rule or statute, and might be predictable, but it is less clear whether these rules and statutes yield a result that is regularly fair and equitable.

The next section of this Article will explore possible amendments to Rule 39(a)(4) that will both assist in limiting the currently unfettered discretion of circuit court judges to award costs in mixed result cases and help ensure that courts reach just resolutions.

V. EXPLORING AMENDMENTS TO RULE 39(a)(4)

With such wide-ranging discretion on the part of the appellate court, it is clear that courts are ordering different proportions of costs and for different reasons. Because in a principled system like cases should be treated alike, this state of affairs should be scrutinized, and ultimately changed. Accordingly, this Article now explores possible amendments to Appellate Rule 39(a)(4) regarding the division of appellate costs in mixed result cases.[154] The Article sets forth the merits and demerits of each proposal, at times using *Exxon Valdez* as an example.

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omitted)).

151. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, at 1081 (9th Cir. 2009).

152. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619–20, 2633 (2008). The plaintiffs also would have had "ability to pay" Exxon's costs because Exxon withheld the $70 million in costs from the punitive damages judgment. Motion to Stay Mandate at 3, *Exxon Valdez*, 568 F.3d 1077 (Nos. 04-35182 & 04-35183). See *supra* note 71 for a discussion of the course Exxon pursued with respect to its Motion to Stay Mandate.

153. Query whether the less discretionary results of the *Exxon Valdez* costs issue achieved under the three states' rules regarding costs would have achieved justice in that case. See *infra* Part VI for a proposed costs rule that centers on equitable considerations.

154. These changes could be reflected in the rule itself or in the commentary to the rule.

A. First Proposal: Award Costs in Proportion to the Percentage of the Case Won or by Which Damages Were Reduced on Appeal

The dissent in *Exxon Valdez* believed that the Ninth Circuit should apportion costs in proportion to the percentage of damages that had been reduced as a direct result of the appellate litigation. Judge Kleinfeld reasoned, "[b]ecause Exxon won 90% percent [sic] of its case and paid 90% of the $60.6 million to hold onto money it ultimately did not owe, Exxon ought to recover 90% of its allowable supersedeas bond costs."[155]

Judge Kleinfeld's approach in *Exxon Valdez* could be adapted into the Federal Rules of Appellate Procedure for cases resulting in mixed results on appeal.[156] The amended rule governing the apportionment of costs in these cases would direct appellate judges to begin by determining the percentage of the case that each side won during the appeal and would then direct the court to apportion costs according to that percentage.[157] If each side wins fifty percent of the issues of appeal, the court awards no costs, and each party bears its own costs or each party bears fifty percent of the total costs.[158] If one side wins more than fifty percent, that party receives that percentage of costs.[159]

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155. *Exxon Valdez*, 568 F.3d at 1085–86 (Kleinfeld, J., concurring in part and dissenting in part); *see also* Republic Tobacco Co. v. N. Atl. Trading Co., 481 F.3d 442, 449 (7th Cir. 2007) (suggesting that district court "may elect—after hearing more from the parties on this issue—to award NATC only a percentage of its appellate costs given that Republic did retain a significant judgment").

156. Judge Kleinfeld's approach might work best in a more generalized form in which the court determines the percentage of the case that each party won, rather than the percentage by which money damages were reduced, because the former covers more cases—including cases involving declaratory or injunctive relief—and tends to be more equitable by ensuring that the court looks at the entire course of the litigation, not just the snapshot result.

157. This approach would accord with the one taken by Rule 54(d) of the Federal Rules of Civil Procedure, which directs district courts to determine which party prevailed. FED. R. CIV. P. 54(d). Of course, the Federal Rules of Civil Procedure do not direct a percentage-of-costs approach, but the concept of determining which party prevailed is familiar to federal courts because they often review Rule 54(d) orders.

158. The difference between splitting costs evenly and leaving each party to bear its own costs can be substantial. *See, e.g.*, *Exxon Valdez*, 568 F.3d at 1081 (involving appellate costs of $70 million for Exxon because of premiums paid on letters of credit). If Rule 39(a)(4) were amended to follow Judge Kleinfeld's dissenting approach in *Exxon Valdez*, it might make more sense for the amended rule to require the parties to split the costs evenly because such a split appropriately reflects the percentage of the case that each party won.

159. Under Judge Kleinfeld's approach, a party that wins 60% of the appeal would receive 60% of its costs (just as Judge Kleinfeld thought that Exxon, which achieved a 90% reduction of the punitive damages judgment, should be relieved of 90% of its costs). A different methodology could be employed such that a party that wins 60% could receive a 10% reduction in its costs, representing a 10% "win" over the 50% baseline. A simple example highlights the difference between these two approaches. Assume Party A won 60% of the case on appeal and had $100 in costs associated with the appeal, while Party B won 40% of the case and had $200 in costs. Under Judge Kleinfeld's approach, Party B would pay all of its $200 in costs plus another $60 of Party A's costs, for a total of $260 in costs. Party A would pay the remaining $40. If a party is confident that it will win on appeal, this methodology provides no incentive to limit costs. Under the other methodology, Party A would pay $90, while Party B would pay $210. Finally, a third methodology could be utilized in which the total costs are added together and then divided out according to the percentage won. Using this method, Party A would pay $120; Party B, $180. Under a scenario such as the one proposed, however, where the "winning" party has fewer costs than

Such a theory is not unprecedented. In the context of awarding attorneys' fees to a prevailing party, the United States Supreme Court has considered each party's level of success an important consideration and has ordered lower courts to award costs in proportion to that level of success.[160] As the Ninth Circuit has explained, allowing recovery for only those successful claims on appeal "will help deter submission of multiple, nonmeritorious claims."[161] At the same time, awarding fees for those claims that prove successful helps to ensure that litigants can pursue valid claims, even when attorneys' fees (or costs) might otherwise prove a substantial deterrent.[162]

Just as the Supreme Court has directed lower courts to award attorneys' fees in proportion to the prevailing party's level of success, the Federal Rules of Appellate Procedure could direct federal circuit courts to award costs in proportion to each party's level of success on appeal. The policies identified by the United States Supreme Court and other courts as supporting the apportionment of attorneys' fees according to plaintiff's level of success have similar force in the costs context, in that such a rule incentivizes parties to appeal meritorious claims, while discouraging pursuit of nonmeritorious claims.[163]

The majority in the *Exxon Valdez* costs case rejected such a mathematical approach, and in doing so, laid bare the predominant problem with awarding costs according to the percentage by which the damages were reduced on appeal or even according to the parties' relative degrees of success.[164] The majority questioned how the dissent was able to discern that Exxon was the prevailing party—or even the ninety-percent prevailing party.[165]

Exxon vigorously fought its liability for punitive damages and, in doing so, it raised four issues at the merits stage before the Supreme Court: (1) Exxon cannot

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the "losing" party, this division of costs penalizes the winner which now has to pay *more* than it would have had costs not been divided.

160. Hensley v. Eckerhart, 461 U.S. 424, 430, 436 (1983) (stating that "the level of a plaintiff's success is relevant to the amount of fees to be awarded," with "the most critical factor" in mixed judgment cases being "the degree of success obtained").

161. Aguirre v. L.A. Unified Sch. Dist., 461 F.3d 1114, 1120 (9th Cir. 2006).

162. *See id.* at 1120–21 (stating that *Hensley* helps prevent filing of frivolous claims, but encourages plaintiffs' pursuit of valid claims).

163. The force may, however, be more limited in the costs arena because the amount of costs usually pales in comparison with the amount of attorneys' fees.

164. *See* Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1082 (9th Cir. 2009) (noting that this approach would "invit[e] increased and wasteful litigation over the apportionment of costs"). The dissent chided the majority for failing to understand fourth-grade arithmetic and forgetting how to use a calculator to determine a fraction. *Id.* at 1089 (Kleinfeld, J., concurring in part and dissenting in part). In the attorneys' fees context, however, the Supreme Court has specifically disavowed "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Hensley*, 461 U.S. at 435 n.11 (internal quotation marks omitted).

165. *Exxon Valdez*, 568 F.3d at 1081. The dissent said it had made that determination based on the amount by which the punitive damages award had been reduced. *Id.* at 1085–86 (Kleinfeld, J., concurring in part and dissenting in part). The majority rejoined, "[w]ith some 20/20 hindsight, Exxon now characterizes the course of this case as having been all about the amount of money Exxon would have to pay in punitives. Having reduced that amount by 90%, it declares itself the winner. Yet this ignores the hard-fought, even relentless, battle Exxon waged to avoid any liability for punitives." *Id.* at 1081(majority opinion).

be held liable for the conduct of the ship's captain under the doctrine of vicarious liability; (2) the Clean Water Act preempts any punitive damages claim under maritime common law; (3) maritime common law does not allow punitive damages in this case because Exxon had already been punished and deterred; and (4) if punitive damages are allowable under maritime common law, they exceed the allowable amount in this case.[166] In its petition for certiorari, Exxon had also argued that the punitive damages award was excessive as a matter of due process.[167]

The Supreme Court rejected all of Exxon's arguments except the fourth—that the punitive damages were excessive under maritime law.[168] When the majority in the Ninth Circuit refused to enter the mathematical thicket of determining who prevailed in this appellate litigation as a whole, presumably the majority was considering this complex history where "neither side is the clear winner" of all of the issues.[169]

To determine which party prevailed, one might want to consider the actual percentage of the case that Exxon won, rather than simply the percentage by which the Supreme Court reduced the $5 billion punitive damages award.[170] What percent did Exxon actually win in this case? Do we assume that each of the five issues Exxon attempted to take to the United States Supreme Court is of equal merit?[171] If so, then Exxon lost four of its five arguments entirely and won 90% of its fifth argument, excessiveness under maritime law. This results in an 18% win rate, not a 90% win rate.[172] Pursuant to this calculation, the plaintiffs were the winners, winning 82% of the entire appellate litigation. Should Exxon have to pay 82% of the plaintiffs' costs even though Exxon achieved a 90% reduction in punitive damages during the course of the appellate litigation? Surely that would be an odd result because Exxon did achieve a major victory—and likely its primary goal—by pursuing its case in the appellate courts.

Judge Kleinfeld's approach would have the court of appeals look at the percentage of damages reduced, not the percentage of the issues won or lost.[173] Nonetheless, it is also odd to saddle the plaintiffs with these costs because they

166. Plaintiffs' Reply Memorandum with Respect to Post-Judgment Interest and Costs, *supra* note 56, at 9–10.

167. Petition for a Writ of Certiorari at 27–30, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219).

168. *Exxon Shipping Co.*, 128 S. Ct. at 2616–34.

169. *Exxon Valdez*, 568 F.3d at 1081 (noting that "neither side is the clear winner").

170. Rule 39(a)(4) as written certainly does not endorse one method at the expense of the other.

171. There is no reason to make that assumption. In fact, Exxon had not attempted to take certiorari from the Ninth Circuit's 2001 ruling on vicarious liability. This indicates that Exxon may have been less persuaded by the vicarious liability argument, in which case it should not be accorded equal weight in this mathematical exercise.

172. Another possible calculation is as follows: Four of Exxon's arguments provided alternative rationales for reducing damages, and one was a way to escape liability in its entirety. Exxon therefore won 90% of 50% of the case, or 45% in total.

173. Judge Kleinfeld has Supreme Court jurisprudence on his side here. *See* Hensley v. Eckerhart, 461 U.S. 424, 435 n.11 (1983) (finding that courts should not apply "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" (internal quotation marks omitted)).

"lost" 90% of their punitive damages, even though they won 82% of the appellate litigation and successfully defended a punitive damages award that remained the fourth largest punitive damages award ever secured.[174] Moreover, Exxon lost issues that would have had wide-ranging effects for future plaintiffs, such as the availability of punitive damages in cases involving vicarious liability and the availability of punitive damages at all in cases governed by maritime law.[175] By prevailing on these issues, the Exxon plaintiffs protected future plaintiffs, and that, it seems, should count for something.

Another problem with the purely mathematical approach is that it assumes that all cases involve damages. Judge Kleinfeld is correct that it is simply a matter of fourth-grade arithmetic to determine the percentage by which damages are reduced. But how does this approach apply in cases not involving damages or some other easily quantifiable relief, but an injunction, declaratory relief, specific performance, or some other form of equitable relief?

In *A&M Records, Inc. v. Napster, Inc.*,[176] for example, the plaintiff successfully defended its entitlement to an injunction, but the defendant convinced the appellate court to narrow the injunction's scope.[177] Would the dissent's approach in *Exxon Valdez* require the appellate court to determine the amount by which the injunction was limited and award those costs to the defendant? Perhaps. But that was not the approach taken by the Ninth Circuit in *A&M Records*. The court awarded costs to the plaintiff, even though the defendant successfully limited the scope of the injunction,[178] perhaps because the plaintiff kept more of the injunction intact than the defendant was able to narrow through appellate litigation. *A&M Records*, like most circuit court cases that discuss costs, does not shed additional light on this issue, although clearly the court did not try to assign a percentage to the limitation of the injunction. The court simply announced the costs decision without further elaboration.

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174. *Exxon Valdez*, 568 F.3d at 1081. The large award of punitive damages in this case lays bare another problem with the mathematical approach: any time the original award of punitive damages is high and the defendant needs to (or wishes to) secure a bond before perfecting an appeal, the plaintiff will know that he may be saddled with the defendant's costs of securing this bond. The plaintiff may realize that he cannot risk the possibility of paying the bond's premiums, and so he may settle on artificially favorable terms to the defendant to avoid the possibility of paying these high costs. This seems unfair, especially in light of the fact that the jury was attempting to punish the wrongdoer with these massive damages. (Maybe this result is not unfair: the plaintiffs could agree not to execute on the judgment, thereby allowing the defendant to appeal without securing a bond.)

175. The outcome in this case may have wide-ranging effects on Exxon, too. Nonmutual issue preclusion might estop Exxon from ever again arguing that it should not be held responsible in maritime law for punitive damages because of the actions of third parties. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–32 (1979) (sanctioning doctrine of nonmutual estoppel under certain circumstances).

176. 239 F.3d 1004 (9th Cir. 2001).

177. *A&M Records*, 239 F.3d. at 1027, 1029.

178. *Id.* at 1029 ("Even though the preliminary injunction requires modification, appellees have substantially and primarily prevailed on appeal. Appellees shall recover their statutory costs on appeal." (citing FED. R. APP. P. 39(a)(4))). The fact that the Ninth Circuit awarded certain costs to the party that "substantially prevailed" on appeal is reminiscent of the result that would follow under Washington Rule of Appellate Procedure 14.2, which requires Washington courts to award costs to the party that substantially prevailed.

Certainly there is some intuitive appeal to the mathematical approach of awarding costs. As a general proposition, it seems just to award costs to the party that substantially prevailed on appeal. It also seems just to award more costs to a party that won most of its appeal than to a party that won only a portion of its appeal.

Assuming that, with some further refinement, the mathematical approach could help courts appropriately apportion costs in mixed result cases, nothing in the current version of Appellate Rule 39(a)(4) suggests that courts should follow that approach, and certainly nothing in the rule mandates that courts follow that approach. But, in fairness, nothing stops courts from using this approach either. According to Rule 39(a)(4), costs are taxed "only as the court orders,"[179] not "in relationship to the percentage that damages were reduced or an injunction was limited" or similar language to that effect. Accordingly, different panels of different circuits may decline to follow the approach taken by the dissenting judge in *Exxon Valdez*. Rule 39(a)(4) would have to be amended to require courts to follow Judge Kleinfeld's methodology.

B. Second Proposal: Award Costs According to the Equities of the Case

The Second Circuit in *Furman v. Cirrito*[180] explained that "costs in the federal courts are considered an incident of judgment and are not used as a punitive measure, nor to deter litigation."[181] All courts that have examined costs generally agree that costs follow the winner, even if that winner is the defendant.[182]

Nonetheless, Wright and Miller's treatise, *Federal Practice and Procedure*, acknowledges that an award of costs may not be dictated solely by who won and who lost, even when that determination is clear—that is, even when Rule 39(a)(1), (a)(2), or (a)(3) applies.[183] Wright and Miller explain that equitable considerations may sway, and should sway, a court's apportionment of costs:

> Even if Rule 39(a)'s default framework applies in a given case, the court has discretion to depart from that framework. For example, the parties themselves may have contracted out of Rule 39(a)'s default framework. Further, equitable and public-policy factors may influence the court's exercise of its discretion; it has been said, for example, that "a combination of equitable considerations, turning on the state of the law at the time of the district court judgment and the nature of the litigation itself" can govern a court's decision about costs. The court may deny recovery and allow each party to bear its own costs. It may award costs

179. FED. R. APP. P. 39(a)(4).

180. 782 F.2d 353 (2d Cir. 1986).

181. *Furman*, 782 F.2d at 354 (citing Hygienic Chem. Co. v. Provident Chem. Works, 176 F. 525, 527–28 (2d Cir. 1910)).

182. *See, e.g.*, Quaker Action Grp. v. Andrus, 559 F.2d 716, 719 (D.C. Cir. 1977) (per curiam) (awarding costs on various appeals according to prevailing parties); *see also* Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 BROOK. L. REV. 727, 735–36 (2005) (discussing apportionment of costs based on outcome of appeal).

183. 16AA WRIGHT & MILLER, *supra* note 7.

> to the prevailing party but only in part. Indeed it may require the successful party to pay the costs of the losing party.[184]

In a related context, the Ninth Circuit has held that under Federal Rule of Civil Procedure 54(d), which governs a district court's apportionment of costs, a district court may appropriately deny costs to a completely successful defendant if (1) the case involves issues of substantial importance, (2) the issues are close and the plaintiff's position has merit, (3) there is a vast economic disparity between the parties, or (4) the costs are extraordinarily high.[185] Thus, these district courts may consider the equities that underlie the costs assessment, even when the apportionment would otherwise seem routine because a party completely, or almost completely, prevailed. So too, Rule 39 of the Federal Rules of Appellate Procedure could be amended to specify these sorts of equitable considerations in the determination of appellate costs.

The equities of the case certainly influenced Judge Schroeder's majority opinion in *Exxon Valdez*.[186] Although Rule 39(a)(4) does not expressly permit consideration of equitable factors, its language is broad enough to permit courts to consider such factors in the course of calculating costs. It was, after all, Exxon's malfeasance that sparked the ensuing twenty years of litigation, and had this been a Federal Rule of Civil Procedure 54(d) issue rather than an Appellate Rule 39(a)(4) issue, a strong argument could be made that all four of the equitable factors identified in *Ass'n of Mexican-American Educators v. California*[187] favored the plaintiffs in *Exxon Valdez*.[188]

First, *Exxon Valdez* presented issues of public importance in assessing liability for the "staggering damage"[189] caused by the "most notorious oil spill in recent times."[190] Moreover, the United States Supreme Court decided an issue of first impression regarding the amount of punitive damages permissible under maritime law.[191] Second, the plaintiffs' positions on the issues were meritorious.

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184. *Id.* (footnotes omitted) (quoting *Rural Housing Alliance v. U.S. Dep't of Agric.*, 511 F.2d 1347, 1349 (D.C. Cir. 1974) (Bazelon, C.J., concurring)).

185. Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 592–93 (9th Cir. 2000).

186. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1081 (9th Cir. 2009) ("[T]he equities in this case fall squarely in favor of the plaintiffs.").

187. See *supra* note 185 and accompanying text for a discussion of the four equitable factors identified by the Ninth Circuit.

188. *See generally* Plaintiffs' Response to Exxon's Memorandum with Respect to Post-Judgment Interest and Costs, *supra* note 42, at 19–22.

189. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2632 (2008).

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

191. *Exxon Shipping Co.*, 128 S. Ct. at 2619. In assessing costs in *Exxon Valdez*, it seems important to keep in mind that the Supreme Court's position regarding punitive damages in maritime cases was a new one. Had the punitive damages in that case been constrained only by the Due Process Clause, the $5 billion in punitive damages should have passed constitutional muster. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (noting that single-digit multipliers between punitive and compensatory damages are more likely to comport with due process). Just as Judge Kleinfeld argued that it was unfair for the majority in *Exxon Valdez* to "punish" Exxon by denying its costs, it would also be unfair to "punish" the plaintiffs for defending a punitive damages judgment that seemed permissible at the time it was rendered. To highlight this unfairness, consider a *Bivens*-type case in which the bad-actor defendant who lost in district court wins in the appellate court because although he trammeled on the plaintiff's constitutional rights, those rights were not "clearly established" at the time of the incident.

The plaintiffs prevailed on the preemption issue and whether Exxon could be held vicariously liable for punitive damages based on the recklessness of its ship's captain.[192] Additionally, the Supreme Court refused to examine whether $2.5 billion in punitive damages for $500 million in compensatory damages violated due process principles.[193] Third, vast economic disparity existed between the plaintiffs and Exxon.[194] The plaintiffs were individuals and small businesses; Exxon, on the other hand, was "the largest corporation in the world."[195] Fourth, the costs Exxon sought were extraordinarily high, approximately $70 million.[196]

If a court considers equitable factors when apportioning costs, the resulting ruling may conflict with the result dictated by Judge Kleinfeld's approach to the apportionment of costs, which was explored in the previous section of this Article. Perhaps the revised appellate rule governing the award of costs in mixed result cases should account for these equitable considerations and should explicitly list the factors, rather than state the open-ended directive "as the court orders," or even a slightly more constrained directive, such as "as justice requires," both of which breed too much uncertainty.[197]

C. Third Proposal: Award Costs Only Pursuant to Explicit Cost-Shifting Statutes Enacted by Congress

Congress sometimes becomes involved in the reimbursement of litigation costs by providing for the shifting of attorneys' fees between parties. These statutes shift attorneys' fees away from a prevailing party—that is, the losing party has to pay the prevailing party's attorneys' fees, despite the traditional American rule that each party bears its own fees.[198] Currently, Rule 39 provides a

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See generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Should the plaintiff really be saddled with the defendant's costs—that is, "punished"—for defending the district court's decision? The plaintiff did lose in the court of appeals. Nonetheless, a sense of equity would lead most jurists to answer that question in the negative.

192. *See Exxon Shipping Co.*, 128 S. Ct. at 2615–19 (holding in favor of plaintiffs with respect to preemption and vicarious liability issues).

193. *See id.* at 2626–27 (differentiating constitutional due process inquiry from maritime common law inquiry).

194. In his article that touches on appellate costs, Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit explicitly notes that "[s]ometimes a panel will disallow costs even though the prevailing party is normally entitled to them. This has happened, for example, when an impoverished appellant with a non-frivolous claim loses to a large corporation. In that circumstance, the decretal language sometimes says 'No costs.'" Newman, *supra* note 182, at 736.

195. Plaintiffs' Response to Exxon's Memorandum with Respect to Post-Judgment Interest and Costs, *supra* note 42, at 20.

196. *Id.* at 21.

197. Courts of appeals have always had discretion in awarding costs. *See* Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("The court necessarily has discretion in making this equitable judgment."). Before the enactment of the Federal Rules of Appellate Procedure governing costs, federal judges used their inherent power to award costs. 10 WRIGHT & MILLER, *supra* note 7, § 2665. For more information on the history of costs, see *supra* note 17. A primary point of this Article, however, is that courts have too much discretion when it comes to appellate costs in mixed result cases.

198. *See, e.g.*, 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2006) (granting courts discretion to award "reasonable attorneys' fees" to a prevailing party who is parent of disabled child under Individuals with Disabilities Education Act); 42 U.S.C. § 1988(b) (allowing attorneys' fees to prevailing party, other than

series of defaults for the apportionment of costs when no statute governs: if the appellee wins because of a dismissal or an affirmance, costs are taxed against the appellant; if the appellant wins due to a reversal, costs are taxed against the appellee; in mixed result cases, costs are taxed "only as the court orders."[199] Perhaps such an elaborate series of default rules is unnecessary and the Federal Rules of Appellate Procedure should simply state that each party bears its own costs in mixed judgment cases[200] unless Congress has provided otherwise. In fact, the Federal Rules of Appellate Procedure already do this for other types of cases, such as criminal cases, in which the United States is a party. Rule 39(b) states that "[c]osts for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law."[201]

Leaving costs for Congress to specify in particular statutes may allow for a more robust consideration of the circumstances in which it is appropriate to shift costs between or among the parties. Congress has the ability and the resources to make such determinations for categories of cases and currently does so for attorneys' fees. Giving Congress a greater role in the apportionment of costs might regularize the award of costs because more specific statutes could address particular classes of cases and could help ensure that like cases are treated alike. In the attorneys' fees context, for example, Congress has determined that parents of disabled children should recover their attorneys' fees if they prevail in an action.[202] Congress has not made a similar determination for contract cases sounding in diversity. Perhaps Congress should make the same determinations vis-à-vis costs by, for example, determining that a prevailing party in an Individuals with Disabilities Education Act case should recover all or some of its appellate costs, while a prevailing party in a contract case should not recover its costs.

With respect to attorneys' fees, the United States Supreme Court announced a rule "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'"[203] The Court has directed lower courts to determine the "degree of success obtained."[204] This has provided a relatively clear-cut rule

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the United States, in federal civil rights cases); 42 U.S.C. § 12205 (allowing reasonable attorneys' fees to prevailing party, other than the United States, in an action under the Americans with Disabilities Act).

199. FED. R. APP. P. 39(a).

200. The default that each party bear its own costs under this proposal makes more sense than a default rule that each party pay fifty percent of the total bundle of costs because, under this proposal, costs are treated like attorneys' fees, and the default regarding attorneys' fees is that each party must pay its own attorneys. Note that the default under this rule may differ from the "default" under the modified Judge Kleinfeld approach explored earlier. See *supra* note 158 and accompanying text for a discussion of the requirement that the parties split costs evenly if each party wins half the case on appeal.

201. FED. R. APP. P. 39(b); *see also* RICHARD H. FALLON JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 866 n.16 (6th ed. 2009) ("The Supreme Court has consistently held that in the absence of an authorizing statute, the United States is not liable for costs or attorney's fees." (citing United States v. Bodcaw Co., 440 U.S. 202, 203–04 n.3 (1979) (per curiam))).

202. See *supra* note 198 and accompanying text for a discussion of United States statutes allowing the recovery of attorneys' fees.

203. Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

204. *Id.* at 436. Note the similarity between this approach and Judge Kleinfeld's approach in *supra*

for courts to follow in awarding attorneys' fees.[205] Cost-shifting statutes enacted by Congress could follow this predictable pattern of providing costs to the "prevailing party," which courts could interpret as allowing costs in proportion to a party's degree of success.[206]

But this proposal may complicate rather than simplify. If the goal in revamping the appellate costs rule is to foster uniformity of decisions, there is no need to involve Congress. In fact, one suspects that Congress's involvement might lead to lack of uniformity, at least between different types of cases, because, as in the attorneys' fees context, Congress would likely consider only certain categories of costs cases at a time, leaving the other categories untouched and therefore governed by whatever default exists in the Rule.[207] Moreover, leaving costs to Congress also impairs the courts' ability to award costs that respond to the unique circumstances inherent in each case.[208] Finally, one suspects that few of these purely costs statutes would be passed, especially considering the low stakes involved in most costs cases, leaving in place the default that the Rule provides.

D. Fourth Proposal: Require Each Party to Bear Its Own Costs

The simplest solution to the costs conundrum requires each party to bear its own costs, at least in mixed result cases where neither party has acted badly.[209] Costs are generally rather low—filing fees, copying fees, and the like. If parties know from the outset that they must pay their own costs, they can more easily

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Part V.A. In fact, Judge Kleinfeld cited *Hensley* in his dissent in *Exxon Valdez* to support his cost-splitting resolution of the case. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1088 n.46 (9th Cir. 2009) (Kleinfeld, J., concurring in part and dissenting in part).

205. Or perhaps not so clear-cut. Should the "degree of success obtained" be based on the percentage of claims won or the percentage of damages reduced?

206. Nothing stops the Supreme Court from announcing a similar rule with respect to costs awarded under the Appellate Rules. The Court could similarly prescribe that a party receives appellate costs in a mixed result case to the extent that the party prevails in the appellate litigation. However, the practicalities of the Court's limited docket will likely forestall this result, and the fact that the Court chose not to offer any guidance in its remand to the Ninth Circuit in *Exxon Valdez* further shows the Court's disinterest or unwillingness to enter into this area. Changing the rule to provide explicit guidance—or requiring Congress to write statutes with such guidance—might provide a more realistic solution.

207. If Congress handles costs the way it does attorneys' fees, then Congress will enact cost statutes for particular types of cases, but not for others. An amended rule, however, will cover all types of cases, except those situations for which Congress has enacted a different cost apportionment. Accordingly, although statutes generally yield uniformity, in this set of circumstances, an Appellate Rule will provide the sought-after uniformity and should be less time-consuming to draft because one rule will cover all cases, at least as a default.

208. Recall that under the current federal costs rule, courts of appeals have discretion to depart from the default rules even when there is a clear winner and a clear loser on appeal because the courts have the explicit authority to "order[] otherwise." FED. R. APP. P. 39(a). This discretion enables courts to respond to the equities of each case or whatever else might sway the court from following the default rules.

209. For an example of a case in which a party acted badly by failing to raise arguments in a timely manner, see Dippold v. Cathlamet Timber Co., 193 P. 909, 913 (Or. 1920), *superseded by statute*, WASH. REV. CODE ANN. §§ 4.28.080, 4.28.185 (West 2010). See *supra* note 22 for more information regarding this case.

take costs into account and control how much they spend.[210] Courts will not need to spend time deciding costs issues.

At least one authority has noted that requiring each party to bear its own costs is fair and that shifting costs from the winner to the loser may unduly penalize the losing party:

> Another objection to the introduction of substantial costs is based on the view that the law at best is a gamble, and that it is unfair to penalize the losing party. . . .
>
> "The scheme urged [the loser to pay all costs] is based on the wholly unwarranted assumption that the losing party in litigation is always, or even ordinarily, in the wrong. Its sole justification must be that an adverse verdict by a jury or an unfavorable decision of the Court carries with it the necessary conclusion that the defeated party was morally culpable in bringing action, or in resisting suit, as the case may be. Nothing could be further from the actual facts of life. . . .
>
> "An enlightened Judge must realize that, in spite of his most conscientious and painstaking efforts, he is, in a given case, as like as not to do injustice when he seeks to do justice."[211]

The ease of implementing this solution along with the soundness of requiring each party to pay the costs it undertook, may make this solution preferable, at least as a default.[212]

E. Fifth Proposal: Award Costs Pursuant to a Procedure Analogous to that Found in Rule 68 of the Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 68 may provide a template for a new type of appellate rule regarding costs. Rule 68 allows a party defending against a claim to make an offer of judgment before the case goes to trial.[213] If the opposing party

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210. Costs do enter into some litigants' calculations when determining whether to pursue a case: "[I]n England a litigant rarely brings or defends an action without realizing that costs are a major consideration and that they may greatly exceed the actual sum in dispute." Goodhart, *supra* note 7, at 850. Costs are probably not such a "major consideration" in the United States, especially in appellate litigation; nonetheless, as a general proposition, it does not seem unfair to saddle each side with the costs it chooses to incur.

211. Goodhart, *supra* note 7, at 876–77 (alteration in original) (second omission in original) (quoting Linton Satterthwaite, *Increasing Costs to Be Paid by Losing Party*, 46 N.J. L.J. 133, 133 (1923)).

212. Recall that Rule 39(a)(4) currently contains no default provision. *See* 16AA WRIGHT & MILLER, *supra* note 7, § 3985 ("If the result on appeal is anything other than a dismissal, reversal or affirmance, then Rule 39 provides no default starting point. Rather, if a judgment is affirmed or reversed in part, is modified, or is vacated, Rule 39(a)(4) provides that the costs shall be allowed only as ordered by the court.").

213. FED. R. CIV. P. 68(a). Several states also allow a plaintiff to make an offer of judgment. *See, e.g.*, ARIZ. R. CIV. P. 68(a) ("At any time more than 30 days before the trial begins, *any party* may serve upon any other party an offer to allow judgment to be entered in the action." (emphasis added)); CAL. CODE CIV. PROC. § 998(b) ("Not less than 10 days prior to commencement of trial or arbitration . . . of a dispute to be resolved by arbitration, *any party* may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (emphasis added)); NEV. R. CIV. P. 68(a) ("At any time more than 10 days before trial, *any party* may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions." (emphasis added)); TENN. R. CIV. P. 68 ("At any time more than 10 days before the trial

rejects the offer and "the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."[214] Rule 68 in the trial context is designed "to encourage settlements and avoid protracted litigation."[215] The Federal Rules of Appellate Procedure could be modified to include the Rule 68 concept for costs incurred during the course of appellate litigation and expanded to allow any party to make an offer and, thereby, possibly recover its costs.[216] Once the party who lost in the district court files a notice of appeal, the appellee could make an offer to the appellant.[217] Presumably, the offer would be in an amount less than the appellee might receive if the appellate court affirms the district court's judgment in its entirety; otherwise, the appellant would have little motivation to accept the offer. If the appellant rejects the offer but achieves a smaller reduction of the award from the appellate court than the appellee had initially offered, the appellant would be required to pay all of the appellee's costs on appeal, despite the fact that the appellant achieved a reduction. The court of appeals would have no discretion on this matter: costs would automatically be awarded to the appellee.[218]

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begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property, or to the effect specified in the offer, with costs then accrued. Likewise *a party prosecuting a claim* may serve upon the adverse party an offer to allow judgment to be taken against that adverse party for the money or property or to the effect specified in the offer with costs then accrued." (emphasis added)). Federal Rule of Civil Procedure 68 could be amended to allow those pursuing claims, as well as those defending against them, to make formal offers of judgment. *See* Joshua P. Davis, *Toward a Jurisprudence of Trial and Settlement: Allocating Attorney's Fees by Amending Federal Rule of Civil Procedure 68*, 48 ALA. L. REV. 65, 69 (1996) (proposing change to Rule 68 that would allow plaintiffs to make offers of judgment); Anna Aven Sumner, *Is the Gummy Rule of Today Truly Better than the Toothy Rule of Tomorrow? How Federal Rule 68 Should be Modified*, 52 DUKE L.J. 1055, 1074 n.84 (2003) (discussing "toothy" California rule that "permits plaintiffs to make offers of judgment as well").

214. FED. R. CIV. P. 68(d).

215. 12 WRIGHT & MILLER, *supra* note 7, § 3001; *see also* Marek v. Chesny, 473 U.S. 1, 10 (1985) (discussing "Rule 68's policy of encouraging settlements"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; Ian H. Fisher, *Federal Rule 68, a Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 91 (2001) (noting Rule 68 promotes settlement through "two related devices. First, a plaintiff who rejects an offer under the rule risks having to pay the costs the defendant incurred after the offer . . . . Second, the same plaintiff will be unable to recover its own post-offer costs even if it prevails in judgment.").

216. Judge Kleinfeld recognized the value of Rule 68 even in the appellate context. During oral argument, he asked Exxon's attorneys whether any party made a Rule 68 offer of judgment during the case. The attorney responded "no," and Judge Kleinfeld ultimately resolved that Federal Rule of Appellate Procedure 39(a)(4) governed the case. Had one of the parties made a post-judgment quasi-Rule 68 offer, Judge Kleinfeld may have decided the issue differently. Oral Argument at 5:36, Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077 (9th Cir. 2009) (Nos. 04-35182, 04-35183), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pkid=0000002580.

217. In this appellate context, there does not seem to be any reason to deny the appellant the opportunity to make a similar offer. The appellant could offer something less than what the appellee had received from the district court, and if the appellee refuses, and the court of appeals reduces the judgment to an amount less than the appellant's offer, the appellant would receive his costs automatically.

218. Daniel Glimcher, Note, *Legal Dentistry: How Attorney's Fees and Certain Procedural Mechanisms Can Give Rule 68 the Necessary Teeth to Effectuate Its Purposes*, 27 CARDOZO L. REV. 1449, 1457 (2006) ("The awarding of post-offer costs to the successful Rule 68 offeror, one who has made an

A Rule 68 counterpart in the Federal Rules of Appellate Procedure would have to work in tandem with the current Rule 39—or with a more concrete default such as each party bearing its own costs—because nothing requires an appellee to make an offer to the appellant.[219] If the appellee declines to make such an offer and the appeal results in a mixed outcome, then both parties will have to take their chances on the apportionment of costs "as the court orders" or according to another default provided in the revised rule. If the amended rule contains an "offer of costs" judgment provision modeled on Rule 68, however, the appellee could shift to the appellant the risk of continuing the litigation by making a generous offer, and an appellee may be inclined to do so in a case like *Exxon Valdez*.[220] Incentivising reasonable offers also encourages settlement and helps busy courts of appeals reduce their overloaded dockets.

A provision analogous to Rule 68 enacted into the Federal Rules of Appellate Procedure would obviate the need for a court of appeals to determine which party prevailed during the appeal (at least where one party makes an offer),[221] which, as discussed, can be difficult to ascertain, especially if the appellant raised several issues on appeal and won some but lost others. A Rule 68-type costs rule would also keep an appellate court from entering into the mathematical thicket of determining what percentage of the case each party won or lost.[222] Finally, an appellate Rule 68 for costs would reduce the number of cases clogging the federal circuit courts because some parties will undoubtedly accept the other parties' offers rather than risk paying the opposing parties' costs in addition to their own, at least in cases where costs are not insignificant.[223]

An appellate costs offer-of-judgment rule may generate some problems as well. For example, non-monetary relief creates issues "because courts cannot easily compare non-monetary relief to money, or even to other non-monetary relief. Essentially, questions arise as to whether the court is comparing 'apples to apples' and 'oranges to oranges.'"[224] This may mean that the appellate rule should

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offer more generous than the judgment finally obtained, is mandatory.").

219. In fact, "cost bills [in district courts] ordinarily were not large enough to provide a substantial incentive to settle." 12 WRIGHT & MILLER, *supra* note 7, § 3001. If that is true in district courts, where costs tend to be higher because of expert witness fees, depositions, and the like, so much the worse in appellate courts, where costs usually include only filing fees and other small expenses.

220. *See* Glimcher, *supra* note 218, at 1459 (noting incentives of Rule 68); *Marek*, 473 U.S. at 5 (noting that Federal Rule of Civil Procedure 68 "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits"). The same reasoning might well apply in an appellate court.

221. *See* Glimcher, *supra* note 218, at 1454 ("A Rule 68 offeror will never be the prevailing party in the traditional sense."); *id.* at 1457 ("Rule 68 is an exception to the general rule that costs are awardable to the prevailing party [in district court].").

222. *See* Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1082 (9th Cir. 2009) (rejecting Exxon's suggested mathematical formula to match costs to reduction in damages).

223. Although some commentators "claim that Rule 68 is not often utilized," at least one scholar claims that Rule 68's "use is underreported." Fisher, *supra* note 215, at 89. Fisher continues: "A Rule 68 offer that is not accepted will not be filed with the court. Thus, no reliable mechanism exists for counting the frequency of Rule 68 offers. In addition, a defendant may prefer to settle privately even though it has made a Rule 68 offer." *Id.*

224. *Id.* at 107.

apply only to cases involving purely money damages so that no problem of comparables arises.

Note how this rule would have worked in the *Exxon Valdez* case. Exxon, upon being hit with $5 billion in punitive damages, filed a notice of appeal. The plaintiffs, weighing the risk of the award being reduced and the high costs associated with Exxon's letters of credit, may have decided to settle with Exxon for some amount less than $5 billion.[225] If the plaintiffs had offered to accept half that amount, Exxon might have settled, obviating the need for further litigation including, of course, the 2009 costs litigation before the Ninth Circuit.[226] If Exxon did not agree and the rest of the case played out as it did, with the reduction of punitive damages to $500 million, then the appellate costs offer-of-judgment rule would not come into play because the judgment on appeal was more favorable to the appellant than was the unaccepted offer. If Exxon did not agree to the plaintiffs' offer, however, and Exxon had ultimately been held responsible for some amount greater than $2.5 billion in punitive damages, then the appellate offer-of-judgment rule would govern, and Exxon would have had to pay the plaintiffs' costs and bear its own.

This hypothetical shows another shortcoming of an appellate offer-of-judgment costs rule: if the appellant does achieve a more favorable result than the appellee had offered, the rule does not inform the appellate court how to apportion costs (absent a built-in default). At least, however, in the converse situation where the result is less favorable to the appellant than the appellee's offer, the circuit court of appeals will know how to apportion costs.

VI. CONCLUSION: PROPOSED AMENDMENT TO RULE 39(a)(4)

As previously discussed, the current rule governing the apportionment of costs in mixed judgment cases provides inadequate guidance to circuit courts. As also noted, in many cases, costs are simply too meager in amount to attract attention and in those few cases in which costs do rise to significant levels—such

225. The following explains how Federal Rule of Civil Procedure 68 "operates in a fashion consistent with the Coase Theorem":

> Both parties will have to perform an economic analysis to determine at what price each of them would be willing to discontinue litigation. A plaintiff, for example, will have to determine the probability of recovering an amount greater than the defendant's offer, balance that likelihood against the amount he may be penalized if he does not recover an amount greater than the offer, factor in the cost of continued litigation, and consider the time value of the money he is being offered. A defendant will have to perform a similar analysis. The defendant will have to determine the probability of defeat, assess how much continued litigation would cost, factor in how much interest could be earned on any potential offer monies during the course of the litigation, and determine the negative value of an adverse judgment being entered against him. At the end of any such exercise the market should, theoretically, create a resolution between the parties.

Glimcher, *supra* note 218, at 1459–61 (footnote omitted).

226. Exxon may not have settled for that amount. When the Ninth Circuit reduced the punitive damages award to $2.5 billion, Exxon took the case to the Supreme Court, which indicates that Exxon was not satisfied with the reduction to $2.5 billion. On the other hand, Exxon may not have been satisfied with the reduction because, by that time, it had already sunk so much time, effort, and money into the case.

as *Exxon Valdez*—there may be more at stake than simply identifying the prevailing party on appeal. The prevailing party analysis on which most judges rely fails to capture the equitable considerations that should affect the apportionment of costs. Accordingly, this author suggests an amendment to Rule 39(a)(4) requiring that parties bear their own costs in mixed judgment cases,[227] subject to a different apportionment if justice requires. But the rule should not end there because "as justice requires" suffers from a problem similar to that suffered by "as the court orders" in that "as justice requires" fails to provide adequate guidance.

The other amendments explored in the previous section[228] suffer from various shortcomings. Determining which party "won" the appeal and by how much is complicated, especially if the parties raised several issues during cross-appeals and each party won some of those but lost others in varying proportions.[229] Similar difficulties arise when the relief sought is equitable in nature rather than pecuniary. Directing courts to review the equities of the case without offering suggestions as to what those considerations may be results in too much discretion—too unbounded by particulars—and parties unhappy with the resulting decision may complain about the result.[230] Requiring Congress to enact specific cost-shifting statutes is inefficient and may result in dissimilar treatment between different classes of cases.[231] And requiring each party to bear its own costs creates inequities in cases if vast economic disparity exists between the parties or one of the parties pursued the ultimately unsuccessful litigation in the public's interest.[232] Finally, refusing to shift costs in the absence of a rejected offer from one of the parties will not cover a sufficient number of cases, and whatever default is enacted to cover the other cases will likely suffer from at least one of the aforementioned defects.[233]

Accordingly, Rule 39(a)(4) should be amended to require that, in mixed judgment cases, courts assess the equities of the case. In particular, the Rule should specify the considerations that bear on the equity determination as follows:[234]

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227. The baseline could have been to split costs evenly. However, requiring each party to bear its own costs in the usual course accords with the American rule regarding attorneys' fees, which requires each party to pay its own attorneys. Moreover, to some extent, each party can control the amount it spends in costs, making it more equitable for that party to bear the costs it chose to incur. Finally, splitting costs evenly may be unfair when one party has voluntarily incurred tremendous expenses, while the other has kept its costs to a minimum.

228. See *supra* Part V for a discussion of possible amendments to Appellate Rule 39(a)(4).

229. See *supra* Part V.A for a discussion of a proposal to award costs in proportion to the percentage of the case won on appeal.

230. See *supra* Part V.B for a discussion of a proposal to award costs according to the equities of the case.

231. See *supra* Part V.C for a discussion of a proposal to award costs only pursuant to explicit cost-shifting statutes enacted by Congress.

232. See *supra* Part V.D for a discussion of a proposal to require each party to bear its own costs.

233. See *supra* Part V.E for a discussion of a proposal to award costs pursuant to a procedure analogous to that found in Rule 68 of the Federal Rules of Civil Procedure.

234. Although this Article has been concerned with appellate costs in mixed judgment cases, nothing precludes the Amendment of the Federal Rules of Appellate Procedure to include these

If a judgment is affirmed in part, reversed in part, modified, or vacated,[235] each party bears its own costs unless the court determines that such apportionment would be inequitable. Factors bearing on the equity of the costs determination include the following:

(1) which party prevailed and by what amount;[236]

(2) the systemic interests in calling the courts' attention to the legal issues involved in the case;

(3) the parties' ability to bear the costs;

(4) whether the issue(s) was (were) meritorious or one(s) of first impression;

(5) whether the parties attempted to negotiate in good faith after the district court's entry of judgment;[237]

(6) whether the costs sought are reasonable;

(7) whether the costs are extraordinarily high;[238]

(8) federal statutes in related areas;[239]

(9) in diversity cases, the state rule with respect to costs;[240] and

(10) the interests of justice.

A court of appeals assigned the task of awarding costs under Rule 39(a)(4) would have a default cost rule to fall back on if the costs are low and nothing

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equitable considerations in cases in which a clear winner and a clear loser emerge. Currently, the Rules do allow a court of appeals to "order[] otherwise." In such cases, the equitable considerations listed in this Article could inform the courts of appeals when they can, or should, depart from the defaults and "order[] otherwise." Moreover, nothing precludes amending the Federal Rules of Civil Procedure to take these same equitable considerations into account. Rule 54(d) allows costs to the prevailing party unless a court order provides otherwise. FED. R. CIV. P. 54(d). A court might order otherwise in response to some of the equitable factors listed in this proposed rule. A change to Rule 54(d) might have more impact than an amendment to Appellate Rule 39 because of the higher costs associated with trials and the greater number of cases in trial courts.

235. Perhaps vacated judgments should not be considered "mixed judgment" cases. After all, in the usual course of events, a vacated judgment favors the appellant. This is probably why Supreme Court Rule 43.2 provides costs to the appellee if the Court reverses *or vacates* a lower court's judgment. SUP. CT. R. 43.2.

236. The comments to the rule could further illuminate this factor: in making this determination, the court should consider whether the judgment below was substantially modified on appeal.

237. In making this determination, the court should consider whether any party made an offer of judgment at the time of the appeal of the district court's judgment (and how much was offered) and any other attempts at settlement.

238. To highlight the difference between considerations (6) and (7): spending even a very small amount to file a surreply that was not authorized by the court of appeals might be unreasonable, but not extraordinarily costly, while spending $70 million to secure a bond might be reasonable, but extraordinarily costly.

239. Congress's fee-shifting statutes, and the federal jurisprudence applying them, may prove useful places for courts to look when confronted with thorny costs issues. *See, e.g.*, 42 U.S.C. § 1988(b) (2006); 42 U.S.C. § 12205 (2006); 20 U.S.C. § 1415 (i)(3)(B)(i)(I) (2006).

240. In *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 7–8 (1987), the Court indicated that the state rule regarding appellate costs is not dispositive, but that does not mean that the state rule should never provide guidance under any circumstances. In fact, *Burlington Northern* does not preclude the possibility of a state rule informing a federal court sitting in diversity regarding costs in the absence of a federal rule on point.

strikes the court as inequitable about requiring each party to bear its own costs. This default would likely cover the vast majority of cases involving appellate cost issues. When faced with a more difficult costs case or one that involves high dollar amounts, such as *Exxon Valdez*, however, the court could explore these factors and come to a reasoned decision regarding costs. The judges would all consider these same factors, making it more likely that the method of decision would be uniform, if not in the result itself.

Ultimately, courts of appeals should have some discretion in awarding costs on appeal. On the one hand, wooden rules can rarely account for all cases in an equitable manner. On the other hand, courts and parties should not be left twisting in the wind, without any guidance at all.

Major costs cases occur infrequently, but when they do occur, courts have had trouble justifying their decisions. An amended rule that grants courts flexibility, but also constrains their discretion, would help appellate courts in apportioning costs rationally, regularly, and reliably in those cases in which costs truly matter.