MISSING THE BOAT WITH *EXXON VALDEZ* AND MISSING THE MARK WITH *BMW*'S GUIDEPOSTS: AN ANALYSIS OF PUNITIVE DAMAGES UNDER LAW AND ECONOMICS THEORY AND THE ROAD TO ENVIRONMENTAL RUIN

Jacqueline F. Pruner[†]

ABSTRACT

The sixteen-year-old story of Exxon Valdez reads like a true Shakespearean tragedy. The millions of gallons of oil released into Alaska's marine ecosystem from a tanker helmed by an inebriated captain resulted in toxic harms that still affect humans and non-humans alike. Although punitive damages have been awarded, they are steadily being reduced, much like the species populations that inhabit Prince William Sound. This Comment explores and analyses both current punitive damages law and law and economics theory and calls for changes in determining punitive damages in environmental litigation in order to reflect the true societal value of pristine environments.

****

> If a path to the better there be, it begins with a full look at the worst.
> ~ Thomas Hardy

> In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all . . . . The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts – that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."[1]
> ~ Justice Antonio Scalia, dissenting in *BMW of North America, Inc. v. Gore* (1996)

> Historically, the most efficient way for society to handle those individuals who point out its faults is to brand them as raving lunatics and crucify them if possible . . . . The sad truth is that the major industries associated with petroleum . . . have been conducting a huge science experiment on mankind.[2]
> ~ Walter J. Crinnon, Foreward, *Sound Truth And Corporate Myths*, 2005

[†] The author would like to thank Professors William H. Rodgers, Jr. and Steve Calandrillo of the University of Washington School of Law for their guidance in the areas of environmental law and law and economic theory, respectively. The author would also like to thank her wonderful fiancé, family and friends for their ongoing encouragement and support in the author's ongoing writing endeavors. Any errors or omissions are the author's own.

[1] BMW of N. Am., Inc. v. Gore, 517, U.S. 559, 605-606 (1996) (Scalia, J., dissenting).

[2] DR. RIKI OTT, SOUND TRUTH AND CORPORATE MYTHS: THE LEGACY OF THE EXXON VALDEZ OIL SPILL xv-xvi (2005).

I. INTRODUCTION

March 24, 2005 marks the sixteenth anniversary of possibly the worst environmental disaster in the history of the United States of America. A disaster which was truly a tragedy, for it was completely avoidable. But perhaps the greatest disaster was the ensuing hundreds of mass environmental litigations which took place, of which a mere $900 million compensatory and remedial settlement for the environment—"to restore and rehabilitate the damaged natural resources in exchange for a release of all claims"[3]—took place between the United States Government and the State of Alaska and Exxon, with no mention of environmental punitive damages.[4] As a result, the only punitive damages in dispute are not for environmental destruction and degradation, but rather, for expected economic damages suffered by the commercial fishing industry. For the purpose of the $5 billion in punitive damages—at the time the largest punitive "damages award in American history"[5]—was made clear:

> This is not a case about befouling the environment. This is a case about commercial fishing. The jury was specifically instructed that it could not award damages of environmental harm. The reason is that under a stipulation with the United States and Alaska, Exxon had already been punished for environmental harm. The verdict in this case was for damage to economic expectations for commercial fishermen.[6]

Just after midnight on March 24, 1989, the Exxon Valdez, helmed by an inebriated Captain Joseph Hazelwood, ran aground on Bligh Reef—a well-known navigational hazard that

---

[3] Eyak Native Village v. Exxon Corp., 25 F.3d 773, 775 (9th Cir. 1994).

[4] *Id*. "The State of Alaska and the United States Government also brought actions against the defendants on behalf of the public for injury to natural resources pursuant to the provisions of the Clean Water Act, 33 U.S.C. § 1321(f), and other federal environmental legislation. On October 8, 1991, the state and federal governments' claims against Exxon Corp. and Exxon Shipping Co. were resolved by entry of an Agreement and Consent Decree in the district court. The Agreement and Consent Decree provided for Exxon Corporation and Exxon Shipping to pay the governments at least nine hundred million dollars ($ 900,000,000) to restore and rehabilitate the damaged natural resources in exchange for a release of all claims, including natural resources claims on behalf of the public. There is also a provision for an additional one hundred million dollars ($ 100,000,000) for unexpected damages under certain conditions." *Id*.

[5] In re Exxon Valdez 270 F.3d 1215, 1225 (9th Cir. 2001) [hereinafter Exxon II].

[6] *Id*. at 1215.

is clearly marked on any navigational chart of Prince William Sound.[7] The result of this collision was a disaster of monolithic proportions.[8] The hull of the Exxon Valdez tore open, hemorrhaging millions of gallons of oily black blood into the then-pristine waters and shores of Prince William Sound.[9] Just how much oil the Exxon Valdez lost on that fateful day is still in dispute, but the uncontested range is between an estimated eleven to thirty-eight million gallons, with Exxon reporting 11 million gallons—the figure used to this day by the media.[10] However, it is worth noting that the State of Alaska's estimate sits at around 30 million gallons.[11] Yet regardless of the amount of contamination, the result of its oily release was the poisoning of the biodiversity of Alaska's waters and shores and the life connected to them—in other words, the entire marine ecosystem.[12] Every species within this ecosystem was negatively impacted, whether that negative impact was direct or indirect.[13] Humans were also affected.[14] Commercial fisherpeople, sports fishers, and cannery workers were affected economically.[15] Recreationalists, naturalists, environmentalists and scientists were affected psychologically.[16] On-site cleaners of the disastrous spill were affected physically with contamination—affected just like the oil-damaged ecosystem the effects of which these people attempted to mitigate. Native Alaskans were affected in a way that reflected "a personal, economic, psychological, social, cultural,

---

[7] Robert E. Jenkins & Jill Watry Kastner, Comment, *Running Aground in a Sea of Complex Litigation: A Case Comment on the Exxon Valdez Litigation*. 18 UCLA J. ENVTL. L. & POL'Y 151, 156 (1999).

[8] *See generally* Exxon II, 270 F.3d 1215 (9th Cir. 2001).

[9] *Exxon II*, 270 F.3d. at 4.

[10] *Id.* at 4-5.

[11] *Id.* at 5. The State's estimate takes into account the known volume of water in the cargo of its tankers, while Exxon's estimate does not. *Id.*

[12] *See generally* OTT, *supra* note 2.

[13] *Id.*

[14] *Id.*

[15] *Id.*; Jenkins & Kastner, *supra* note 7, at 156.

[16] *See generally* OTT, *supra* note 2.

communal and religious form of daily living."[17] And, as human beings, all were affected—in many, many more ways than merely economic.[18]

Failure to immediately mitigate the results of the spill led to over 2,592 miles of coastline contamination, with at least hundreds of thousands of species killed.[19] The massive environmental damage of Prince William Sound and the surrounding Gulf of Alaska coastline lead to massive clean-up efforts, payouts from mass environmental litigation and fines and restitutions costing Exxon over $3.4 billion.[20] Yet the damages eventually obtained by the plaintiffs of the actions are solely based on use market value and primarily based on economic loss, including the $5 billion punitive damages award[21]—an award that the courts are steadily reducing, much like the populations of the petroleum-poisoned species that inhabit Prince William Sound.[22] This legal solution to environmental loss—mere injurer-, tortfeasor- or defendant- led environmental clean-up and money damage awards based solely on easily-calculable, use-market-valued economic losses—is insufficient in the face of the value society increasingly places on a disappearing natural, healthy and pristine environment. The great insufficiency of the clean-up efforts and the punitive damages awards becomes even more apparent when the egregious actions of the injurers make clear how truly avoidable the environmental disaster and senseless the destruction of this Alaskan ecological gem were. In such a case as *Exxon Valdez*, contrary to current Supreme Court case law and law and economics

---

[17] Jenkins & Kastner, *supra* note 7, at 156 (citing In re Exxon Valdez, 104 F.3d 1196, 1197 (9th Cir. 1997).

[18] *Id*.

[19] *Id*. at 153.

[20] Exxon II, 270 F.3d 1215, 1244 (9th Cir. 2001). "Exxon's casualty losses for the vessel and cargo (approximately $ 46 million), n143 the costs of clean up (approximately $ 2.1 billion), the fine and restitution (approximately $ 125 million), settlement with the government entities (approximately $ 900 million), settlements with private parties (approximately $ 300 million), and the net compensatory damages (approximately $ 19.6 million) totaled over $ 3.4 billion." *Id.*

[21] In re Exxon Valdez 270 F.3d 1215 (9th Cir. 2001) [hereinafter Exxon I].

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

assertions, punitive damages are truly justifiable—not only for economic losses, but for the loss of the environment itself.

Punitive damages awards, which are an historical part of traditional state tort law,[23] are used to punish an injurer for actions viewed as reprehensible to society and to deter future conduct by this and all other would-be injurers.[24] The purpose of punitive damages is not to make the plaintiff whole, but rather, is purely to punish and deter the defendant.[25] Thus, "punitive damages are meant to provide a public remedy for a public wrong rather than an individual remedy."[26] However, the recent landmark Supreme Court case law has limited punitive damages awards for their violation of the Due Process Clause of the Fourteenth Amendment—the result of such awards being termed "excessive" damages and for failing to place the defendant on "fair notice" that such damages could in fact be awarded.[27] But how much of a punitive damages award is too much when dealing with environmental destruction due to pollution such as the *Exxon Valdez* oil spill, especially if the only remaining remedy is for economic damages rather than environmental damages?

Law and economics theory identifies contingent valuation ("CV") as one of the only methods seriously considered for use in such cases where the environmental harms created cannot or have not been assigned use market value.[28] "CV is essentially the collection of

[23] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984).

[24] Daniel M. Weddle, *A Practitioner's Guide to Litigating Punitive Damages After BMW of North America, Inc. v. Gore*, 47 Drake L. Rev. 661, 662 (1999).

[25] *Id.*

[26] *Id.*; Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 Am. U. L. Rev. 1573, 1579 (1997).

[27] Joseph J. Chambers, *In Re Exxon Valdez: Application of Due Process Constraints On Punitive Damages Awards*, 20 Alaska L. Rev. 195, 202-18 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

[28] STEVE CALANDRILLO, READING MATERIALS FOR LAW & ECONOMIC A 561, UNIVERSITY OF WASHINGTON SCHOOL OF LAW Chapter 4, 4-5 (2004) (excerpted from S. SHAVELL, PRINCIPLES, Chapter 4 Extensions of Basic Theory (2000)). "Although economists have developed several indirect methods to measure nonmarket use values, currently the only technique that can measure nonuse values is the contingent valuation method (CV) . . . ." Note,

statistics about the values people say they place on something (as opposed to what they really would pay for it)."[29] Through the use of survey questions, CV determines what people value public goods at by discovering what they would be willing to pay to protect, preserve or improve them.[30] Yet economists are increasingly criticizing CV as being value-laden, subjective, bias-ridden and inherently unreliable.[31] However, "[w]hen natural resources are despoiled, the legal system should assess liability for lost nonmarket values to give despoilers proper incentives to take safety precautions."[32] Simply determining CV to be insufficient without allowing for some other form of nonuse nonmarket valuation to be transferable into use market-valued dollars for purposes of punitive damages awards leaves the environment back at Garrett Hardin's *reverse tragedy of the commons scenario*.[33] A tragedy of the common occurs when the unbridled freedom to act, when combined with social stability, results in the total devastation of a shared environmental commons.[34] Typically, the destruction occurs when something is taken out of the commons; pollution of an environment, however, puts something into the commons, and is thus the reverse.[35] Law and economics theory must accept that a nonuse nonmarket value for an environment does not equate to no value, but rather to a high value—perhaps even to the invaluable—whether the punitive damages are for direct environmental harm or economic damages resulting form that harm.

"Ask A Silly Question . . .": Contingent Valuation Of Natural Resource Damages, 105 Harv. L. Rev. 1981, 1981 (1992).

[29] CALANDRILLO, *supra* note 28, at 5.

[30] Note, *supra* note 28, at 1981.

[31] *Id*.

[32] *Id*.

[33] Garrett Hardin, *The Tragedy of the Commons*, Science, 162 (1968):1243-1248, available at: http://dieoff.org/page95.htm (last visited March 25, 2005).

[34] *Id*. "Ruin is the destination toward which all men rush, each pursuing his interest in a society which believes in the freedom of the commons. Freedom in a commons brings ruin to us all." *Id*.

[35] *Id*.

This Comment calls for changes in determining punitive damages in environmental litigation and at least a temporary acceptance of CV in order to help the American legal system come closer to a reflection of the true societal value of pristine environments, be they nonuse nonmarket intrinsic values or use market economic values. Part II of this Comment explores and analyses the inadequacy of the most recent landmark punitive damage awards case law in protecting the punitive damages award of the *Exxon Valdez* spill. Part III explores and analyses the inadequacy of current law and economic theory regarding punitive damage awards and CV in protecting the environment in general. Part IV proposes changes to current legal standards of punitive damages law and law and economic theory in order to better legally protect the environment and asserts why, from a policy prospective, punitive damages should accurately reflect the value society places on its natural, healthy and pristine environment.

II. CURRENT LEGAL SOLUTIONS FAIL TO ADEQUATELY PROTECT THE ENVIRONMENT FROM POLLUTION

The current legal methods of punitive damages awards in order to deal with massive environmental pollution sorely fail to adequately protect the environment from harm. This failure occurs in part because the increasing tightening of constitutional constraints in punitive damages awards grossly under-value a pristine, healthy environment. Such failure becomes evident when the "due process fair notice excessiveness jurisprudence"[36] legal cases are examined in which the United States Supreme Court holdings limit punitive damages awards.[37] These landmark cases are: *BMW of North America, Inc. v. Gore*, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, and *State Farm Mutual Automobile Insurance Co. v. Campbell*.[38]

[36] Chambers, *supra* note 27, at 212.
[37] *Id.* at 204-223.
[38] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

A. PUNITIVE DAMAGES AWARDS UNDER THE SUPREME COURT'S DUE PROCESS FAIR NOTICE EXCESSIVENESS STANDARD FAIL TO PROTECT THE ENVIRONMENT

The due process fair notice excessiveness standard for punitive damages awards as laid out by the Supreme Court is an insufficient one. This standard has been criticized for its failure to create uniformity and predictability.[39] Added to these shortcomings of the punitive damages standards for excessiveness, however, is the additional failure of punitive damage awards to adequately value and thus protect the environment.

Punitive damages are, quite simply, damages intended to punish the defendant. "Punitive damages have long been a part of traditional state tort law."[40] Specifically, they are:

> Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; such damages, which are intended to punish and thereby deter blameworthy conduct, are generally not recoverable for breach of contract.[41]

Punitive damages are viewed as "quasi-criminal"[42] monetary awards which operate as "private fines levied by civil juries" to advance the objectives of government.[43]

> Moreover, punitive damages may have a retributive or expressive function, designed to embody social outrage at the action of serious wrongdoers. They may reflect the "sense of community" about the egregious character of defendants' actions.[44]

There are three landmark federal decisions from the Supreme Court which collectively expanded the concept of a punitive damages awards restriction by the United States Constitution

---

[39] Chambers, *supra* note 27, at 195.

[40] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984).

[41] BLACK'S LAW DICTIONARY 164 (Pocket ed. 1996).

[42] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991).

[43] *Cooper*, 532 U.S. at 432; *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) (citing *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

[44] *Cooper*, 532 U.S. at 432 (citing Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L. J. 2071, 2074 (1998).

("Constitution").[45] These decisions are relatively recent, with all three of them decided between 1996 and 2003.[46] The first, *BMW of North America, Inc. v. Gore* ("*BMW*"), held that the punitive damages award was too high and thus violated the Due Process Clause of the Fourteenth Amendment for an excessiveness that failed to give fair notice to the defendant of the possibility of its imposition.[47] *BMW* established guideposts in determining whether a punitive damages award is constitutionally excessive.[48] The second, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* ("*Cooper*"), upheld the rule of *BMW*: that the Due Process Clause forbids the imposition of grossly excessive punishments on torfeasor defendants and additionally held that a *de novo* standard of review should be used on review rather than an abuse-of-discretion standard.[49] Finally, the third, *State Farm Mutual Automobile Insurance Co. v. Campbell* ("*State Farm*"), determined: that a state cannot punish a defendant for conduct occurring out-of-state; that without a nexus to the harm suffered by the plaintiff in a given case, evidence of bad conduct cannot be used to show reprehensibility; and that a defendant's wealth is not a proper factor for courts to consider when reviewing the constitutionality of a punitive damages award.[50]

1. BMW *and its Inadequacy with Regards to Environmental Valuation and Protection*

BMW of North America, Inc. v. Gore ("*BMW*") involved a nation-wide BMW corporate policy which did not notify its dealers of any pre-delivery damage to any car when repair costs

---

[45] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

[46] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

[47] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575-76 (1996); Joseph J. Chambers, *In Re Exxon Valdez: Application of Due Process Constraints On Punitive Damages Awards*, 20 Alaska L. Rev. 195, 204-09 (2003).

[48] *BMW*, 517 U.S. at 574-86; Chambers, *supra* note 27, at 212.

[49] *Cooper*, 532 U.S. at 434-436 (2001); Chambers, *supra* note 27, at 209-13.

[50] State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003); Chambers, *supra* note 27, at 212-17.

totaled less than three percent of the car's suggested retail price.[51] Dr. Gore, the plaintiff, purchased a BMW for $40,740.88; some time after the purchase, Dr. Gore discovered that the car had been partially repainted by the national distributor, likely after being damaged by acid rain during transport.[52] The cost of the repaint repair was $601.37—1.5 percent of the suggested retail price of the car.[53] The plaintiff requested $4,000 in compensatory damages, a figure based on expert testimony that stated that the repainting devalued the car by approximately ten percent.[54] Further, the plaintiff sought $4 million in punitive damages, since approximately 1,000 cars had been sold nation-wide in this manner.[55] The jury agreed with the plaintiff, finding that the nondisclosure policy was a "gross, oppressive or malicious" fraud under Alabama state law.[56]

On appeal, the Alabama Supreme Court reduced the punitive damages award to $2 million, holding that the incorporation of the cars affected outside of Alabama in determining the punitive damages award was improper.[57] The United States Supreme Court granted certiorari to better define the standard of what constitutes a punitive damages award so excessive as to reach the realm of unconstitutionality.[58] It stated that:

> Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. . . .Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.[59]

---

[51] *BMW*, 517 U.S. at 562. This policy was adopted in 1983. *Id*. at 563.
[52] *Id*. at 563..
[53] *Id*. at 564.
[54] *Id*.
[55] *Id*.
[56] *Id*. at 565; Ala. Code §§ 6-11-20, 6-11-21 (1993).
[57] *BMW*, 517 U.S. at 567-68.
[58] *Id*. at 568.
[59] *Id*.

The Supreme Court agreed with the Alabama Supreme Court's finding that Alabama punitive damage award laws could not reach outside of its jurisdiction, and also found the punitive damages to be "grossly excessive" due to a lack of fair notice of the punishable conduct and the severity of the penalty.[60] Three guideposts were used by this Court to show a lack of fair notice that results in the "grossly excessive" punitive damages award: the degree of reprehensibility of the defendant's conduct; the disparity or ratio between the harm or potential harm suffered by the plaintiff and the punitive damages awarded; and the difference between the punitive damages and the civil penalties authorized or imposed in similar cases.[61]

The United States Supreme Court in *BMW* held that defendant BMW did not meet any one of the three guideposts.[62] BMW did not meet the "high degree of culpability" or "egregiously improper conduct" that warrants a substantial punitive damages award of $2 million.[63] Nor did this defendant deserve such an unreasonable ratio of punitive damages to compensatory damages—in this case a ratio of 500 to 1 exists, with the punitive damages exceeding by 500 times the amount of the compensatory damage.[64] Finally, by comparison to the civil or criminal penalties for similar misconduct with the punitive damages award, although the Court refused to articulate a "bright line marking the limits of a constitutionally acceptable punitive damages award," it did find that the $2 million dollar award in this case did exceed that constitutional limit.[65]

---

[60] *Id*. at 573-74.
[61] *Id*. at 575-76
[62] *Id*. at 575-86
[63] *Id*. at 580.
[64] *Id*. at 575-76
[65] *Id*. at 583-87. For a thorough evaluation of *BMW*, from a practitioner's standpoint, *see* Weddle, *supra* note 24.

a. The General Inadequacy of BMW's Three Guideposts

The deficiency of *BMW* lies in its "idiosynchratic"[66] character which the Supreme Court nevertheless utilized to create an extremely mushy standard of constitutional constraint that in essence usurps the law-making authority of the States and decision-making authority of the jury in the name of Constitutional fairness, or Due Process.[67] Certainly in the case of *BMW* an award of four—or even two—million dollars to one car purchaser suffering actual damages of $4,000 is excessive. But for the Supreme court to make its ruling based on a "gut feeling"—or, as Justice Ginsberg stated in her dissent, a "raised eyebrow test"[68]—that in this case the award is simply "too big" is not doing this question of constitutionality justice. For such a ruling based on a "gut feeling"—even if the right one—should not seek justification for itself based on a three-guidepost reasonableness rule that analyses reprehensibility, ratios and comparable conduct but possesses neither a "bright-line"[69] marker nor a "mathematical formula."[70] Such an action elevates "fairness" to the level of substantive due process which then raises a constitutionality issue reviewable by the United States Supreme Court for all jury findings, including both *how* reprehensible as well as *if at all* reprehensible.[71] According to Justice Scalia in his dissent, through this reasoning, "*every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is stupefying."[72]

---

[66] *BMW*, 517 U.S. at 610 (Ginsberg, J., dissenting).

[67] *Id*. at 587 (Breyer, J., concurring); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 453, 454, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 40-42, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991).

[68] *BMW*, 517 U.S. at 613 (Ginsberg, J., dissenting).

[69] *Id*. at 613

[70] *Id*.

[71] *Id*. at 607 (Scalia, J., dissenting).

[72] *Id*.

b. The Inadequacy of BMW *with Regards to* Exxon Valdez

Comparing the *BMW* case to the *Exxon Valdez* case is like comparing apples and oranges, yet the U.S. Court of Appeals for the Ninth Circuit does just that.[73] In *Exxon II*, the Ninth Circuit remanded the case back to the district court in order to consider the constitutional analysis.[74] Before it did so, however, it gave guidelines under *BMW*'s three guideposts.[75] Under reprehensibility, the Ninth Circuit agreed that the facts of the *Exxon Valdez* case find reprehensibility, "[b]ut this goes more to justify punitive damages than to justify punitive damages at so high a level."[76] The Ninth Circuit went on to say that factors such as "prompt and comprehensive" mitigating actions on the part of Exxon and the fact that Exxon did not spill the oil on purpose or kill anyone must be taken into account.[77] Under the "reasonable relationship" ratio, the Ninth Circuit looked at the $287 million compensatory damage award in comparison to the $5 billion punitive damages award for a ratio of 17.42 to 1—a ratio larger than the single-digit ratios previously asserted by the Supreme Court.[78] Finally, under the comparable conduct guidepost, the Ninth Circuit compared the punitive damages award with criminal fines such as those in 18 U.S.C. § 3571, which award $200,000 to $500,000. Even 18 U.S.C. § 3571(d), which calls for double the gross loss or double the gross gain, may only allow damages double the $287 million—the "loss to a person other than the defendant."[79] The Ninth Circuit also looked to the Trans-Alaska Pipeline Act, which caps punitive damages at $100,000,000, as further justification for the $5 billion award as excessive.[80]

---

[73] *Exxon II*, 270 F.3d at 1241.
[74] *Id.*
[75] *Id.* at 1241-46.
[76] *Id.* at 1242.
[77] *Id.* at 1242-43.
[78] *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991).
[79] 18 U.S.C. § 3571(d).
[80] 18 U.S.C. § 1653(c)(3). Note also that Alaska has a punitive damages cap. Alaska Stat. § 09.17.020 (2004).

Yet a national corporate car company's policy, legal in some states but illegal in others,[81] when compared to a sea captain who took command of an oil tanker carrying 53 million gallons of crude oil,[82] shows a range of reprehensibility. There is no simple comparison between a devalued car, and the destruction of a pristine Alaskan marine ecosystem resulting in a devastating loss of species and human livelihoods dependant upon those species. The car owner received $4,000 in compensatory damages, but lost the punitive damages award of $4 million on appeal due to the latter's excessiveness to the point of unconstitutionality.[83] The damage to Prince William Sound and the surrounding coastal area, however, resulted in costs to Exxon over $3.4 billion.[84] Even a ratio advocating England's historical double, triple or quadruple damages makes the original $5 billion punitive damages award settlement a reasonable one.[85] And although Alabama's maximum civil penalty under its Deceptive Trade Practices Act is $2,000,[86] the punitive damages actually awarded by the Alabama Supreme Court on remand was $50,000[87] – just $6,000 less than multiplying the actual compensatory damages award of $4,000 by the fourteen repainted vehicles sold in Alabama.[88] In *Exxon Valdez*, there is no similar calculation for the loss of a pristine wilderness area, which is considered to have both market and nonmarket value.[89] Currently, only the law and economic calculation method of continued valuation ("CV") is being used, often with great dissatisfaction.[90] However, a lack of market valuation should not be justification for under-valuation of the environment.

---

[81] *BMW*, 517 U.S. at 562.
[82] Jenkins & Kastner, *supra* note 7, at 151.
[83] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).
[84] *Exxon II*, 270 F.3d at, 1244 (9th Cir. 2001). *See* OTT, *supra* note 2.
[85] *Exxon I*, 270 F.3d 1215 (9th Cir. 2001); *BMW*, 517 U.S. at 581.
[86] *BMW*, 517 U.S. at 584.
[87] BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997).
[88] *BMW*, 517 U.S. at 567.
[89] Note, *supra* note 28, at 1981.
[90] *See infra* Part III.B.

2. *Cooper* *and its Inadequacy with Regards to Environmental Valuation and Protection*

Cooper Industries, Inc. v. Leatherman Tool Group, Inc. ("*Cooper*") involved an action by Leatherman against Cooper Industries, Inc. for trade dress infringement, unfair competition and false advertising under section 43(a) of the Lanham Act and an additional common-law claim for unfair competition.[91] Leatherman alleged that Cooper used drawings, photographs and product samples of the Leatherman pocket tool to promote Cooper's yet-to-be produced pocket tool.[92] The trial jury awarded the plaintiff $50,000 in compensatory damages and, for "act[ing] with malice, or show[ing] a reckless and outrageous indifference to a highly unreasonable risk of harm and . . . [for] act[ing] with a conscious indifference to Leatherman's rights"[93] awarded $4.5 million in punitive damages.[94] The District Court rejected Cooper's arguments that the punitive damages award was grossly excessive and thus unconstitutional under *BMW*.[95] On appeal to the Ninth Circuit Court of Appeals, in its unpublished opinion, this Court upheld the punitive damages award of the District Court, holding that the award was not an abuse of discretion, for it "was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size."[96] The Ninth Circuit further held that the award was not in constitutional violation of Cooper's due process rights under the Constitution.[97]

---

[91] *Cooper*, 532 U.S. at 424-426.
[92] *Id*. at 426.
[93] *Id*. at 429.
[94] *Id*.
[95] *Id*.
[96] *Id*. at 430-31 (citing App. To Pet. For Cert. 3a, judgt. Order reported at 205 F.3d 1351 (CA9 1999).
[97] *Id*. at 430. Note also that *Cooper* reaffirmed that the Due Process Clause of the Fourteenth Amendment "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Id*. at 434 (citing Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (*per curiam*).

The United States Supreme Court granted certiorari to review "the constitutionality of the punitive damages award under the correct standard" and also to determine whether the award violated the *BMW* guideposts.[98] The Supreme Court held that review of constitutional issues requires a *de novo* review standard rather than an "abuse of discretion" standard and remanded the case for determination of the *BMW* guideposts.[99] However, both Justices Thomas and Scalia opined in their concurring opinions that the Due Process Clause of the Constitution does not constrain excessive punitive damages.[100]

a. *The General Inadequacy of* Cooper

Cooper holds that, in order to apply *BMW*'s three guideposts to a constitutional issue, the *de novo* rather than the less demanding abuse-of-discretion standard of review should be utilized by the Federal Court of Appeals in their review of the district courts' holdings.[101] Such a ruling undermines the jury's ability to rule based on the facts of the case which are alive and fresh during the trial. The U.S. Supreme Court has held that:

> The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous . . . . But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.[102]

Yet, if the actual constitutional review of allegedly excessive punitive damages is itself in doubt—as both Justices Scalia and Thomas make clear—*BMW* would be overruled and such *de novo* review would be moot.[103]

---

98 *Id*. at 431
99 *Id*.
100 *Id*. at 442 (Thomas, J. and Scalia, J., concurring).
101 *Id*. at 442.
102 *Id*. at 435 (citing United States v. Bajakajian, 524 U.S. 321, 336-37, n. 10, 141 L. Ed. 2d 314, 118 S. Ct. 2028 (1998) (citing Ornelas v. United States, 517 U.S. 690, 697, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996))).
103 *Id*. at 442 (Thomas, J. and Scalia, J., concurring).

But since this has not yet occurred, the inadequacy of *Cooper*'s holding must still be analyzed. In her dissent, Justice Ginsberg opined that the proper standard of review for an action challenging a punitive damages award as excessive is in fact the abuse-of-discretion standard and not the *de novo* standard of review.[104] Justice Ginsberg used the same reasoning used by the Supreme Court in *Gasperini v. Center for Humanities, Inc.*, which dealt with compensatory damages.[105] *Gasperini* held that "appellate review of a federal trial court's refusal to set aside a jury verdict as excessive is reconcilable with the Seventh Amendment['s Reexamination Clause] if "appellate control [is] limited to review for 'abuse of discretion."[106] The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[107]

In the federal system, primary responsibility for any application of an excessiveness standard lies with the federal district trial courts, for trial judges and juries see the "living" evidence, while appellate judges see only "the cold paper record."[108] The holding in *Cooper* that the jury's determination of a punitive damages award is not a mere finding of "fact" within the Seventh Amendment is not adequate, for such a jury determination, much like a jury's determination of compensatory damages, gets its "meaning form a set of underlying facts as determined by a jury."[109] And with regards to *BMW*'s guideposts, although the Supreme Court holds that the first reprehensibility guidepost lands in the domain of the trial court, the second

---

[104] *Id*. at 444 (Ginsberg, J., dissenting).
[105] *Id*.
[106] *Id*. (citing Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 419, 135 L. Ed. 2d 659, 116 S. Ct. 2211 (1996).
[107] U.S. CONST. amend. VII.
[108] *Cooper*, 532 U.S. at 444 (Ginsberg, J., dissenting) (citing *Gasperini*, 518 U.S. 438).
[109] *Id*. at 446 (Ginsberg, J., dissenting).

reasonable relationship ratio guidepost could go either way and the third comparable conduct guidepost better-suited to the experiential realm of the appellate courts.[110] Yet the fact-finding necessary in all three of the guideposts—reprehensibility, actual harm, and intra- and inter-jurisdictional comparisons—make the trial courts the better venue for review.[111] Thus, review should be the abuse-of-discretion standard and not *de novo*.

b. The Inadequacy of Cooper *with Regards to* Exxon Valdez

In *Exxon* II, the Ninth Circuit used *Cooper*'s holding that a *de novo* review of a jury award which results in a reduction of a punitive damages award "does not implicate the Seventh Amendment" to justify its call for a punitive damages reduction.[112] A case like *Exxon Valdez*, when it applies *Cooper* on appeal, should not be faced with a constitutional review or a *de novo* standard of review. For, as described above, (1) punitive damages should not be reviewed for their constitutionality, and (2) $5 billion in punitive damages for the destruction livelihoods based on the destruction of a once-pristine environment that cost $3.4 billion in clean-up and compensatory costs thus far is anything but unconstitutional.[113] For the trial court is the best venue in which to see the massive amount of evidence that will reveal itself in relative "real time." From the oil-coated seabirds to the destroyed commercial fisheries and Prince William Sound tourism industries, such evidence is best reviewed and ruled upon at the trial court level, where visuals, emotions and facts are fresh. To allow an appellate court to go over such facts *de novo* is not only inefficient from time and financial perspectives; such review also allows for a further distancing of the reality of the horrific environmental catastrophic event that was the

---

[110] *Id*. at 449 (Ginsberg, J., dissenting).

[111] *Id*.

[112] *Exxon II*, 270 F.3d AT 1240. Note that in Cooper the jury award of punitive damages was rationalized not to be a real "fact" that is "tried" by the jury. *Id*.

[113] *See supra* Part I.; Chambers, *supra* note 27, at 202-18.

Exxon Valdez oil spill to an intellectual exercise in the legal process. Such an action further disadvantages an already under-valued victim in the market: the environment and those who make their livelihoods from it.[114]

3. State Farm *and its Inadequacy with Regards to Environmental Valuation and Protection*

State Farm Mutual Automobile Insurance Co. v. Campbell picked up where *BMW* and *Cooper* left off and served to further tighten the constitutional constraints on punitive damages awards.[115] *State Farm* was an insurance case in which the insurance company, State Farm, refused to settle within the $50,000 policy limits of its insured and ended up losing the case and facing a payment of $185,849.[116] In light of the insurance company's initial refusal to pay the entire judgment, the insureds filed an action alleging bad faith, fraud and intentional infliction of emotional distress.[117] *BMW* had been decided prior to this action by the insured against its insurer.[118] As a result, when the jury trial awarded the insureds $2.6 million in compensatory damages and $145 million in punitive damages, the trial court reduced the former figure to $1 million and the latter to $25 million.[119] On appeal, the Utah Supreme Court used *BMW's* guideposts and reinstated the $145 million punitive damages award.[120] The United States Supreme Court granted certiorari and held that *BMW*'s guideposts had been improperly applied and that a $145 million punitive damage award, when compared with a $1 million compensatory award, is in violation of the Due Process Clause and is thus unconstitutionally excessive.[121]

---

[114] Note, however, that the size of the tortfeasor's wealth was a factor in the punitive damages award in *Cooper* and that such a line of reasoning applies to *Exxon Valdez*. *Cooper*, 532 U.S. at 430.
[115] Chambers, *supra* note 27, at 212.
[116] *State Farm*, 538 U.S. at 413.
[117] *Id*. at 413-14.
[118] *Id*. at 414
[119] *Id*. at 415.
[120] *Id*.
[121] *Id*. at 429.

In applying the three guideposts, the Supreme Court found that State Farm's conduct was not reprehensible enough to result in such a large award of punitive damages,[122] that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1,"[123] and that the under Utah statutory law the largest civil sanction for an act of fraud was $10,000 and thus much smaller than the $145 million award.[124] In its determination of this result, the Supreme Court also held that lawful out-of-state conduct must have a nexus to the plaintiff's harm;[125] that only evidence of bad conduct that affected the plaintiff can be used to show reprehensibility;[126] and that a defendant's wealth has no bearing on an unconstitutional punitive damages award.[127]

a. The General Inadequacy of State Farm

Once again, Justices Scalia, Thomas and Ginsberg dissented.[128] Justices Thomas and Scalia once again rejected a constitutional review of allegedly excessive punitive damages awards.[129] Justice Ginsberg rejected *BMW*'s guideposts and opined that State Farm's reprehensibility both in and out of state, and whether directly or indirectly related to the plaintiff's harm, justified a larger award.[130] Further, Justice Ginsberg opined that, at least prior

---

[122] *Id*. at 419.
[123] *Id*. at 429 (citing *BMW*, 517 U.S. at 582) (citations omitted).
[124] *Id*. at 428; 2001 UT 89.
[125] *Id*. at 421.
[126] *Id*. at 423. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id*.
[127] *Id*. at 427. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id*., citing *BMW* 517 U.S. at 585.
[128] State Farm, 538 U.S. at 429-39 (Scalia, Thomas and Ginsberg, J., dissenting).
[129] *Id*. at 429.
[130] *Id*. at 430-37.

to this case, the wealth of a defendant is taken into account in determining punitive damages awards is "well-settled law."[131] Under BMW's first guidepost, reprehensibility is determined by:

> [C]onsidering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[132]

Under such an analysis, conduct in- or out-of-state (whether or not legal in or out of those states) and whether or not the conduct directly or indirectly pertains to the plaintiff's harm, does in fact provide evidence which builds a case for reprehensibility that is relative to the case at hand. Further, a defendant's "deep pockets" logically must be taken into account, for in order to actually be punitive, such an award must actually punish and deter the defendant.[133]

b. The Inadequacy of State Farm *with Regards to* Exxon Valdez

State Farm came down well over a year after *Exxon II* and thus forms the latest tool in the punitive damages awards reduction toolbox. The district court complied with the Ninth Circuit's request to reduce the punitive damages; in December, 2002, the district court reduced the award by $1 billion."[134] "In August 2003, even before the parties submitted appellate briefs, the Ninth Circuit vacated the district court's judgment and remanded the case so that the district court could reconsider its decision in light of *State Farms v. Campbell* – the Supreme Court's most recent due process excessiveness decision."[135] *State Farm* tightens the noose on the

---

[131] *Id.* at 438 (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462, n. 8, 125 L. Ed. 2d 36, 113 S. Ct. 2711 (1993)).

[132] *Id.* at 419 (citing *BMW*, 517 U.S. at 576-577).

[133] Likewise, an award that is more than a defendant can pay also fails to punish and deter, for such a defendant would be judgment-proof. *See generally* CALANDRILLO, *supra* note 28.

[134] Chambers, *supra* note 27, at 218 (citing Exxon III, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002).

[135] *Id.* (citing Exxon IV, No. 03-35166, at 1 (9th Cir. Aug. 18, 2003) (Order). For an analysis of issues regarding due process excessiveness review of punitive damages that State Farm fails to resolve for Exxon II—such as extraterritoriality, multiple punishments, BMW's guideposts and uniformity, the appropriateness of *de novo*

already choking constraints of constitutional review of punitive damages awards. Although *State Farm*'s holding restricting conduct that occurs out-of-state and requires a nexus to the plaintiff's harm does not significantly apply to the *Exxon Valdez* case, it may very well have detrimental effects to other massive environmental harm cases. Further, if an award is unconstitutional, no factor—wealth or otherwise—should have bearing. However, this Comment agrees with Justices Scalia and Thomas in their never-faltering opinion that punitive damages awards do not warrant a review for constitutionality.[136] Thus, the "deep pockets" of Exxon should be taken into account in the punitive damages award of the *Exxon Valdez* case. Finally, *State Farm* tries to squeeze out the life force of punitive damages awards by on the one hand requesting low ratios of compensatory-to-punitive damages,[137] while on the other hand suggesting that high compensatory damages should warrant much lower punitive damages.[138] Where punitive damages are concerned, the Supreme Court simply cannot have it both ways. Apparently the United States District Court for the District of Alaska agrees, for in January 2004 it amended the Exxon's punitive damages by increasing them to $4.5 billion.[139]

---

review, the role of the jury, and the defendant's wealth and expenses incurred—consult Chambers, *supra* note 27, at 252-68.

[136] *BMW*, 517 at 598-607 (Scalia and Thomas, J., dissenting); *Cooper*, 532 U.S. at 443-44 (Thomas and Scalia, J., concurring); *State Farm*, 538 U.S. at 429-30 (Scalia and Thomas, J., dissenting).

[137] *State Farm*, 538 U.S. at 424-25.

[138] *Id*. at 425. Granted, here the Supreme Court was trying to express that the converse is also true, that a low compensatory damage award for egregious conduct may warrant a higher ratio than the close-ratio suggested. However, such a suggestion implies a baseline of total damages that does not exist when punitive damages are factored in over and above compensatory damages.

[139] Amended Partial Judgment In A Civil Case, Case No. A89-0095CV(HRH) (January 28, 2004).

III. CURRENT LAW AND ECONOMIC THEORY'S SOLUTION OF CONTINGENT VALUATION FAILS TO ADEQUATELY PROTECT THE ENVIRONMENT FROM POLLUTION

The environment has value over and above its market value of goods exchanged within the market system.[140] These values are defined by economists as "use values" and "nonuse values."[141] Use values are actual uses derived from the environment, such as hiking, swimming, camping or bird watching.[142] Nonuse values are intrinsic values that people place on the environment and its resources regardless of whether they ever make use of them.[143]

Nonuse values fall into three categories.[144] First, an option value is used to describe an environment and its resource that may or may not be used in the future.[145] Second, a bequest value is used to describe an environment and its resources that are to be preserved for future generations.[146] Third, an existence value is used to describe an environment and its resources that are valued merely for the knowledge that such a place exists.[147]

When the environment and its natural resources are harmed, law and economics theorists advocate for the assessment of the liability for the "lost nonmarket values to give despoilers proper incentives to take safety precautions" within the legal system.[148] Although several methods of measuring nonmarket use values have been developed, the only current measurement of nonuse nonmarket values is the contingent valuation method ("CV").[149] However, this method of valuation is increasingly criticized by economists for its alleged bias and

---

[140] Note, *supra* note 28, at 1981.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* (noting that the first articles to recognize nonuse values were John V. Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777, 778-81 (1967); and Burton A. Weisbrod, *Collective-Consumption Services of Individual-Consumption Goods*, 78 Q.J. ECON. 471, 472-73 (1964). *Id.* at n.1.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*

unreliability.[150] Not only do some law and economics theorists feel that punitive damages themselves are inefficient, but that the sole method of valuation of nonuse nonmarket values should be abolished. Yet, regardless of these critiques, this Comment asserts that, although perhaps an imperfect measure of nonuse nonmarket values, CV provides a great service by at least expressing some measure of environmental value calculable within the legal system; for, without CV, these nonuse nonmarket measures of environmental valuation would continue to be externalized as they have been for hundreds of years.[151]

A. LAW AND ECONOMICS THEORY'S CRITIQUE OF PUNITIVE DAMAGES AWARDS

As seen in Part II, *supra*, the American legal system is struggling with punitive damages awards, which exist to punish and deter.[152] Leading law and economic theorists, such as Professors Polinsky and Shavell, argue that punitive damages are inefficient because they punish the shareholders and not the corporation and its employee wrongdoers.[153] Further, in order to properly deter (rather than under- or over-deter), punitive damages should ordinarily only be awarded if an injurer has a significant likelihood of escaping liability for the harms caused or in order to disgorge the injurer of "socially illicit gains" obtained from "malicious acts".[154]

---

[150] *Id.*

[151] *See generally* Erin Englebrecht, *Three Fallacies of the Contemporary Legal Concept of Environmental Injury: An Appeal to Enhance "One-Eyed Reason" with a Normative Consciousness*, 18 TUL. ENVTL. L.J. 1 (2004).

[152] A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 869-70 (1998).

[153] *Id.*

[154] *Id.*; Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L. J. 2071 (1998).

B. LAW AND ECONOMICS THEORY OF CONTINGENT VALUATION CRITICIZED

The contingent valuation ("CV") measurements of nonuse values are viewed as speculative—so speculative as to have the costs outweigh the benefits.[155] CV, a fairly new method of nonuse, nonmarket valuation,[156] consists of a survey:

> A CV survey begins by providing a detailed description of the good being valued, the baseline level at which the good is provided, and the method of payment by which respondents might "purchase" more of the good, such as a one-time tax or an increase in prices. The survey then asks how much respondents would be willing to pay for a specified improvement in the good. Finally, it asks about respondents' demographic characteristics and may elicit further information about why they valued the good the way they did. Researchers then calculate an average willingness to pay (WTP), which is multiplied by the relevant population to produce a total value.[157]

CV is criticized for its unreliability based on bias, measurements of bias, and the uncertainty of the CV measurement itself.[158] The asserted unreliability on bias is based on economists' distrust of hypothetical questions and answers based on WTP and sole reliance on observed behavior regarding a resource the respondent to the survey may know very little about.[159] The unreliability of the measurements of bias allegedly lie with a lack of other techniques with which to compare the CV method, and problems with additive and continuity and over- and under-stating when determining a respondent's WTP.[160] Two apt examples to show an overstatement of WTP as a result of using two different surveys which appropriately focus on marine oil spills, are:

> The "single-focus" survey (typically used in CV studies) simply asked for respondents' WTP to prevent oil spills in Alaska. The second, "top-down

[155] Note, *supra* note 28, at 1982
[156] *Id*. at 182.
[157] *Id*. at 182 (footnotes omitted).
[158] *Id*. at 1985-90.
[159] *Id*. at 1985
[160] *Id*. at 1987.

> disaggregation" survey asked people their total WTP for a broad list of social programs. It then asked respondents to disaggregate that amount, step by step, into the proportion they would devote to environmental programs; the proportion of *that* amount they would devote to wilderness areas; to human-caused problems in wilderness areas; to marine oil spills; and finally, to marine oil spills in Alaska. The mean WTP obtained by the single-focus survey was *290 times* larger than that from the top-down disaggregation survey.[161]

Such wide disparites of individual responses are criticized by some economists as inaccurate and unreliable.[162] Finally, the asserted unreliability of the CV measurement itself questions what exactly CV measures.[163] Critics claim that CV surveys measure the respondents' general altruistic values with regards to environmental preservation and not the respondents' actual WTP economic preferences for improving specific environments and their resources.[164] The economic critics call this "embedding" or "symbolic" bias.[165]

As a result of these imperfections of CV, some economists claim that it should not be used, for such shortcomings lead to the potential for excessive liability awards and costly litigation costs that would together cause potential injurers to take overly excessive precautions to avoid environmental harm, thus grossly distorting corporate behavior and incentives.[166] Thus critics of CV argue for a limitation of CV to the measurement of long-term or irreversible harm to unique, well-known resources.[167]

C. Contingent Valuation and Punitive Damages Needed to Protect the Environment

Some critics to the legal theories today—including the law and economics theorists' critiques of contingent valuation ("CV") and punitive damages—assert that legal environmental

---

[161] *Id*. at 1988 (footnotes omitted).
[162] *Id*. 1988-89.
[163] *Id*. at 1989.
[164] *Id*.
[165] *Id*.
[166] *Id*. at 1990-94.
[167] *Id*.

injuries are "tainted" by three factors: an "anthropocentric perspective" (motivated by human interests), an "over-confidence in objective and rational formulations for determining the earth's sustainability thresholds" (science and methodical data), and on "emphasis on private property entitlements and individual liberty over the greater interests of the community" (individual liberty).[168] These three "fallacies" lead to an "illusory legal concept of environmental injury."[169] In order to correct these fallacies, a "normative consciousness" needs to be infused into the legal system.[170] CV, although it falls under the "methodical data" of the second fallacy, it also severely criticized by its own peers and thus could possibly be the foundation of such a gauge to measure this normative consciousness—with punitive damages reflecting society's repugnance and horror at the destruction of its environment and both its use and nonuse, market and non-market values—at least until a better method is created and widely accepted by the legal system.[171]

IV. PROPOSED LEGAL AND ECONOMIC THEORY CHANGES TO PUNITIVE DAMAGES LAW IN ORDER TO BETTER PROTECT THE ENVIRONMENT AND THEIR JUSTIFICATION VIA A POLICY PERSPECTIVE

Human beings have always impacted their environment, with the size of the impact increasing over time as population and technological advancements increase.[172]

> Indeed, much of human action . . . can adversely impact the natural environment. In terms of significance, humans left their footprint on the earth far before the industrial revolution. Geological studies have shown that as early as 11,000 years ago, the hunting and gathering practices of early civilizations caused significant changes in the world's mega-fauna, including extinctions of species; and that more than 4000 years ago, irrigation practices of agricultural societies led to soil salinization, affecting crop yields. Throughout human history, the intensity,

[168] Englebrecht, *supra* note 151, at 5, 7 (footnotes omitted).
[169] *Id.*
[170] *Id.* at 6.
[171] *Id.* at 7.
[172] *Id.* at 2.

> complexity, and frequency of human impact on the natural environment has increased exponentially, following the pace of industrial and technological development, the growth of the human population, and the rise in overall per capita consumption.[173]

Post-industrial revolution, that the size of that footprint has only increased, perhaps epitomizing itself in the *Exxon Valdez* tragedy—a tragedy that left anything but a mere footprint on Alaska's pristine marine ecosystem. As a result of environmental value beyond any use market value calculation, constitutional review of punitive damages should be abolished, punitive damages should continue to be awarded and, until a better methodology evolves, CV should be utilized for its normative valuation.

A. THE SOCIETAL VALUE OF A PRISTINE ENVIRONMENT IS INVALUABLE AND ETHICAL

It has now been just over sixteen years since the disastrous *Exxon Valdez* oil spill, and the numerous affected species are still struggling to recover. The harmful toxic effects of oil contamination, once thought to be short-term in its damage, is now known to be much more long-term.[174]

The Exxon oil spill is the disaster which killed over 250,000 seabirds, 3,500 sea otters, and hundreds of bald eagles.[175] In addition, numerous harbor seals, thirteen of the thirty-six orcas in the resident orca AB pod, and eleven of the twenty-one transient AT1 orcas died.[176] Many other species also suffered, such as the loss of twenty-five percent of wild pink salmon and

---

[173] *Id*. at 2 (footnotes omitted).

[174] OTT, supra note 2, at 414. Oil is a persistent, bioavailable, toxic (PBT) pollutant with extremely adverse effects to human and marine ecosystems. *Id*. The toxicity level of oil is also much more acute than thought three decades ago; oil is harmful to fish and wildlife at levels 1,000 times lower than thought to be the case in the 1970s. *Id*.

[175] Jenkins & Kastner, *supra* note 7, at 153.

[176] OTT, *supra* note 2, at 229. The orcas perished within two years of the spill. *Id*. Note that no new orcas were born during this time. *Id*.

an estimated seven million hatchery pink salmon.[177] Seventy-five percent of pacific herring were also estimated to be lost from oil pollution poisoning.[178] To this day this ecosystem is struggling to recover. The thousands of clean-up workers who were exposed to the spill are also still feeling the effects of toxic poisoning, in many cases requiring long-term monitoring and medical care to this day.[179]

The American legal system has failed victims of environmental hazards—be they non-human or even human. This failure has resulted from the three fallacies of the contemporary legal concept of environmental injury[180] and a failure to adopt an environmental ethic reflective of the "unreliable" CV methodology.[181] Perhaps Christopher Stone had it right after all; perhaps trees and other natural objects—such as the marine ecosystem destroyed by the *Exxon Valdez* as a result of that fateful March night sixteen years ago—should have standing, after all.[182] And perhaps animals should also have legal rights.[183]

The actions of a wrongdoer such as Exxon are deplorable. From its attempts to reduce its liability in numerous ways—from low-balling the size of the spill to denying responsibility and financial support to those severely debilitated or killed by long-term toxic poisoning, be they human or non-human—Exxon should pay in full the costs of the harm it has caused.[184] And then some. In a case such as *Exxon*, punitive damages are not only warranted, but essential if we wish

---

[177] *Id*. at 257

[178] *Id*. at 265.

[179] *Id*. at 67 (2005).

[180] Englebrecht, *supra* note 151, at 5, 7.

[181] Note, *supra* note 28, at 1982; *cf.* Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (republished in book form as CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? – TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (1974)) and Aldo Leopold, *The Land Ethic*, in A SAND COUNTY ALMANAC 21 (1949).

[182] *See* Stone, *supra* note 181.

[183] *See generally* Steven M. Wise, *A New Species of Rights Rattling the Cage: Toward Legal Rights for Animals*, 89 CALIF. L. REV. 207 (2001).

[184] *See generally* OTT, *supra* note 2.

the planet on which we live to be habitable in the future by making bad faith polluters pay in full for eroding our commons.

B. REJECT THE CONSTITUTIONAL REVIEW OF PUNITIVE DAMAGES

BMW's three guideposts, reinforced by *Cooper* and *State Farm*, form the foundation for the constitutional review of punitive damages awards for excessiveness based on a lack of fair notice.[185] Yet in all three cases, Justices Scalia and Thomas were adamant that the United States Constitution does not constrain punitive damages, whether "grossly excessive" or not.[186] Likewise, Justice Ginsberg also raised her concerns, such as intrusion upon the States' domain,[187] Seventh Amendment concerns with *de novo* review,[188] and a lack of Eight Amendment or federal common law justification for limiting punitive damage awards, excessive or not.[189] Punitive damages awards—in particular such awards for environmental harm, be they use or nonuse, market or nonmarket values—should not be limited by constitutional claims of a lack of fair notice. For the environment is invaluable and as a result should become our ethic—it is the foundation of our very existence and survival on this planet. If harmed, it should be restored to the fullest extent possible, with the injurers paying punitive damages in order to force a shift to a normative consciousness of the invaluableness of the environment and of an environmental ethic that would ensure a healthy environment for the long-term.[190]

[185] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

[186] *BMW*, 517 U.S. 598-607 (Scalia and Thomas, J, dissenting); *Cooper*, 532 U.S. at 443-44 (Thomas and Scalia, J, concurring); *State Farm*, 538 U.S. 429-30 (Scalia, Thomas, J, dissenting).

[187] *BMW*, 517 U.S. 607-15 (Ginsberg, J. and Rehnquist, C.J., dissenting).

[188] *Cooper*, 532 U.S. at 444-50 (Ginsberg, J, dissenting).

[189] *State Farm*, 538 U.S. 430-39 (Ginsberg, J., dissenting). "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[190] Englebrecht, *supra* note 151, at 5, 7; *see* Stone, *supra* note 181 and Leopold, *supra* note 181.

C. CONTINUED UTILIZATION OF CONTINGENT VALUATION AND PUNITIVE DAMAGES TO ENSURE THAT NONMARKET VALUES ARE TAKEN INTO ACCOUNT IN THE CALCULATION OF DAMAGES

The critics of contingent valuation ("CV") fail to realize that what they term to be "unreliable" are in fact exactly what nonuse nonmarket values are and that this is not problematic. Environmental preservation is valued at different levels by different people (from a low value to the invaluable) and thus causes different—often emotional or what some would term spiritual—responses. When a person is asked to measure these responses and reactions using WTP, already one is using a measurement inadequate for its purpose. For to ask someone to express in terms of WTP their emotional and spiritual value of a place is to set up the CV method for failure. Instead, CV should be used much as an opinion poll is used—to gather the overall consciousness, attitude and sentiment of the general populace—and not to expect each person who expressed a WTP to actually pay it, or even be able to afford to pay it. For a respondent to say, "if I was a millionaire, I would pay whatever it took to save the ecosystem of Prince William Sound," should not be discounted merely because that respondent is not a millionaire, for to do so translates CV into a measurement of only what the very wealthy value as a result of their greater WTP. Finally, even if the above critiques were accepted as justified and correct, the suggestion by those same economic critics of CV—to restrict the use of CV to the measurement of long-term or irreversible damage to unique, well-known resources—clearly describes the *Exxon Valdez* case and the harm to Prince William Sound and the surrounding coastal area.

Although its struggles with the method of calculating and awarding punitive damages awards are blatant,[191] the American legal system should not throw out the proverbial baby with

[191] Polinsky & Shavell, *supra* note 152, at 869-70.

the bathwater. For although it is true that shareholders are harmed in the punitive damages process, they are harmed because the corporation is harmed in the form of punishment and deterrence. Over-deterrence in a world in which environmental resources are over-utilized, over-strained, and under-valued in an unethical way, may not be such a bad thing—for when it comes to the air, water and soil on which the human beings of this planet depend, it is wiser to err on the side of caution.

V. CONCLUSION

Changes need to be made to reflect society's values with regard to the environment and punitive damages and contingent valuation ("CV") are key parts of that process. Punitive damages in environmental litigation are needed, be they nonuse nonmarket intrinsic values (which should have been sought out in *Exxon* Valdez) or use market economic values as in the ongoing punitive damages case of the *Exxon Valdez*. Punitive damages are needed to help create the shift from human-centered interests, scientific and economic value systems and narrowly-focused individualism to a normative consciousness that protects the commons, rather than takes resources from and places wastes in it. Further, punitive damages awards should not be constrained by constitutional review, for the invaluableness of the environment, as revealed by CV, requires the utmost protection from would-be injurers. The value of pristine and healthy environments—such as the Alaskan marine ecosystem once was—cannot be so easily capped nor calculated.