Article

Punitive Damages and Valuing Harm

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In February 1994, a mobile home company, Steenberg Homes, arranged to deliver a mobile home to a customer in Manitowoc County, Wisconsin.[1] The easiest way to deliver the home was to cut across the neighbors' property.[2] The neighbors who owned the property, Harvey and Lois Jacque, however, had made it clear to the company that they would not give the company permission to cross their land.[3] The Jacques were sensitive about letting others use their land because they had lost property valued at over $10,000 to other neighbors in an adverse possession action in the mid-1980s.[4] Despite the Jacques' express denial of permission, the company deliberately crossed the Jacques' land to deliver the home. The Jacques sued the company for trespass, seeking compensatory and punitive damages.[5] A jury ultimately awarded the Jacques $1 in nominal damages and $100,000 in punitive damages.[6]

In *Johansen v. Combustion Engineering, Inc.*, a federal jury in Georgia awarded twenty-three landowners of sixteen different properties $47,000 in compensatory damages and $45 million in punitive damages.[7] The defendant in the case, Combustion Engineering, operated a mine that polluted streams running through the plaintiffs' properties.[8] For several years the defendant failed to prevent acidic water emanating from its property from entering the streams.[9] The trial court reduced the punitive damages award first to $15 million and then, after

1. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 157 (Wis. 1997).

2. *Id.* ("Steenberg determined that the easiest route to deliver the mobile home was across the Jacques' land.").

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 158.

7. No. CIV. A. CV 191-178, 1997 WL 423108, at *4 (S.D. Ga. June 9, 1997), *vacated in part*, 170 F.3d 1320 (11th Cir. 1999).

8. *Id.* at *2–3 (describing the "most egregious" conduct as the failure of Combustion Engineering to do more to prevent the acidic water problem).

9. *Id.* at *2–3; *see also* Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1336 (11th Cir. 1999).

appeal and remand, to $4.35 million.[10] The Court of Appeals for the Eleventh Circuit affirmed the reduced punitive damages award.[11]

At first glance, these two cases do not appear to have much in common. The *Jacque v. Steenberg Homes, Inc.*, case was a dispute between a small company and individual landowners over the ability of the landowners to exclude others from their property.[12] The damages were nominal and the punitive damages were fairly modest for an award against a corporate defendant.[13] The conflict affected virtually no one other than the litigants. By contrast, the *Johansen* case involved a dispute between a large mining company and twenty-three landowners of sixteen different properties.[14] Although this was a private civil suit, the defendant's actions caused damage not only to the plaintiffs themselves but also to public natural resources (the streams).[15] Further, the punitive damages award was substantial, even after the court's reduction.[16]

Despite these differences, the two cases are similar in many ways. First, the harm to the plaintiffs comprised only a portion of the defendant's total wrongdoing sought to be punished through punitive damages. In both cases, the defendant caused harm that went uncompensated in the civil action. In *Jacque*, the damages awarded did not compensate for the violation of the plaintiffs' right to exclude others from their property, nor did they vindicate society's interest in protecting that right; such harm was never translated into monetary terms. Similarly, in *Johansen*, there was no valuation of damage to the streams or to the public's right in those resources. The plaintiffs' compensation was limited to diminution in value of their private properties, which resulted in most of the plaintiffs receiving only $3000 in compensatory damages.[17]

Second, both cases were litigated in the shadow of the Supreme Court's efforts to place constitutional due process limits on punitive damages, efforts which began in earnest with its

10. *Johansen*, 170 F.3d at 1327.

11. *Id.* at 1339.

12. 563 N.W.2d 154, 156–58 (Wis. 1997).

13. *See id.* at 156.

14. *Johansen*, 1997 WL 423108, at *1.

15. *See id.*

16. *See Johansen*, 170 F.3d at 1340 (upholding a punitive damages award of $4.35 million).

17. *Johansen*, 1997 WL 423108, at *4.

1996 decision in *BMW of North America, Inc. v. Gore*.[18] In *BMW*, the Supreme Court for the first time placed substantive due process limits on punitive damages awards in civil cases.[19] The Court also set forth three "guideposts" for assessing the constitutionality of such damages awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the punitive damages awarded and the actual or potential harm suffered by the plaintiff; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[20]

In 2003, the Court went further and warned that few awards exceeding a single-digit ratio of punitive to compensatory damages would satisfy due process.[21] The Court, relying on *BMW*, stated, however, that awards exceeding a single-digit ratio "may" comport with due process if an egregious act results in only a small amount of economic damages, if the injury is hard to detect, or if the monetary value of noneconomic harm is difficult to determine.[22] The Court reasoned that the presumptive ratio would ensure that "the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[23]

This Article proposes that, in applying the constitutionally based single-digit ratio presumption, courts must be attentive to unvalued harm. Where courts ignore this unvalued harm, it can result in a mechanical and inappropriate reduction of punitive damages awards on due process grounds. Both the intentional trespass claim in *Jacque* and the environmental harm claim in *Johansen* meet the Supreme Court's standard for departure from a single-digit ratio: in both cases, there is a strong argument that either the defendant's conduct resulted in only a small amount of economic damages (nominal damages in *Jacque*) or that the monetary value of noneconomic harm is difficult to determine (harm to the streams in *Johansen*).[24]

18. 517 U.S. 559 (1996).

19. *Id.* at 585.

20. *Id.* at 575.

21. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

22. *Id.*

23. *Id.* at 426.

24. *See id.* at 425 (noting that damages may comport with due process where an egregious act results in a small amount of economic damages or where noneconomic harm might be difficult to determine).

Although both types of cases present circumstances justifying departure from the ratio presumption, a close review of the intentional tort and environmental harm cases decided since *BMW* show that courts have often applied the ratio requirement very differently in the two types of cases. In the intentional tort cases with small or nominal damages, like *Jacque*, as well as in cases involving defamation and civil rights violations, lower courts more freely disregard single-digit ratios.[25] Courts reason that, because compensatory damages in these cases are often nominal or very small, higher ratios are needed to deter and punish reprehensible conduct that results in harm to the plaintiff beyond any monetary loss.[26] In all of these intentional tort cases, the plaintiff's rights are violated, but no valuation of that violation occurs in assessing compensatory damages.[27]

Just as damages awards in the intentional tort cases contain no valuation of the interference with person or property, harm to natural resources also constitutes harm that is difficult to measure easily in monetary terms. More often, however, courts in environmental harm cases brought by private parties fail to recognize that compensatory damages do not measure a large portion of environmental harm. This failure results because in private party environmental harm cases, the compensatory damages frequently are limited to cleanup costs or diminution in value to property, and there is no named plaintiff with standing to obtain compensation for damage to "public" natural resources or ecosystems.[28] As a result, compensatory

25. *See infra* Part III.A.

26. *See infra* Part III.A.

27. *See infra* Part III.A.

28. *See* M. STUART MADDEN & GERALD W. BOSTON, LAW OF ENVIRONMENTAL AND TOXIC TORTS 66–68 (3d ed. 2005) (citing RESTATEMENT (SECOND) OF TORTS § 821C (1979)) (stating that the law has been slow to recognize the right of private persons to bring actions for public nuisance to recover for environmental harm without a showing of "special injury" because, in part, the theory remains that only sovereigns should maintain actions for public harm); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 74–75 (5th ed. 2006) (discussing the limitations of private nuisance claims brought to recover for environmental harms, noting that class actions have "not played a significant role in redressing environmental damage," and concluding that even when the aggregate damage is significant, the damage to individual victims "may be insufficient to make a lawsuit worthwhile"); *see also infra* Part III.C (exploring the standing and valuation difficulties in environmental harm cases).

damages in such cases do not adequately reflect the actual harm or damage to natural resources.

Unlike in the intentional tort cases, many courts deciding private party environmental harm cases mechanically reduce the jury's punitive damages award to reach a single-digit ratio.[29] In doing so, courts fail to recognize the nonmonetary harm to the environment that was not included in the compensatory damages award. This Article argues that lower courts should more fully address those circumstances where the judicial system fails to monetarily account for certain types of harm, whether the harm occurs to public resources, other public rights, or certain private interests. The environmental harm cases are simply an illustration of how the ratio guidepost has been tied too closely to a compensatory damages award rather than to the total harm caused by the defendant. This leads to cases where punitive damages are lowered excessively and thus not allowed to serve their primary purposes of punishment and deterrence. Notably, despite the significant attention given to punitive damages in general, over the past ten years, neither the Supreme Court nor legal scholars have given much, if any, attention to the problem of valuing harm.

Part I of this Article explores the purposes of punitive damages and the factors juries consider in awarding punitive damages. This Part explains that, while punishment and deterrence are universally cited as the two purposes behind imposing punitive damages, such damages were historically recognized as also encompassing certain types of harm that the civil justice system did not "count" in computing compensatory damages. Part II traces the Supreme Court's relatively short journey from being uninvolved in policing state court punitive damages awards to its creation of today's constitutional due process standards. This Part shows that the Court's new constitutional ratio presumption is based, in large part, not only on the perceived problem of large punitive damages awards, but also on excessive nonpecuniary damages awards that serve to inflate both punitive damages awards and overall awards.

Part III contains a review of intentional tort and environmental harm cases issued since the Supreme Court's 1996 *BMW v. Gore* decision. The analysis in this Part reveals that

29. The court in *Johansen* avoided this error and allowed a ratio of punitive damages to compensatory damages of 100-to-1. Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1337 (11th Cir. 1999); *see infra* Part III.B.1 (discussing cases that reduced punitive damages to a single-digit ratio).

courts depart from single-digit ratios in the intentional tort cases without much difficulty, justifying their departure with rationales of punishment, deterrence, and the absence of large overall awards. By contrast, although the environmental harm cases in which the court awards punitive damages involve many of the same reasons to depart from single-digit ratios, courts have more difficulty identifying those reasons in such cases. The reason for this difficulty is because the compensatory damages in these cases are often large, although, I argue, not sufficiently large to reflect the total harm the defendant caused or could potentially have caused to the affected natural resources. As a result, courts in the environmental harm cases struggle to apply the ratio and ensure an adequate penalty for the defendant's misconduct. This Part concludes with an analysis of the similarities and differences between the intentional tort cases on the one hand and the environmental harm cases on the other. The similarities support rejecting a mechanical approach to the ratio guidepost in both types of cases, while the differences demonstrate the need to adopt distinct approaches to the total awards.

Part IV uses the cases discussed in Part III to create a framework within which courts can either attempt to value (or at least recognize) harm that goes unmeasured in calculating compensatory damages or, justify ratios that exceed single digits. This Part shows that courts in the intentional tort cases should and do recognize that there is no valuation of the invasion of the plaintiff's right in the calculation of compensatory damages, and allow recovery of punitive damages beyond single-digit ratios. This Part then suggests a different approach for the environmental harm cases. In those cases, courts can attempt to value harm to the environment beyond the plaintiff's compensatory damages, as a component of the reprehensibility of the misconduct. If such information is available, a single-digit ratio can be appropriate.

Where valuation measures for environmental harm are not available, courts should use the same approach applied in the intentional tort cases with small or nominal damages. This would help courts to recognize that harm to natural resources exists that cannot be valued, of a type which allows courts to depart from single-digit ratios. In both types of environmental harm situations, however, the full amount of punitive damages should not necessarily go to the plaintiff unless the plaintiff will be paying for the environmental restoration. If the plaintiff

will not be paying for the restoration, some portion of the punitive damages should go to the government or nonprofit organizations in an amount to be identified by state legislatures or the courts. The remaining portion would be awarded to the plaintiff, along with attorney's fees, to create sufficient incentives for bringing such suits. This "split-recovery" approach can be implemented by state legislatures or by courts using their inherent common law authority.

The proposed framework relies on the flexibility that exists in the Supreme Court's jurisprudence and suggests some refinements. Allowing higher punitive damages awards in environmental harm cases (either through a full valuation of harm or a departure from a single-digit ratio) fills a gap that today's environmental regulatory enforcement system is unable to address. In this way, civil tort law can continue to play an optimal role in both environmental protection efforts and in other cases without the necessity of a government plaintiff that is willing or available to pursue defendants who have engaged in wrongdoing that justifies punitive damages.

I. PURPOSE AND IMPLEMENTATION OF PUNITIVE DAMAGES

Punitive damages are damages, other than compensatory or nominal damages, awarded against a defendant to punish him or her for outrageous conduct and to deter the defendant or others similarly situated from engaging in such conduct in the future.[30] Commentators and courts generally are in agreement that the twin purposes of punitive damages are punishment and deterrence.[31] According to the Supreme Court, although compensatory damages and punitive damages are usually awarded at the same time in our judicial system, they serve dif-

30. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

31. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (noting that the main purposes of punitive damages are to punish the defendant and deter both the defendant and others from acting in a similar manner); LINDA L. SCHLUETER, 1 PUNITIVE DAMAGES § 1.4(B), at 16–17 (5th ed. 2005) (observing that the most widely accepted purposes of punitive damages have been punishment and deterrence); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 356–57 (2003) (stating that courts and academic commentators agree that punishment (or retribution) and deterrence are the two prevailing justifications for punitive damages).

ferent purposes.[32] Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[33] Punitive damages, by contrast, serve the broader functions of deterrence and retribution.[34] Specifically, a state may allow imposition of punitive damages through its common law or by statute to further its legitimate interest in "punishing unlawful conduct and deterring its repetition."[35] Because the purposes of punitive damages are to punish and deter wrongful conduct, states generally require, by statute or common law, that the defendant's wrongful act be done intentionally or with willful indifference, deliberate disregard, malice, or a similar state of mind.[36]

Today's apparent unanimity regarding the purposes of punitive damages has not always existed. Historically, at least four other purposes have been identified, such as (1) preserving the peace; (2) inducing private law enforcement; (3) compensating victims of otherwise uncompensable losses; and (4) paying the plaintiff's attorney's fees.[37] Indeed, even today in a few states, the stated purpose of punitive damages is to provide additional compensation to the injured plaintiff.[38] Other states justify this additional compensation as a bounty for plaintiffs to bring suits acting as private attorneys general.[39] By allowing plaintiffs to recover punitive damages in appropriate cases, plaintiffs will have an incentive to fulfill important societal ob-

32. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

33. *Id.* (citing *Cooper Indus.*, 532 U.S. at 432; RESTATEMENT (SECOND) OF TORTS § 903, at 453–54 (1979)).

34. *Id.* (citing *Cooper Indus.*, 532 U.S. at 432; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996)).

35. *Id.*

36. SCHLUETER, *supra* note 31, § 4.2(A)(2), at 159–62 (discussing the pleading requirements and the basis for a claim in a punitive damages case).

37. 2A STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 8:46, at 167 (2003).

38. KEETON ET AL., *supra* note 31, § 2, at 9 (noting that some decisions have mentioned "reimbursing the plaintiff for elements of damage which are not legally compensable, such as wounded feelings or the expenses of suit" as an additional purpose of punitive damages); SPEISER ET AL., *supra* note 37 (noting that punitive damages are intended, in part, to "reimburse for losses too remote to be considered elements of strict compensation" (citing Hofer v. Lavender, 679 S.W.2d 470, 474 (Tex. 1984))).

39. SPEISER ET AL., *supra* note 37, § 8.46, at 169–70 (citing Stockett v. Tolin, 791 F. Supp. 1536, 1560–61 (S.D. Fla. 1992); Blue Cross & Blue Shield of Miss., Inc. v. Maas, 516 So. 2d 495, 497 (Miss. 1990) (awarding punitive damages to plaintiffs acting as "private attorneys general" to reward the plaintiffs' public service and encourage litigation to address injustices)).

jectives by bringing a civil enforcement action for serious misconduct.[40] This is particularly true where the prospective compensatory recovery is low or the expected cost of litigation is high.[41] Thus, although punishment and deterrence are the most-cited justifications for imposing punitive damages, historic uses of punitive damages both to compensate plaintiffs for otherwise uncompensable harm and encourage private attorney general actions also are present in the case law.

The instructions juries receive regarding the factors they can consider in awarding punitive damages will vary depending on a state's goals. In many states, juries are instructed to consider the reprehensibility of the misconduct, the profitability of the misconduct, the duration of the misconduct, the defendant's concealment of the misconduct, the degree of the defendant's awareness of its misconduct, the defendant's attitude upon discovering the misconduct, the defendant's financial condition,[42] the total effect of other punishment likely to be imposed as a result of the misconduct, and the relationship between the amount of punitive damages and the damage actually suffered by the plaintiff.[43]

40. *Id.* at 170 (citing Tuttle v. Raymond, 494 A.2d 1353, 1358 (Me. 1985) (noting that the "potential for recovering an exemplary award" provides an incentive for "private civil enforcement of society's rules against serious misconduct")).

41. *Id.* (citing *Tuttle*, 494 A.2d at 1358).

42. Although the Supreme Court has warned that the wealth of a defendant cannot justify an otherwise unconstitutional award, it has recognized that it is not inappropriate for states to allow juries to account for the defendant's wealth when assessing punitive damages, as many states do. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427–28 (2003) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 (1996) (Breyer, J., concurring)); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21–22 (1991) (finding that Alabama's standards for reviewing punitive damages awards, which allow a defendant's wealth to be one of many considerations, sufficiently constrain jury discretion); *see* 2 DAN B. DOBBS, THE LAW OF TORTS 1066–68 (2001) (listing a defendant's wealth as one of the factors courts and legislatures present as a basis for assessing the amount of punitive damages). The rationale for allowing juries to consider the defendant's wealth in assessing punitive damages, but not compensatory damages, is that it obviously takes more money to punish a wealthy defendant and deter future misconduct than it does a defendant of modest means. *See id.* at 1068; *infra* notes 335–39 and accompanying text.

43. 2 DOBBS, *supra* note 42, at 1066–67 (listing the "traditional" factors for assessing punitive damages); SCHLUETER, *supra* note 31, § 5.6(F)(4), at 338–40 (citing the provisions of a California model jury instruction); Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After* State Farm v. Campbell, 41 SAN DIEGO L. REV. 1465,

Beyond the purposes of punitive damages, there has been much recent debate about their frequency, their rate of increase, and their overall impact on the tort system and society.[44] In an effort to gather data on this topic, several studies have attempted to assess the impact of punitive damages. According to six major studies reviewing punitive damages awards since 1985, juries have awarded punitive damages in approximately 2%–9% of all cases where plaintiffs have won.[45] Assuming an average success rate of 50% for plaintiffs, these statistics mean that punitive damages were awarded in 1%–4.5% of all civil trials. Although this number may not seem significant, recent punitive damages awards in the millions and billions of dollars, particularly against tobacco companies and other product manufacturers, have made headlines in recent years.[46] As a result, the issue of punitive damages is a significant topic among tort scholars, interest groups, and state legislatures.[47]

Despite the increasing size of the awards, until recently, state courts reviewed punitive damages awards without regard to federal constitutional concerns. Now, however, both trial and appellate courts must engage in a de novo substantive due process review of punitive damages under the United States

1470–76 (2004) (setting forth jury instructions on punitive damages in numerous states).

44. *See infra* note 82 and accompanying text.

45. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 964–65 (2007) (summarizing numerous empirical studies of punitive damages since the 1980s); *see* Theodore Eisenberg et al., *The Relation Between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES (Brian H. Bornstein et al. eds., forthcoming Nov. 2007) (manuscript at 5–21, available at http://ssrn.com/abstract=929565) (analyzing various data sets on punitive damages from 1985 through 2004).

46. W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1405–08, 1428 tbl.1 (2004) (discussing the media attention given to punitive damages awards, the interest of tort reformers, and the rise of "blockbuster" awards, ranging from $100 million to over $1 billion); *see* Williams v. Philip Morris Inc., 127 P.3d 1165, 1167–68, 1171 (Or. 2006) (affirming a punitive damages award of $79.5 million against Philip Morris based on a plaintiff smoker's compensatory damages award of $521,485), *vacated sub nom*. Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007); *infra* note 83 (discussing the activity of state legislatures and tort reformers).

47. *See, e.g.*, Viscusi, *supra* note 46, at 1405 ("Punitive damages represent the most visible symptom of the ills of the U.S. tort system."); *infra* note 82 (citing debates over whether punitive damages really are a problem in today's tort system).

Constitution.[48] Part II sets forth briefly the current constitutional structure for awarding and reviewing punitive damages with a focus on some of the societal factors underlying the Supreme Court's foray into this area. This review shows that this sea change in punitive damages jurisprudence arose predominantly from cases involving product liability claims with large personal injury components, and from consumer fraud cases involving nationwide misconduct. Because these cases involve little dispute over whether the plaintiff can quantify and recover for the actual and potential damage flowing from the wrongful conduct, the presumptive single-digit ratio may be appropriate. Many lower courts, however, have not always focused adequately on how the new due process rules can or should apply to cases in which total harm is difficult to value and thus difficult to recover as compensatory damages.

II. THE SUPREME COURT'S JOURNEY FROM BYSTANDER TO POLICEMAN: NARROW CASES AND BROAD PRINCIPLES

A. THE JOURNEY

Prior to 1996, the Supreme Court had never used substantive due process as a ground to invalidate as excessive a state court punitive damages award.[49] The Court began moving in that direction beginning in 1989, however, in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*[50] In that case, the Court rejected a challenge to a punitive damages verdict under the Excessive Fines Clause of the Eighth Amendment.[51] The Court did suggest, though, that a state's imposition of punitive damages might violate the Due Process Clause of the Fourteenth

48. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (holding that appellate courts should apply a de novo standard in reviewing the constitutionality of punitive damages awards).

49. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599–600 (1996) (Scalia, J., dissenting) (stating that the majority's decision represents the first instance of the Court's invalidation of a punitive damages award as unreasonably large); *In re* The Exxon Valdez, 472 F.3d 600, 603 (9th Cir. 2006) (per curiam) (noting that as of the time of the *Exxon Valdez* spill in 1989, the Supreme Court had never invalidated a punitive damages award on grounds that the size of the award violated due process), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

50. 492 U.S. 257 (1989).

51. *Id.* at 275–76.

Amendment.[52] At the time of the *Browning-Ferris* decision, it was settled that there were procedural due process limitations on punitive damages, but less certainty existed regarding whether punitive damages were subject to substantive due process limitations beyond the rational basis review that applied to legislative penalties.[53]

The Court squarely addressed the substantive due process issue for the first time in 1991 in *Pacific Mutual Life Insurance Co. v. Haslip*.[54] In *Haslip*, the Court explained that it had historically upheld punitive damages awarded by juries pursuant to state common law.[55] However, the Court made clear that jury discretion in awarding punitive damages was not unlimited. The opinion emphasized that the Court was under a constitutional obligation to review the reasonableness of the award and the adequateness of judicial guidance to the jury in making the award.[56] The Court held that the jury instructions were adequate and that the amount of punitive damages was not excessive, even though it was more than four times the amount of compensatory damages and twenty times the amount of the plaintiff's out-of-pocket expenses.[57]

The Court again addressed constitutional limits on punitive damages in 1993 in *TXO Production Corp. v. Alliance Resources Corp.*[58] In upholding a punitive damages award that, on its face, was 526 times the amount of compensatory damages,[59] the Court reasoned that, in assessing punitive damages, it was appropriate to consider the potential harm to the plaintiff and other possible victims that could have resulted from the defendant's wrongful conduct.[60] Thus, the punitive damages award did not "'jar one's constitutional sensibilities.'"[61]

52. *Id.* at 276. The Court did not reach the issue of due process limitations on punitive damages because it found that the petitioners had not properly preserved the issue for appeal. *Id.* at 276–77.

53. *Id.*; *see* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–55 (1993) (stating that the respondents do not dispute that the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award but that they contend the Court's scrutiny should be the same rational basis scrutiny appropriate for reviewing state economic legislation).

54. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 7–8 (1991).

55. *Id.* at 15–18.

56. *Id.* at 18–19.

57. *Id.* at 23.

58. 509 U.S. 443 (1993).

59. *Id.* at 459.

60. *Id.* at 461–62.

61. *Id.* at 462 (quoting *Haslip*, 499 U.S. at 18).

These cases culminated in the Court's decision in *BMW*,[62] where the Court for the first time struck down a punitive damage verdict as excessive on due process grounds.[63] The plaintiff in *BMW* had purchased a new BMW automobile that had been repainted without his knowledge prior to sale to hide a surface defect in the car.[64] In the plaintiff's suit for fraud, the jury awarded $4000 in compensatory damages and $4 million in punitive damages (later reduced to $2 million) based on evidence that the defendant's fraudulent practice was widespread.[65] In holding that the punitive damages award violated due process, the Court established its now-famous three guideposts courts now must use to provide a constitutional review of punitive damages: (1) the reprehensibility of the misconduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between the punitive damages imposed and the civil penalties authorized or imposed in comparable cases.[66] The Court held the reprehensibility guidepost was the most important, and focused on assessing the flagrancy or enormity of the misconduct.[67]

The Court reasoned that the ratio requirement ensured that the actual and potential harm to the plaintiff reasonably related to the penalty imposed on the defendant.[68] The Court cited to early English statutes authorizing double, treble, or quadruple damages for particular wrongs as the historic grounding for a numerical relationship between compensatory and punitive damages.[69] The Court recognized, however, that "low awards of compensatory damages may properly support a higher ratio" if a particularly egregious act resulted in only a small amount of economic damages.[70] The Court also acknowledged that a higher ratio might be justified where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[71] To round out the three guideposts, the Court stated that the focus on civil sanc-

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

63. *See id.* at 585.

64. *Id.* at 563 & n.1.

65. *Id.* at 564–65. The state supreme court subsequently reduced the punitive damages award to $2 million. *Id.* at 567.

66. *Id.* at 575.

67. *Id.* at 575–76.

68. *Id.* at 580–81 & n.33.

69. *Id.*

70. *Id.* at 582.

71. *Id.*

tions for comparative misconduct was to ensure the defendant was on notice that its conduct could subject it to a significant penalty.[72]

In 2003, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court retained the *BMW* framework's focus on reprehensibility of harm, appropriate ratios, and available civil penalties.[73] In *State Farm*, the plaintiffs brought claims of bad faith, fraud, and intentional infliction of emotional distress against their automobile insurer for mishandling their legal defense in an accident claim.[74] The jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages.[75] The Supreme Court struck down the jury's punitive damages award as unconstitutional.[76] In reaching the decision, the Court provided more specific limits on the ratio between compensatory and punitive damages. While in *BMW* the Court merely set forth the ratio as an important guidepost, in *State Farm* it went further.

The Court expressed its reluctance to "identify concrete constitutional limits" on the ratio between harm or potential harm to the plaintiff and the punitive damages award.[77] It went on to say, though, that the Court's jurisprudence and principles demonstrate that in practice "few awards exceeding a single-digit ratio between punitive and compensatory damages" will satisfy due process.[78] While the Court retained some flexibility in the ratio test consistent with its statement in *BMW*,[79] it warned that, when compensatory damages are substantial, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee."[80]

The Court's discussion of the ratio requirement in *BMW* and *State Farm* recognizes that punitive damages should be based on total harm where the compensatory damages award

72. *Id.* at 583–84.

73. 538 U.S. 408, 418 (2003).

74. *Id.* at 413–14.

75. *Id.* at 415. The trial court reduced the punitive damages award but the state supreme court reinstated it. *Id.*

76. *Id.* at 418.

77. *Id.* at 424.

78. *Id.* at 425.

79. *Id.* (reaffirming language in *BMW* that a larger ratio might be constitutional if an "egregious act" results in a small amount of economic harm, if the injury is hard to detect, or if the monetary value is difficult to determine).

80. *Id.*

does not include all harm caused by the defendant's misconduct. The Court, however, provided little detail as to which circumstances would justify a disproportionate punitive damages award. This can be explained, perhaps, by the specific concerns the Court sought to address in both *BMW* and particularly in *State Farm*. These concerns and the Court's response to them in its series of punitive damage cases are discussed in the next Section.

B. REASONS FOR THE JOURNEY

This Section proposes that the Court's single-digit ratio presumption is driven not only by concerns of out-of-control punitive damages awards, but also by concerns of excessive, nonpecuniary compensatory damages awards in cases involving nationwide harm.[81] As shown below, the Court's majority and dissenting opinions throughout these cases express fears of large verdicts and excessive compensatory damages, in addition to excessive punitive damages. These concerns reflect the heightened public debates regarding punitive damages and tort law. During this period, reports of excessive awards in products liability, personal injury, and other tort lawsuits had increased, and such awards generated significant amounts of academic writing and news stories that continue to this day.[82] State leg-

81. Pecuniary damages compensate the plaintiff for the economic consequences of the injury such as medical expenses, lost earnings, and loss of custodial care. *See* McDougald v. Garber, 536 N.E.2d 372, 374–75 (N.Y. 1989). Nonpecuniary damages compensate the plaintiff for pain and suffering, loss of enjoyment of life, and other physical and emotional consequences of the injury. *See id.*

82. Howard A. Denemark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931, 939–40 (2002) (stating that both the public and the courts are being misled by "[p]opular press reports [that] erroneously claim that the United States is in the midst of an unprecedented explosion of litigation with the indiscriminate use of punitive damages forcing legitimate enterprises out of existence"); Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1129–32 (2005) (arguing that recovery for noneconomic damages, such as awards for pain and suffering, "are starting to supplement punitive damages awards as a source of 'jackpot justice' damages for plaintiffs"); Sharkey, *supra* note 31, at 349 ("Large punitive damages awards get attention."); Viscusi, *supra* note 46, at 1405 ("Punitive damages represent the most visible symptom of the ills of the U.S. tort system."); Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381, 381–82 (2003) (reviewing CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002)) (describing the proliferation of recent academic work on the jury's role in determining punitive damages, and noting the Supreme Court and lower courts' reliance on this academic work);

islatures also have responded to this "crisis" by enacting significant tort reform measures which include placing caps on both punitive damages and noneconomic damages.[83] It is clear from many of the Court's opinions that it wished to address the perceived need to control excessive verdicts generally in addition to punitive damages specifically. These concerns appeared first in dissent in the early punitive damages cases, but came to ultimately underlie the majority opinion in *State Farm*.

First, in *Browning-Ferris*, Justice O'Connor declared that "[a]wards of punitive damages are skyrocketing."[84] She cited several then-recent cases to illustrate a trend of new, multimillion dollar awards.[85] She also relied on various amicus briefs warning that the threat of such "enormous awards" was detrimentally affecting the research and development of new products, pharmaceutical drugs, vaccines, and motor vehicles.[86] Justice O'Connor's concerns were not limited to the punitive

Catherine M. Sharkey & Jonathan Klick, *The Fungibility of Damage Awards: Punitive Damage Caps and Substitution* 1 (Columbia Law Sch., Columbia Law and Econ. Working Paper No. 298; Fla. State Univ. Coll. of Law, Law and Econ. Paper No. 912,256, 2007), *available at* http://ssrn.com/abstract=912256 (noting that blockbuster punitive awards tend to dominate the academic and popular debates and have fueled recent legislative efforts to cap or constrain such awards); *see also* DAVID C. JOHNSON, THE ATTACK ON TRIAL LAWYERS AND TORT LAW 3–9 (2003), *available at* http://commonwealinstitute.org/reports/TortReport.pdf (describing the right-wing tort reform agenda that is focused on achieving judicial and legislative reforms in limiting punitive damages and noneconomic harm); Eisenberg et al., *supra* note 45 (manuscript at 3–4) (concluding that empirical data show that punitive damages have not increased over time, are rarely awarded, and are most frequently awarded where intentional misbehavior occurred); American Tort Reform Association, About ATRA, http://www.atra.org/about/ (last visited Oct. 16, 2007) (stating that the ATRA supports an aggressive civil justice reform agenda that includes, among others, limits on punitive damages and limits on noneconomic damages).

83. JOHNSON, *supra* note 82, at 17 (citing the success of tort reform advocates in 2002 and 2003 to legislate state punitive damage caps in Alaska, Mississippi, and Texas, and noneconomic damage caps in Colorado, Idaho, Nevada, Ohio, Oklahoma, Texas, and West Virginia); Sharkey & Klick, *supra* note 82, app. A, at 31 (showing twenty-one states with punitive damages caps, with most enacted beginning in the mid-1980s and through the 1990s); *id.* app. B, at 33 (showing seven states with caps on noneconomic damages). In a few states, courts have invalidated noneconomic damage caps as unconstitutional. *Id.*

84. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part).

85. *Id.*

86. *Id.* (citing Brief of the Pharm. Mfrs. Ass'n. & Am. Med. Ass'n as Amici Curiae in Support of Petitioners, Browning-Ferris Indus. Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (No. 88-556), 1989 WL 1127717, at *5–23).

damages at issue in the case before the Court, but related to the broader effect of large verdicts on technological and economic development.[87]

Justice O'Connor again dissented from the majority opinion in *Haslip*, which upheld the punitive damages award at issue as within constitutional boundaries.[88] Her opinion called for more stringent constitutional limits because juries use punitive damages to "target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim."[89] Emphasizing this point, Justice O'Connor noted "an explosion in the frequency and size of punitive damages awards"[90] that appear to be "'limited only by the ability of lawyers to string zeros together in drafting a complaint.'"[91] Justice O'Connor declared a need to reevaluate the Court's punitive damages jurisprudence, in part because of the changes in the availability of compensatory damages. In the past, punitive damages were awarded to fill the gap "when compensatory damages were not available for pain, humiliation, and other forms of intangible injury."[92] With the changes in the law, however, punitive damages no longer appeared necessary to fill the compensatory gap.[93]

Justice O'Connor's opinions in these cases, particularly in *Haslip*, show a significant concern with the ability of the civil jury system to award noneconomic damages (whether compensatory or punitive) that are not arbitrary and unreasonable. The criticism is not limited to punitive damages claims but appears to extend to large verdicts generally, increases in compensatory damages, and the effect of mass tort and product liability litigation. These broad concerns did not surface expressly in *BMW*, but made their way into Justice Stevens' majority opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[94] In that case, the Court held for the first time that appel-

87. *Id.*

88. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

89. *Id.* at 43.

90. *Id.* at 62.

91. *Id.* at 62 (quoting Oki Am., Inc. v. Microtech Int'l, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring)).

92. *Id.* at 61.

93. *See id.* at 61 (citing KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.3(A) (1980); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519–20 (1957)).

94. 532 U.S. 424 (2001).

late courts should apply a de novo standard in reviewing the constitutionality of punitive damages awards.[95] The Court held that, unlike the measure of actual damages, the level of punitive damages is not a "fact" that is "tried by the jury."[96]

In support of that proposition, the Court relied on the changing role of punitive damages and compensation for harm in the civil justice system. According to the Court, until well into the nineteenth century, punitive damages "compensate[d] for intangible injuries" because recovery for such injuries "was not otherwise available under the narrow conception of compensatory damages prevalent at the time."[97] As an example, the court noted that plaintiffs are generally allowed to recover pain and suffering damages in a compensatory award, whereas such harm was previously compensated by punitive damages.[98] The increasing ability of plaintiffs to recover damages that historically were not subject to valuation for purposes of recovery eliminated the compensatory role of punitive damages. According to the Court, their changed role rendered them "less factual" and thus subject to a different standard of review than that applied to compensatory damages.[99] The Court also reasoned that the new, more limited purpose of punitive damages justified closer constitutional scrutiny of such awards.[100]

95. *Id.* at 443.

96. *Id.* at 437 (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)) (internal quotation marks omitted).

97. *Id.* at 437 n.11. According to other sources, courts have allowed recovery for pain and suffering associated with physical injuries since ancient times, but it was not until well into the twentieth century that courts routinely began allowing recovery for pure emotional distress and other nonpecuniary damages without physical impact. Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 141–46 (1992) (tracing the history of the judicial recognition of emotional distress claims); Jeffrey C. Dobbins, Note, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879, 888 (1994) (stating that claims for nonmarket losses are far greater today than they were under traditional common law and that claims for pure emotional distress were not regularly permitted until well into the 1900s).

98. *Cooper Indus.*, 532 U.S. at 437 n.11.

99. *Id.*

100. *Id.* at 437–38. *But see* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 164 (2003) (arguing that the Court made a historical error in *Cooper Industries* when it posited that punitive damages served primarily as a compensatory function in the early years of American tort law). Even if the Court was incorrect that the primary purpose of punitive damages in early tort law was to compensate for losses that were not previously recognized as a category of compensatory damages but now are, the fact remains

Justice Ginsburg disagreed with the Court's bright-line rule. She questioned the Court's conclusion that punitive damages were less "factual" than nonpecuniary damages, which are just as difficult to quantify.[101] She contended that punitive damages are "not unlike" the measure of actual damages suffered in a noneconomic injury: "One million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage."[102] Thus, Justice Ginsburg saw no legal basis for applying one standard of review to pain and suffering damages and another to punitive damages.

Finally, in *State Farm*, the majority questioned whether punitive damages continued to serve any purpose. In justifying its invalidation of a punitive damages award that exceeded the compensatory damages award by 145-to-1, the Court emphasized that compensatory damages in the case were "substantial" ($1 million).[103] The Court believed there was "likely" an overlap between the punitive damages award and the compensatory damages award because much of the compensatory award compensated for emotional distress caused by the outrage and humiliation the plaintiffs suffered.[104] The Court went on to cite authority arguing that compensatory damages of this type already contain a punitive element, and stated that there is "'no clear line of demarcation between punishment and compensation'" in a case of this kind.[105] Thus, the Court further limited the role of punitive damages by questioning their role as a punitive measure in cases involving awards of nonpecuniary damages. Following its reasoning in *Cooper Industries*, the Court found the more limited role justified greater scrutiny of such awards.

The Court has continued to narrow the role of punitive damages as evidenced by its most recent case, *Philip Morris USA v. Williams*, which was issued in February 2007.[106] In that

that compensation was and can still be a component of punitive damages. *See, e.g.*, Sharkey & Klick, *supra* note 82 (suggesting that punitive damages and noneconomic compensatory damages are more fungible than has been acknowledged); *supra* text accompanying notes 37–39 (discussing the historic purposes of punitive damages).

101. *Cooper Indus.*, 532 U.S. at 446–47 (Ginsburg, J., dissenting).

102. *Id.*

103. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

104. *Id.*

105. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1979)).

106. 127 S. Ct. 1057, 1057 (2007).

case, the Oregon Supreme Court affirmed a jury award to the wife of a smoker in a wrongful death claim for fraud and negligence.[107] The jury found that Philip Morris had engaged in a publicity campaign to undermine published concerns about the dangers of smoking.[108] The jury awarded the plaintiff $79.5 million in punitive damages, based on a total compensatory award of $821,485.80 ($21,485.80 in economic damages and $800,000 in noneconomic damages), resulting in a ratio of roughly 100-to-1.[109] On appeal to the Supreme Court, the defendant raised two issues. First, the defendant argued that the jury's award violated due process because there was a "significant likelihood" that a portion of the punitive damages award represented punishment for harm to nonparties rather than solely for harm or potential harm to the plaintiff.[110] Second, the defendant argued that the punitive damages award was grossly excessive and violated due process by significantly exceeding the presumptive single-digit ratio set out in *State Farm*.[111]

In its decision, the Court addressed the first issue but not the second issue.[112] The Court held that due process prohibited a jury from imposing damages based on harm to nonparties.[113] It also held, however, that the jury *could* consider harm to nonparties in determining the reprehensibility of the defendant's conduct.[114] The Court reasoned that to allow the jury to punish the defendant for harm to "strangers to the litigation" would prevent the defendant from mounting a proper defense.[115] The defendant would have insufficient facts as to the number of such nonparty victims, as well as the circumstances and seriousness of their injuries.[116] The Court found that the jury instructions did not sufficiently narrow the jury's consideration of harm to nonparties, resulting in a risk that the jury's punitive damages award may punish the defendant not only for the rep-

107. *Id.* at 1060–61.

108. *Id.*

109. Williams v. Philip Morris Inc., 127 P.3d 1165, 1171 (Or. 2006), *vacated sub nom.* Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007). The Court's opinion appears to contain a mathematical error in adding economic and noneconomic damages. The error has been corrected in the text of this Article.

110. *Williams*, 127 S. Ct. at 1061.

111. *Id.* at 1061–62.

112. *Id.* at 1062.

113. *Id.* at 1063.

114. *Id.* at 1063–64.

115. *Id.* at 1063.

116. *Id.*

rehensibility of its conduct, but also for similar harm the defendant may have caused to smokers not parties to the case.[117] The Court then remanded the case to the Oregon Supreme Court to allow that court to apply the standard set out in the opinion.[118] Though it set out extensive standards regarding the permissible role of nonparty harm, the Court expressly refused to reach the issue of whether the punitive damages award was "grossly excessive" based on the ratio to compensatory damages.[119]

Like in its prior decisions, the Court in *Williams* was clearly concerned about excessive damages awards, particularly those awarded in nationwide mass torts where numerous suits can result in multiple, and potentially overlapping, punitive damages awards. The *Williams* Court, however, implicitly assumed that "strangers to the litigation" can bring their own lawsuits to recover not only punitive damages, but also damages compensating economic and noneconomic harm such as pain and suffering, loss of enjoyment of life, and the like. Indeed, like the plaintiff in *State Farm*, the plaintiff in *Williams* recovered far more in noneconomic damages ($800,000) than she did in economic damages ($21,485.80).[120]

But what about cases where the noneconomic harm remains uncompensated? The Court's ratio analysis specifically allows for departing from single-digit ratios where economic harm is small or the injury is hard to detect or difficult to value.[121] Thus, in cases where the plaintiff can establish the existence of actual or potential harm that is not included in compensatory damages, the reviewing court should ensure that such harm is part of the ratio assessment.

The next Part shows how since *BMW*, and particularly since *State Farm*, lower courts have fairly easily applied the presumptive single-digit ratio exception in cases involving small or nominal damages. Lower courts have more often failed to do so, however, where damages are more substantial but still fail to value all the actual or potential harm.

117. *Id.* at 1063–65.

118. *Id.* at 1065.

119. *Id.*

120. Williams v. Philip Morris Inc., 127 P.3d 1165, 1171 (Or. 2006), *vacated sub nom.* Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

121. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582–83 (1996).

III. RECOGNIZING AND VALUING HARM

A. THE INTENTIONAL TORT CASES POST-*BMW*

This Section evaluates several intentional tort cases involving claims for trespass, defamation, and civil rights violations. These cases are notable for several reasons. First, compensatory damages were small or nominal and punitive damages far exceeded single-digit ratios. Second, the reviewing courts had to determine whether to apply a strict ratio or whether to use the language in *BMW* and *State Farm* to justify a higher ratio.[122] Third, the reviewing courts had little difficulty upholding punitive damages awards whose ratios to the compensatory damages awards far exceeded single digits. Finally, in each case, the court justified its decision by appealing to the punitive and deterrent purposes of punitive damages, as well as the fact that compensatory damages in the case were nominal or very small. As a result, no punishment and deterrence of egregious conduct would result without departing from a single-digit ratio.

None of these cases are difficult. These are not the cases that motivated the Supreme Court to develop constitutional limits on punitive damages in the first place. In most cases, the plaintiff recovers little or no compensatory damages. Thus, punitive damages in these cases ultimately represent some amount of harm not valued as compensatory damages. Though courts do not explicitly state their reasoning, these cases show that courts continue to use punitive damages to serve compensatory, as well as punitive and deterrent, goals where the tort system fails to recognize certain types of harm.

1. Intentional Trespass Cases

In 2002, the Minnesota Court of Appeals addressed the constitutional ratio issue under *BMW* in an intentional trespass suit.[123] The court conducted a constitutional due process review of punitive damages in a case where the jury awarded the plaintiff $819 in rental value for the disputed land and

122. *See State Farm*, 538 U.S. at 425; *BMW*, 517 U.S. at 582 (allowing higher ratios when the conduct is egregious and the economic injury is small, hard to detect, or difficult to value).

123. Brantner Farms, Inc. v. Garner, No. C6-01-1572, 2002 WL 1163559, at *1 (Minn. Ct. App. June 4, 2002).

$50,000 in punitive damages.[124] The jury found that the defendant deliberately disregarded the plaintiff's rights when the defendant maintained that he owned the property and threatened to have the plaintiff arrested and have his farming equipment confiscated if he used the property.[125] The defendant argued that because the ratio between punitive damages and compensatory damages was 61-to-1, the punitive damages award was unconstitutionally excessive under *BMW*.[126] The court of appeals disagreed and held that such arguments fail if there is a small compensatory award.[127] The court reasoned that applying a strict-ratio requirement to a small compensatory damages award would "negate the purpose of deterring the defendant from engaging in the same reprehensible conduct in the future."[128]

Other jurisdictions similarly have focused on the small amount of compensatory damages and the reprehensibility of the conduct in affirming punitive damages awards that far exceed single-digit ratios. In 2006, the Supreme Court of Kentucky reinstated a $5000 punitive damages award based on an award of nominal damages for the defendant's intimidating and abusive behavior in blocking access to a road.[129] To justify its decision, the court relied on the exception established in *BMW*, which permits higher ratios where an egregious act has resulted in only a small amount of damage or when noneconomic harm is difficult to determine.[130] The court also pointed to decisions in other jurisdictions allowing ratios of 150-to-1 and higher where damages were small and the defendant in the case had acted with malice or oppression.[131]

The *Jacque* case discussed in the introduction to this Article also follows this rationale. In *Jacque*, the Wisconsin Su-

124. *Id.* at *6.

125. *Id.* at *1.

126. *Id.* at *6.

127. *Id.*

128. *Id.*

129. Roberie v. VonBokern, No. 2004-SC-00250-DG, 2006 WL 2454647, at *3 (Ky. Aug. 24, 2006).

130. *Id.* at *7 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 583 (1996)).

131. *Id.* at *8 (citing Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003) (upholding a punitive damages award of $15,000 based on nominal damages of $100); Provost v. City of Newburgh, 262 F.3d 146, 164 (2d Cir. 2001) (upholding a $10,000 punitive damages award where there was no compensable injury and only nominal damages of $1)).

preme Court upheld a punitive damages award of $100,000 based on a $1 nominal damages award for the corporate defendant's trespass across the plaintiff's property after the plaintiff had denied access.[132] In finding the award consistent with due process, the court emphasized that a private landowner's right to exclude is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[133] The court asserted that, beyond protecting the interests of the individual landowner, society also has an interest in preventing landowners from resorting to self-help remedies, which requires assuring landowners as a group that the legal system will appropriately punish wrongdoers.[134] Based on the egregiousness of the defendant's conduct in this case, the court concluded that *BMW* did not require a mathematical bright-line ratio between punitive and compensatory damages and that adhering to the ratio "would turn the concept of punitive damages on its head."[135] These cases provide examples of how courts properly recognize the important role of punitive damages in providing redress for invasions of personal rights that are not tied directly to a compensatory damages award.[136]

2. Defamation and Civil Rights Cases

Cases involving claims for defamation[137] or violations of civil rights resemble the trespass cases in that courts have al-

132. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 156 (Wis. 1997).

133. *Id.* at 159–60 (quoting Dolan v. City of Tigard, 512 U.S. 374, 384 (1994)).

134. *Id.* at 160–61.

135. *Id.* at 164–65; *see* Gianoli v. Pfleiderer, 563 N.W.2d 562, 570 (Wis. Ct. App. 1997) (upholding a punitive damages award of $200,000 based on a compensatory damages award of $12,000 in a land-based tort case on the grounds that conduct toward neighbors was outrageous and that the case was "not a situation in which a runaway jury awarded mind-boggling punitive damages that require a reining in by a judge").

136. *See* Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1098 (2005) (stating that punitive damages can be justified as a "means of protecting the plaintiff's individual tort right from wrongful infringements by the defendant"); Sebok, *supra* note 45, at 1036 (advising that punitive damages "fit within a scheme of civil recourse and provide a unique form of redress where citizens have suffered the indignity of a willful violation of their private rights").

137. Defamation is a communication that tends "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977). Because of First Amendment concerns, plaintiffs who are public officials or public figures must establish that the defendant "published

lowed punitive damages to be based upon nominal damages if the defendant acted with sufficient malice, deliberate disregard, or other intent sufficient to justify an award of punitive damages.[138] Judicial analysis of punitive damages in these cases often focuses on the need to effectively punish and deter the defendants' egregious conduct that was directed specifically at the plaintiff.[139] Thus, these opinions imply that punitive damages serve as redress where the judicial system does not compensate for the harm associated with the violation of the personal right.

Significantly, there is no reason courts could not attempt to value the violation of the right and award compensatory damages for such noneconomic harm. Courts have valued other nonpecuniary injuries such as pain and suffering and loss of enjoyment of life.[140] Indeed, a move in this direction would avoid reliance on the Supreme Court's exception to single-digit ratios, and may increase certainty and precision in damages awards.[141] For now, though, courts facing situations involving noneconomic harm continue to use punitive damages which exceed single-digit ratios—rather than increased compensatory damages—to pursue deterrent, punitive, and even compensatory goals. Whatever the court's approach, the Supreme Court has given lower courts the flexibility to award higher punitive damages in cases if awarding that same amount as compensatory damages would be a stretch under current law.[142]

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a knowing or reckless falsehood" to recover presumed or actual damages for defamation. 2 DOBBS, *supra* note 42, at 1121, 1192. Where the issue involves a matter of public concern, private-figure plaintiffs must establish negligence or some other fault plus actual damages and, if warranted, punitive damages. *Id.* Where the alleged defamation is of no public concern, private-figure plaintiffs can recover presumed damages and punitive damages, if appropriate. *Id.*

138. *See* Sherman v. Kasotakis, 314 F. Supp. 2d 843, 874–75 (N.D. Iowa 2004) ("[M]any civil rights violations will fall into this category of cases in which it is difficult to assess a monetary value to the harm suffered, thus resulting in only the imposition of nominal damages, but where punitive damages are warranted."); 2 DOBBS, *supra* note 42, at 1192.

139. *See Sherman*, 314 F. Supp. 2d at 874–75.

140. *See supra* text accompanying note 97 (discussing judicial recognition of pain and suffering damages).

141. *But see infra* notes 325–26 and accompanying text (discussing the lack of precision in jury instructions for awards of pain and suffering and other nonpecuniary damages).

142. *See* Sebok, *supra* note 45, at 1036 (proposing a theory of punitive damages that "provide[s] a unique form of redress where citizens have suffered the indignity of a willful violation of their private rights").

For instance, in 2005, the United States Court of Appeals for the Sixth Circuit upheld a punitive damages award of $600,000 against officers in a civil rights unlawful arrest case, despite a compensatory damages award of only $279.05.[143] Casino security officers placed a seventy-two-year-old casino patron in a security office, told her that she had committed a crime, handcuffed her, photocopied her identification, reported her to the state police, refused to let her use the bathroom alone, and forced her to wait outside in the heat for her afternoon bus home.[144] The security officers subjected the plaintiff to this treatment because they suspected her of stealing one nickel from a slot machine.[145]

In its analysis of the constitutionality of the punitive damages award, the court emphasized that the case was not about a monetary injury, but about a violation of the elderly plaintiff's right not to be unreasonably seized and detained in an outrageous manner.[146] Relying on *BMW* and prior civil rights cases, the court found that "where 'injuries are without a ready monetary value,' such as invasions of constitutional rights unaccompanied by physical injury or other compensable harm," higher ratios of punitive damages to compensatory damages should be expected.[147]

Likewise, in a 2006 defamation case from the United States District Court for the District of Kansas, although the court reduced the punitive damages award from $150,000 to $50,000, the 20-to-1 ratio of punitive damages to compensatory damages remained in excess of the single-digit ratio.[148] The court recognized that "the monetary value of harm to reputation is difficult to determine" and that the plaintiff's intangible harm to reputation "transcends out-of-pocket loss."[149] Although the court reduced the award, the driving force behind the reduction was the rationale that a more modest amount would be

143. Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629, 635, 649–50 (6th Cir. 2005) (upholding a punitive damages award but reducing it from $875,000).

144. *Id.* at 632–34.

145. *Id.* at 632.

146. *Id.* at 645.

147. *Id.* at 645–46 (quoting Argentine v. United Steel Workers of Am., AFL-CIO, 287 F.3d 476, 488 (6th Cir. 2002) (sustaining a 42.5-to-1 ratio and a $400,000 punitive damages award in a union retaliation case)).

148. Sunlight Saunas, Inc. v. Sundance Sauna, Inc., No. 04-2597-KHV, 2006 WL 3021109, at *5–7 (D. Kan. Oct. 23, 2006).

149. *Id.* at *6.

sufficient to achieve punishment and deterrence—not the ratio guidepost.[150]

These cases show that courts routinely invoke *BMW* in departing from single-digit ratios where the act is egregious, but the actual damages are small. One reason is that concerns of the jackpot justice system of multimillion dollar awards and their hindering effect on commerce—concerns which prompted a reining in of punitive damage verdicts—are simply not present in these cases. These cases involve discrete parties where the total damages, both compensatory and punitive, do not approach even $1 million. Thus, courts more easily allow disproportionate punitive damages awards.

More important, courts in these cases recognize, at least implicitly, that the punitive damages awards should reflect the injury to the plaintiff, and serve to punish and deter the defendant.[151] Such a goal is consistent with the Supreme Court's recognition that where such harm is not recoverable as compensatory damages, there is a greater role for punitive damages.[152] Although the Court has made clear that punitive damages' compensatory component has no place in cases where significant nonpecuniary damages are awarded,[153] lower courts have justified disproportionate punitive damages awards to reflect the value of the individual's interest in the integrity of his or her rights.[154] These courts appeared to assume that there were no (or very little) compensatory damages in cases associated with violation of those rights, so it was appropriate to rely on

150. *Id.* at *6–7.

151. *See* Nemecek v. Santee, No. 05-0518, 2006 WL 334298, at *3 (Iowa Ct. App. Feb. 15, 2006) (stating that "harm" does not equate with "damages" and concluding that the harm "clearly exceeded the amount of compensatory damages awarded him"); Molenaar v. United Cattle Co., 553 N.W.2d 424, 429 (Minn. Ct. App. 1996) (focusing on punishment and deterrence but also discussing the need for punitive damages to ensure society's reinforcement of personal accountability); Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160 (Wis. 1997) (noting that the law infers some damage for direct entry on the land of another, whether or not compensatory damages are awarded, as nominal damages represent recognition that although "immeasurable in mere dollars, actual harm has occurred") (citing KEETON ET AL., *supra* note 31, § 13, at 67–84).

152. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437–48, n.11 (2001) (noting that the types of compensatory damages available to plaintiffs, including pain and suffering, broadened in the twentieth century, rendering it unnecessary for punitive damages to contain a compensatory component to account for a plaintiff's inability to recover for those injuries).

153. *Id.*

154. *See supra* notes 123–50 and accompanying text.

punitive damages to punish and deter interference with those rights as well as value that uncompensated harm.

The courts' practice of using punitive damages for multiple purposes where the plaintiff cannot easily value the harm in monetary terms should be extended beyond the "easy" cases described above to cases involving environmental harm or other cases involving difficult valuation issues. The next Section presents several examples of environmental harm cases and argues that, in contrast to the intentional torts cases, lower courts in environmental harm cases have not fully embraced the Court's suggestion that where harm is difficult to value economically a higher ratio is constitutional.

B. THE ENVIRONMENTAL HARM CASES

The environmental harm cases discussed below have much in common with the intentional tort cases analyzed in the previous Section. First, both types of cases involve defendants who acted with malice, deliberate indifference, extreme recklessness, or another mental state required under state law to impose punitive damages. Second, both types of cases involve private party or local government plaintiffs attempting to recover, not only for harm to their own economic interests, but also for harm to broader interests. In cases involving environmental damage, the defendant has caused harm to the environment (air, water, soil, etc.) for which the plaintiff cannot (and sometimes should not) be compensated because of standing limitations or valuation difficulties. As a result, compensatory damages awards, though often large in these cases, undervalue the harm, and courts risk undermining punishment and deterrence if they insist on applying the single-digit ratio presumption.

There are two types of environmental cases in this Section. First, I discuss cases in which courts fail to include harm to the environment as part of compensatory damages, apply a single-digit ratio of punitive to compensatory damages, and reduce the jury's punitive damages award. In these cases, courts do not recognize that some or all of the environmental harm was not valued, and also fail to utilize the Supreme Court's exception to single-digit ratios to award a more appropriate damage amount. Second, I discuss cases in which the courts more fully recognize environmental harm. Both types of cases are instructive in showing the difficulty in valuing environmental harm and the impact that difficulty has on the amount of punitive damages the court awards.

1. Undervaluing Environmental Harm

The Alabama Supreme Court faced the issue of undervalued environmental harm in a 2000 case where landowners sued a nearby hog feedlot under theories of nuisance, negligence, and trespass for damage to their property and for environmental harm.[155] One defendant, Tyson Foods, had contracted with the landowner-defendant to maintain a hog farm for the benefit of Tyson.[156] Shortly after the hog farm went into operation, it began emitting noxious odors and discharging waste into a stream and onto the plaintiffs' property.[157] The plaintiffs presented evidence at trial that, although both defendants knew about the ongoing air and water pollution, they did not make the necessary repairs.[158]

At trial, the only damages the plaintiffs recovered were for diminution in value to their property based upon the "smells coming from [the defendant's] property, as well as upon the waste that flowed onto the [plaintiffs'] property."[159] The trial court specifically charged the jury that the compensatory damages, if any, would be "the difference in the reasonable market value of the property of the plaintiffs with the nuisance, and the value of what the property would have been had the nuisance not existed."[160] The jury awarded the plaintiffs $2500 in compensatory damages and $75,000 in punitive damages.[161]

In conducting its constitutional review of the punitive damages award, the state supreme court discussed all of the *BMW* factors. With respect to reprehensibility, the court found that both defendants were aware of the continuing pollution, knew how to fix it, and were financially able to do so.[162] The court concluded that the conduct was "fairly reprehensible" but not "highly reprehensible."[163] Next, in applying the ratio presumption, the court found that a ratio of 30-to-1 was unreasonable under Alabama law and *BMW*.[164] The court reasoned that, although the plaintiffs had "endured the odors that emanated

155. Tyson Foods, Inc. v. Stevens, 783 So. 2d 804, 805–07 (Ala. 2000).
156. *Id.* at 806.
157. *Id.*
158. *Id.*
159. *Id.* at 808.
160. *Id.*
161. *Id.* at 807.
162. *Id.* at 809.
163. *Id.*
164. *Id.* at 810.

from the farm, as well as the frequent overflow across their land, the jury awarded only $2500 in compensatory damages" and the defendants later stopped raising hogs.[165] Based on its conclusion that a 30-to-1 ratio was unreasonable, the court reduced the punitive damages award to $25,000.[166] The court did not explain how it arrived at $25,000, but did discuss the state law factors that justified the reduction.[167] The court focused on the fact that the likelihood of additional harm to the plaintiffs was "nonexistent," that the harm was reprehensible but not "so reprehensible," the lack of criminal sanctions imposed, the implicit assumption that the punitive award was a sufficient incentive for potential plaintiffs to bring wrongdoers to trial, and the fact that "the jury did not find the actual harm suffered by the [plaintiffs] significant enough to require a large compensatory-damages award."[168]

However, not all justices agreed with the remittitur of damages. One justice thought "the defendants' environmental pollution so egregious that the entire punitive award is justified."[169] Another justice, by contrast, argued that the punitive damages should be reduced not to $25,000, but to $20,000.[170] His reasoning stemmed from his proposal in an earlier case to adopt a stricter mathematical presumption for evaluating any punitive damages award under Alabama law and *BMW*. Under his approach, punitive damages in all cases would be the greater of $20,000 or three times the compensatory damages award; applying that theory to this particular case resulted in a $20,000 punitive damages award.[171]

The justices' varying conclusions reflect their different views of both the nature of the harm the defendant caused and how the punitive damages award should relate to that harm. The majority and one other justice measured the harm by the compensatory damages awarded at trial, which consisted solely of the economic diminution in value to the plaintiffs' proper-

165. *Id.*

166. *Id.*

167. *Id.* at 810–11.

168. *Id.* (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989)). The court noted that other people living near the hog farm incurred "the same kind of injury the Stevenses suffered." *Id.*

169. *Id.* at 811–12 (Johnstone, J., concurring in part and dissenting in part).

170. *Id.* at 811 (Houston, J., concurring in part and dissenting in part).

171. *See id.* (citing Prudential Ballard Realty Co. v. Weatherly, 792 So. 2d 1045, 1052–54 (Ala. 2000) (Houston, J., concurring)).

ty.[172] However, the compensatory award did not represent any part of the environmental damage to the stream, resulting in the conclusion that punitive damages were excessive.[173] Because the court assessed the reasonableness of punitive damages awards by calculating the ratio of punitive to compensatory damages, the artificially low compensatory figure caused the court to characterize as excessive a punitive damages award which may not have been based on the total harm.[174] Yet another justice, by contrast, saw this as a case of "environmental pollution" and one so "egregious" that the punitive damages the jury awarded were not unreasonable.[175] Similarly, the jury, though careful to follow instructions and award compensatory damages only for economic harm, attempted to account for the defendant's reprehensible conduct in polluting the environment through its punitive damages award.[176] The Alabama Supreme Court, however, reduced the award to correspond more directly with the compensatory damages in the case (creating a 10-to-1 ratio),[177] and in doing so erased the noneconomic harm that was "difficult to determine."[178]

An Iowa federal district court in 1998 similarly frustrated a jury's attempt to award punitive damages based in part on unmeasured environmental harm.[179] In *E.T. Holdings, Inc. v. Amoco Oil Co.*, the plaintiff, a shopping center owner, sued Amoco Oil Company for nuisance and trespass in connection with petroleum that had leaked from the defendant's nearby gas station and migrated to the plaintiff's property, which re-

172. *Id.* at 810–12.

173. *Id.* at 810–11.

174. *See id.* at 809–10.

175. *Id.* at 811–12 (Johnstone, J., concurring in part and dissenting in part). In *Ballard Realty*, Justice Houston established his formula of a $20,000 award or three times the compensatory damages award. *Ballard Realty Co.*, 792 So. 2d at 1052 (Houston, J., concurring in part and dissenting in part). Justice Johnstone also concurred, stating that he agreed with Justice Houston's benchmark approach but that it may require reevaluation in "peculiar" cases. *Id.* at 1056 (Johnstone, J., concurring in part and dissenting in part). Apparently, Justice Johnstone found the facts surrounding the environmental pollution in the *Tyson* case sufficiently "peculiar" to warrant departing significantly from Justice Houston's benchmark approach. *Id.*

176. *See Tyson Foods*, 783 So. 2d at 811.

177. *Id.*

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

179. E.T. Holdings, Inc. v. Amoco Oil Co., No. C95-1034 MJM, 1998 WL 34113907, at *14–16 (N.D. Iowa Dec. 27, 1998).

sulted in soil and groundwater contamination.[180] At trial, the plaintiff established that Amoco knew that the tanks at its station were leaking and that the petroleum was migrating offsite for several years before it reported the contamination to the state or anyone else.[181] Despite continuous urging by its environmental employees, Amoco continued to store gasoline in the tanks, neglected to perform an assessment, and, even after it reported the contamination, refused to install the appropriate remediation system to avoid the spread of contamination.[182] Amoco did not wish to put more money into an unprofitable station.[183] It was not until more than five and one-half years after the company discovered the contamination that it finally closed the station and removed the tanks.[184]

At trial, the plaintiff sought compensatory damages and punitive damages. The jury awarded compensatory damages of $1.7 million, which was the plaintiff expert's estimate of the decrease in fair market value attributable to the contamination.[185] The jury also awarded the plaintiff $15 million in punitive damages based on Amoco's conduct.[186] Following the jury's verdict, the district court conducted a constitutional due process review of the punitive damages award under *BMW*.[187] The court acknowledged that punitive damages were appropriate based on Amoco's reckless operation of the station for several years after it had knowledge that the tanks were leaking, contrary to the advice of its own employees and consultants.[188] The court also focused on the fact that Amoco operates hundreds of gas stations in the United States, conducts operations throughout the world, and, in 1997, had revenues of $17.667 billion and earnings of $168 million.[189] The court noted that the benzene levels under the shopping mall were severely elevated and that Amoco's conduct had caused significant contamination.[190]

180. *Id.* at *1.
181. *Id.* at *3–9.
182. *Id.*
183. *Id.* at *12, *15.
184. *Id.* at *9.
185. *Id.* at *10, *16.
186. *Id.* at *14.
187. *Id.* at *14–16.
188. *See id.* at *16 ("[T]he Court finds that the punitive damages verdict was not the product of passion or prejudice.").
189. *Id.*
190. *Id.* at *15.

Despite these findings, the court ordered a remittitur of the punitive damages award to $2 million, reasoning that: (1) the jury accepted the plaintiff's expert's estimate as to the loss of value to the shopping center and thus the plaintiff was "fully compensated" for its claimed damages; (2) Amoco had eventually spent considerable time and money to clean up the problem; and (3) the reduced amount of punitive damages represented slightly more than 1% of Amoco's earnings and thus was adequate punishment.[191] This case, like the Alabama case, shows that the court's perception that the plaintiff has been compensated "in full" drives the court to apply the ratio factor to reduce punitive damages. However, the court's reduction of punitive damages resulted from a failure to value the harm the defendant caused to natural resources. Because the plaintiff did not own the land surrounding its shopping center, it could not seek compensation for the significant contamination to surrounding groundwater and soil. The court's refusal to acknowledge this significant damage and its reliance on the plaintiff's "full compensation" resulted in an unjustified reduction of punitive damages.[192]

The same phenomenon occurred to a lesser extent in a 2006 California case. The city of Modesto, California sued Vulcan Materials Company, Dow Chemical Company, and several other defendants for marketing perchloroethylene (PCE) to dry cleaners.[193] Substantial evidence demonstrated that, as of the late 1970s, defendants Vulcan and Dow knew PCE was hazardous and a potential human carcinogen, and also knew it had contaminated and would further contaminate public drinking-water supplies.[194]

After a four-month trial, the jury awarded $3,173,834 in compensatory damages along with $100 million in punitive damages against Vulcan and $75 million against Dow.[195] The city's compensatory damages consisted solely of its "economic damages," consisting of the city's environmental investigation costs and wellhead filtration costs.[196] The court's opinion con-

191. *Id.*

192. *See id.*

193. City of Modesto Redev. Agency v. Dow Chem. Co., Nos. 999345, 999643, 2006 WL 2346275, at *1 (Cal. Super. Ct. Aug. 1, 2006).

194. *Id.* at *7.

195. *Id.* at *1. The jury also awarded punitive damages of $75,000 against a third defendant, R.R. Street & Co. *Id.*

196. *Id.* at *1, *8.

tained no discussion of the broader effects of the contamination to the aquifer, the permanence of the impairment, or any other valuation of public harm. In reviewing the jury's punitive damages award, the court relied on both California law[197] and the Supreme Court's constitutional guideposts,[198] and concluded that California due process "mirrors" federal due process.[199]

In applying the state and federal due process standards, the court agreed that substantial evidence supported the jury's finding that the conduct of Vulcan and Dow was "despicable and was done with a willful and knowing disregard of the rights or safety of another."[200] The court, however, relied heavily on the ratio guidepost in holding that the award exceeded state and federal due process limits.[201] Noting that few awards exceeding single-digit ratios will satisfy due process, the court also concluded the exception to this presumption did not apply because damages were not small, hard to detect, or hard to measure.[202] The court then stated that ratios of 3- or 4-to-1 "express the due process norm" and should apply to the case.[203]

The court rejected the city's argument that it should measure the reasonableness of punitive damages in relation to the $40 million required to remediate the groundwater instead of the $3 million compensatory award.[204] The court reasoned that the $40 million cost to remove PCE from the city wells was an "unrealistic" estimate.[205] Based on a $3 million measure of harm, a 4-to-1 ratio, and an allocation of the punitive damages between the two defendants based on various factors, the court held that a $7,254,115 punitive damages award against Vulcan and a $5,441,221 punitive damages award against Dow was "the maximum constitutional award [allowable] under both

197. Under California law, the court reviewed: "(1) the reprehensibility of defendant's conduct, (2) the requirement of a reasonable relationship between the amount of punitive damages and the harm to the plaintiff, . . . (3) in view of the defendant's financial condition, the amount that is necessary to punish the defendant and discourage future wrongful conduct," and (4) "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at *6 (citing Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 70 (Cal. 2005)).

198. *Id.* at *5 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996)).

199. *Id.*

200. *Id.* at *7 (listing instructions given to the jury).

201. *Id.* at *10–13, *16–17.

202. *Id.* at *10–11.

203. *Id.* at *11.

204. *Id.*

205. *Id.*

federal and state due process."[206] The reduced award against Vulcan represented one-third of one percent of its net worth and the reduced award against Dow amounted to less than four-hundredths of one percent of its net worth.[207]

While the punitive damages awarded were a significant sum, in setting a 4-to-1 ratio, the court refused to value any environmental harm other than that attributable to the immediate cost to the city in providing water to its residents. Even if the $40 million cleanup price tag was unrealistic, the court completely ignored the long-term harm to the resource itself when it calculated the "harm" against which to measure punitive damages.

This is not to say courts should never reduce a jury's punitive damages award in environmental harm cases.[208] Courts always have exercised review over punitive damages and should continue to do so. The analysis here, though, cautions that, in conducting a ratio review under state law or federal due process, courts should ensure they account for harm caused by the defendant that is difficult to measure as compensatory damages. Below, I discuss several cases in which courts *do* consider harm to public resources in analyzing the ratio of punitive damages to compensatory damages. In some cases, this consideration enters into the court's decision because either a private or government party has quantified the harm for the court. In other cases, the harm was not quantified, but received sufficient attention to allow the court to either depart from a single-digit ratio based on *BMW* and *State Farm* or allow punitive damages at the outer limit of the ratio guidepost.

2. Recognizing Environmental Harm

In *Johansen*,[209] discussed in the introduction of this Article, the Court of Appeals for the Eleventh Circuit held that a punitive damages award that was one hundred times the compensatory damages award did not violate federal due process limits.[210] In that case, the plaintiff-landowners sued the defendant mining company for allowing acidic water to escape from the mining site and pollute streams that flowed onto the plain-

206. *Id.* at *14–15.

207. *Id.* at *15.

208. *See* SCHLUETER, *supra* note 31, § 6.4(B), at 379–83 (discussing judicial review of the adequacy and excessiveness of punitive damages awards).

209. Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320 (11th Cir. 1999).

210. *Id.* at 1339.

tiffs' properties.[211] The final award consisted of $47,000 in compensatory damages and $4.35 million in punitive damages.[212] In reviewing the $4.35 million punitive damages award, the court of appeals found that, because the defendant had ultimately cooperated in attempting to address the environmental harm, the defendant's conduct was not severely reprehensible.[213]

The court, however, focused on other factors to justify a punitive damages award that was one hundred times the compensatory damages. Relying on *BMW*'s instruction that higher ratios are allowed where the injury is hard to detect or "the monetary value of noneconomic harm might have been difficult to determine,"[214] the court found that "[t]his is such a case" justifying departure.[215] The court recognized that the actual damages awarded were small, but that "the state's interest in deterring the conduct—environmental pollution—is strong."[216] As a result, "ratios higher than might otherwise be acceptable are justified."[217] The court also relied on Supreme Court authority which suggested that the wealth of the defendant may be considered in order to promote the deterrence function of punitive damages.[218] The defendant in this case was an "extremely wealthy international corporation" and the court suggested the award should attract the attention of the company's environmental decision-makers and other managers.[219]

Although *Johansen* was decided prior to the more stringent ratio requirements announced in *State Farm*, the court recognized that a punitive to compensatory damages ratio of 100-to-1 was large enough to "raise a suspicious eyebrow,"[220] and noted that there is no "mathematical bright line" for a constitu-

211. *Id.* at 1326.

212. *Id.* at 1326–27. The jury originally awarded $45 million in punitive damages which the lower court reduced first to $15 million based on state law, and later to $4.35 million based on the *BMW* guideposts. *See id.*

213. *Id.* at 1336.

214. *Id.* at 1338 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 n.28 (1993)).

219. *Id.* at 1338–39.

220. *Id.* at 1338 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576 (1996)) (internal quotation marks omitted).

tionally acceptable ratio.[221] Thus, to defend its punitive damages award, the court emphasized the fact that the compensatory damages in the case did not reflect the harm to the important state interest in preventing environmental pollution.[222] In this way, the court considered the full scope of the harm the defendant caused in evaluating the constitutionality of the award.

While *Johansen* is instructive because it conducted a full review of harm, the Louisiana Court of Appeals's decision in *Grefer v. Alpha Technical*[223] in 2005 is also instructive, despite the fact that the Supreme Court recently vacated and remanded the decision for further consideration in light of *Phillip Morris USA v. Williams*.[224] The lower court's decision contains a helpful analysis because it recognized that, where most or all of the environmental harm is reflected in the compensatory award, single-digit ratios can be appropriate. In *Grefer*, the plaintiff-landowners sued Exxon Mobil Corporation and other defendants for contaminating their property with radioactive materials in the process of obtaining oil from the plaintiffs' property.[225] Even though Exxon knew that the property had become contaminated with radioactivity, it did not disclose this to the plaintiffs or anyone else.[226] Several years later, testing on the property revealed the contamination and the plaintiffs sued for compensatory and punitive damages.[227]

After a five-week trial, a jury awarded the plaintiffs compensatory damages of $56,145,000, of which $56 million was the cost of restoring the property to its original condition.[228]

221. *Id.* (quoting *BMW*, 517 U.S. at 576) (internal quotation marks omitted).

222. *Id.*; *see* Action Marine, Inc. v. Cont'l. Carbon, Inc., No. 3:01-CV-994-MEF, 2006 WL 173653, at *7–8 (M.D. Ala. Jan. 23, 2006) (affirming a punitive damages award nearly ten times that of the compensatory damages award for wrongful emissions of carbon black onto plaintiffs' properties and stating that the case would have supported a much larger punitive damages award because of the reprehensibility of the conduct, injury to the environment, and need to deter the defendant and others from a "pollute and pay" environmental policy) (citing Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1339 (11th Cir. 1999)), *aff'd*, 481 F.3d 1302 (11th Cir. 2007), *petition for cert. filed*, 76 USLW 3082 (U.S. Aug 24, 2007) (No. 07-257).

223. 901 So. 2d 1117 (La. Ct. App. 2005), *vacated sub nom.* Exxon Mobil Corp. v. Grefer, 127 S. Ct. 1371 (2007).

224. *Grefer*, 127 S. Ct. at 1371.

225. *Grefer*, 901 So. 2d at 1124–28.

226. *Id.* at 1127.

227. *Id.* at 1127–28. The plaintiffs' claims were for negligence, strict liability, nuisance, and fraud. *Id.*

228. *Id.* at 1128.

The jury also awarded $1 billion in punitive damages.[229] In reviewing the compensatory damages award, the court first rejected Exxon's argument that it was completely unreasonable to award $56 million in restoration costs for a property worth only $1.5 million.[230] The court responded that disputes between private litigants over remediation costs also involve consideration of state environmental standards and interests because of the state's role as the public trustee for environmental protection.[231] Thus, the court held that it was appropriate for the jury to award restoration costs, and that the jury was not restricted to considering only the minimum legal cleanup standards.[232]

The court then conducted a federal due process review of the punitive damages. It focused, in large part, on the fact that the compensatory damages in the case were substantial and far exceeded the property's value of $1.5 million.[233] The court concluded that, under these circumstances, a 2-to-1 ratio was the highest that could comport with due process.[234] Accordingly, the court ordered a remittitur of the punitive damages award from $1 billion to $112,290,000.[235]

A review of this case shows that significantly lowering a punitive damages award in an environmental harm case can fulfill the purposes of punitive damages when the compensatory damages award attempts to more fully value the actual and potential harm to the environment. In considering the state's interest in protecting public resources, the court allowed compensatory damages to include a significant portion of the environmental harm. Because the compensatory damages award was so substantial, a lower ratio of punitive to compensatory damages was appropriate.[236]

Finally, no treatment of punitive damages and environmental harm would be complete without a discussion of the *Ex-*

229. *Id.*
230. *Id.* at 1136.
231. *Id.* at 1137–38.
232. *Id.* at 1141–42.
233. *Id.* at 1150.
234. *Id.* at 1151.
235. *Id.* at 1152.
236. The court allowed the defendant's wealth to be a consideration but not the basis for affirming the $1 billion punitive damages award. *See id.* at 1151. The evidence at trial included the fact that Exxon was the largest corporation in the world with assets of $251 billion, year 2000 revenues of $228.439 billion, and a year 2000 total net worth of $174 billion. *Id.* at 1150–51.

xon Valdez case.[237] On March 24, 1989, the oil tanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, Alaska.[238] The Exxon Corporation owned the tanker and employed Captain Joseph Hazelwood to command it on that day.[239] Exxon knew both that Hazelwood was a relapsed alcoholic and that he had been drinking leading up to the day in question.[240] As a result of a combination of several events and conditions, including Hazelwood's absence from the deck due to his inebriated state, the *Exxon Valdez* ran aground, resulting in the dispersal of an estimated eleven million gallons of crude oil into Prince William Sound.[241] This release and the resulting environmental harm completely disrupted the largest commercial and subsistence fishing operation in the nation, wreaked havoc on the community at large, and caused devastating damage to the environment and ecosystem.[242] It was arguably the largest environmental disaster in the nation's history.

The early phases of the resulting litigation and negotiation included payment of over $1 billion to local, state, tribal, and federal governments for environmental damages, and a jury award to a plaintiff class of commercial fishermen of over $500 million in compensatory damages.[243] In a later phase of the trial, the jury awarded the fisherman plaintiff class $5 billion in punitive damages.[244] The now eighteen-year litigation has spanned the Supreme Court's decisions in *BMW, State Farm*, and the series of cases in between.[245] The various appeals and remands focus, not surprisingly, on the constitutional due

237. *In re* The Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004), *vacated per curiam*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

238. *Id.* at 1076.

239. *Id.*

240. *Id.* at 1076–77.

241. *Id.* at 1077.

242. *Id.* at 1078.

243. *Id.* at 1078–80.

244. *Id.* at 1082.

245. *In re* The Exxon Valdez, 472 F.3d 600, 601 (9th Cir. 2006) (per curiam) ("The resolution of punitive damages has been delayed because the course of this litigation has paralleled the course followed by the Supreme Court when, in 1991, it embarked on a series of decisions outlining the relationship of punitive damages to the principles of due process embodied in our Constitution."), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

process limit on the punitive damages award in this case. On the first remand, the United States District Court for the District of Alaska applied the then-new *BMW* standard and reduced the punitive damages award to $4 billion.[246]

In its most recent decision, the district court applied the *State Farm* standard and increased the allowable award to $4.5 billion.[247] The court's analysis is extremely detailed and its discussion of the ratio element is instructive. First, the court recognized that the key issue was ensuring that the ratio analysis sufficiently considered the harm and potential harm caused by Exxon's conduct.[248] The court stated that it was "not restricted to the jury's compensatory award in evaluating the ratio guidepost" because the Supreme Court had indicated clearly that potential harm must be considered, and that potential harm was "often not subject to precise calculation."[249]

With regard to actual harm, the court rejected Exxon's argument that the compensatory damages figure, for purposes of applying the ratio test, could consist only of the compensatory damages actually awarded against Exxon ($20.3 million).[250] Instead, the court found that the actual harm was $513,147,740, which included all amounts Exxon paid in connection with the spill to the plaintiffs, municipalities and villages, native corporations, and others directly affected by the spill.[251]

In addition to these amounts, "there was purely non-economic harm that cannot be quantified; there was harm which likely occurred but has not yet been valued; and there was potential harm—all flowing from the grounding of the *Exxon Valdez*."[252] On the issue of potential harm, the court found there was no way of calculating how much additional harm would have resulted if the entire cargo of oil had spilled.[253] Thus, relying on *BMW*, the court determined that "the appropriate approach is to accommodate the unknowns by allowing a

246. *In re The Exxon Valdez*, 296 F. Supp. 2d at 1084. Even though it reduced the award, it did so only upon the express direction of the Court of Appeals for the Ninth Circuit and stated that it still believed the original $5 billion punitive damages award was appropriate and constitutional. *Id.*

247. *Id.* at 1110.

248. *Id.* at 1098.

249. *Id.* (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993)).

250. *Id.* at 1099–1103.

251. *Id.* at 1101.

252. *Id.* at 1103.

253. *Id.*

higher ratio to pass constitutional muster."[254] Unlike in *State Farm*, where a portion of the award was for emotional distress and already contained a punitive element, the compensatory damages award in this case encompassed solely economic loss.[255] Moreover, Exxon's financial status justified a higher award in order to fulfill the appropriate punishment and deterrence objectives. Exxon's treasurer had testified that "full payment of the judgment would not have a material impact on the corporation or its credit quality,"[256] suggesting to the court "at least some evidence of the absence of over-deterrence."[257]

Based on its analysis, the court concluded that the original punitive damages award of $5 billion satisfied due process.[258] Because the Court of Appeals for the Ninth Circuit had ordered the district court to lower the award, however, it entered judgment on punitive damages in the amount of $4.5 billion, a 9.74-to-1 ratio.[259]

The Ninth Circuit, however, again disapproved of the punitive damages award, holding that due process limitations required a punitive damages award that was not more than five times the economic harm caused by the defendant, or $2.5 billion.[260] The court emphasized, consistent with the district court's analysis, that the punitive damages award could be based only on actual and potential economic harm to the plaintiffs and not on harm to public natural resources.[261] It stated that "[w]e are precluded, as the jury was, from punishing Exxon for befouling the beautiful region where the oil was spilled, because that punishment has already been imposed in separate litigation."[262]

The court then had two main issues to resolve: First, how to value the harm against which to compare the punitive damages award. Second, whether that award exceeded due process

254. *Id.* at 1104 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).

255. *See id.*

256. *Id.* at 1105.

257. *Id.* at 1105–06.

258. *Id.* at 1110.

259. *Id.* at 1106, 1110.

260. *In re* The Exxon Valdez, 472 F.3d 600, 602, 625 (9th Cir. 2006) (per curiam), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

261. *Id.* at 601.

262. *Id.*

limits. On the issue of how to calculate the harm, the court agreed with the district court that, in addition to economic losses, the spill caused other "undeniable, if not easily quantifiable, harms,"[263] and affirmed the district court's conclusion as to that harm figure.[264] The court then found, however, that a nearly 10-to-1 ratio violated due process requirements because the reprehensibility of the conduct, while "in the higher realm of reprehensibility," was not "in the highest realm" and thus any ratio exceeding 5-to-1 was unconstitutional.[265]

Here, both the district court and the court of appeals held decisively that the harm to the plaintiff was not limited to the compensatory damages award. Instead, the courts used all available figures to value economic losses and then concluded that even those figures did not adequately reflect the potential harm and harm that could not be or had not been translated into monetary value.[266] Thus, the court ensured that the ratio analysis encompassed total harm as completely as possible and did not limit the harm to solely the compensatory damages awarded at trial.

The *Exxon Valdez* case is unique because of its scope. The disaster was massive, the harm was massive, Exxon's wealth is massive, and the amount of valuation information available on economic loss and environmental harm is massive. The case is *sui generis* in many ways. Regardless of the unique nature of the case, it serves as a model of how courts can conduct a due process ratio evaluation carefully to ensure that there is a recognition (even if not a full valuation) of total harm. As shown in the cases above, simply comparing punitive damages and com-

263. *Id.* at 618–19.

264. *Id.* at 619–23. Exxon argued that the measure of harm was only $20.3 million because the court should subtract $493 million representing amounts paid to plaintiffs through Exxon's voluntary claims program and other settlements. *Id.* at 619. The only difference between the district court's harm value and the court of appeals' harm value was a $9 million overpayment that the court of appeals found the district court had overlooked and should not have been included in the final number. *See id.* at 623.

265. *Id.* at 618, 624.

266. *See In re* The Exxon Valdez, 296 F. Supp. 2d 1071, 1103 (D. Alaska 2004), *vacated per curiam*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276). The court did not include in its ratio analysis payments by Exxon to state and federal governments for natural resource damage that amounted to $900 million over ten years. *Id.* at 1078–79, 1099–1101; *see In re The Exxon Valdez*, 472 F.3d at 601.

pensatory damages is insufficient and is not supported by either *BMW* or *State Farm*. Instead, courts in environmental harm cases must consider all harm caused by the defendant, whether or not the plaintiff can actually recover such harm as compensatory damages. The next Section discusses existing roadblocks to assessing total harm in environmental cases and provides suggestions for surmounting them.

C. EXPLORING STANDING AND VALUATION DIFFICULTIES IN ENVIRONMENTAL HARM CASES

In the environmental harm cases, courts are able to place a monetary value either on the costs the plaintiff has spent to remediate the property or the diminution to the market value of the property as a result of the contamination.[267] The court may also attempt to value harm to public natural resources when there is a plaintiff in the case with the right to recover for damage to natural resources. Very often though, standing doctrines and the difficulty of placing monetary values on natural resources prevent such valuation.

Such standing and valuation restrictions limit significantly the ability to remedy environmental harm and to properly punish and deter environmental wrongdoing. Despite the vast array of federal and state statutes imposing severe civil and criminal penalties for polluting activities and violation of environmental standards,[268] there is often less than optimal enforcement of such laws at both the federal and state levels.[269]

267. *See* Grefer v. Alpha Technical, 901 So. 2d 1117, 1138–39 (La. Ct. App. 1995), *vacated sub nom.* Exxon Mobil Corp. v. Grefer, 127 S. Ct. 1371 (2007); Johansen v. Combustion Eng'g, Inc., No. CIV. A. CV 191-178, 1997 WL 423108, at *1 (S.D. Ga. June 9, 1997), *vacated in part*, 170 F.3d 1320 (11th Cir. 1999).

268. *See* PERCIVAL ET AL., *supra* note 28, at 948–49 (discussing the range of civil and criminal penalties for violating federal environmental standards, including fines of up to $50,000 and three years in prison for knowing violations, and fines of up to $250,000 and fifteen years in prison for violations that knowingly endanger another).

269. *See* TONY DUTZIK, COPIRG FOUND., THE STATE OF ENVIRONMENTAL ENFORCEMENT 22–26 (2002) (on file with author) (citing the lack of budget, staff, effective enforcement policies, political will, and accountability as reasons why state governments have failed to effectively enforce environmental protection laws); Barry Breen, *Citizen Suits for Natural Resources Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 873–76 (1989) (discussing enforcement problems as the result of limited funding and "institutional forces endemic to the way any large organization makes decisions"); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 115 (2005) ("It is a common view that during the past

Scholars, government officials, and others blame the underenforcement on the lack of effective enforcement policies, accountability, and political will; agency capture; and insufficient agency budgets and staff.[270] While scholars disagree over whether these failures arise from public choice problems or other systemic deficiencies at the state or federal level,[271] underenforcement remains.[272] In this situation, private actions brought to address environmental harm, such as common law suits and statutory citizen suits, can play a significant role in filling the enforcement gap. Congress, in trying to fulfill its long-standing goal of enhancing citizen enforcement of environmental laws,[273] has created citizen-suit provisions in most major federal environmental statutes in recognition of the fact that federal agencies will lack necessary resources (and some-

five years the environmental zeal of the federal executive branch has waned, resulting in fewer new or strengthened laws, fewer strengthened regulations, and less federal enforcement than one would have expected in a more pro-environment administration.").

270. *See* DUTZIK, *supra* note 269, at 22–26; PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 1027–28 (3d ed. 2004) (discussing Congress's use of citizen-suit provisions to address breakdowns in federal enforcement of environmental laws because of a lack of resources and political pressure from the executive branch); Buzbee, *supra* note 269, at 121 (stating that growth-oriented tax and labor policies, along with the impact of interest group pressures, often lead state and local governments to underenforce existing laws and regulations).

271. *Compare* DUTZIK, *supra* note 269, at 22–26 (asserting that state enforcement of environmental laws fails because of a lack of budget, staff, effective enforcement policies, political will, and accountability), *and* Buzbee, *supra* note 269, at 121 (arguing that underenforcement of environmental statutes and regulations arises, in part, from inherent inertial forces and interest group pressures), *with* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 571–78 (2001) (rejecting the claim that federal environmental regulations arise out of the clash between environmental and business interests, and listing several alternative public choice accounts of environmental regulation).

272. Revesz, *supra* note 271, at 559 (addressing the causes of "underregulation" of state environmental statutes); *see* Buzbee, *supra* note 269, at 121 (noting the "temptation to fail to implement and enforce laws and regulations").

273. *See* Baughman v. Bradford Coal Co., 592 F.2d 215, 218 (3d Cir. 1979) ("Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternate enforcement mechanism."); Gardeski v. Colonial Sand & Stone Co., 501 F. Supp. 1159, 1168 (S.D.N.Y. 1980) (stating that the legislative history of the Clean Air Act suggests a "sensitive handling of citizen suits, that reflects Congress's conviction that such suits can perform an indispensable function").

times will lack the political will) to address all statutory violations.[274]

However, as discussed below,[275] statutory citizen-suit provisions have significant limitations, particularly in valuing and recovering damages for harm to natural resources. Common law public nuisance claims similarly suffer from standing limitations that limit citizen efforts to seek redress for environmental harm.[276] These limitations suggest that a better approach, either in the form of legislative action, judicial action, or both, is needed to obtain appropriate punitive damages for environmental wrongdoing in cases where standing or valuation limitations restrict recovery.

1. Standing Limitations for Valuing Harm

Many of the environmental harm cases involve claims of public or private nuisance. A public nuisance is an "unreasonable" interference with a right common to the general public.[277] In many public nuisance cases, the plaintiff is a state or local government with presumptive standing to recover for harm to the public right.[278] When the plaintiff is a private party, however, standing limitations apply.[279] In order to recover damages in a private action for public nuisance, the plaintiff must have suffered a "special injury," which the *Restatement (Second) of Torts* defines as "harm of a kind different from that suffered by

274. Conservation Law Found. v. Browner, 840 F. Supp. 171, 174–76 (D. Mass. 1993) (stating that the congressional purpose of the Clean Air Act's citizen-suit provision was to authorize citizens to act as private attorneys general because the Act's sponsors were wary of federal environmental agencies' lack of will and resources); PLATER ET AL., *supra* note 270, at 1027–28, 1033 (stating that, beginning in 1970, Congress included citizen-suit provisions in virtually all the major environmental laws because it viewed such suits as an "efficient policy instrument" and a "participatory mechanism" at a time when limited resources or lack of political will made enforcement of environmental regulations difficult).

275. *See infra* notes 292–301 and accompanying text.

276. *See infra* notes 279–88 and accompanying text.

277. RESTATEMENT (SECOND) OF TORTS § 821B (1979); *id.* § 821B(2) (listing the criteria for deciding if an interference is unreasonable).

278. *See id.* § 821C(2)(b) (stating that a public official or agency may represent the state or political subdivision in public nuisance actions).

279. *See, e.g.*, Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 757–60 (2001) (explaining problems with the public nuisance doctrine that presently limit plaintiff standing to seek recovery for community-based social and environmental problems).

other members of the public."[280] In interpreting the special injury requirement, courts have generally required that the plaintiff suffer an economically recognizable injury, such as injury to person, profits, or land.[281]

The requirement of a recognizable injury creates difficulty in environmental harm cases because damage to natural resources, which does not result in a direct economic loss, does not constitute a recognizable injury for standing purposes. This difficulty is illustrated by another lawsuit flowing from the *Exxon Valdez* spill, where the Court of Appeals for the Ninth Circuit held that a class of Alaskan Natives could not bring a public nuisance action to recover for harm to their subsistence way of life.[282] Their way of life was described as "dependent upon the preservation of uncontaminated natural resources, marine life and wildlife" reflecting "a personal, economic psychological, social, cultural, communal and religious form of daily living."[283] In affirming the lower court's dismissal of the action, the court of appeals agreed with the district court that the plaintiffs' noneconomic subsistence claims were not "different in kind" from those suffered by other members of the public, although they "potentially might be different in degree."[284] The court noted that the plaintiffs received compensation for their economic loss claims associated with the spill in an earlier settlement, and that the law could not value the remaining claims of noneconomic injury.[285]

As a result of the court's conclusions, the plaintiffs' remedy could be no more than the benefit they, along with other Alaskans, received from the substantial payments Exxon made to local, state, and federal governments for environmental restoration.[286] In this case, because federal, state, and local gov-

280. RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979).

281. *See* MADDEN & BOSTON, *supra* note 28, at 66–78 (listing cases in which plaintiffs who suffered personal injury, or whose privately-owned land or chattels were harmed, met the special injury requirement).

282. *In re* The Exxon Valdez, 104 F.3d 1196, 1197–98 (9th Cir. 1997).

283. *Id.* at 1197.

284. *Id.* at 1198.

285. *Id.* at 1197–98; *see In re* The Exxon Valdez, No. A89-0095-CV, 1994 WL 182856, at *3 (D. Alaska Mar. 23, 1994) (dismissing plaintiffs' claims because they sought a recovery of nonmarket claims of cultural damage which was "not founded" on any legal theory recognized by maritime law), *aff'd*, 104 F.3d 1196 (9th Cir. 1997).

286. *In re The Exxon Valdez*, 104 F.3d at 1198 (noting that any claims arising out of damage to the Natives' subsistence way of life "miss the mark" because the right to a subsistence way of life is "shared by all Alaskans").

ernments had already recovered $1 billion in connection with environmental harm, the plaintiffs were not acting to fill a "gap" in enforcement of environmental protection laws.[287] In many cases, however, significant environmental harm occurs, and no state or federal plaintiff is willing or able to seek recovery, leaving private tort actions as the only practical means of attempting to value and recover for damages to natural resources.[288] As a result, the decision has a potentially significant and adverse impact on other private party actions where the plaintiff has not suffered a direct pecuniary loss.

The standing limitations that hinder full use by environmental plaintiffs' of public nuisance claims apply equally to private nuisance claims, but for different reasons. A private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land."[289] Because the plaintiff seeks recovery for interference with land the plaintiff owns rather than a public right, the problem is less one of standing than of remedy. A defendant is liable for private nuisance if his or her conduct causes the invasion, and the invasion is (1) intentional and unreasonable; or (2) unintentional and negligent, reckless, or subject to strict liability for abnormally dangerous activities or conditions.[290] Because the interest the plaintiff seeks to protect is the violation of the plaintiff's use and enjoyment of land, the remedy generally consists of the damages measured by the diminution in value or restoration costs.[291]

287. *See supra* notes 268–74 and accompanying text (discussing the role private lawsuits play in filling federal and state enforcement gaps).

288. *See* Kirstin H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 167, 180–81 (2006) (discussing the federal government's failure to address "environmental issues posing interstate externalities" and its current "deregulatory and passive approach toward environmental regulation"); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 749 n.280 (2006) (citing authorities that discuss the failure of the federal government to enforce existing environmental regulations and its decision not to enact new regulations to address growing environmental problems). For an analysis of the problem of underenforcement of federal and state environmental statutes, see *supra* notes 268–72 and accompanying text. For a discussion of the difficulties states have in valuing damages to natural resources, see *infra* Part III.C.2.

289. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

290. *Id.* § 822.

291. *See id.* § 929(1)(a); *see also* Grefer v. Alpha Technical, 901 So. 2d 1117, 1139–42 (La. Ct. App. 1995), *vacated sub nom.* Exxon Mobil Corp. v. Grefer, 127 S. Ct. 1371 (2007). The *Grefer* decision discussed earlier remains unusual, however, in that the plaintiff recovered restoration costs without first incur-

Thus, private nuisance claims do not provide a vehicle for plaintiffs to recover for damage to natural resources that cannot be translated into an economic loss borne by the plaintiff.

Beyond the common law claims just discussed, even federal statutes enacted for environmental protection purposes have significant standing limitations. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Water Act (CWA), and the Oil Pollution Act (OPA) all contain provisions under which federal and state governments and Indian tribes can recover for damage to natural resources.[292] For instance, CERCLA imposes liability for the release of a hazardous substance that causes "damages for injury to, destruction of, or loss of natural resources,"[293] including the reasonable cost of assessing such loss or injury.[294] The OPA contains a similar provision in the case of oil discharges, and specifically describes the measure of damage for natural resources as the sum of (1) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources; (2) the diminution in value of those natural resources pending restoration; and (3) the reasonable cost of assessing those damages.[295] Private parties and local governments, however, cannot recover for natural resource damages under any of these laws. Instead, the statutes limit their recov-

ring those costs or obtaining government approval for a remediation plan, and because the restoration costs significantly exceeded the value of the property. *See id.* at 1141 (allowing recovery of $56 million in restoration costs even though market value of the property was $1.5 million and the court could not force the plaintiff to use the money for a cleanup). For a discussion of cases that measure harm to land from past invasions, see MADDEN & BOSTON, *supra* note 28, at 255–70.

292. 33 U.S.C. § 1321(f)(4) (2000) (listing a provision of the Clean Water Act allowing for the recovery of costs of removal for oil or hazardous substance from navigable waters and other related areas, including any costs or expenses incurred "in the restoration or replacement of natural resources damaged or destroyed"); 33 U.S.C. § 2706(d) (2000); 42 U.S.C. §§ 9607(a)(4)(C), 9607(f) (2000) (containing CERCLA provisions allowing recovery for natural resource damages caused by the release of a hazardous substance).

293. 42 U.S.C. § 9607(a)(4)(C) (2000). CERCLA defines "natural resources" as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States[,] . . . any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." 42 U.S.C. § 9601(16).

294. *See* 42 U.S.C. § 9607(a)(4)(C).

295. *See* 33 U.S.C. § 2706(d).

ery to the costs incurred in investigating and remediating the harm caused by the release of hazardous substances.[296]

Moreover, although state and federal governments recovered $1 billion in compensation for natural resource damages in the *Exxon Valdez* oil spill,[297] claims for natural resource damages remain far less frequent than claims to recover cleanup costs.[298] Indeed, many argue that existing provisions allowing recovery for damage to natural resources are significantly underutilized.[299] This is due, in large part, to the difficulty of valuing such damages and the failure of federal agencies to prom-

296. *See* 42 U.S.C. § 9607(a)(4).

297. *In re* The Exxon Valdez, 296 F. Supp. 2d 1071, 1078–79 (D. Alaska 2004) (discussing the settlement between Exxon, the United States, and the State of Alaska for damages to natural resources), *vacated per curiam*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

298. James P. Power, *Reinvigorating Natural Resource Damage Actions Through the Public Trust Doctrine*, 4 N.Y.U. ENVTL. L.J. 418, 448 (1995) (concluding that the CERCLA natural resource damage provision has "enormous potential" for recovery of damages, but that the actual experience has been disappointing with only fifty suits brought since 1980 and only two suits that have gone to trial); *see* AMY W. ANDO ET AL., ILL. WASTE MGMT. & RESEARCH CTR., NATURAL RESOURCE DAMAGE ASSESSMENT: METHODS AND CASES 2 (2004), *available at* http://www.wmrc.uiuc.edu/main_sections/info_services/library_docs/RR/RR108.pdf (discussing the various statutes that allow recovery of natural resource damage, but detailing the difficulty states face in bringing actions upon such statutes and developing valuation techniques to conduct damage assessments). *But see* N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 923 A.2d 345, 354 (N.J. Super. Ct. App. Div. 2007) (holding as a matter of first impression that the New Jersey Spill Compensation and Control Act's definition of "cleanup and removal costs" gives the state the right to recover for the "loss of use" of natural resources injured or destroyed by an illegal discharge, in addition to the costs of physical restoration).

299. Breen, *supra* note 269, at 867–68 (stating that the experience with natural resource damage claims as of 1989 "is largely one of missed opportunities" with relatively few federal or state claims filed); Gordon Johnson, Deputy Bureau Chief, Envtl. Prot. Bureau, Office of N.Y. Attorney Gen., Address at the Columbia Law School Symposium: The Role of State Attorneys General in National Environmental Policy (Sept. 20, 2004), *in* 30 COLUM. J. ENVTL. L. 461, 462–63 (2003) (expressing concern that damages associated with smaller spills, while frequent, often are not pursued by states because of the time and money required to bring such lawsuits). *But see* Gerald F. George, *Litigation of Claims for Natural Resource Damages*, SE98 ALI-ABA 397, 399 & n.2 (2000) (Westlaw) (stating that claims for natural resource damage under CERCLA have become "commonplace" with sixty-seven claims resolved by the federal government as of 1996 for payments totaling over $135 million, but noting that few claims have gone to trial, resulting in little case law).

ulgate regulations to help in the valuation process.[300] In tion, the statutory prohibition on local government suits for natural resource damages precludes recovery by those governmental entities closest to the problem.[301]

The various limitations on standing and available remedies mean that, in a private party tort action to recover for environmental harm, the compensatory damages rarely will value fully the harm caused by the defendant's misconduct. This lack of full valuation is a major gap in the punitive damages framework because many cases involving significant environmental harm do not have the benefit of a government plaintiff with standing to sue for the full scope of damages to environmental resources. Thus, it is important that plaintiffs be able to utilize private lawsuits as a means of advancing valuation techniques.[302] Such private lawsuits are consistent with the federal environmental law framework. Most of the major federal environmental statutes have explicit savings clauses, showing Congress's intent to allow private citizens to continue to utilize the common law to seek relief for environmental harm.[303]

300. *See* ANDO ET AL., *supra* note 298, at 2; PLATER ET AL., *supra* note 270, at 942–44 (discussing disagreements between government agencies and stakeholders on how to value natural resource damages and the general uncertainty in this area of the law); Dale Thompson, *Valuing the Environment: Courts' Struggles with Natural Resource Damages*, 32 ENVTL. L. 57, 58–61 (2002) (detailing difficulties in valuing natural resource damages).

301. *See* Michael J. Wittke, Comment, *Municipal Recovery of Natural Resource Damages Under CERCLA*, 23 B.C. ENVTL. AFF. L. REV. 921, 941–43 (1996) (arguing that local governments should be given standing to sue for natural resource damages under CERCLA and that "[i]t is the extraordinary case, such as the *Exxon Valdez* disaster, that warrants widespread notice and action" leading to federal and state government involvement).

302. *See* Antolini, *supra* note 279, at 757–60 (discussing the interest of scholars and practitioners in reinvigorating private party actions and common law remedies to address the lack of federal enforcement of environmental laws); Breen, *supra* note 269, at 874–76 (stating that the government apparatus for bringing enforcement actions is cumbersome and subject to significant budget restrictions and arguing that citizen suits for natural resource damages would result in substantial gains in both environmental compliance and recovery of natural resource damages); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 579–80 (2007) (discussing the lack of federal enforcement of environmental law and the need for an increased role by state governments, local governments, and private parties in environmental protection efforts).

303. *See* Klass, *supra* note 302, at 570 & n.143 (citing savings clauses in federal environmental statutes and numerous cases interpreting savings clauses to allow for common law claims to enjoin environmental harm and obtain damages for such harm).

2. Valuation Limitations

Beyond standing problems, valuation problems also impede a full assessment of environmental harm. Valuation difficulties exist even in cases where a federal or state government plaintiff can recover for natural resource damages under statutory or common law theories. While claims for direct property losses and diminution in market value can be quantified fairly easily, natural resources have values that are not yet fully captured in the market system.[304] What is the value of a seal? Of a bird? Of a day at the beach? Of the ability to prevent another *Exxon Valdez* disaster in the future?[305]

Scholars have created "use values," which assign an attributed market value to things not traded in the marketplace in an attempt to capture their value.[306] "Consumptive value" attributes a value to lost-resource uses by sportsmen or tourists who, but for the harm to the resource, would have taken wildlife in hunting or fishing pursuits.[307] "Nonconsumptive use" refers to the ecosystem's value to photographers, bird watchers, and others who gain appreciation from nature.[308] These nonconsumptive uses include an "existence value"—the amount a person is willing to pay to know that the resource is there, even if they do not yet actively use or enjoy it.[309] Such uses also in-

304. Ohio v. U.S. Dep't of the Interior, 880 F.2d 432, 462–64 (D.C. Cir. 1989) ("From the bald eagle to the blue whale and snail darter, natural resources have values that are not fully captured by the market system. . . . Option and existence values may represent 'passive' use, but they nonetheless reflect utility derived by humans from a resource, and thus, *prima facie*, ought to be included in a damage assessment.") (citations omitted); PLATER ET AL., *supra* note 270, at 183–94 (discussing the difficulty of valuing natural resources).

305. *See* Lisa Heinzerling, Professor of Law, Georgetown Univ. Law Ctr., Address at the Columbia Law School Symposium: The Role of State Attorneys General in National Environmental Policy (Sept. 20, 2004), *in* 30 COLUM. J. ENVTL. L. 449, 454–56 (2005) (discussing efforts to value the loss of natural resources, including the use of contingent valuation surveys); Thompson, *supra* note 300, at 58–61(discussing the difficulties of valuing nonmarket commodities such as natural resources and problems with the Contingent Valuation Method (CVM) of calculating "nonuse values" in natural resource damages cases).

306. PLATER ET AL., *supra* note 270, at 188.

307. *Id.*

308. *Id.*

309. *See Ohio*, 880 F.2d at 476 n.73 (explaining existence value); James Peck, *Measuring Justice for Nature: Issues in Evaluating and Litigating Natural Resources Damages*, 14 J. LAND USE & ENVTL. L. 275, 279–81 (1999) (discussing methods of valuation, including a biocentric approach (as opposed to

clude an "option value," which measures how much a person would to pay to reserve the option to use that resource in the future.[310]

Scholars have developed economic methods for estimating some of these values. Each of the various methods creates a hypothetical human market for resources.[311] For example, the Contingent Valuation Method (CVM) sets up "hypothetical markets to elicit an individual's economic valuation of a natural resource."[312] CVM employs interviews and surveys with individuals to arrive at a "willing to pay" value for resources.[313] As early as 1989, the Court of Appeals for the D.C. Circuit approved the use of CVM for ascertaining use and option values of resources in state and federal natural resource damages actions.[314]

A second method that attempts to quantify the value of environmental resources is the growing field of "ecosystem services."[315] Ecosystems are a key component of our natural capital, but historically society has not assigned them a monetary value because they are "free."[316] A growing body of literature presents the case for valuing and thus increasing protection for natural resources such as wetlands, diverse plant and animal species, healthy forests, and clean air.[317] This framework attempts to

an anthropocentric approach) which recognizes the intrinsic value of natural resources independent of human satisfactions).

310. *Ohio*, 880 F.2d at 475 n.72.

311. PLATER ET AL., *supra* note 270, at 188.

312. *Ohio*, 880 F.2d at 475 (quoting 43 C.F.R. § 11.83(d)(5)(i) (1988)) (internal quotation marks omitted).

313. *Id.*

314. *See id.* at 476–79 (sustaining Department of the Interior regulations relying on CVM for calculating option and use values).

315. Gretchen C. Daily, *Introduction: What Are Ecosystem Services?*, *in* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 1, 3 (Gretchen C. Daily ed., 1997) (defining ecosystem services as "the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life"). Ecosystem services support "ecosystem goods" such a seafood, forage, timber, biomass fuels, natural fiber, and pharmaceutical and industrial products. *Id.*

316. *See* Geoffrey Heal et al., *Protecting Natural Capital Through Ecosystem Service Districts*, 20 STAN. ENVTL. L.J. 333, 341 (2001).

317. *See* James Salzman, *Creating Markets for Ecosystem Services: Notes from the Field*, 80 N.Y.U. L. REV. 870, 871–77 (2005) (discussing developments in research on ecosystem services and reviewing initiatives around the world which have sought to create markets for natural capital); James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 609–16 (2000) (analyzing environmental trading markets (ETMs) such as wetland banking programs, air pollution trading programs,

provide a mechanism to capture the value of ecosystem services as well as quantify and promote service values.[318]

CVM and ecosystem services, however, have yet to make their way into common legal parlance, and natural resource damage continues to be less-than-fully valued in many lawsuits.[319] As a result, even the most obvious vehicle for recovering harm to natural resources—CERCLA's natural resource damage provision—arguably remains a "sleeping giant."[320] Significant confusion persists regarding the appropriate measure of damages in environmental harm claims and neither state nor federal governments have made frequent efforts to recover for such harm, even though they regularly seek out-of-pocket remediation costs.[321] Indeed, the *Exxon Valdez* case, where Exxon agreed to pay state and federal governments approximately $1 billion for "environmental damage," remains an anomaly.[322] As scholars have recognized, "[t]he subtle relationship between environmental systems and the uses provided by the systems . . . is not readily grasped by the relative crudeness of the legal system."[323] This results in an inability to easily convert damages to, and loss of use of public environmental assets into, a monetary damages award. The controversy surrounding CVM, reflected in scholarly writing supporting and criticizing CVM, shows that it remains a challenge to value natural resources in the context of civil litigation.[324]

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and species habitat programs, and suggesting that modifications to such programs would better capture the value of nonfungible resources). *See generally* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, *supra* note 315 (containing a collection of articles on economic and ecological issues surrounding ecosystem services).

318. *See* Lawrence H. Goulder & Donald Kennedy, *Valuing Ecosystem Services: Philosophical Bases and Empirical Methods*, *in* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, *supra* note 315, at 23, 33–35 (discussing methods for valuing nonuse and nonconsumptive values from ecosystems).

319. *See supra* Part III.B.1.

320. PLATER ET AL., *supra* note 270, at 942.

321. *See id.* at 942–45 (discussing CERCLA remedies).

322. *See In re* The Exxon Valdez, 296 F. Supp. 2d 1071, 1078–79 (D. Alaska 2004), *vacated per curiam*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

323. Brian R. Binger et al., *The Use of Contingent Valuation Methodology in Natural Resource Damage Assessments: Legal Fact and Economic Fiction*, 89 NW. U. L. REV. 1029, 1030 (1995).

324. *Compare id.* at 1030–31 & n.8, 1032–34 (criticizing the use of CVM in natural resource damage assessments and citing to recent economic litera-

In many ways, the difficulty of valuing environmental harm is similar to the difficulty of valuing other forms of non-economic harm. As one court has stated, damages for nonpecuniary injury such as pain and suffering, loss of life, and loss of enjoyment of life is based on a "legal fiction" that the courts accept, "knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong."[325] For decades now, the legal system has allowed juries to award damages for pain and suffering, loss of life, and other nonpecuniary injury despite the valuation difficulties.[326] Thus, as a practical matter, significant changes in legal doctrine are not required to allow recovery for natural resource damages and loss of ecosystem services, at least in cases where standing hurdles are not at issue.[327] Indeed, there is much less of a "legal fiction" involved in awarding damages for natural resource harm than for pain and suffering because natural resource damages can be tied directly to remediating the harm. What is required is a greater willingness by current government plaintiffs and private plaintiffs with sufficient standing to seek such damages, and for courts to be open to awarding such damages with greater frequency.

In sum, these standing and valuation limitations highlight the difficulty of recognizing and awarding damages for environmental harm, regardless of whether the plaintiff is a private party or a government entity, or whether the claim is one under common law or statute. Under these circumstances, harm to the environment regularly goes unvalued or undervalued, and

ture), *with* Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 285–92 (1989) (discussing the nonuse values of natural resources), Dobbins, *supra* note 97, at 944–46 (arguing that CVM should be utilized to quantify natural resource nonuse values and comparing the valuation process to that for nonpecuniary losses such as pain and suffering), *and* Judith Robinson, Note, *The Role of Nonuse Values in Natural Resource Damages: Past, Present, and Future*, 75 TEX. L. REV. 189, 213 (1996) (concluding that CVM "provides the best available method for quantifying nonuse values; despite the intangible nature of the injuries").

325. McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989).

326. *See* Geistfeld, *supra* note 136, at 1106 ("The absence of well-defined standards for determining pain and suffering damages is well known."); *see also* Jennifer H. Arlen, Note, *An Economic Analysis of Tort Damages for Wrongful Death*, 60 N.Y.U. L. REV. 1113, 1114 (1985) ("[C]urrent wrongful death damage rules, which base recovery . . . on the future income of the victim, are not efficient[, but] it is not possible to design efficient damages rules to govern recovery for loss of life."); *supra* note 97 and accompanying text.

327. *See, e.g.*, J.B. RUHL ET AL., THE LAW AND POLICY OF ECOSYSTEM SERVICES 266–71 (2007).

wrongdoers go unpunished or underpunished, similar to the problem of the undervaluation of harm that exists in the intentional tort cases discussed in Section III.A. The next Section further explores the problems of undervaluation of environmental harm by comparing environmental harm cases to the intentional tort cases, and addresses the methods courts have used in the intentional torts cases to address valuation difficulties.

D. COMPARING AND CONTRASTING THE INTENTIONAL TORT AND ENVIRONMENTAL HARM CASES

This Section more closely compares the intentional tort cases and environmental harm cases to explore why courts have often taken such different approaches to the two types of cases. While there are significant differences between the intentional tort and environmental harm cases for purposes of punitive damages, there are important similarities as well. First, the differences. There is no question that the absolute dollar amounts of both compensatory damages and punitive damages are far smaller in the intentional tort cases.[328] *State Farm* and *BMW* both state clearly that when an egregious act has resulted in a small amount of economic damage, a higher ratio of punitive damages may be appropriate.[329]

As discussed above, courts have no difficulty recognizing these cases as ones in which significantly larger punitive damages awards are necessary to punish the defendant for misconduct and deter the defendant and others from engaging in similar misconduct in the future.[330] Recognizing that the single-digit ratio has little role in these cases, courts defer to the jury's assessment of the punitive damages award necessary to fulfill the purposes of punitive damages based on applicable state law factors.[331] Furthermore, lower courts realize that the purpose of the Supreme Court's jurisprudence in this area is to reign in multimillion dollar and billion dollar punitive damages awards.[332] Civil rights, defamation, and trespass cases do not fit that model, giving lower courts more discretion to "do justice" and use punitive damages to serve as a form of redress

328. *See supra* Part III.A.

329. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

330. *See supra* Part III.A.

331. *See supra* Part III.A.

332. *See supra* Part III.A.

within substantive due process limitations.

Unlike the small awards in intentional tort cases, the environmental harm cases often involve significant compensatory damages and punitive damages awards.[333] In addition, the awards in these cases attract attention, as they appear at first glance to be precisely those the Court attempted to "rein in" with the introduction of its single-digit ratio presumption.[334] However, as the *Exxon Valdez* case illustrates, the presence of a large, multinational corporate defendant tempers the massiveness of an award for several reasons. First, a more substantial punitive damages award is required to punish and deter the conduct of a large company, which possesses more financial resources than an individual or a small corporate defendant. In reviewing the punitive damages awarded by the jury, the *Exxon Valdez* court found that "[w]hat is sufficient to effect just but not excessive deterrence of Captain Hazelwood, and what is sufficient to effect just and not excessive deterrence of the Exxon defendants are vastly different."[335]

Although the Supreme Court warned in *State Farm* that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,"[336] the Court has never rejected the use of wealth as a factor, and has confirmed the appropriateness of its use in prior cases.[337] Numerous state courts direct juries to consider wealth as a factor in setting a punitive damages award,[338] which is consistent with the ap-

333. *See supra* Part III.A.

334. *See infra* notes 385–86 and accompanying text (discussing some scholars' use of the term "environmental torts" to refer to toxic tort cases with significant nonpecuniary damages and their arguments that such cases are in particular need of punitive damage reform); *see also supra* Part II.B (discussing the types of cases driving the Supreme Court's constitutional restrictions on punitive damages).

335. *In re* The Exxon Valdez, 236 F. Supp. 2d 1043, 1065 (D. Alaska. 2002), *amended by* 296 F.Supp.2d 1071 (D. Alaska 2004), *vacated per curiam*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

336. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427 (2003).

337. *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 n.28 (1993) (stating that it is "well-settled law" that the net worth of the defendant can be considered in setting punitive damages); *see also supra* note 42 (discussing the validity of using the defendant's wealth in assessing punitive damages).

338. *See supra* notes 42–43 and accompanying text (discussing factors state courts direct juries to use when setting punitive damages).

proach in the *Restatement (Second) of Torts*.[339] Thus, simply because the amount of punitive damages awarded in environmental harm cases is larger than those in many of the intentional tort cases does not mean courts should mechanically reduce jury awards in such cases.

Second, and more importantly, large companies have the potential to cause damage on a far greater scale. These are companies in a position to spill fifty-three million gallons of oil into one of the most treasured natural environments in the nation.[340] These are companies whose scope of operations make them capable of contaminating land with high levels of radioactive material.[341] These are companies whose operations create the potential for serious contamination of public drinking-water supplies.[342] In short, such cases involve companies who, as a result of their size and power, have the ability to cause harm on a scope not possible for many other defendants. For example, while the *BMW* owners experienced distress upon discovering their cars were repainted without their knowledge, that distress simply did not compare to the mental distress suffered by those people who had "to change the way they make their living" as a result of the Exxon spill.[343] Thus, while the awards in the environmental harm cases are large enough to raise eyebrows, the corporate defendants' wealth and the scope of harm they caused in these cases render the awards just as appropriate as the smaller amounts awarded against smaller and less

339. RESTATEMENT (SECOND) OF TORTS § 908 (1979) (stating that the trier of fact may consider the means of the defendant).

340. The *Exxon Valdez* was carrying 53 million gallons of oil when it ran aground on Bligh Reef. *In re* The Exxon Valdez, 296 F. Supp. 2d 1071, 1077–78 (D. Alaska 2004), *vacated per curiam*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3073 (U.S. Aug. 20, 2007) (No. 07-219), *petition for cert. filed*, 76 U.S.L.W. 3082 (U.S. Aug. 28, 2007) (No. 07-276). Experts estimated that 11 million gallons were discharged in the grounding of the ship, but had Captain Hazelwood succeeded in his efforts to back the ship off Bligh Reef, significantly more oil—perhaps the entire cargo—would have spilled. *Id.*

341. Grefer v. Alpha Technical, 901 So. 2d 1117, 1123–26 (La. Ct. App. 2005), *vacated sub nom.* Exxon Mobil Corp. v. Grefer, 127 S. Ct. 1371 (2007); *see supra* note 225 and accompanying text.

342. City of Modesto Redev. Agency v. Dow Chem. Co., Nos. 999345, 999643, 2006 WL 2346275, at *1 (Cal. Super. Ct. Aug. 1, 2006); *supra* notes 193–94 and accompanying text.

343. *In re* The Exxon Valdez, 490 F.3d 1066, 1086 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

wealthy defendants in the intentional trespass and defamation cases.

Despite the difference in the size of awards, in both types of cases the harm the defendant caused does not fully translate into compensatory damages. In many of the intentional tort cases, no compensatory damages are available. This inability to recover results from the failure of the civil justice system to provide monetary relief for an individual's right to exclude others from his or her property or person.[344] The failure of compensatory damages to account for all of the harm the defendant causes is easy to see in intentional torts cases, when damages are often nominal. However, in the environmental harm cases, where damages often total millions of dollars, this gap is not so easy to see. Courts are able to place a monetary value on the harm as either costs the plaintiff has incurred in restoring property or as diminution in the fair market value of the property as a result of contamination. Courts sometimes attempt to value harm to natural resources when a plaintiff who has the right to recover damages for such harm is present in the case. More often, though, standing doctrines and the difficulty of assigning a monetary value to natural resources prevents valuing the harm the defendant has caused to natural resources.

In sum, both the intentional tort and environmental harm cases involve harm for which the judicial system has difficulty setting an economic value, resulting in no, or only partial, valuation of the harm caused by the defendant. Because the damage amounts are so great in environmental harm cases, courts struggle to identify the significant harm that remains unvalued. By contrast, courts in intentional tort cases easily recognize the undervaluation and can award punitive damages to correct the undervaluation without due process limitations. Part IV offers a framework to address the problem of valuation for punitive damages purposes in both types of cases.

344. *See* RESTATEMENT (SECOND) OF TORTS § 306 (1965) (requiring a plaintiff to suffer illness or other "bodily harm" to recover for negligent infliction of emotional distress); *id.* § 46 (requiring a plaintiff to suffer "bodily harm" in connection with emotional distress to recover for intentional infliction of emotional distress against a defendant); JAMES A. HENDERSON ET AL., THE TORTS PROCESS 667–76 (6th ed. 2003) (discussing the development of the tort of intentional infliction of emotional distress); *see also supra* notes 139–54 (discussing courts' use of punitive damages as a substitute for the inability to compensate for invasions of person or property).

IV. VALUING HARM AND APPLYING RATIOS

This Part introduces the beginning of a framework for awarding punitive damages that helps courts more fully recognize total harm and concludes with some suggestions for potential legislative and judicial initiatives that may help alleviate concerns that a full valuation of harm will result in "windfall" punitive damages to plaintiffs in environmental harm cases.

First, intentional tort cases and environmental harm cases require different frameworks. Even though an undervaluation of harm exists in both types of cases, in the intentional tort cases the unvalued harm is still personal to the plaintiff—it is the plaintiff's right to exclude or to personal integrity that has been violated. As a result, it seems appropriate to award any increase in punitive damages to the plaintiff. The punitive damages substitute for the compensation of the personal right violation that goes unvalued in the case, just as punitive damages awards substituted for unrecoverable emotional harm in earlier cases.[345] There is little concern regarding plaintiff "windfalls" in these cases. The total awards are modest, and punishment and deterrence objectives suggest that in these often interpersonal disputes where no third-party interests or public resources are involved, the plaintiff herself should receive the award.[346]

The same is not true in the environmental harm cases. If the court values harm to natural resources beyond the plaintiff's direct economic loss, it is not so clear that the court should award the plaintiff the increased punitive damages representing the full valuation of harm. If the punitive damages are based on harm to resources "owned" by the public instead of the plaintiff, the public should receive the portion of the punitive damages award reflecting the harm to public resources, minus some amount awarded to the plaintiff as an incentive for bringing the suit. These proposals are discussed below.

345. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 n.11 (2001).

346. *See, e.g.*, Geistfeld, *supra* note 136, at 1097–98 (2005) (stating that the punitive damages in cases involving the violation of a plaintiff's individual rights punish the wrong to the plaintiff rather than to society, resulting in no overlap with any related criminal penalties and thus not raising an issue of "double punishment").

A. AWARDING PUNITIVE DAMAGES IN INTENTIONAL TORT CASES WITH SMALL OR NOMINAL DAMAGES

Intentional tort cases, such as defamation, trespass, and civil rights violations, are cases where all or a large portion of the harm goes unvalued as compensatory damages and the harm is focused on the individual plaintiff. As shown above, courts are able to conduct a full due process analysis without adhering to single-digit ratios. Although courts often reduce the amount of punitive damages, these reductions are invariably based not on any ratio requirement, but instead on the reprehensibility of conduct, the financial status of the defendant, the purposes of punitive damages, and other state statutory factors.[347] Importantly, the courts recognize that a consideration of the ratio of punitive to compensatory damages is not helpful in the analysis because compensatory damages do not represent the harm the defendant caused. Though courts do not attempt to place a dollar amount on the harm that goes unvalued, their recognition of its existence justifies disregarding the ratio between compensatory and punitive damages. As a result, courts implicitly allow punitive damages to serve a compensatory role, in addition to fulfilling punitive and deterrent purposes. In these cases, it seems perfectly appropriate that the plaintiff be the beneficiary of the punitive damages award.

Based on the unique characteristics of intentional tort cases, the best approach appears to be as follows. First, courts should continue to recognize, as they generally do, that the single-digit ratio should not apply to small or nominal damages in intentional tort cases. Courts also should recognize, though, that it is not that there is no actual harm in these cases, but only that the civil justice system does not value the harm resulting from an invasion of personal or property rights. Courts need not attempt to actually measure that harm, although there is nothing that prevents them from attempting to do so.[348] Instead, they should recognize expressly that such harm exists and, after applying *BMW* and *State Farm*, affirm those awards that exceed a single-digit ratio. In sum, courts should continue to use the approach laid out by many courts already,

347. *See supra* note 43 and accompanying text (discussing factors for punitive damages).

348. *See supra* notes 97–99 and accompanying text (discussing and critiquing existing and historical standards for recovery of damages).

with the addition of an explicit recognition of the nature of the plaintiff's unvalued harm.

B. AWARDING PUNITIVE DAMAGES IN ENVIRONMENTAL HARM CASES

As discussed above, environmental harm cases require a framework different than intentional tort cases. First, one possible approach would be to relax standing requirements to allow private parties to bring public nuisance and statutory claims. These actions could result in quantifying environmental harm using restoration costs and the natural resource valuation techniques discussed earlier,[349] even if the plaintiff would not be responsible financially for the restoration. Under this approach, single-digit ratios of punitive damages to compensatory damages would be appropriate because compensatory damages would include the total value of harm.

Another possible approach would be to abandon the single-digit ratio presumption and follow the analysis courts have used in intentional tort cases. Under such an approach, courts would recognize harm occurred but remains unvalued as damages, and would use the flexible standards in *BMW* and *State Farm* to depart from single-digit ratios when harm is difficult to value.[350] This approach involves far less precision than the first. However, it may be more realistic to implement, at least in the short term, as it does not require major changes to existing standing doctrines. This approach must address directly the Court's recent decision in *Philip Morris USA v. Williams*, which limits the plaintiff's ability to rely on harm to nonparties (here, harm to public natural resources) in seeking punitive damages.[351] As shown below, this concern is significantly lessened by the place-based nature of environmental harm. This is in contrast to products liability claims, toxic tort claims to recover for personal injury, and other types of claims based on nationwide conduct.

Finally, under both the approaches to valuing harm in environmental cases outlined here, the problem arises that the harm (whether valued monetarily or not) is not "personal" to the plaintiff as it is in the intentional tort cases. Instead, the private plaintiff is attempting to recover for harm to natural

349. *See supra* notes 306–14 and accompanying text.

350. *See supra* note 79 and accompanying text.

351. *See* 127 S. Ct. 1057, 1063–64 (2007).

resources owned or managed by the public, in addition to his or her own pecuniary loss. Therefore, even if obstacles to private party standing and valuation are removed, it does not follow that the plaintiff should be the beneficiary of all the now-increased punitive damages that flow from the public harm. As a result, there must be a method of apportioning the award of punitive damages between the private party plaintiff and the federal, state, or local government responsible for the resource. Each of these approaches and concerns are discussed below.

1. Valuing Environmental Harm in the Absence of a State or Federal Government Plaintiff

As the cases discussed in earlier Parts show, attempting to value environmental harm is difficult.[352] In some cases, however, valuation of harm is at least possible because a state or federal government, whether a plaintiff or not, has attempted to value the harm through restoration costs or other economic indicators. Valuation should become more sophisticated as quantification of nonuse values for natural resources develops through further refinement of CVM or new methods of valuation.[353] As that happens, existence and option values of natural resources can and should be added to restoration costs to value total harm.[354] In the meantime, courts should consider restoration costs in measuring total harm for purposes of reviewing punitive damages awards, even if the court finds it inappropriate to award such costs to a private or local government plaintiff as compensatory damages.

Private plaintiffs can enhance valuation techniques more directly if legislatures expand *qui tam* provisions that are part of federal and state false claims acts to supplement government efforts to value and recover for environmental harm. *Qui tam* provisions currently allow private parties to sue on behalf of the federal or state government to recover stolen government funds after giving notice of the suit to the government.[355] As an

352. *See supra* Part III.C.2.

353. *See supra* notes 311–14 (discussing CVM for assessing nonuse values).

354. *See, e.g.*, N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 923 A.2d 345, 401, 409–10 (N.J. Super. Ct. App. Div. 2007) (holding as a matter of first impression that the New Jersey Spill Compensation and Control Act's definition of "cleanup and removal costs" gives the state the right to recover for "loss of use" of natural resources injured or destroyed by a discharge in addition to the costs of physical restoration).

355. Aaron R. Petty, Note, *How* Qui Tam *Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 863–70 (2006) (discussing history and

incentive for private parties to bring such suits, this legislation directs courts to award private plaintiffs between fifteen and thirty percent of the funds recovered.[356] The purpose of such laws is to allow private attorneys general to supplement the governments' effort to combat fraud.[357]

State legislatures could enact statutes that similarly allow private citizens to bring *qui tam* suits for conduct that violates state or federal law and results in harm to the environment. The legislation would allow the plaintiff to seek restoration costs and/or loss of use damages based on CVM and other methods. In addition, the legislation could provide for a split in the recovery of any punitive damages, with the majority going to the state and some portion going to the private plaintiff as an incentive for bringing the lawsuit.[358]

Qui tam and split-recovery legislation would enhance the citizen-suit provisions that exist under many federal and state environmental laws by allowing private plaintiffs to recover financially as an incentive for bringing a case that attempts to quantify harm to the environment. While the valuation would not be "perfect" because of the inherent difficulties in valuing environmental harm, it would be akin to the efforts to value pain and suffering damages. Courts routinely award these damages even though courts recognize that they do not serve to "compensate" for the harm and do not value the harm economically.[359] Although we have little ability to value such harm "in the market," we allow juries to place a dollar value on the loss to recognize the significant nonmarket injury that has oc-

current trends in *qui tam* actions).

356. 31 U.S.C. § 3730(d) (2000) (providing that private parties can obtain between fifteen and twenty-five percent of the recovery or settlement if the government decides to proceed with the suit after notice, and between twenty-five and thirty percent of the recovery or settlement if the government decides not to proceed with the suit); *see* The False Claims Act Legal Center, State False Claims Acts, http://www.taf.org/statefca.htm (last visited Oct. 16, 2007) (showing states with false claims acts and providing links to the text of such laws); *see also* Petty, *supra* note 355, at 865–70 (discussing the recovery provisions of state and federal *qui tam* laws).

357. United States v. Northrop Corp., 59 F.3d 953, 967–68 (9th Cir. 1995) (stating the *qui tam* provisions of the False Claims Act exist to deter fraud, return funds to the federal treasury, and vindicate the public interest); S. REP. NO. 99-345, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.").

358. *See infra* notes 403–08 and accompanying text.

359. *See supra* Part III.A.1.

curred.[360] Awards for both pain and suffering and harm to natural resources are necessary to create a legal system that recognizes that not all harm easily translates into economic terms but still attempts to fashion justice with the legal tools available.[361] Under this framework, there would be no need to depart from single-digit ratios in awarding punitive damages because there would be a fuller valuation of the harm against which to compare punitive damages for ratio purposes.

Even in the absence of new legislation, courts also have the authority to use existing valuation methods to allow enhanced punitive damages in private party actions. Three of the cases discussed in Section III.B are instructive for other courts addressing cases involving environmental harm. In *Grefer* for example, there was no assessment of damage to natural resources but there were other indicators of total harm.[362] In reviewing the punitive damages award, the court relied heavily on the estimated costs of restoration.[363] By doing so, the court at least approached a calculation of total harm to natural resources by which to compare punitive damages. By using this more complete estimate of actual harm, a single-digit ratio, even at a 2-to-1 ratio, did not risk undervaluing the harm or creating insufficient punishment and deterrence. The court allowed the plaintiff to recover restoration costs as compensatory damages. The court, however, could have refused to award restoration costs as too speculative but still used those costs as its total harm number in assessing punitive damages. Similarly, the court in *City of Modesto Redev. Agency v. Dow Chem. Co.*, though it determined the city's estimate for remediating the groundwater was unrealistic, could also have used that esti-

360. *See supra* notes 325–26 and accompanying text.

361. *See supra* notes 325–26 and accompanying text; *see also* Levit, *supra* note 97, at 179–80 (arguing that allowing recovery for nonpecuniary harm requires courts to be sensitive to the "real nature" of injuries and prevents a "hopelessly inauthentic account of humanity" that would endure under a fiction where only physical injuries "actually hurt"); Margaret Jane Radin, Essay, *Compensation and Commensurability*, 43 DUKE L.J. 56, 74 (1993) (awarding compensation for pain and suffering allows the justice system to recognize a wrong and signify its weightiness even though money "is unrelated to the harm suffered"); Dobbins, *supra* note 97, at 885 (contending that allowing recovery of nonuse values as a part of natural resource damages serves to value those losses in the same way as recovery for nonmarket pain and suffering damages in tort suits).

362. Grefer v. Alpha Technical, 901 So. 2d 1117, 1147–52 (La. Ct. App. 2005), *vacated sub nom.* Exxon Mobil Corp. v. Grefer, 127 S. Ct. 1371 (2007).

363. *Id.* at 1149–50.

mate as the value of harm for purposes of calculating the ratio of punitive damages to compensatory damages.[364]

The *Exxon Valdez* case is also consistent with this approach. Because state and federal governments had already recovered for environmental harm in a separate lawsuit, the court did not include those amounts in the total harm value for evaluating punitive damages.[365] Instead, harm for purposes of punitive damages consisted solely of actual and potential economic harm that resulted from the spill.[366] It is clear though, that in a case where there had been no separate recovery for environmental harm to public resources, such harm should be included in the amounts against which punitive damages are measured. In this way, courts ensure a fuller valuation of environmental harm for purposes of assessing punitive damages but avoid any double recovery of either compensatory or punitive damages.

In cases where valuation information is available to assess total harm, there is a stronger argument for remaining within single-digit ratios. Courts can recognize the nonmarket injury to the environment, even if the plaintiff is not financially injured by the environmental harm, by including it as part of the total harm against which punitive damages are measured. Such judicial efforts would complement, rather than conflict with, existing federal and state citizen suits that federal and state statutes permit.[367] No new legal framework is necessary

364. *See* Nos. 999345, 999643, 2006 WL 2346275, at *11 (Cal. Super. Ct. Aug. 1, 2006); *supra* notes 195–202 and accompanying text.

365. *In re* The Exxon Valdez, 296 F. Supp. 2d 1071, 1078–79 (D. Alaska 2004) (discussing the natural resource damage settlement), *vacated per curiam*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276); John Tomlin, Comment, *Waking the Sleeping Giant: Analyzing New Jersey's Pursuit of Natural Resource Damages from Responsible Polluting Parties in the Lower Passaic River*, 23 PACE ENVTL. L. REV. 235, 246–47 (2005–2006) (reporting that the contingent valuation method determined that the damages to natural resources from the *Exxon Valdez* spill were $3 billion, which played a role in Exxon's agreement to settle those claims).

366. *In re* The Exxon Valdez, 472 F.3d 600, 601 (9th Cir. 2006) (per curiam), *amended by* 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3224 (U.S. Oct. 29, 2007) (No. 07-219), *cert. denied*, 76 U.S.L.W. 3222 (U.S. Oct. 29, 2007) (No. 07-276).

367. *See supra* notes 274, 303 and accompanying text (discussing savings clauses in federal environmental statutes and judicial recognition that Congress intended statutory citizen suits and common law actions to supplement enforcement of federal environmental laws).

to allow consideration of environmental harm in setting punitive damages, and such consideration would serve existing policy goals of enhancing enforcement of environmental laws as well as punishing and deterring environmental wrongdoing.[368]

2. Recognizing Unvalued Environmental Harm Where Valuation Is Difficult

In contrast to the prior approach, the alternate approach outlined below attempts to use the analysis in the intentional tort cases to promote punishment and deterrence objectives in environmental harm cases where the court has recognized, though not valued, total harm. In these cases, courts should permit punitive damage verdicts with high single-digit ratios or ratios exceeding single digits. There is some authority already for this approach in existing case law. For instance, in the *Exxon Valdez* case, even though the district court was only valuing economic harm from the spill and a significant amount of data was available, it remained unable to fully value the harm. Even after including all voluntary payments by Exxon in the total harm amount, "there was purely non-economic harm that [could not] be quantified; there was harm which likely occurred but ha[d] not yet been valued; and there was potential harm—all flowing from the grounding of the *Exxon Valdez*."[369] The court relied on this unvalued harm to justify a higher ratio of punitive damages, thus following the approach of courts in the intentional torts cases.[370] While the Ninth Circuit disagreed that the ratio should be as high as nearly 10-to-1, it did agree that that total harm used to evaluate the reasonableness of the punitive damages award should far exceed the compensatory damages awarded in the case.[371]

The *Johansen*[372] case, discussed *supra*, also exemplifies an attempt to value harm beyond compensatory damages. In that case, the court allowed a 100-to-1 ratio of punitive damages to compensatory damages, reasoning that the compensatory damages did not sufficiently value the harm to the environment and that the state had an interest in deterring environmental pollution.[373] The court did not attempt to place a dollar value on the

368. *See supra* notes 31–36 and accompanying text.
369. *In re The Exxon Valdez*, 296 F. Supp. 2d at 1103.
370. *Id.* at 1104.
371. *In re The Exxon Valdez*, 472 F.3d at 624.
372. Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320 (11th Cir. 1999).
373. *Id.* at 1337–38.

state's interest in protecting the environment or the actual environmental harm.[374] Instead, it recognized the presence of the invasion of the state's interest, the existence of the harm, and conducted its ratio analysis with that in mind.[375] Such an approach avoids the concerns expressed by the *State Farm* majority of excessive punitive damages on top of excessive noneconomic damages.[376] Here, the court does not award damages for noneconomic harm, but the award of punitive damages still serves its purposes.

A court adopting this approach must squarely address the Court's recent decision in *Williams*.[377] In that case, the Court limited the ability of the jury to consider harm to "nonparties" in awarding punitive damages.[378] Thus, *Williams* calls into question a punitive damages award that is based in part on unvalued harm to natural resources where those natural resources are not "represented" in the case by a governmental entity with standing to seek relief for those damages. For the reasons set forth below, however, *Williams* does not act as a bar to courts awarding punitive damages that are enhanced (or not reduced) based on unvalued environmental harm.

First, *Williams* does not prevent juries from taking into account harm to nonparties. Instead, it only prevents the jury from considering such harm for purposes other than determining the reprehensibility of the defendant's conduct.[379] As a result, because of the importance of the reprehensibility factor in assessing punitive damages, the decision should not pose a bar to allowing harm to natural resources to result in higher ratios of punitive damages to compensatory damages. Instead, juries can base punitive damages awards in part on unvalued harm to natural resources so long as courts carefully instruct juries on the limitations of the use of such unvalued harm.[380]

Second, and perhaps more important, *Williams*, like the Court's other punitive damages cases, implicitly assumes that

374. *Id.* at 1338–39.

375. *Id.*

376. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

377. Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

378. *Id.* at 1063–64.

379. *Id.*

380. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

the harm to "nonparties" can be valued and recovered as compensatory damages (whether economic or noneconomic) by multiple similarly situated plaintiffs against the same defendant, resulting potentially in multiple punitive damages for the same wrong.[381] The line of cases ending with *Williams* addressed not only cases with large punitive damage verdicts, but also cases with large noneconomic compensatory damage verdicts that can be recovered by multiple tort victims across the country.[382] The problem in those cases is that there are too many available plaintiffs who can seek damages; in the natural resource damage cases, there are often too few.[383] Thus, the concerns present in *Williams* do not necessarily exist in environmental harm cases.

Third, environmental harm cases, just like the trespass cases, are generally limited to discrete geographic areas and do not involve injuries replicated thousands of times throughout the state or country.[384] Creating confusion on this point is the fact that scholars often use the term "environmental torts" broadly to describe not only claims for damage to the environment but also claims for personal injury resulting from exposure to pesticides, asbestos, contaminated soil and groundwater, and other hazardous products or wastes.[385] In fact, scholars

381. *See Williams*, 127 S. Ct. at 1063 ("[T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation.").

382. *Id.* at 1060–62 (finding the punitive damages award violated due process because the jury instructions allowed the jury to consider harm to smokers across the state); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419–20, 422 (2003) (concluding that the punitive damages award violated due process because it attempted to punish defendant for its "operations throughout the country" which "bore no relation to the [plaintiffs'] harm"); *BMW*, 517 U.S. at 564 (stating that the punitive damages were based, in part, on nearly one thousand cars throughout the state that had fraudulently been repainted).

383. *See supra* notes 269–71 and accompanying text (discussing limitations in federal and state enforcement of environmental laws).

384. Even in environmental harm cases involving large corporations such as Exxon Mobil and Dow Chemical, the number of potential plaintiffs in a position to sue based on harm to the physical environment, even with loosened standing requirements, is likely to be far less than the number of potential plaintiffs in any nationwide consumer fraud or product liability action involving personal injury or emotional harm. *See supra* Part III.C.1 (discussing standing limitations for environmental harm cases).

385. *See* Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1621 (2005) ("As with products liability claims, environmental injury claims hold the potential for numerous plaintiffs to allege individual injuries arising out of a single act

such as Kip Viscusi have included "environmental torts" in the category of cases driving the need for judicial reform of punitive damages.[386] Based on these calls for reform, one might think that the problem of multiple punishments would be a primary concern in environmental harm cases.

A closer look at this claim reveals, however, that these scholars are focusing not on private party claims for environmental harm, but on more traditional "toxic tort" claims involving personal injury.[387] Such toxic tort cases raise the same concerns of large, nonpecuniary damages awards present in the product liability and nationwide fraud cases that have been the topic of significant scholarly attention,[388] in addition to a focus of the Supreme Court decisions in *State Farm* and *Williams*.[389]

The environmental toxic tort cases, however, should not be so easily classified with the environmental harm cases that are the subject of this Article. The environmental harm cases result in unvalued harm precisely because there is a significant component of the injury (i.e., harm to natural resources) that, unlike pain and suffering, economic loss, or medical expenses, is not personal to or "owned" by the plaintiff. The concern in the toxic tort and other personal injury cases is that juries will overvalue the damage due to the presence of a sympathetic plaintiff and the use of open-ended jury instructions providing little guidance in awarding nonpecuniary damages for pain and

or course of conduct on behalf of a single defendant."); Robert L. Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27, 30, 39–43 (1987) (discussing "environmental harms" with reference to toxic tort cases involving thousands of victims); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 285 (1998) (referring to "environmental" cases to discuss toxic tort accidents leading to injury and death).

386. *See* Viscusi, *supra* note 385, at 285–86 (arguing for the elimination of punitive damages for corporate risk and environmental decisions, but relying primarily on "environmental" cases involving toxic tort accidents leading to personal injury and death); *see also* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 19, 64–74 (2002) (basing conclusions on mock jury data assessing "products liability and environmental damage torts" although the only environmental case studied involved damage solely to public resources and was not brought by a private party).

387. *See supra* note 385.

388. *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages and Punishment for Individual Private Wrongs*, 87 MINN. L. REV. 583, 583–91 (2003); Denemark, *supra* note 82, at 931; Gash, *supra* note 385, at 1613.

389. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003).

suffering, loss of life, and the like.[390] In many natural resource damages cases, by contrast, there is no plaintiff able to seek damages for harm to natural resources and, even when there is, the legal system has struggled to develop a system to value that damage.[391] Thus, it is an error to include the environmental harm cases discussed in this Article as merely one type of "environmental tort" contributing to the alleged "breakdown" of the tort system.

In sum, the cases involving harm to natural resources are significantly different than toxic tort, product liability, and other cases involving nationwide corporate misconduct that raise the specter of a multiplicity of lawsuits with multiple and overlapping punitive damages awards.[392] Because of these significant differences, the concerns raised in *State Farm* and *Williams* simply do not apply. Instead, environmental harm cases, like the intentional tort cases, fall within their own discrete category of cases that fit the exception to the *State Farm* single-digit ratio presumption.[393] In the environmental harm cases, the unvalued harm is not to "nonparties" who can bring their own suits for compensatory and punitive damages, but to public natural resources. Even if vindicated by state and federal governments, the awards often do not achieve full economic valuation.

C. APPORTIONING PUNITIVE DAMAGES IN ENVIRONMENTAL HARM CASES

This Section addresses problems of apportioning the damages awarded in environmental harm cases filed by a private plaintiff attempting to recover punitive damages based not only

390. *See supra* note 326 and accompanying text (discussing the lack of precision in jury instructions for awards of pain and suffering and other nonpecuniary damages).

391. *See supra* Part III.C (discussing the difficulty of bringing suits for natural resource damages and valuing such damages).

392. *See Williams*, 127 S. Ct. at 1063–64 (invalidating a punitive damages award to the wife of a smoker because of concern that the jury based the punitive damages award on harm to other smokers across the state); *State Farm*, 538 U.S. at 419–24 (stating that the punitive damages award was excessive because it was based significantly on defendants' nationwide misconduct with regard to processing insurance claims rather than on conduct directed toward the plaintiff).

393. *See State Farm*, 538 U.S. at 425 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

on his or her own economic loss, but also on harm to public resources. In these cases, the plaintiff must establish whether or not she will incur some or all of the restoration costs representing the total harm inflicted by the defendant. If the plaintiff cannot establish she will incur those costs, the plaintiff should receive only some portion of the punitive damages, with the remainder going to state or nonprofit environmental agencies responsible for the resource. Such apportionment is necessary to address concerns of plaintiff "windfalls" and ensure that any punitive damages awarded based on "wrongs" to the public go to the public. Despite the minimal precedent for such apportionment in environmental cases, the building blocks exist to create a system of apportionment.

First, Catherine Sharkey has persuasively argued that we should recognize that punitive damages contain a compensatory component in addition to the punishment and deterrence components.[394] According to Sharkey, these "compensatory societal damages" are a significant, but insufficiently acknowledged, aspect of punitive damages that serve the goal of redressing the harms caused by defendants beyond the individual plaintiffs in any particular case.[395] Sharkey focuses primarily on single tortious acts by defendants that harm multiple victims and on torts which consist of repeated conduct affecting multiple parties.[396] In both types of cases, she suggests various mechanisms to distribute a portion of punitive damages "not only to the plaintiff but also to the society of similarly harmed individuals."[397] These mechanisms include variations on punitive damages class actions,[398] refinements to split-recovery statutes,[399] and judicial allocation of some portion of punitive damages awards to state coffers in the absence of legislation.[400]

The judicial analysis in the intentional tort and environmental harm cases discussed in earlier Parts is consistent with

394. *See* Sharkey, *supra* note 31, at 350–52, 389–414.

395. *Id.* at 351–52.

396. *Id.* at 389.

397. *Id.* at 390.

398. *Id.* at 410–14.

399. Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah all have statutes that require some percentage of punitive damages awards in all or certain classes of cases to be paid to the state or an agency within the state. *Id.* at 373, 375–80.

400. *Id.* at 380–86, 402–15 (discussing the judicial apportionment of punitive damages between the plaintiff and the state in the absence of controlling legislation).

Sharkey's concept of compensatory societal damages. Throughout these cases, courts continually refer to the need for significant punitive awards to not only punish and deter defendants, but to somehow compensate or value harm to society and to protect individual rights and resources.[401] Each of these cases focuses on the state's interest in the private dispute before the court either in terms of protecting natural resources, deterring similar wrongful conduct in the future, or both.[402] It is not a significant leap, however, to conceive of the state's interest as a compensatory one as well. At least in the environmental harm cases, where the injury is to public resources, an award of punitive damages can, in addition to serving its traditional punitive and deterrent purposes, serve to compensate the state for the defendant's violation of its interest. More tailored legislative and judicial efforts to implement split-recovery of punitive damages seem particularly applicable in these cases, where an individual plaintiff lawsuit raises larger issues of harm to public environmental resources.

Building on this idea, several states have split-recovery statutes where a certain percentage of punitive damages awarded in all or certain classes of cases are paid to state funds.[403] Seven of the eight states with such statutes impose split-recovery in all cases; whereas Georgia permits split-recovery only in product liability cases.[404] Alaska, Missouri, and Utah require 50% of the punitive damages award to go to a

401. Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1338 (11th Cir. 1999) (allowing a ratio larger than single digits and focusing on the state's interest in deterring environmental pollution); Grefer v. Alpha Technical, 901 So. 2d 1117, 1137–38 (La. Ct. App. 2005), *vacated sub nom.* Exxon Mobil Corp. v. Grefer, 127 S. Ct. 1371 (2007) (reviewing remediation estimates with reference to the state's interest in cleaning up the property and serving as a trustee for public natural resources); Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160–61 (Wis. 1997) (focusing on society's interest in preserving the integrity of the legal system and protecting the interests of individual landowners in awarding punitive damages).

402. *Johansen*, 170 F.3d at 1333, 1338–39; *Grefer*, 901 So. 2d at 1137–38; *Jacque*, 563 N.W.2d at 160–61.

403. *See supra* note 399.

404. Sharkey, *supra* note 31, at 377–78 (noting that Alaska, Indiana, Iowa, Missouri, Utah, Oregon, and Illinois permit split-recovery in all cases and citing and quoting the relevant state statutes). In addition, since 2003, six states have proposed legislation that would deny plaintiffs any portion of punitive damages awards, although no state has yet enacted such legislation. *See* Kelly-Rose Garrity, Note, *Whose Award Is It Anyway?: Implications of Awarding the Entire Sum of Punitive Damages to the State*, 45 WASHBURN L.J. 395, 395–96, 403 (2006).

state fund; Oregon requires 60%; Georgia, Indiana, and Iowa require 75%; and Illinois leaves the percentage to the discretion of the trial court.[405] In some states these amounts are deposited in the general fund, while in others legislation directs that the money go to civil reparations funds, criminal reparation funds, and the like.[406]

Currently, none of these statutes apply specifically to cases involving environmental harm. It would not be difficult, however, to amend these statutes or create others to ensure that a portion of the punitive damages award in a private party environmental harm case goes to the state department of natural resources or a pollution control agency where appropriate. In a case where restoration costs make up a portion of compensatory damages, like in *Grefer*, punitive damages based on that amount should go to the state unless it is clear the private plaintiff will be incurring those costs. Likewise, if damage to natural resources is recognized in order to allow a ratio of punitive damages to compensatory damages above single digits, but that damage is not monetized like in *Johansen*, the court should award the amount of punitive damages exceeding a single-digit ratio to the state unless the plaintiff takes responsibility for restoring the natural resources. In each of these cases, the legislation should ensure that the plaintiff receives compensatory damages, punitive damages based on the plaintiff's actual losses (economic loss and restoration costs incurred), a full recovery of attorney's fees,[407] and some additional percentage of the punitive damages based on harm to public resources.

Allowing private plaintiffs to receive a percentage of the "public" punitive damages is necessary to ensure that plaintiffs have sufficient incentives to pursue claims that involve not only private out-of-pocket losses, but also harm to public natural resources. The *qui tam* laws discussed earlier serve as precedent for allowing private plaintiffs to bring suit on behalf of federal or state governments and retain a portion of the proceeds.[408]

405. Sharkey, *supra* note 31, at 377–78.

406. *Id.* at 379–80.

407. Existing split-recovery legislation in some states already ensures that the state does not receive its percentage of recovery until after the plaintiff's attorneys fees are recovered from the total award. *Id.* at 378–79 (stating that in most, but not all, states with split-recovery statutes, the percentage allocated to the state is calculated after all applicable costs and fees, including the plaintiff's full contingency fee, are recovered by the plaintiff).

408. *See supra* notes 355–57 and accompanying text.

This incentive allows private parties to act on behalf of the environment and thus aid federal and state enforcement efforts.

This type of "split" could be available not only pursuant to legislation but also through the courts' inherent common law authority.[409] Sharkey details examples where courts have engaged in judicial split-recovery remedies in the absence of applicable legislation.[410] Courts have directed some portion of punitive damages to specific state or nonprofit funds to mitigate plaintiff windfalls, as well as to promote societal interests the defendants violated.[411] While critics may charge that such actions constitute inappropriate judicial activism, significant support exists in legal theory and case law for courts' use of their common law authority to shape legal remedies in the absence of statutes to the contrary.[412] As a result, courts can direct some portion of punitive damages awards to state or nonprofit funds for environmental restoration or protection when it is clear that some of the harm, whether valued or not, is to public natural resources.

Notably, there are anecdotes, though not empirical data, of juries who questioned whether they had authority to impose a split-recovery scheme in environmental cases. In *Grefer*, for example, the jury foreperson sent a note to the trial court during deliberations inquiring whether any of the punitive damages award would "go to compensate the people in the community."[413] Likewise, in a 2002 trial involving environmental contamination and punitive damages in Minnesota, the jury foreperson sent a note to the trial court as follows:

> Your Honor, for clarification purposes, would you please explain to us "punitive damages." Do we as a jury get to decide where and how the funds are distributed? Meaning, can we specify that these funds must be used to clean up this property? Or go to the [Minnesota Pollution

409. Sharkey, *supra* note 31, at 380–86.

410. *Id.*

411. Miller v. Cudahy Co., 592 F. Supp. 976, 1009 (D. Kan. 1984) (affirming an award of $10 million in punitive damages to the plaintiff based on the defendant's intentional acts of pollution, but holding the award in abeyance contingent upon the defendant's agreement to undertake cleanup efforts); Sharkey, *supra* note 31, at 380–86 (citing Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 121–22, 144–46 (Ohio 2002) (remitting a $49 million punitive damages award in a bad faith insurance claim case to $10 million and awarding two-thirds of that amount, after attorneys fees, to a cancer research fund)).

412. *See, e.g.*, Klass, *supra* note 302, at 570; Sharkey, *supra* note 31, at 424.

413. Grefer v. Alpha Technical, 901 So. 2d 1117, 1150 n.26 (La. Ct. App. 2005), *vacated sub nom.* Exxon Mobil Corp. v. Grefer, 127 S. Ct. 1371 (2007).

> Control Agency] to clean up the property, or do they go to [the plaintiff] to use as they see fit (do they pocket the money)?[414]

In both these cases, the answer to the jury was that the plaintiff, not the state or the community, would receive the full amount of punitive damages.[415] But was that the only possible answer? I argue that it was not. Courts and legislatures can implement split-recovery of punitive damages in order to allow optimal punishment and deterrence of defendants without resulting in plaintiff windfalls.

Indeed, in the absence of judicial or legislative implementation of split-recovery, there is evidence that juries will attempt to "do justice" using whatever tools they are given. Empirical studies have shown that mock jurors will inflate their compensatory damages awards if they are denied the opportunity to award punitive damages or if caps are placed on punitive damages.[416] In this way, jurors "use compensatory judgments to seek retribution or promote specific deterrence or general deterrence."[417] Because of the serious harm to public natural resources in many environmental cases involving punitive damages, such cases run a significant risk of jurors conflating compensatory and punitive damages if the punitive damages can only be based on the economic loss of the private plaintiff.

Legislative and judicial action to implement split-recovery of punitive damages in environmental harm cases thus will

414. Transcript of Proceedings at 2–3, Kennedy Bldg. Assocs. v. Viacom, 2006 WL 305279 (D. Minn. Feb. 8, 2002) (No. 99-CV-1833 JMR/FLN).

415. *Grefer*, 901 So. 2d at 1150 n.26; Transcript of Proceedings at 2–3, *Kennedy Bldg. Assocs.*, 2006 WL 305279 (No. 99-CV-1833 JMR/FLN).

416. Sharkey & Klick, *supra* note 82, at 1–2 (discussing findings that the adoption of punitive damage caps leads to statistically significant increases in compensatory damages awards and citing studies showing similar inflation of compensatory awards where mock jurors were prohibited from awarding punitive damages); *see* Wangen v. Ford Motor Co., 294 N.W.2d 437, 447 (Wis. 1980) ("[I]f punitive damages are not allowed, juries [will] give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages, particularly those awarded for pain and suffering." (citing 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.1, at 1300 (1956))).

417. Sharkey & Klick, *supra* note 82, at 3 (quoting Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, LAW & HUM. BEHAV. 313, 315 (1999)) (internal quotation marks omitted); *see* Catherine Sharkey, *Crossing the Punitive-Compensatory Divide*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES (Brian H. Bornstein et al. eds., forthcoming Nov. 2007) (discussing how juries use compensatory damages to punish defendants when caps are placed on punitive damages).

serve multiple, positive goals. First, it will ensure that the punitive and deterrent purposes of punitive damages are fully implemented by basing the punitive damages award on the total harm, whether incurred by the private plaintiff or the public.[418] Second, it will provide some measure of compensation to the absent public plaintiff who, for lack of resources, politics, or other reasons is not present as a plaintiff to protect the natural resources in question. Third, it will provide additional incentives for plaintiffs to bring suits to protect environmental resources, in addition to recovering their related private losses. If plaintiffs know that they can obtain attorneys fees, out-of-pocket losses, as well as a portion of the "public" punitive damages, potential plaintiffs will have sufficient incentive to bring suit and thus act as private attorneys general without the corresponding public concern of inappropriate windfall awards. Last, it will encourage courts and juries to impose punitive damages based on a reprehensibility analysis that includes "total" harm, rather than merely the plaintiff's compensatory damages.[419]

Finally, this more nuanced approach to punitive damages will further illuminate the fact that a unitary approach to punitive damage assessments is inappropriate. As shown in Part II, the Supreme Court's current jurisprudence centers around the fear of excessive nonpecuniary damages and excessive total awards in products liability cases and other cases involving nationwide harm. These concerns have little place in most environmental harm cases, where uncertainties in valuation more often result in undervaluation of harm rather than excessive damages. If courts more fully recognize harm that is difficult to value and address this issue explicitly, they will properly use the flexibility the Supreme Court created in *BMW* and *State Farm* in their review of jury awards for punitive damages in cases involving environmental harm.

CONCLUSION

The jurisprudence of punitive damages has been significantly transformed in little more than a decade. Where punitive damages were once almost exclusively the province of jur-

418. *See supra* notes 31–36 and accompanying text (discussing recognized purposes of punitive damages).

419. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063–64 (2007) (allowing harm to the public and nonparties to be considered as part of the reprehensibility guidepost of punitive damages).

ies and state courts, the Supreme Court's involvement in this area has now brought punitive damages awards under exacting federal constitutional due process review. Throughout the Supreme Court's journey in this area, judicial and public attention has focused on the billion-dollar punitive damages awards against large corporations arising from nationwide conduct, or punitive awards based on large, nonpecuniary compensatory damages awards. This focus has resulted in insufficient attention to cases in which harm to individual rights, public rights, or public resources remains partially or wholly unvalued. This Article attempts to shed light on these latter cases through the study of intentional tort and environmental harm cases and provides the beginnings of a framework for correcting the undervaluation of environmental harm. If courts can attempt to value or at least acknowledge harm that a compensatory damages award does not currently measure, they can better implement the Supreme Court's due process objectives, while still retaining the effectiveness of punitive damages in deterring and punishing wrongful conduct.