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FOREWORD

***EXXON VALDEZ* REVISITED: RIGHTS AND REMEDIES**

BRYCE YOUNG*

The evening of March 23, 1989 was just another night on the pristine waters of the Alaskan waterways. Thousands of tankers had been sailing the route through Prince William Sound for twelve years with minimal incident—there was no reason to suspect an impending catastrophe was looming just ahead.¹ On that fateful night, the *Exxon Valdez* oil tanker, the second newest ship in the Exxon Shipping Company fleet, left the Valdez oil terminal in Alaska, bound for California—she would never reach her destination.² En route, Captain Joseph Hazelwood steered the *Exxon Valdez* outside of the normal shipping lanes, a Coast Guard-approved maneuver, to avoid ice.³ However, possibly due to intoxication and/or negligence, Captain Hazelwood failed to ensure that a critical turn was timely initiated to avoid colliding with the Bligh Reef in Prince William Sound, Alaska.⁴ Within six hours of the *Exxon Valdez* running aground on the reef, the ship's damaged tanks spilled approximately 10.9 million gallons of its 53 million gallons of cargo of Prudhoe Bay crude oil into the surrounding waters.⁵ Three days later, 70 knot winds spread the oil south and west, resulting in oil flowing out of Prince William Sound, "extending down to the Kenai Fjords, Kodiak Island, Cook Inlet, and ultimately reaching the Alaska

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1. Alaska Oil Spill Commission, *Final Report: Details about the Incident*, SPILL: THE WRECK OF THE *EXXON VALDEZ* 5 (February, 1990), available at <http://www.evostc.state.ak.us/facts/details.cfm>.

2. HAZARDOUS MATERIALS RESPONSE AND ASSESSMENT DIVISION, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., OIL SPILLS CASE HISTORIES: 1967-1991, at 65 (1992), available at http://response.restoration.noaa.gov/book_shelf/26_spilldb.pdf [hereinafter NOAA].

3. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2612 (2008).

4. *Id.*

5. NOAA, *supra* note 2, at 65.

Peninsula”—some five hundred miles from the grounded vessel.⁶ Over the next two years, over eleven thousand workers, utilizing one thousand four hundred vessels and eighty-five aircraft, worked tirelessly to contain and mitigate the effects of the oil spill, at an ultimate cost to Exxon of nearly \$2.5 billion.⁷

While Exxon assisted state and federal agencies in the cleanup effort, the company's focus soon shifted from cleanup to preparing for litigation. A protracted legal battle ensued, resulting in both criminal and civil legal actions against Exxon.⁸ The criminal charges were quickly settled and the civil actions were either settled or consolidated into one suit with three separate classes of plaintiffs: commercial fishermen, Native Alaskans, and landowners.⁹ Exxon stipulated to negligence and the three phases of the trial established Exxon's recklessness and potential for punitive liability, compensatory damages for commercial fishermen and Native Alaskans, and the amount of punitive damages.¹⁰ In 1994, a federal jury awarded the commercial fishermen \$287 million for compensatory damages and their class \$5 billion in punitive damages.¹¹ Exxon appealed in 2006 and, following numerous remands, the Ninth Circuit Court of Appeals reduced the award to \$2.5 billion.¹² Exxon again appealed, this time to the U.S. Supreme Court, which further reduced the punitive damages to \$507 million in 2008.¹³

In light of the twenty-year anniversary of the *Exxon Valdez* running aground on Bligh Reef and the recent U.S. Supreme Court opinion, the *University of St. Thomas Law Journal* sought to examine the legal, sociological, cultural, and psychological repercussions of the *Exxon Valdez* oil spill. Partnering with the Holloran Center for Ethical Leadership at the University of St. Thomas, the *Journal* was privileged to host top experts in their respective fields to explore the ramifications and effects of the oil spill two decades after the tanker ran aground on Bligh Reef. The *Journal* is honored to publish the following articles that resulted from the symposium. As each author brings a vital and unique perspective to the discussion, the *Journal* hopes that this forum will be a launching point for continued discourse on the emerging and far-reaching ramifications of this terrible incident.

Professor Doug Rendleman, Robert E.R. Huntley Professor of Law at Washington and Lee School of Law, opens the discussion on the *Exxon Valdez* oil spill and its impact on the legal community by exploring the role

6. Stanley D. Rice, *Persistence, Toxicity, and Long-Term Environmental Impact of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 55, 56 (2009).

7. *Id.*; NOAA, *supra* note 2, at 65.

8. *Exxon Shipping Co.*, 128 S. Ct. at 2613.

9. *Id.*

10. *Id.*

11. *Id.* at 2614.

12. *In re Exxon Valdez*, 472 F.3d 600, 625 (9th Cir. 2006).

13. *Exxon Shipping Co.*, 128 S. Ct. at 2634.

of punitive damages within the U.S. legal system. Largely viewed as a “quasi-criminal punishment,” punitive damages blur the line between criminal and civil sanctions, as they punish the defendant’s misconduct rather than compensating and restoring the wronged party.¹⁴ However, punitive damages lack the constitutional due process requirements afforded to criminal defendants and, thus, punitive damage awards can fall victim to runaway juries, unpredictable verdicts, and windfalls to defendants who have already been made whole.¹⁵ The U.S. Supreme Court addressed these concerns in several key punitive damage cases, establishing guideposts by which jury punitive damage awards were to be measured for excessiveness, including the reprehensibility of the defendant’s actions, the ratio of punitive damages to compensatory damages, and the comparable civil penalty.¹⁶ In *Exxon Shipping Co. v. Baker*, the Supreme Court applied a 1:1 ratio of punitive damages to compensatory damages, believing that the “best approach is . . . to peg punitive damages to compensatory damages and to leave adjustments for later inflation to the judge or jury.”¹⁷ Finding no reason to depart from its 1:1 ratio, the Court held that maritime common law capped the damages at 1:1 and opined that “the common law cap . . . might also be the substantive due process cap.”¹⁸ Professor Rendleman critiques this approach, arguing that the Court, “[t]oo anxious to reverse a well-litigated and well-reviewed judgment, . . . imposed a rigid solution that will be problematic in future application.”¹⁹ He expects “the Supreme Court to defer more to a statutory punitive damages regime than we have observed for a common law regime,” which may result in “an unyielding ratio [that is] a crude and unsatisfactory technique [for measuring] the proportion between misconduct and injury.”²⁰ He concludes by remarking that legislatures “might consider the Court’s questionable solution to be an invitation to the revision that Professors Romero, Sharkey, and Klass suggest.”²¹

Professor Catherine Sharkey, Professor of Law at the New York University School of Law, further explores the U.S. Supreme Court’s “interventionist course to reverse punitive damages judgments in lower state

14. Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. ST. THOMAS L.J. 1, 1–2 (2009).

15. *Id.* at 2–9.

16. *Id.* at 10–15.

17. *Id.* at 19 (citing *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2629 (2008)).

18. *Id.* at 21.

19. *Id.* at 23.

20. Rendleman, *supra* note 14, at 23–24.

21. *Id.* at 24 (referencing Leo M. Romero, *Punishment for Ecological Disasters: Punitive Damages and/or Criminal Sanctions*, 7 U. ST. THOMAS L.J. 154 (2009); Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 27 (2009); Alexandra B. Klass, *Punitive Damages After Exxon Shipping Company v. Baker: The Quest for Predictability and the Role of Juries*, 7 U. ST. THOMAS L.J. 182 (2009)).

and federal courts.”²² Chronicling the trio of cases in which the Court held punitive damages to be constitutionally excessive in reference to due process standards, Professor Sharkey critiques the use of a static ratio, parsing out the federalism issues intrinsic to these decisions.²³ Due to the *Exxon Shipping* Court’s abandonment of the constitutional due process review, Professor Sharkey examines the reverberations in both the federal and state legal system, arguing that the case may have been meant to serve as a “template” for lower courts and may advocate the adoption of detailed guidelines that would warrant departure from an established punitive damage ratio.²⁴ This “template,” however, may raise more problems than it cures: it will not effectively solve the issue of unpredictability, does not account for the fact that class-action punitive awards already exclude the possibility of a single defendant paying multiple punitive damages, and may result in the federalization of punitive damages.²⁵ Due to the “inevitable tensions between the Court’s constitutional due process jurisprudence and its policy analysis of punitive damages as a common law remedy,” “[f]uture punitive damages issues loom large.” As Professor Sharkey concludes, “*Exxon Shipping* encapsulates the previous two decades’ developments in punitive damages jurisprudence . . . [and] may also contain the seeds of the salient issues in punitive damages for the next two decades.”

The legal analysis cannot be fully appreciated without a thorough understanding of the direct impact this spill had, and continues to have, on the people and wildlife in Alaska. Dr. Stanley D. Rice, Program Manager for the National Marine Fisheries Service, describes the predicted short-term effects of the oil spill as well as the unpredicted long-term effects that are still being discovered.²⁶ Using various case studies, Dr. Rice chronicles the unpredicted continual harm occurring to various species of wildlife due to exposure to toxic levels of oil.²⁷ The possibility of reopening litigation regarding these harms has created a swath of opposing views, but Dr. Rice is confident that the “studies finding long-term persistence and long-term effects will likely influence the decision-making processes in future spills, including the methods of cleaning and restoration and the degree of cleaning needed to prevent future damage.”²⁸

In addition to the on-going biological harms, the *Exxon Valdez* oil spill continues to plague the survivors through an extremely litigious legal battle. Dr. J. Steven Picou, Professor of Sociology at the University of South Ala-

22. Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 26, 26–27 (2009).

23. *Id.* at 27–31.

24. *Id.* at 30–44.

25. *Id.* at 44–53.

26. Stanley D. Rice, *Persistence, Toxicity, and Long-Term Environmental Impact of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 56 (2009).

27. *Id.* at 58–67.

28. *Id.* at 67.

bama, explains the various typologies of disasters, the effects these disasters can have on survivors, and identifies the survivors of the *Exxon Valdez* oil spill as “manifest[ing] all of the defining characteristics that social science researchers attribute to technological disasters.”²⁹ Through a “twenty-year research agenda that . . . focused on identifying the community, economic, cultural, social, and psychological impacts of the [*Exxon Valdez* oil spill],”³⁰ Dr. Picou explains the persisting impact the *Exxon Valdez* oil spill had on the local communities, including severe mental health disorders, social isolation, deteriorating social relationships, and the emergence of corrosive social cycles.³¹ Moreover, recent studies “have provided strong empirical evidence that being a litigant in the [*Exxon Valdez* oil spill] civil trial resulted in a shift in the source of social and psychological stress from the original oil spill to the lengthy adversarial litigation that emerged.”³² Dr. Picou examines the correlation between the twenty years of litigation and the tremendous toll on the communities of Prince William Sound, theorizing that “[e]cological and sociological recovery from the [*Exxon Valdez* oil spill] may never occur because of the massive and lingering contamination and the failure of the United States legal system to address the documented damages to the people and communities of Prince William Sound.”³³

Returning to the arena of legal analysis, Professor William H. Rodgers, Stimson Bullitt Professor of Law at the University of Washington School of Law, critically examines the logical underpinnings in Justice Souter’s decision in *Exxon Shipping*, primarily the under-compensation of the plaintiffs, as well as the failure of the Court to compensate for “[m]assive environmental damage.”³⁴ While noting that the company may have learned “its ‘drunken captain’ lesson,” Professor Rodgers opines this decision’s deterrent effect may be impossible to test, but that many victims may view this decision as an abuse of the legal system.³⁵

Professor Amy J. Wildermuth, Professor of Law at S.J. Quinney College of Law at the University of Utah, explores the “root causes of why an oil spill of this magnitude occurred.”³⁶ Using a survey of conservation writers as a foundation, Professor Wildermuth analyzes the role of economics, population growth, science, individualism, and corporations in the question of why society would allow “(1) a tanker holding (2) fifty-three million

29. J. Steven Picou, *When the Solution Becomes the Problem: The Impacts of Adversarial Litigation on Survivors of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 68, 68–71 (2009).

30. *Id.* at 75.

31. *Id.* at 76–80.

32. *Id.* at 80.

33. *Id.* at 88.

34. William H. Rodgers, *Punitive Decisionmaking*, 7 U. ST. THOMAS L.J. 89, 89–92 (2009).

35. *Id.* at 93–94.

36. Amy J. Wildermuth, *The Legacy of Exxon Valdez: How Do We Stop the Crisis?*, 7 U. ST. THOMAS L.J. 130, 130 (2009).

gallons of (3) oil [to go through] (4) Prince William Sound on that fateful day in 1989.”³⁷ She then examines how these facets of our worldview have impacted our current federal environmental laws, offering insight into the shortcomings of these laws.³⁸ Ultimately, to prevent these future disasters, Professor Wildermuth advocates that our society rethink, “at a fundamental level, our materialistic worldview and the economic system it spawned” and create laws that will “encourage as well as limit behaviors” in accord with a system that “acknowledges the limits of nature’s capital.”³⁹

Professor Sanne Knudsen, Visiting Assistant Professor of Law at S.J. Quinney College of Law at the University of Utah, applies the “precautionary principle to transfer the risk of long-term, unknown ecological harm to those who caused the injury.”⁴⁰ Using the herring fishery as an example of a keystone species, Professor Knudsen explores how the uniqueness of ecological injuries, particularly the complexity and interconnectedness of species, makes predicting the degree of harm ultimately caused by an environmental disaster difficult, often resulting in unforeseen consequences.⁴¹ As highlighted in *Exxon Shipping*, the current tools of compensatory damages, punitive damages, and natural resource damages are insufficient at “(1) identifying the ecological harm over a meaningful timeframe; and (2) valuing those harms to reflect their unique, public nature, resulting in the injuring party not internalizing the full cost of the harm.”⁴² While the precautionary principle has been implemented in other environmental laws,⁴³ a burden-shifting precautionary principle could prove to be useful in accounting for the uncertainties of ecological injuries, particularly those illustrated in the *Exxon Shipping* case.⁴⁴

Professor Leo M. Romero, Keleher & McLeod Professor of Law at the University of New Mexico School of Law, examines the purposes of punitive damages and proposes a “different way of determining the proper amount of punitive damages” by adopting a model similar to criminal punishments.⁴⁵ After a thorough analysis of the role and history of punitive damages,⁴⁶ Professor Romero uses *Exxon Shipping* as a framework for analyzing the retributive and deterrent efficacy and effect of punitive damages.⁴⁷ The Court’s rationale suggests that “punitive damages need to be

37. *Id.* at 131, 132–45.

38. *Id.* at 145–50.

39. *Id.* at 152–53.

40. Sanne Knudsen, *A Precautionary Tale: Assessing Ecological Damages After the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 95, 98 (2009).

41. *Id.* at 98–107.

42. *Id.* at 119; *see id.* at 107–19.

43. *Id.* at 119–25.

44. *Id.* at 125–29.

45. Leo M. Romero, *Punishment for Ecological Disasters: Punitive Damages and/or Criminal Sanctions*, 7 U. ST. THOMAS L.J. 154, 157 (2009).

46. *Id.* at 157–61.

47. *Id.* at 161–70.

regulated by legislatures if [they] are to be respected and upheld," similar to the legislative oversight of criminal punishment and departure from uniform sentencing guidelines.⁴⁸ Professor Romero concludes by analyzing the interplay between criminal sanctions and punitive damages, suggesting circumstances that may result in one, or both, being levied against an offending party.⁴⁹

Concluding this issue's examination of the *Exxon Valdez* oil spill is a discussion by Professor Alexandra B. Klass, Professor of Law at the University of Minnesota Law School, on the unpredictability within punitive damages and how lower courts have interpreted and applied the *Exxon Shipping* decision.⁵⁰ Against the backdrop of recent punitive damage jurisprudence, Professor Klass analyzes how the lower courts have adopted a "fact-intensive review of prior punitive damages cases" even though comparing the reprehensibility of conduct in one case with that of another is extremely difficult, "making this type of review appear arbitrary and haphazard."⁵¹ Ultimately, the future "role for juries in a world where punitive damages must be predictable"⁵² seems to suggest judicial or legislative oversight, but the *Exxon* Court gave "juries and courts no guidance on how to remedy the problem [of unpredictability]."⁵³

The *University of St. Thomas Law Journal* would also like to thank Professor Collette Routel, Assistant Professor of Law at William Mitchell College of Law, for her valuable contributions at the symposium but who was not able to publish an article with this issue. The *Journal* thanks all of the authors for their invaluable contribution to this discussion and for their continued effort to ensure that the events from that fateful night in March of 1989 will never be repeated. The trials may be over and the appeals may be resolved, but one thing remains evident—the legacy of the *Exxon Valdez* will continue to leave its indelible mark on our society for many years to come.

48. *Id.* at 171, 172–75.

49. *Id.* at 175–81.

50. Alexandra B. Klass, *Punitive Damages After Exxon Shipping Company v. Baker: The Quest for Predictability and the Role of Juries*, 7 U. ST. THOMAS L.J. 182, 182–83 (2009).

51. *Id.* at 194, 194–97.

52. *Id.* at 198, 198–201.

53. *Id.* at 202.