Punitive Damages and Valuing Harm

Alexandra B. Klass
ABSTRACT

In 2003, the Supreme Court created a presumption that only single-digit ratios of punitive damages to compensatory damages would satisfy substantive due process limits. The exception to this presumption is when the defendant’s misconduct results in only a small amount of compensatory damages or when harm is difficult to value. This Article proposes that while lower courts have properly departed from single-digit ratios where the compensatory damages are small, they have had more difficulty doing so when harm is difficult to value. As a result, lower courts are mechanically applying a single-digit ratio in cases where the Court’s current framework and the purposes of punitive damages justify departure from that ratio. This Article uses actions involving intentional torts on one hand and private party actions involving environmental harm on the other to illustrate how lower courts have failed to fully implement the exception to single-digit ratios. This Article proposes that in conducting a due process analysis of punitive damages, courts should focus on the existence of uncompensated harm to either depart from single digit ratios or, in the alternative, calculate punitive damages based on the full amount of harm even if that exceeds the compensatory damage award. To avoid “windfalls” to plaintiffs in cases involving harm to public natural resources, state legislatures or state courts should utilize a “split-recovery” approach to direct a significant portion of punitive damages based on public harm to governmental or nonprofit coffers for environmental remediation. Such an approach is consistent with due process while still fulfilling the purposes of punitive damages.

INTRODUCTION

In February 1994, a mobile home company, Steenberg Homes, had arranged to deliver a mobile home to a customer in Manitowoc County, Wisconsin. The easiest way to deliver the home was to cut across the neighbors’ property. However, the neighbors, Harvey and Lois Jacque, had made it clear to the company that they would not give permission to cross their land. 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. Despite the

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

2 Jacque, 563 N.W.2d at 157.
Jacques’ express denial of permission, the company deliberately crossed the Jacques’ land to deliver the home, and the Jacques sued the company for trespass seeking compensatory and punitive damages.\(^3\) A jury ultimately awarded the Jacques $1 in nominal damages and $100,000 in punitive damages.\(^4\)

In 1993, in *Johansen v. Combustion Engineering*, a federal jury in Georgia awarded sixteen plaintiff landowners $47,000 in compensatory damages and $45 million in punitive damages.\(^5\) The defendant in the case, Combustion Engineering, operated a mine upstream from the plaintiffs’ properties that polluted streams running through the plaintiffs’ properties.\(^6\) Specifically, the defendant failed to prevent acidic water from entering the streams emanating from its property for several years.\(^7\) The trial court reduced the punitive damage award first to $15 million and then, after appeal and remand, to $4.35 million.\(^8\) The Court of Appeals for the Eleventh Circuit affirmed the reduced punitive damage award.\(^9\)

At first glance, these two cases do not appear to have much in common. The *Jacque* case was a dispute between a small company and individual landowners over the ability of the landowners to exclude others from their property. The damages were nominal and the punitive damages were fairly modest for an award against a corporate defendant. The dispute affected virtually no one other than the litigants. By contrast, the *Johansen* case involved sixteen different plaintiffs on sixteen different properties against a large mining company. Although this was a private civil suit, the damage was not only to the plaintiffs themselves but also to public natural resources (the stream). Further, both the compensatory damages and punitive damages were significant, even after the court’s reduction.

Despite the differences between the two cases, they are similar in many ways. First, both involve tort claims in which the harm to the plaintiffs was only a portion of the overall wrongdoing of the defendant to be punished through punitive damages. In both cases, the defendant caused harm which went uncompensated in the civil action. In *Jacque*, there was no compensation for the violation of the plaintiffs’ right to exclude others from their property or society’s interest in protecting that right. This harm was never translated into monetary terms. Similarly, in *Johansen*, the plaintiffs did not receive any compensatory damages for the injury to the stream itself. Based on the facts set forth in the decision, there was no valuation of damage to the stream or the public’s right in those resources. The plaintiffs’ compensation was limited to diminution in value to their private properties. The compensatory damage award to each plaintiff was quite small with most plaintiffs receiving $3,000.\(^10\)

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

\(^3\) Id.
\(^4\) Id. at 158.
\(^5\) *Johansen v. Combustion Eng’r Co.*, 170 F.3d 1320, 1326 (11th Cir. 1999).
\(^6\) *Johansen*, 170 F.3d at 1326-27.
\(^7\) Id. at 1336. See also *Johansen v. Combustion Eng’r Co.*, 1997 WL 423108 at **1-3 (S.D. Ga., June 9, 1997).
\(^8\) *Johansen*, 170 F.3d at 1326.
\(^9\) Id. at 1339.
\(^10\) *Johansen*, 1997 WL at *4.*
earnest with its 1996 decision in BMW v. Gore. In Gore, the Supreme Court for the first time placed substantive due process limits on punitive damages in civil cases and set forth three “guideposts” for assessing the constitutionality of such damages: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

In 2003, the Court went further and warned that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. The Court allowed, however, citing to Gore, that awards exceeding that ratio “may” comport with due process if an egregious act results in only a small amount of economic damages, the injury is hard to detect or the monetary value of non-economic harm is difficult to determine. The Court’s rationale for its presumptive ratio was to 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.”

This Article proposes that courts must be careful to recognize harm that goes unvalued in applying the constitutional single-digit ratio presumption. Where courts fail to do so, it results in an excessive focus on mechanically reducing punitive damage awards on due process grounds rather than tailoring review of punitive damages to the specific facts of the case. Both the intentional trespass claim in Jacque and the environmental harm claim in Johansen meet the Supreme Court’s standard for allowing 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 the monetary value of non-economic harm is difficult to determine (harm to the stream in Johansen).

A close review of the intentional tort and environmental harm cases decided since BMW show, however, that courts have often conducted very different analyses in the two different types of cases with regard to the constitutional “ratio” issue. In the intentional tort cases with small or nominal damages like Jacque, as well as cases involving defamation and civil rights violations, lower courts more freely disregard single-digit ratios. Courts generally justify this departure by relying on the fact that compensatory damages in these cases are often nominal or very small. In order to deter and punish reprehensible conduct that results in harm to the plaintiff and society beyond any monetary loss to the plaintiff, courts allow much higher ratios. In all of these intentional tort cases, there is an invasion of the plaintiff’s rights, but there often is no valuation of that invasion as part of compensatory damages.

Just like the intentional tort cases where there is often no valuation of the interference with person or property, harm to natural resources also constitutes harm beyond any amount that can be measured easily in monetary terms. More often, however, courts in environmental harm cases brought by private parties fail to recognize a large portion of environmental harm that goes unmeasured as compensatory damages. This is 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.16 As a result, compensatory damages in such cases do not adequately reflect the actual harm or damage to natural resources.

Unlike in the intentional tort cases, many courts mechanically reduce the jury’s punitive damage award in private party environmental harm cases to reach a single-digit ratio.17 In doing so, courts fail to recognize the non-monetary harm to the environment that was not included in the compensatory damage award. This Article argues that lower courts should more fully address those circumstances where certain types of harm (whether harm to public resources, other public rights or certain private interests) are still rarely given monetary value in the judicial system. The environmental harm cases are simply an illustration where the ratio guidepost has been tied too closely to a compensatory damage award rather than to 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, neither the Supreme Court nor legal scholars have given much, if any, attention to this problem of valuing harm despite the significant attention given to punitive damages in general over the past ten years.

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, there historically was recognition that punitive damages could encompass certain types of harm that the civil justice system did not “count” as compensatory damages. Part II traces the Supreme Court’s journey over a relatively short period of time from being uninvolved in policing state punitive damage awards up through 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 damage awards but also on excessive non-pecuniary damage awards that serve to inflate both punitive damages and overall awards.

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

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16 While federal and state governments sometimes can recover for more intangible harm to the environment in the form of natural resources damages claims, there are many cases of egregious conduct that warrant punitive damages where the federal or state government is either not involved or only tangentially involved and thus such damages cannot be recovered. See, e.g., Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(f) (CERCLA) (stating that liability for injury to, destruction of, or loss of natural resources shall be only to federal, state or tribal governments); MADDEN & BOSTON, ENVIRONMENTAL AND TOXIC TORTS 66-68 (3d ed. 2005) (stating that the law has been slow to recognizing the right of a private person to bring an action for public nuisance to recover for harm to the environment without a showing of “special injury” based in part on the theory that only the sovereign should maintain actions for harm suffered by the public); ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION 74 (5th ed. 2006) (discussing limitations of private nuisance claims to recover for environmental harms and concluding that even when the aggregate damage caused by pollution is significant, the damage to individual victims “may be insufficient to make a lawsuit worthwhile” and that class actions “have not played a significant role in addressing environmental damage.”).

17 The court in Johansen avoided this error and allowed a ratio of punitive damages to compensatory damages of 100-1. See also infra Part III.
Section reveals that courts have been able to depart from single-digit ratios in the intentional tort cases without much difficulty using rationales of punishment, deterrence and the absence of large overall awards. By contrast, although the environmental harm cases justifying punitive damages involve many of the same reasons to depart from single-digit ratios, they are more difficult for courts to identify. This is because the compensatory damages in these cases are often large, although, I argue, not sufficiently large to reflect all harm the defendant caused or could have potentially caused to the affected natural resources. As a result, courts in the environmental harm cases struggle with applying the ratio and ensuring 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 argue for rejecting a mechanical approach to the ratio guidepost in both types of cases. The differences argue for adopting different approaches to the actual awards in the two types of cases.

Part IV uses the cases discussed in Part III to create a framework for courts to attempt to value (or at least recognize) harm that goes unmeasured as compensatory damages or, in the alternative, 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 as compensatory damages, and allow recovery of punitive damages beyond single-digit ratios. This Part then takes a different approach to 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 approach from the intentional tort cases with small or nominal damages. This would result in courts recognizing that there is harm to natural resources that cannot be valued in the case and allowing departure 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. Where the plaintiff will not be paying for the restoration, some portion of the punitive damages should go to government or nonprofit organizations in an amount to be determined by state legislatures or the courts. The remaining portion would be awarded to the plaintiff, along with attorneys fees, to create sufficient incentives for bringing such suits. This “split recovery” can be implemented by state legislatures or by courts using their inherent common law authority.

This framework relies on the flexibility that exists in the Supreme Court’s jurisprudence and suggests some refinements. Allowing higher punitive damage awards in these cases (either through a full valuation of harm or departing from a single-digit ratio) fills a gap today’s environmental regulatory enforcement system is unable to address. In this way, civil tort law can continue to play an optimal role in environmental protection efforts and in other cases where there is no government plaintiff 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. Commentators and courts generally are in agreement that the twin purposes of punitive damages are punishment and deterrence. According to the Supreme Court, although compensatory damages and punitive damages are usually awarded at the same time in our judicial system, they serve different purposes. Compensatory damages “are intended to redress the concrete loss the plaintiff has suffered by reason of the defendant’s wrongful conduct.” Punitive damages, by contrast, serve the broader functions of deterrence and retribution. 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.” 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 intentional or with willful indifference, deliberate disregard, malice, or some similar state of mind.

This apparent unanimity with regard to the purposes of punitive damages comes apart a bit when placed under a historical lens. Despite the consensus on the dual role of punitive damages today (punishment and deterrence) at least four other purposes have been identified at various times: (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. Indeed, even today in a few states, the stated purpose of punitive damages is to provide additional compensation to the injured plaintiff. Some states justify this additional compensation as a bounty for plaintiffs to bring suits acting as private attorneys.

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18 Restatement (Second) of Torts § 908(1) (1979).
19 See Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); W. Page Keeton, et al., Prosser & Keeton on the Law of Torts § 2, at 9 (5th ed. 1984) (main purposes of punitive damages are to punish the defendant and deter 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) (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 there are two prevailing justifications for punitive damages: punishment (or retribution) and deterrence) (citations omitted).
21 Id. (citing Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); Restatement (Second) of Torts § 903 (1979)).
22 Id. (citing Cooper Indus., 532 U.S. at 432; BMW v. Gore, 517 U.S. 559, 568 (1996)).
23 Id. (quoting BMW v. Gore, 517 U.S. at 568).
24 Schlueter, supra note 19, at 159-62.
26 Id. (citing, e.g., Hofer v. Lavender, 679 S.W.2d 470 (Tex. 1984) (punitive damages are intended in part to “reimburse the plaintiff for losses too remote or speculative to be considered elements of strict compensation”). See also W. Page Keeton, Prosser & Keeton on the Law of Torts § 2, p. 9 (5th ed. 1984) (noting that some decisions have mentioned an additional purpose of punitive damages of “reimburse the plaintiff for elements of damage which are not legally compensable, such as wounded feelings or the expenses of suit.”).
By allowing plaintiffs to recover punitive damages in appropriate cases, plaintiffs will have an incentive to fulfill important societal objectives by bringing a civil enforcement action for serious misconduct. This is particularly true where the prospective compensatory recovery is low or the expected cost of litigation is high. Thus, although punishment and deterrence are the main cited justifications for punitive damages, a historic and selective focus on compensation for otherwise uncompensable harm and encouraging private attorney general actions also runs through the cases.

States vary in their instructions to the jury on assessing punitive damages and in the factors trial and appellate courts consider in reviewing punitive damage awards. These factors can include reprehensibility of the misconduct, profitability of the misconduct, duration of the misconduct and its concealment, degree of the defendant’s awareness of its misconduct, its attitude upon discovering the misconduct, the defendant’s financial condition, 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.

According to six major studies reviewing punitive damage awards since 1985, juries have awarded punitive damages in approximately 4%-9% of all cases where plaintiffs have won. That means for the total number of cases (whether plaintiffs won or lost) based on an average success rate of 50%, punitive damages were awarded in 2%-4.5% of all civil trials. Although this number may not seem significant, recent punitive damage awards in the millions and billions of dollars, particularly against tobacco companies and other product manufacturers have made...
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headlines in recent years. As a result, the issue of punitive damages is a significant topic among tort scholars, interest groups and state legislatures.

Until recently, state courts reviewed punitive damage 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 U.S. Constitution. The next Part 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 the forces that have brought about this sea change in punitive damages jurisprudence focus on specific types of cases. These cases are predominantly consumer fraud and product liability claims involving nationwide misconduct such as cases against insurance companies, tobacco companies, and other product manufacturers. In these cases there is little dispute over whether the plaintiff can quantify and recover for the actual and potential damage flowing from the wrongful conduct. As will be shown, these cases are a driving force behind the presumptive single-digit ratio. As a result, the Court has not adequately focused on how its new due process rules can or should apply to cases in which total harm is difficult or impossible to value.

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 invalidated a state court punitive damage award as being excessive on substantive grounds. The Court began moving in that direction beginning in 1989, however, in Browning-Ferris Industries v. Kelco Disposal. In that case, the Court rejected a challenge to a punitive damages verdict under the Excessive Fines Clause of the Eighth Amendment. The Court did suggest that a state’s imposition of punitive damages might violate the Due Process Clause of the Fourteenth Amendment, but that the petitioners had not properly preserved the issue on appeal. At that time, there was agreement that there were procedural due process limitations on punitive damages, but less certainty

34 See, e.g., Williams v. Philip Morris, 127 P.3d 1165 (Or. 2006) (affirming punitive damage award of $79.5 million against Philip Morris based on plaintiff smoker’s compensatory damage award of $521,485), vacated and remanded, 127 S. Ct. 1057 (2007); W. Kip Viscusi, The Blockbuster Punitive Damages Awards, 53 Emory L.J. 1405, 1405-08 and Table 1 (2004) (discussing the media attention given to punitive damage awards, the interest of tort reformers and the rise of “blockbuster” awards, ranging from $100 million to over $1 billion); infra note 69 (discussing activity of state legislatures and tort reformers).
35 See, e.g., Viscusi, supra note 34, at 1405 (“Punitive damages represent the most visible symptom of the ills of the U.S. tort system.”); infra note 68 and accompanying text (citing debates over whether punitive damages really are a problem in today’s tort system).
36 See BMW v. Gore, 517 U.S. 559, 599-600 (1996) (Scalia, J. dissenting) (stating that majority’s decision represents the first instance of the Court’s invalidation of a punitive damage award as unreasonably large); In re The Exxon Valdez, 472 F.3d 600, 603 (9th Cir. 2006) (noting that as of the time of the Exxon Valdez spill in 1989, the Supreme Court had never invalidated a punitive damage award on grounds that the size of the award violated due process).
38 Browning-Ferris Indus., 492 U.S. at 275-76.
39 Id. at 276.
on whether there were substantive limitations on the amount of punitive damages beyond the same rational basis review that would apply to legislative penalties. 40

The Court addressed the substantive due process issue for the first time squarely in 1989 in Pacific Mutual Life Insurance v. Haslip. 41 In Haslip, the Court held that the due process clause did place an outer limit on the amount of punitive damages, but held that the specific award at issue was neither excessive nor arbitrary. 42 In reaching that conclusion, the Court explained that since as early as the 1850s, the Court had upheld jury awards of punitive damages under state common law. The Court, however, stated that jury discretion in this area has limits, and that the Court is under a constitutional obligation to review the reasonableness of the award and the adequateness of judicial guidance to the jury in making the award. 43 In reviewing the award in question, the Court held that the state court’s instructions to the jury on the purposes of punitive damages and the criteria for awarding punitive damages were adequate. 44 The Court also held that the amount of punitive damages was not excessive, even though it was more than four times the amount of compensatory damages and 20 times the amount of the plaintiff’s out-of-pocket expenses. 45

The Court addressed constitutional limits on punitive damages again in 1993 in TXO Production Corp. v. Allied Resources Corp. 46 In TXO, the Court upheld a punitive damages award that, on its face, was 526 times the amount of compensatory damages. 47 The Court held that in assessing punitive damages, however, 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. 48 Thus, the punitive damage award did not “jar one’s constitutional sensibilities.” 49

The next year, in BMW v. Gore, 50 the Court for the first time struck down a punitive damage verdict as excessive on due process grounds. The plaintiff in BMW had purchased a new BMW automobile that had been repainted prior to sale without the plaintiff’s knowledge to hide a surface defect in the car. In the plaintiff’s suit for fraud, the jury awarded him $4,000 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. 51 In holding the punitive damage award violated due process, the Court set out its now famous three guideposts courts must use to provide a constitutional review of punitive damages: (1) reprehensibility

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40 Id. See also TXO Production Corp. v. Alliance Resources, Corp., 509 U.S. 443, 453-55 (1993) (stating that respondents do not dispute that the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award but contend that the Court’s scrutiny should be the same rational basis scrutiny appropriate for reviewing state economic legislation).
42 Haslip, 499 U.S. at 19.
43 Id. at 18-19.
44 Id. at 19-20, 23.
45 Id. at 23.
47 TXO Production Corp., 509 U.S. at 459.
48 Id. at 461-62.
49 Id. at 462.
51 BMW, 517 U.S. at 564-65. The state supreme court subsequently reduced the punitive damage award to $2 million. Id. at 567.
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of the misconduct; (2) ratio of compensatory damages to punitive damages; and (3) difference between the punitive damages imposed and the civil penalties authorized or imposed in comparable cases.\(^{52}\) The Court held the reprehensibility guidepost was the most important, and focused on assessing the flagrancy or enormity of the misconduct.\(^{53}\)

The ratio requirement was to ensure there was reasonable relationship between the actual and potential harm to the plaintiff and the penalty imposed on the defendant.\(^{54}\) 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.\(^{55}\) 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.\(^{56}\) The Court also acknowledged that a higher ratio might be justified where “the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine.”\(^{57}\) To round out the three guideposts, the Court stated that the focus on civil sanctions for comparative misconduct was to ensure the defendant was on notice that its conduct could subject it to a significant penalty.\(^{58}\)

In 2003, in *State Farm v. Campbell*, the Court retained the *BMW* framework with its focus on reprehensibility of harm, ratio, and available civil penalties.\(^{59}\) In that case, the plaintiffs sued their automobile insurer for bad faith, fraud and intentional infliction of emotional distress for mishandling their legal defense in an accident claim.\(^{60}\) The jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages.\(^{61}\) The Supreme Court struck down the jury’s punitive damages award as unconstitutional.\(^{62}\) 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 held that it was reluctant to “identify concrete constitutional limits” on the ratio between harm or potential harm to the plaintiff and the punitive damages award.\(^{63}\) It went on to say, however, 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.\(^{64}\) The Court retained some flexibility by reaffirming what it said earlier in *BMW*, that a larger ratio might

\(^{52}\) *Id.* at 575.
\(^{53}\) *Id.* at 575-76.
\(^{54}\) *Id.* at 580-81.
\(^{55}\) *Id.*
\(^{56}\) *Id.* at 582.
\(^{57}\) *Id.*
\(^{58}\) *Id.* at 583-84.
\(^{60}\) *State Farm*, 538 U.S. at 413.
\(^{61}\) *Id.* at 415. The trial court reduced the punitive damage award but the state supreme court reinstated it. *Id.*
\(^{62}\) *Id.* at 418.
\(^{63}\) *Id.* at 424.
\(^{64}\) *Id.* at 425.
be constitutional if an egregious act results in a small amount of economic harm, or if the injury is hard to detect or the monetary value is difficult to determine.\textsuperscript{65} The Court also warned though that when compensatory damages are substantial, “a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process clause.”\textsuperscript{66}

The Court’s discussion of ratio in \textit{BMW} and \textit{State Farm} recognizes that punitive damages should be based on total harm where the compensatory damage award does not include all harm caused by the defendant’s misconduct. The Court, however, provided little detail on the circumstances that would lead to such a result. This can be explained, perhaps, by the specific concerns the Court was attempting to address in both \textit{BMW} and particularly in \textit{State Farm}. These concerns and the Court’s response to them through its series of punitive damage cases are discussed in the next Section.

\textbf{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 damage awards, but also by concerns of excessive, non-pecuniary compensatory damage awards.\textsuperscript{67} 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. This is not surprising in light of the increasing publicity surrounding products liability, personal injury and other torts lawsuits resulting in perceived excessive jury awards. Such awards not only have gained news headlines but have generated a significant amount of academic writing that continues to this day.\textsuperscript{68} Also during the time in which the Court was creating these limits, state

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} Pecuniary damages compensate the plaintiff for the economic consequences of the injury such as medical expenses, lost earnings, and loss of custodial care. Nonpecuniary damages compensate the plaintiff for pain and suffering, loss of enjoyment of life, and other physical and emotional consequences of the injury. \textit{See} McDougal v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989).

\textsuperscript{68} For literature addressing the alleged ills of the tort system and the particular dangers of “excessive” punitive damages, see, e.g., Viscusi, \textit{supra} note 34, at 1405 (“Punitive damages represent the most visible symptom of the ills of the U.S. tort system.”); Catherine M. Sharkey, \textit{Punitive Damages as Societal Damages}, 113 \textit{Yale L.J.} 347, 349 (2003) (“Large punitive damages awards get attention.”); Catherine M. Sharkey & Jonathan Klick, \textit{The Fungibility of Damage Awards: Punitive Damage Caps and Substitution}, available at \textit{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); Catherine M. Sharkey, \textit{Punitive Damages: Should Juries Decide?}, 82 \textit{Tex. L. Rev.} 381, 382 (2003) (describing the proliferation of recent academic work on the jury’s role in determining punitive damages and the Supreme Court and lower courts’ reliance on this academic work); Steven B. Hantler, et al., \textit{Is the “Crisis” in the Civil Justice System Real or Imagined?}, 38 \textit{L.A. L. Rev.} 1121, 1129-32 (2005) (arguing that non-economic damages such as recovery for non-economic damages such as awards for pain and suffering “are starting to supplement punitive damages awards as a source of “jackpot justice” damages for plaintiffs.”). \textit{See also} American Tort Reform Association, \textit{ATRA’s Mission: Real Justice in Our Courts}, available at \textit{www.atra.org/about/} (stating that ATRA supports an aggressive civil justice reform agenda that includes, among others, limits on punitive damages and limits on non-economic damages); David C. Johnson, \textit{The Attack on Trial Lawyers and Tort Law} (Commonwealth Inst. 2003) (describing right-wing tort reform agenda with focus on achieving judicial and legislative reforms that include limiting punitive damages and non-economic harm).
legislatures were enacting significant tort reform measures, including placing caps on both punitive damages and non-economic damages to address what it perceived as a tort system in “crisis.”\(^{69}\) 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 underline the majority opinion in *State Farm*.

First in *Browning-Ferris*, Justice O’Connor wrote in her partial concurrence and partial dissent in 1989 that “[a]wards of punitive damages are skyrocketing.”\(^{70}\) She went on to cite numerous cases showing a trend of new, multimillion dollar awards.\(^{71}\) She then paraphrased from various amicus briefs warning that the threat of such “enormous awards” has a detrimental effect on the research and development of new products, pharmaceutical drugs, vaccines and motor vehicles.\(^{72}\) Justice O’Connor’s concerns were not limited to punitive damages under the facts of the case before the Court, but the broader effect of large verdicts on technological and economic development.

Likewise, in *Haslip*, in 1991, the majority upheld the punitive damage award at issue as within constitutional boundaries.\(^{73}\) In dissent, however, Justice O’Connor declared that more stringent constitutional limits were needed 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.”\(^{74}\) Justice O’Connor cited “an explosion in the frequency and size of punitive damages awards” that appear to be limited “only by the ability of lawyers to string zeros together in drafting a complaint.”\(^{75}\) Justice O’Connor justified her call to re-evaluate the Court’s punitive damages jurisprudence in part because in the past, punitive damages were awarded “when compensatory damages were not available for pain, humiliation and other forms of intangible injury.”\(^{76}\) Punitive damages filled this gap and, according to Justice O’Connor, because of changes in compensatory damages, there was no longer a compensatory gap for punitive damages to fill.\(^{77}\)

\(^{69}\) See, e.g., Johnson, *supra* note 68 (citing success of tort reform advocates just in 2002-2003 in bringing about state legislative punitive damage caps in Alaska, Mississippi and Texas and caps on non-economic damages in Colorado, Idaho, Nevada, Ohio, Oklahoma, Texas and West Virginia. Nearly all states capped the targeted damages at under $500,000); Sharkey & Klick, *supra* note 68 at Appendix A (table showing 21 states with punitive damages caps and showing that most caps were enacted beginning in the mid-1980s with most statutes enacted in the 1990s; id. at Appendix B (showing seven states with caps on non-economic damages). In a few states, courts in those states invalidated the damage caps as unconstitutional. See id.


\(^{71}\) *Id.*

\(^{72}\) *Id.* (citing Brief for Pharmaceutical Manufacturers Assoc., et al., at 5-23).

\(^{73}\) TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 459-62 (1993) (upholding punitive damages award ($10 million) that was 526 times the compensatory damage award ($19,000) based in part on the fact that potential damages that could have flowed from the misconduct were between $5 million and $8.3 million).


\(^{75}\) *Id.* at 62 (quoting OKI America, Inc. v. Microtech Int’l, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring)).

\(^{76}\) *Id.* at 61.

\(^{77}\) *Id.* at 61 (citing K. REDDEN, PUNITIVE DAMAGES § 2.3(A) (1980); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519-20 (1957)).
Justice O’Connor’s opinions in Browning-Ferris and particularly in Haslip show a significant concern with the ability of the civil jury system to award non-economic 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 v. Gore, but made their way into Justice Stevens’ majority opinion in Cooper Industries v. Leatherman Tool Group. In that case, the Court held for the first time that appellate courts should apply a de novo standard in reviewing the constitutionality of punitive damages awards.78 The Court held that unlike the measure of actual damages, the level of punitive damages is not really a “fact” that is “tried by the jury.”79

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 19th century, punitive damages operated to “compensate for intangible injuries” because recovery for such injuries “was not otherwise available under the narrow conception of compensatory damages prevalent at the time.”80 As an example the Court cited the general ability today to recover pain and suffering damages.81 The Court engaged in this discussion to show that punitive damages historically were used to compensate for previously unavailable non-pecuniary damages as well as to punish and deter the defendant. Now, according to the Court, the wider recovery of damages that were previously not subject to valuation and recovery has eliminated the need for punitive damages to serve a compensatory purpose in these cases. This, in turn, renders punitive damages less “factual.”82 Through this analysis, the Court created a bright line between compensatory damages and punitive damages in order to justify a different standard of review for punitive damages.83 The Court also used this discussion to justify closer

79 Id. at 437 (quoting Gasperini v. Center for Humanities, 518 U.S. 415, 459 (1996) (Scalia, J. dissenting).
80 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 20th century that courts routinely began allowing recovery for pure emotional distress and other non-pecuniary damages without physical impact. See, e.g., Nancy Levit, Ethereal Torts, 61 GEO. WASH. L. REV. 136, 141-46 (1992) (tracing history of 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 under traditional common law and that claims for pure emotional distress were not regularly permitted until well into the 1900s).
81 Id. This is not to say that monetary damages can ever truly “compensate” for severe emotional distress, loss of enjoyment of life, or loss of life. It only means that as a society we have relied on the judicial system to attempt to translate these losses into monetary form and that damages for such losses are awarded and in many cases are in the hundreds of millions of dollars. See, e.g., McDougald v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989) (stating that recovery for non-pecuniary injury such as emotional distress, loss of life or 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. We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace for the condition created.”).
82 Id. at 437.
constitutional scrutiny of punitive damages because of the now more limited purposes of the award.

Justice Ginsburg in dissent also discussed the relationship between punitive damages and non-pecuniary compensatory damages but disagreed with the bright line the Court had drawn between the two. She questioned the Court’s ability to hold that punitive damages were less “factual” and thus subject to de novo review than non-pecuniary damages which are just as difficult to quantify and thus are no more “factual” in nature. She contended that punitive damages are “not unlike” the measure of actual damages suffered in non-economic 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.” Thus, there was no legal basis to have one standard of review for pain and suffering damages and another for punitive damages.

Finally, in *State Farm*, the majority went further and questioned whether punitive damages are even necessary to fully implement the punitive purpose of punitive damages (as opposed to the compensatory purpose which the Court had previously rejected as outdated). In justifying its invalidation of the punitive damage award (which contained a punitive to compensatory damage ratio of 145-1), the Court focused on the fact that compensatory damages in the case were “substantial” ($1 million). The Court stated that there was “likely” a duplication between the punitive damage award and the compensatory damage award because much of the compensatory award was based on emotional distress caused by outrage and humiliation the plaintiffs suffered. The Court went on to cite authority that compensatory damages of this type already contain a punitive element, and that there is “no clear line” of demarcation between punishment and compensation in a case of this type. The Court thus further limited the role of punitive damages, resulting in a justification for greater scrutiny of such awards. In sum, in the context of its series of punitive damage cases, the Court’s various opinions have addressed many underlying concerns other than excessive punitive damages, notably the explosion of mass tort and product liability claims and the advent of significant compensation for pain and suffering and other non-pecuniary damages that inflate overall awards.

The Court has continued to narrow the role of punitive damages in its most recent case, *Williams v. Philip Morris USA*, issued in February 2007. In that case, the Oregon Supreme Court affirmed a jury award to the wife of a smoker in a historical error in *Cooper Industries* when it posited that punitive damages historically served primarily a compensatory function in the early years of tort law). Even if the Court was incorrect that the primary purpose of punitive damages in early American tort law was to compensate for losses that did not used to be recognized as a category of compensatory damages but now are, the fact remains that compensation was and can still remain one of several purposes of punitive damages; Sharkey & Klick, *supra* note 68 (suggesting that punitive damages and non-economic compensatory damages are more fungible than has been acknowledged).

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84 *Id.* at 446-47 (Ginsburg, J. dissenting).
85 *Id.*
86 *Id.*
88 *Id.*
89 *Id.* (quoting *RESTATEMENT (SECOND) OF TORTS* § 908, cmt. c (1977)).
wrongful death claim for fraud and negligence. In support of its verdict, the jury found that Philip Morris had engaged in a publicity campaign to undercut published concerns about the dangers of smoking. The jury awarded the plaintiff $79.5 million in punitive damages, based on a total compensatory award of $821,485.50 ($21,485.80 in economic damages and $800,000 in non-economic damages), resulting in a ratio of roughly 100-1. 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 damage award represented punishment for harm to nonparties rather than solely for harm or potential harm to the plaintiff. Second, the defendant argued that the roughly 100-1 ratio of punitive damages to compensatory damages was grossly excessive and violated due process by significantly exceeding the presumptive single-digit ratio set out in State Farm.

In its decision, the Court addressed the first issue but not the second issue. The Court held that due process prohibited a jury from punishing a defendant based on harm to nonparties. It also held, however, that the jury could consider harm to nonparties in determining the reprehensibility of the defendant’s conduct. 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 to the charge because there would be insufficient facts available as to the number of such nonparty victims, as well as the circumstances and seriousness of their injuries. The Court found that the trial court’s jury instructions did not sufficiently narrow the jury’s use of evidence of harm to nonparties in determining reprehensibility rather than punishment. This, in turn, resulted in a risk that the jury’s punitive damage award was intended to punish the defendant not only for the harm it caused the plaintiff but also for similar harm it may have caused to other smokers not parties to the case. The Court then remanded the case to the Oregon Supreme Court to allow that court to apply the standard set out in the opinion and expressly refused to reach the issue of whether the punitive damage award was “grossly excessive” based on the ratio to compensatory damages.

In Williams, like in its prior decisions, the Court is clearly concerned about excessive damage awards, particularly those that may be based on nationwide mass torts where multiple suits could result in multiple and overlapping punitive damage awards. Also in Williams though, the Court implicitly assumes that the “strangers to the litigation” can bring their own lawsuits to recover not only for punitive damages but also for a full compensatory damage award based on economic and non-economic harm such as pain and suffering, loss of enjoyment of life, and the like.
Indeed, just like in *State Farm*, the plaintiff in *Williams* recovered far more in non-economic damages ($800,000) than she did in economic damages ($21,485.80).  

But what about cases where the non-economic harm still is not compensated? 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.  

Thus, in cases where the plaintiff can establish the existence of actual or potential harm that is not being valued as part of compensatory damages, the reviewing court should ensure that 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 exception to the presumptive single-digit ratio 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. This is not surprising. It is fairly obvious that if punitive damages are meant to deter and punish, a $10 punitive damage award on top of a $1 nominal damage award will not have the desired effect. By contrast, many of the environmental harm cases discussed in the next Part have substantial damages but the parties or the court have difficulty identifying or valuing the full amount of harm to public resources caused by the defendant’s wrongdoing.

This problem is very similar to the compensatory damage regime prior to the modern era where it was more difficult to recover for non-pecuniary harm. According to the Court, punitive damages at that time included a component that recognized the inability to value certain types of non-economic harm. This is analogous to the situation today where there is harm to resources or rights that still is not valued as compensatory damages. The next Part discusses this issue using as examples cases of intentional torts and cases of environmental harm.

### 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. What is notable about these cases is that in each of them, compensatory damages were small or nominal and punitive damages far exceeded single digit-ratios. In these cases, the reviewing courts had to determine whether a strict ratio should apply or whether to use the language in *BMW* and *State Farm* that a higher ratio is constitutional when the conduct is egregious and the economic injury is small, hard to detect or difficult to value. In each case, the reviewing court had little difficulty upholding a ratio that far exceeded single digits. In each case, the court relied on the punitive and deterrent purposes of punitive

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101 *Id.* at 1061.

102 See *State Farm*, 538 U.S. at 425; *BMW v. Gore*, 559, 582-83 (1996).

103 See, *e.g.*, Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 437, n.11 (2001) (noting that the types of compensatory damages available to plaintiffs, including pain and suffering damages, has broadened in the 20th century, rendering it unnecessary to punitive damages to contain a compensatory component to account for plaintiffs inability to recover for those injuries); SCHLUETER, supra note 19, at 8, 16-17 (stating that English and U.S. courts did not allow recovery for mental anguish in most cases until the middle of the 19th century and so punitive damages filled the role of compensating for such injuries). See also supra notes 80-82 (discussing history of judicial compensation for pain and suffering and other non-pecuniary damages).
damages and the fact that compensatory damages in the case were nominal or very small. As a result, there would be no punishment and deterrence of egregious conduct without departing from a single-digit ratio.

Although in each case the court conducts a perfectly good analysis of the constitutional requirements, the task is not very difficult. These are not cases where the plaintiff is recovering substantial damages but still less than the full amount of damage caused by the defendant’s misconduct. Instead, the plaintiff is often not recovering any compensatory damages at all or only some small amount that would not even cover attorneys’ fees. These are not the cases that drive constitutional limits on punitive damages in the first place. More important, because there is often very little in the way of compensatory damages being awarded, punitive damages end up accounting for some amount of harm not valued as compensatory damages. In this way, courts use punitive damages in these cases to serve compensatory as well as punitive and deterrent goals but they just don’t say so.

In 2002, the Minnesota Court of Appeals addressed the constitutional ratio issue under *BMW* in an intentional trespass suit.\(^{104}\) The court conducted a constitutional due process review of punitive damages in a case where the plaintiff was awarded $819 in rental value for the disputed land and $50,000 in punitive damages.\(^{105}\) The jury found that the defendant acted with deliberate disregard of the plaintiff’s rights based on evidence that the defendant wrongfully maintained that he owned the property and threatened to have the plaintiff arrested and his farming equipment confiscated if he used the property.\(^{106}\) The defendant argued that because the ratio between punitive damages and compensatory damages was 61-1, the award was unconstitutionally excessive under *BMW*.\(^{107}\) The court of appeals disagreed and held that such arguments fail where there is a small compensatory award.\(^{108}\) The court reasoned that to apply a strict ratio requirement to a small compensatory damage award would “negate the purpose of deterring the defendant from engaging in the same reprehensible conduct.”\(^{109}\)

Other jurisdictions similarly have focused on the small amount of compensatory damages and the reprehensibility of the conduct to affirm punitive damage awards that far exceed single-digit ratios. In 2006, the Kentucky Supreme Court upheld a $5,000 punitive damage award based on an award of nominal damages for the defendant’s intimidating and abusive behavior in blocking access to a road.\(^{110}\) To justify the award, the court relied on the language in *BMW* stating that higher ratios are constitutional where an egregious act has resulted in only a small amount of damage or when non-economic harm is difficult to determine.\(^{111}\) The court also relied on decisions in other jurisdictions allowing 150-1 and higher ratios in cases of

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105 *Id.* at *6*.
106 *Id.* at *1*.
107 *Id.*
108 *Id.*
109 *Id.*
111 *Id.* at *7* (quoting BMW v. Gore, 517 U.S. 559, 583 (1996)).
small or nominal damages, along with its determination that the defendant in this case had acted with malice or oppression.\textsuperscript{112} Likewise, in the \textit{Jacque} case discussed in the Introduction to this Article, the Wisconsin Supreme Court upheld a punitive damage award of $100,000 based on a $1 nominal damage award for the corporate defendant's trespass across the plaintiff's property after the plaintiff had denied access.\textsuperscript{113} In upholding the award as consistent with due process, the court began with the principle that the private landowner's right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."\textsuperscript{114} The court stated that this important right is "hollow" if the legal system provides an insufficient means to protect it.\textsuperscript{115} The court went on to argue that society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner.\textsuperscript{116} According to the court, society must preserve the integrity of the legal system so private landowners feel confident that wrongdoers will be appropriately punished and will thus be less likely to resort to self-help remedies.\textsuperscript{117} Based on the egregiousness of the defendant's conduct in this case, the court concluded that \textit{BMW} did not require a mathematical bright line ratio between punitive and compensatory damages and such a result "would turn the concept of punitive damages on its head."\textsuperscript{118}

Cases involving intentional torts such as defamation\textsuperscript{119} and violation of civil rights are cases, like the trespass cases, where courts have allowed punitive damages to be based upon nominal damages if the defendant acted with sufficient malice, deliberate disregard or other state of mind sufficient for punitive damages.\textsuperscript{120} Judicial analysis of punitive damages in these cases often focuses on the need to

\textsuperscript{112} \textit{Id.} at *8 (citing William v. Kaufman County, 352 F.3d 994, 1016 (5\textsuperscript{th} Cir. 2003) (upholding punitive damages of $15,000 based on $100 in nominal damages as reasonable); Provost v. City of Newburgh, 262 F.3d 146, 165 (2d Cir. 2001) (upholding $10,000 punitive damage award where there was no compensable injury and nominal damages of $1).

\textsuperscript{113} \textit{Jacque} v. Steenberg Homes, 563 N.W.2d 154, 156 (Wis. 1997).

\textsuperscript{114} \textit{Id.} at 159-60 (quoting Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

\textsuperscript{115} \textit{Id.} at 160.

\textsuperscript{116} \textit{Id.} at 160-61.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.} at 164-65. \textit{See also} Gianoli v. Pfleiderer, 563 N.W.2d 562, 570 (Wis. 1997) (upholding punitive damage award of $200,000 based on compensatory award of $12,000 in land-based tort case on grounds that conduct toward neighbors was outrageous and case was not a situation "in which a runaway jury awarded mind-boggling punitive damages that require a reining in by a judge.").

\textsuperscript{119} 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." \textsc{Restatement (Second) of Torts} § 559. Because of First Amendment concerns, if the plaintiff is a public official or public figure, he or she must establish the defendant published a knowing or reckless falsehood to recover presumed or actual damages for defamation. If the plaintiff is a private figure but the issue involves a matter of public concern, he or she must establish some fault (usually negligence) plus actual damages and, if warranted, punitive damages. If the defendant is a private figure and the alleged defamation is of no public concern, the plaintiff can recover presumed damages and punitive damages, if appropriate. See \textit{Dobbs, supra} note 30, at 1121.

\textsuperscript{120} \textit{See, e.g.}, \textit{Dobbs, supra} note 30, at 1192. \textit{See, e.g.}, Sherman v. Kasotakis, 314 F. Supp. 2d 843, 874-75 (N.D. Iowa 2004) (stating that "many civil rights violations will fall into this category 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.").
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depart from single-digit ratios in order to punish and deter egregious conduct directed specifically at the plaintiff that results in only small or nominal damages. Implicit in the courts’ opinions in these cases, however, is that punitive damages are being used in part to compensate the plaintiffs. Courts allow punitive damages to serve this compensatory role, whether or not they say so, because our judicial system currently does not place a dollar value on the invasion of the personal right or the harm to society’s ability to protect that right.

For instance, in 2006, the U.S. Court of Appeals for the Sixth Circuit remitted a punitive damage award of $875,000 to $600,000 in a civil rights unlawful arrest case based on a compensatory damage award of $279.05. In that case, security officers at a casino placed the 72-year old plaintiff casino patron in a security office, told her 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. The security officers subjected the plaintiff to this treatment because they suspected her of stealing one nickel from a slot machine.

In its analysis of the constitutionality of the punitive damage award, the court emphasized that the harm in the case was not any monetary loss, but about the elderly plaintiff’s right not be unreasonably seized and detained in an outrageous manner. With regard to the ratio, the court relied on the language of BMW and prior civil rights cases to find 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.

Likewise, in a 2006 case from the U.S. District Court for the District of Kansas, the court reduced a punitive damage award from $150,000 to $50,000 in a defamation case, leaving a ratio of punitive damages to compensatory damages of 20-1. 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.” Although the court reduced the award, it did not do it based on the ratio, but on the rationale that a more modest amount would be sufficient to achieve punishment and deterrence.

These cases show that courts take seriously the language in BMW on departing from ratios where the act is egregious but the actual damages are small. In many ways, this is not surprising. The impetus for “reigning in” punitive damages verdicts is based predominantly on the multimillion dollar awards courts, legislatures and the public worry will result in a “jackpot” justice system that will hinder new developments in science, technology and consumer goods. These concerns are

121 Romanski v. Detroit Entertainment, 428 F.3d 629, 635, 649-50 (6th Cir. 2006).
122 Romanski, 425 F.3d at 633-34.
123 Id. at 645.
124 Id. at 645-46 (citing Argentine v. United Steel Workers, 287 F.2d 476, 488 (6th Cir. 2002) (sustaining a 42.5 to 1 ratio and $400,000 punitive damage award in union retaliation case); Dean v. Olibas, 129 F.3d 1001, 1007 (8th Cir. 1997) (sustaining 14 to 1 ratio and $70,000 punitive damage award in unlawful arrest case)).
126 Id. at *6.
127 Id. at *6.
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lessened, if they exist at all, in disputes between discrete parties where the total damages, both compensatory and punitive, do not approach even $1 million. Thus, these cases end up being “easy” cases simply based on the relatively modest size of the overall verdict.

More important, these cases can be seen as ones in which the courts at least implicitly recognize that the punitive damage award should include a value for injury to society and the plaintiff as well as punish and deter the defendant.128 Such a goal is consistent with the Supreme Court’s recognition that where such harm is not recovered as compensatory damages, there is a greater role for punitive damages. The Court certainly has stated that a compensatory component of punitive damages is no longer justifiable in cases where significant non-pecuniary damages are awarded.129 In more than one of the intentional tort cases, however, the courts justified a larger ratio of punitive damages because of the individual’s interest in protecting the integrity of his or her rights and society’s independent interest in protecting that integrity. The courts in these cases appeared to assume that there were no (or very little) compensatory damages in the case associated with violation of those rights, so it was appropriate to rely on punitive damages to punish and deter interference with those rights as well as value that uncompensated harm.

This use of punitive damages to serve multiple roles in cases where the plaintiff is not in a position to obtain compensation for harm should be recognized not only in the “easy” cases described above. Punitive damages also can and should serve multiple roles in the more difficult cases involving environmental harm or other cases of difficult valuation. 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 had difficulty fully implementing the Court’s suggestion that where harm is difficult to value in economic terms (and not only when the amount of harm is small), a higher ratio is constitutional.

B. The Environmental Harm Cases Post-BMW

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 other 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 broader interests. In these cases, the defendant has caused harm to the

128 See, e.g., Jacque v. Steenberg Homes, 563 N.W.2d at 160 (focusing on goals of punishment and deterrence but stating that the law infers some damage for direct entry on the land of another whether or not compensatory damages are awarded; nominal damages represents recognition that although “immeasurable in dollars, actual harm has occurred.”) (citing W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 13 (5th ed. 1984)); Molenaar v. United Cattle Co., 553 N.W.2d 424, 429 (Minn. Ct. App. 1996) (focusing on punishment and deterrence but also discussing need for punitive damages to ensure society’s reinforcement of personal accountability); Nemecek v. Santee, 2006 WL 334298 at *3 (Minn. Ct. App., Feb. 15, 2006) (stating that “harm” does not equate with “damages” and concluding that harm done to the plaintiff “clearly exceeded the amount of compensatory damages awarded him.”).

129 See, e.g., Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 437, n.11 (2001) (noting that the types of compensatory damages available to plaintiffs, including pain and suffering damages, broadened in the 20th century, rendering it unnecessary for punitive damages to contain a compensatory component to account for plaintiffs inability to recover for those injuries).
environment (air, water, soil, etc.) for which the plaintiff cannot (and sometimes should not) be compensated because of standing limitations or valuation difficulties. This results in undervaluing the harm and risks an improper reduction of punitive damages if the single-digit ratio is applied.

The environmental cases in this Section are of two types. First, I discuss cases in which the private plaintiff is seeking to recover economic damages based on harm to private interests and the environment as well as punitive damages based on the defendant’s conduct. In these cases, courts often fail to include harm to the environment as part of compensatory damages and apply a single digit ratio to reduce punitive damages. In those cases, the parties and the courts both should have recognized the portion of the harm to the environment that was not valued, triggering the exception to the single-digit ratio. Second, I discuss cases in which the private party has been able to quantify the harm to the environment in a fuller fashion. These cases generally are ones in which a governmental entity has been involved in some aspect of the case or because the jury has awarded as compensatory damages the full cost of remediating all or nearly all of the natural resources affected by the wrongful conduct.

1. Undervaluing environmental harm

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

At trial, the only damages plaintiffs recovered were for diminution in value to their property based on the “smells coming from the Burnett’s property, as well as upon the waste that flowed onto the Stevenses’ property.” 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.” The jury awarded the plaintiffs $2,500 in compensatory damages and $75,000 in punitive damages. In conducting its constitutional review of the punitive damage award, the supreme court discussed all of the BMW factors. On reprehensibility, the court found that both defendants were aware of the continuing pollution, knew how to fix it, and were financially able to fix it. The court

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131 Id. at 806.
132 Id. at 808.
133 Id. at 809.
concluded that the conduct was “fairly reprehensible” but not “highly reprehensible.”

On the ratio, the court recognized that due process did not require a mathematical formula, but focused on other cases in which various ratios had been held constitutional. The court then found that a ratio of 30-1 was unreasonable under Alabama law and BMW. The court reasoned that although the plaintiffs “had endured the odors that emanated from the farm, as well as the frequent overflow across their land, the jury awarded only $2,500 in compensatory damages” and the defendants later abandoned the hog farm. The court then reduced the punitive damage award to $25,000 on grounds that a 30-1 ratio was unreasonable under BMW and state law. The court did not explain how it arrived at $25,000, as opposed to any other number, but did provide a justification under the state law factors to justify the reduction in general. 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 to the plaintiffs’ counsel and to others to bring the wrongdoers to trial, and “the fact that the jury did not find the actual harm suffered by the Stevenses significant enough to require a large compensatory-damage award.”

There were two partial concurrences and partial dissents to the case. Justice Johnstone agreed with affirming the judgment on liability but did not agree with any remittitur of punitive damages. Instead, he stated that he thought “the defendants’ environmental pollution so egregious that the entire punitive award is justified.” Justice Houston also concurred but on grounds that the punitive damages should be reduced to $20,000, not $25,000. He based this on a concurrence he wrote in another punitive damages case. In that case, he proposed a stricter mathematical presumption for evaluating any punitive damages under Alabama law and BMW. Under that approach punitive damages for all cases would be the greater of $20,000 or three times the compensatory damages award, resulting in a $20,000 punitive damage award in this case.

This case shows a significant difference among members of the court regarding the harm the defendant caused and how that should be valued in reviewing punitive damages. The majority and Justice Houston focused exclusively on the compensatory damages awarded at trial, which consisted solely of the economic diminution in value to the property. Not surprisingly, this number was quite small since the hog farm had closed and the odors and land pollution had stopped. But

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137 Id.
138 See id. at 810 (citing Ford Motor Co. v. Sperau, 708 So. 2d 111 (Ala. 1997) (1-1 ratio); Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997) (12-1 ratio)).
139 Id.
140 Id. at 810.
141 Id. at 810-811 (citing Green Oil 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. at 811.
142 Id. at 811-12 (Johnstone, J., concurring in part and dissenting in part).
143 Id. at 811 (Houston, J., concurring in part and dissenting in part).
144 Id. (citing Ballard Realty Co. v. Weatherly, 792 So. 2d 1045, 1052-54 (Ala. 2000) (Houston, J., concurring specially)).
what about the environmental damage to the stream? Nothing in the majority opinion discusses harm to water quality or the effect on the stream at all. This was a harm to public environmental resources that was never valued. Justice Johnstone, by contrast, saw this as a case of “environmental pollution” and one so “egregious” that the punitive damages the jury awarded were not unreasonable. Moreover, one can interpret the jury’s award in a similar fashion. It appeared that the jury was careful to award only economic harm to the plaintiffs in the compensatory damages award just as it was instructed to do. However, it clearly wished to account for the defendant’s reprehensible conduct in polluting the environment and it attempted to do that through the punitive damage award. By reducing the award to correspond more directly with the compensatory damages in the case (creating a 10-1 ratio), the supreme court erased the non-economic harm that was “difficult to determine.”

The same problem arose in a 1998 case in the U.S. District Court for the Northern District of Iowa. In that case, the plaintiff 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 resulting in soil and groundwater contamination. At trial, it was 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. Despite continuous urging by its environmental employees, Amoco continued to store gasoline in the tanks, refused to perform an assessment, and, even after it reported the contamination, refused to install the appropriate remediation system to avoid the spread of contamination. Amoco refused to address the problem because it did not wish to put more money into a station that was not profitable and wished to sell the station. 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.

At trial, the plaintiff sought compensatory damages and punitive damages. Like in the Alabama case, the compensatory damages consisted of the decrease in fair

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145 In the Ballard Realty case in which Justice Houston had established his formula of a $20,000 award or three times the compensatory damage award, Justice Johnston also concurred, stating he agreed with Justice Houston’s benchmark approach but that it may require re-evaluation in particular cases. Ballard Realty Co., 792 So. 2d at 1056 (Johnstone, J., concurring specially). Apparently, Justice Johnstone found the facts surrounding the environmental pollution in the Tyson case sufficiently “particular” to warrant departing significantly from Justice Houston’s benchmark approach.

146 See BMW v. Gore, 517 U.S. 559, 582 (1996). Although one might argue that expanding current standing doctrine to allow private plaintiffs to seek recovery for environmental harm may be a more direct approach to the problem, courts have been very resistant to going down that path. 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) (discussing aspects of public nuisance doctrine that presently limit plaintiff standing to seek recovery for community-based social and environmental problems); infra notes 238-39. Moreover, the proposal set forth here is more tailored in that it applies only in the most egregious cases of environmental harm where the plaintiff can establish a sufficient state of mind to support punitive damages.


149 Id. at 3-9.

150 Id.

151 Id. at 12, 15.

152 Id. at 9.
market value to the property as a result of the contamination. The plaintiff’s expert testified that the diminution in value was at least $1.7 million and that is what the jury awarded.\(^{153}\) The jury also awarded the plaintiff $15 million in punitive damages based on Amoco’s conduct.\(^{154}\)

After the jury issued its verdict, the district court conducted a constitutional due process review of the punitive damages award under *BMW*.\(^{155}\) The court agreed that punitive damages were appropriate based on the fact that Amoco had recklessly continue to operate the station for several years after it had knowledge that the tanks at the station were leaking and in the face of advice offered by its own employees and consultants.\(^{156}\) The court also focused on the fact that Amoco operates hundreds of gas stations in the United States, conducts operations all over the world, and had 1997 revenues of $17.667 billion and 1997 earnings of $168 million.\(^{157}\) The court acknowledged that the benzene levels under the shopping mall were severely elevated and Amoco’s conduct had caused significant contamination.\(^{158}\)

Despite the harm and the defendant’s conduct, the court ordered a remittitur of the punitive damage award to $2 million.\(^{159}\) The court justified this reduction as follows: (1) the jury accepted the plaintiff’s expert testimony on 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; (3) the reduced amount of punitive damages represented slightly more than 1% of Amoco’s earnings and thus was adequate punishment.\(^{160}\)

This case, like the Alabama case shows that the court’s perception that the plaintiff has been compensated “in full” drives a reduction of punitive damages based on the ratio factor. Here, of course, the plaintiff was not in any position to seek compensation for a significant portion of the harm in this case: massive contamination to the soil and groundwater under and around the shopping center. The plaintiff did not own those resources and could not recover for harm to them; it could only recover for the effect of the impairment of those resources on its business investment. As a result, the defendant caused significant harm to natural resources that was never valued in the case. By refusing to acknowledge this harm that went unmeasured and relying on the plaintiff’s “full” compensation, the court mechanically reduced the jury’s punitive damage award unnecessarily.

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.\(^{161}\) Substantial evidence supported the conclusion that as of the late 1970s, defendants Vulcan and Dow knew PCE was a hazardous substance and a

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\(^{153}\) *Id.* at 10, 16.

\(^{154}\) *Id.* at 14.

\(^{155}\) *Id.* at 14-16.

\(^{156}\) *Id.* at 16 (“the Court finds that the punitive damages verdict was not the product of passion or prejudice”).

\(^{157}\) *Id.*

\(^{158}\) *Id.* at 15.

\(^{159}\) *Id.* at 16.

\(^{160}\) *Id.*

potential human carcinogen that had contaminated and would further contaminate public drinking water supplies. Evidence also supported the conclusion that between the late 1970s and the early 1990s in connection with the defendants’ marketing of PCE to dry cleaners, both defendants deliberately failed to adequately instruct, warn or advise about the hazardous nature of PCE and deliberately failed to adequately instruct or advise concerning the safe handling of PCE to avoid contamination. There was also evidence that the defendants took effective measures at their own facilities to reduce exposure and prevent escape of PCE into the environment but failed to adequately instruct or advise dry cleaners to do the same.

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. The City’s compensatory damages were based solely on its “economic damages” in connection the City’s environmental investigation costs and wellhead filtration costs. The court’s review contained no discussion of the broader effects of the contamination on the aquifer, the permanence of the impairment or any other valuation of public harm. In reviewing the jury’s punitive damage award, the Court relied on both California law and the Supreme Court’s constitutional guideposts, holding that in this case, California due process “mirrors” federal due process. 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.” The court, however, proceeded to the ratio guidepost and relied heavily on that factor in holding the award exceeded state and federal due process limits. The court cited State Farm and California law for the proposition that few awards exceeding single-digit ratios will satisfy due process, and held that damages were not small, hard to detect or hard to measure. The court then concluded that ratios of three or four to one “express the due process norm” and should be applied in this case.

The court rejected the City’s argument that it should consider as the harm against which punitive damages are measured a $40 million estimate to remediate the

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162 Id. at *7.
163 Id.
164 Id.
165 Id. at *2. The jury also awarded punitive damages of $75,000 against a third defendant, R.R. Street & Co.  
166 Id. at **1, 8.
167 Under California law, the court reviewed: (1) the reprehensibility of the 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 necessary to punish the defendant and discourage future wrongful conduct; and (4) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. Id. at **5-6 (citing Simon v. San Paolo U.S. Holding Co., 113 P.3d 63 (Cal. 2005); Johnson v. Ford Motor Co., 113 P.3d 82 (Cal. 2005)).
168 Id. at *5.
169 Id. at *7 (citing instructions given to the jury).
170 Id. at **10-11.
171 Id. at 11.
groundwater instead of the $3 million compensatory award.\textsuperscript{172} The court found that the prospect of the City spending $40 million to remove PCE from the city wells had previously been held “unrealistic.”\textsuperscript{173} Based on a $3 million measure of harm, using a 4-1 ratio, and allocating the punitive damages among the two defendants based on various factors, the court held that a $7,254,115 punitive damage award against Vulcan and a $5,441,221 punitive damage award against Dow was “the maximum constitutional award under both federal and state due process.”\textsuperscript{174} The reduced award against Vulcan represented one-third of one percent of its net worth and the reduced award against Dow represented less than four-hundredths of one percent of its net worth.\textsuperscript{175}

There is no question that the punitive damages in the case, even after remittitur are a significant sum. But in setting a 4-1 ratio, the court refused to consider any environmental harm other than the immediate economic effect on the City in providing water to its residents. Even if the court found the $40 million cleanup pricetag unrealistic, it completely ignored the long-term harm to the resource itself in determining the “harm” against which to measure punitive damages.

This is not to say a court should never reduce a jury’s punitive damage award in an environmental harm case either under its own state law or under the federal due process guideposts. Courts always have exercised significant 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 are including some recognition of harm caused by the defendant that is difficult or impossible to measure as compensatory damages. Below are several cases where courts do take harm to public resources into account in analyzing the ratio of punitive damages to compensatory damages. In some case, this is because the harm was quantified either by the private or government party. In other cases, the harm was not quantified but was recognized sufficiently to allow the court to depart from a single digit ratio based on the language in \textit{BMW} and \textit{State Farm} or at least allow punitive damages at the very top of the ratio.

\textbf{2. Recognizing environmental harm}

In \textit{Johansen v. Combustion Engineering Co.},\textsuperscript{176} discussed in the Introduction to this Article, the Court of Appeals for the Eleventh Circuit held a punitive damages award that was 100 times the compensatory damage award did not violate federal due process limits. 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 plaintiffs’ properties.\textsuperscript{177} The jury awarded $47,000 in compensatory damages and $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 \textit{BMW} guideposts.\textsuperscript{178} In reviewing the $4.35 million punitive damage award, the

\begin{itemize}
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.} at **14-15.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} 170 F.3d 1320, 1326 (11\textsuperscript{th} Cir. 1999).
\item \textsuperscript{177} \textit{Johansen}, 170 F.3d at 1326.
\item \textsuperscript{178} \textit{Id.} at 1326-27.
\end{itemize}
court of appeals found that the defendant’s reprehensibility was not very severe in that the defendant had ultimately cooperated in attempting to address the environmental harm. 179

The court, however, focused on other factors to justify a punitive damage award that was 100 times the compensatory damages. The court quoted the language in BMW stating 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.”180 The court then held that “[t]his is such a case.”181 The court recognized that the actual damages awarded were small, but “the state’s interest in deterring the conduct—environmental pollution—is strong.”182 As a result, “ratios higher than might otherwise be acceptable are justified.”183 The court also relied on Supreme Court authority that the wealth of the defendant may be considered in order to promote the deterrence function of punitive damages.184 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 without imposing an undue burden on interstate commerce.185

Johansen is an example where the court conducted a full due process review of punitive damages, albeit prior to the more stringent ratio requirements in State Farm. The court, however, recognized that a punitive damages ratio of 100-1 was large enough to “raise a suspicious eyebrow,”186 but relied upon the language of BMW that “there is no mathematical bright line” for a constitutionally-acceptable ratio.187 Instead, the court focused on BMW’s allowance of higher ratios where harm is difficult to value. The court relied on the important state interest in preventing environmental pollution and the fact that the compensatory damages in this case were not in a direct relationship to the harm to the state’s interest in protecting natural resources.188

In another example, the Louisiana Court of Appeals decided a case in 2005 where most or all of the environmental harm was translated into a compensatory damage award. As a result, although the court reduced the original punitive damage award, its remittitur order did not undervalue the harm and thus did not render a single-digit ratio inappropriate. In Grefer v. Alpha Technical,189 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

179 Id. at 1336.
180 Id. at 1338 (quoting BMW v. Gore, 517 U.S. 559, 582 (1996)).
181 Id.
182 Id.
183 Id.
184 Id. (citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 n.28 (1993)).
185 Id. at 1338-39.
188 See also Action Marine v. Continental Carbon, Inc., 2006 WL 173653 at *7-8 (M.D. Ala., Jan. 23, 2006) (affirming punitive damage verdict nearly 10 times that of compensatory damage in for wrongful emissions of carbon black onto plaintiffs’ properties and stating that case would have supported a much larger punitive damage award because of reprehensibility of conduct, injury to the environment, and need to deter defendant and others from a “pollute or pay” environmental policy) (citing Johansen, 170 F.3d at 1339).
plaintiffs’ property. Even though Exxon knew that the property had become contaminated with radioactivity, it did not disclose this to the plaintiffs or anyone else. Several years later, testing on the property revealed the contamination and plaintiffs sued under theories of negligence, strict liability, nuisance and fraud seeking compensatory and punitive damages.

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. The jury also awarded $1 billion in punitive damages. In reviewing the compensatory damage 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. The court reasoned that even disputes between private litigants over remediation costs involve consideration of state environmental standards and interests. As a result, even if the plaintiffs were not under a cleanup order from the state, the reasonableness of the cleanup costs should be based on the state’s exercise of its role as the public trustee for environmental protection. The actual damages for a private litigant in a case involving public natural resources might not be the same as a conventional measurement of damages based on the before and after value of the property. Thus, the court held it was appropriate for the jury to award restoration costs based on evidence that the plaintiffs wished to restore this property which had been in the family since 1875 to its original condition and not just to the minimum state cleanup standards.

The court then proceeded to conduct a federal due process review of the punitive damages. The court focused in large part on the fact that the compensatory damages in the case were substantial and far exceeded the value of the property of $1.5 million. The court concluded that under these circumstances an 18-1 ratio was too high and a 2-1 ratio was the highest that could comport with due process. Accordingly, the court ordered a remitter of the punitive damage award from $1 billion to $112,290,000.

A review of this case shows that significantly lowering a punitive damage award, even to a 2-1 ratio, can fulfill the purposes of punitive damages when the compensatory damage award fully values the actual and potential harm to the environment. In allowing such recovery in this case based on the state’s interest in protecting public resources, the court allowed compensatory damages to include a significant portion of the environmental harm. Once that was done, and particularly

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190 Grefer, 901 So. 2d at 1124-28.
191 Id. at 1127.
192 Id. at 1128.
193 Id. at 1182.
194 Id.
195 Id. at 1136.
196 Id. at 1137-38.
197 Id.
198 Id.
199 Id. at 1141-42.
200 Id. at 1150.
201 Id. at 1151.
202 Id. at 1152.
because the compensatory damage award was so substantial, a lower ratio of punitive damages seems appropriate. Finally, no treatment of punitive damages and environmental harm would be complete without a discussion of the *Exxon Valdez* case. On March 24, 1989, the oil tanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, Alaska. The Exxon Corporation owned the tanker and employed Captain Joseph Hazelwood to command the tanker on that day. Exxon knew Hazelwood was a relapsed alcoholic and, on the day in question, Hazelwood was drunk. 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 11 million gallons of crude oil into Prince William Sound. This release and resulting environmental harm completely disrupted the largest commercial and subsistence fishing operations in the nation, wreaked havoc on the community at large, and caused devastating damage to the environment and the ecosystem. The event arguably is 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 damage, and a jury award to a plaintiff class of commercial fishermen of over $500 million in compensatory damages. In a later phase of the trial, the jury awarded the fisherman plaintiff class $5 billion in punitive damages and an amended judgment was entered in that amount in January 1997. The timing of the trial and resulting appeals was such that the Supreme Court decided *BMW*, *State Farm* and the series of cases in between during the course of the now 18-year litigation. The various appeals and remands focus, not surprisingly, on the constitutional due process maximum of the punitive damage award in this case. On the first remand, the U.S. District Court for the District of Alaska applied the then-new *BMW* standard and reduced the punitive damage award to $4 billion, although it stated that it still believed the original $5 billion award was appropriate.

In its most recent decision on the issue in 2004 after a second remand, the district court applied the then-new *State Farm* standard and increased the allowable award to $4.5 million. 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 included a sufficient recognition of the harm and potential

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203 The court allowed the defendant’s wealth to be a consideration but not be the basis for affirming the $1 billion punitive damage award. 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. Grefer, 901 So. 2d at 1150-51.

204 See *In re The Exxon Valdez*, 296 F. Supp. 2d 1070, 1076 (D. Alaska 2004), vacated and remanded, 472 F.3d 600 (9th Cir. 2006).

205 *Id.* at 1077.

206 *Id.* at 1078.

207 *Id.* at 1078-80.

208 *Id.* at 1082.

209 See *In Re The Exxon Valdez*, 472 F.3d 600, 601 (9th Cir. 2006) (“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.”).

210 *Id.* at 1110.
harm caused by Exxon’s conduct. 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.”211 The court went on to evaluate actual harm and potential harm in turn.

With regard to actual harm, the court rejected Exxon’s argument that the actual harm for ratio purposes could consist only of the compensatory judgments actually awarded against Exxon ($20.3 million).212 Instead, the court found that the actual harm was $513,147,740, which included all amounts paid by Exxon and other sources of funding as judgments or voluntary payments in connection with the spill to the plaintiffs, municipalities and villages, native corporations and others directly affected by the spill.213 The court went on to find that in addition to these dollar 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.”214

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 instead of only one-fifth of the cargo. Thus, relying on the language in BMW that higher ratios are justified where harm is difficult to determine, the court held that “the appropriate approach is to accommodate the unknowns by allowing a higher ratio to pass constitutional muster.”215 The court went on to state that unlike in State Farm, where a portion of the award was for emotional distress and already contained a punitive element, the compensatory damage award in this case encompassed solely economic loss.216 The court also found that appropriate punishment and deterrence justified a higher award based on Exxon’s financial status and the fact that its treasurer had testified that “full payment of the Judgment would not have a material impact on the corporation or its credit quality.”217 According to the court, “[t]his is at least some evidence of the absence of over-deterrence.”218

Based on this analysis, the court found that the original punitive damage award of $5 billion satisfied due process.219 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 9.74-1 ratio.220

In December 2006, the Ninth Circuit reviewed the punitive damage award for the second time.221 The court of appeals held that due process limitations required a punitive damage award that was not more than five times the economic harm caused by the defendant, or $2.5 billion.222 In reaching that decision, the court began by

211 Id. at 1098 (citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993)).
212 Id. at 1099-1103.
213 Id. at 1101.
214 Id. at 1103.
215 Id. at 1104 (citing BMW v. Gore, 517 U.S. 559, 582 (1993)).
216 Id. at 1104.
217 Id. at 1105.
218 Id.
219 Id. at 1110.
220 Id. at 1106, 1110.
221 In re The Exxon Valdez, 472 F.3d 600 (9th Cir. 2006).
222 Id. at 602, 625.
emphasizing that the punitive damage award could be based only on actual and potential economic harm to the plaintiffs and not on harm to public natural resources. It stated that “we 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 that has been settled.”

The court then had two main issues to resolve relevant to this Article. First, how to value the harm against which to compare the punitive damage award for purposes of determining reprehensibility of conduct and ratio and, second, whether that award exceeded due process 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.” It thus affirmed the district court’s conclusion that the harm figure should be the compensatory damage verdict plus the additional judgments, settlements and other recoveries resulting from the spill for a total harm value of $504.1 million. The court then found that a nearly 10-1 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 5-1 was unconstitutional.

Here, both the district court and the court of appeals held decisively that the harm to the plaintiff was not limited to the compensatory damage award. Instead, the courts used all available figures valuing economic losses and then concluded that even that did not fully value the potential harm and harm that could not or had not been translated into monetary value. Thus, the courts 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 it is so big. 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. Even more important, in Exxon Valdez, the attempt to value harm specifically excluded harm to the environment and other public resources because that harm had been addressed in a separate litigation. Despite its singularity and level of detail, however, the case still serves as a model of how courts can conduct a due process ratio evaluation carefully to ensure there is a recognition (even if not a full valuation) of total harm. As shown in the cases above, simply comparing punitive damages and compensatory damages is insufficient and is not supported by either BMW or State Farm.

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223 Id. at 601.
224 Id. at 618-19.
225 Id. at 619-23. Exxon had argued that the measure of harm was only $20.3 million because the court should subtract $493 million representing amounts paid to plaintiffs though Exxon’s voluntary claims program and other settlements. Id. at 619. The only difference between the district court harm value and the court of appeals harm value was a $9 million overpayment the court of appeals found that the district court had overlooked and should not have been included in the final number. Id. at 623.
226 Id. at 618, 624.
227 In re the Exxon Valdez, 296 F. Supp.2d 1071, 1103 (D. Alaska 2004). The court did not include in its ratio analysis payments by Exxon to state and federal governments for damage to natural resources in the amount of $900 million over ten years. See id. at 1078-79, 1099-1101. See also In re the Exxon Valdez, 472 F.3d at 601.
228 In re The Exxon Valdez, 472 F.3d at 601.
C. Comparing the Intentional Tort Cases with the 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. There are some obvious differences but there also are more subtle similarities. Ultimately, the similarities show why courts should avoid using solely compensatory damages as the harm against which punitive damages are measured or, in the alternative, allow departure from the single-digit ratio.

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 discussed in earlier Parts than in the environmental harm cases. State Farm and BMW both clearly state that when an egregious act has resulted in a small amount of economic damage, a high ratio of punitive damages may be appropriate. Courts have no difficulty finding that these are precisely the types of cases where significantly larger punitive damage awards are necessary to punish the defendant for misconduct and deter the defendant and others from engaging in similar misconduct in the future. Courts recognize the single-digit ratio has little role in these cases and defer to the jury’s assessment of what amount of punitive damages will fulfill the purposes of punitive damages based on whatever state law factors apply. Furthermore, lower courts are aware that the Supreme Court’s jurisprudence in this area is to reign in multimillion dollar and billion dollar punitive damage awards. These civil rights, defamation and trespass cases do not fit that model, giving lower courts more discretion to “do justice” and even let punitive damages serve as compensation with less worry of substantive due process limitations.

In the environmental harm cases, by contrast, the compensatory damages are significant and the punitive damages are significant. On their face, these appear to be precisely the types of cases the Court is attempting to “reign in.” But even though the amount of absolute damages is far greater in these cases, the scale of harm and corporate wealth is also far greater. In each of the environmental harm cases discussed earlier, the defendant was an extremely large, multinational corporation. This is important for a few reasons. First, it obviously requires a bigger punitive damage award to punish and deter a large company. More important, however, such large companies have a greater potential to do a much greater amount of harm to a larger number of people and resources. These are companies in a position to recklessly spill 53 million gallons of oil into one of most treasured natural resources.

Indeed, scholars such as Kip Viscusi have included “environmental torts” into the category of cases most need judicial reform of punitive damages. A closer look at this claim shows, however, that in many instances, these scholars are focusing not on private party claims for environmental harm but on more traditional “toxic tort” claims involving personal injury or government suits to recover for public natural resources. The toxic tort cases raise the same concerns of large, non-pecuniary damage awards present in the product liability and fraud cases, while the government suits for public natural resource damages do not have the same undervaluation problems that exist in private suits. See, e.g., W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 Geo. L.J. 285 (1998) (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); Cass Sunstein et al., Punitive Damages: How Juries Decide 19, 65 (2002) (basing conclusions on mock jury data assessing “products liability and environmental damage torts” but the only environmental case studied was one involving damage solely to public resources and not brought by a private party).
environments in the nation. These are companies in a position to contaminate land around the country with high levels of dangerous radioactivity. These are companies with a national presence large enough to contaminate significant public drinking water supplies with dangerous chemicals.

The Ninth Circuit explicitly recognized this ability to do significant harm in its analysis of the reprehensibility of Exxon’s conduct. In determining whether the harm in the case was physical or emotional harm (more reprehensible) or only economic harm (less reprehensible), the court recognized Exxon’s ability to cause mental and emotional devastation through its size and power in a way not present in most cases. The court stated that the case involved “the entirely foreseeable disruption to the way tens of thousands of people live their lives if a giant oil tanker were to run aground and spill its cargo.” It went on to note that the mental distress suffered by all these people in having “to change the way they make their living” is simply not comparable to the BMW owners distressed at their cars being repainted without their knowledge. The court concluded that “[a]nyone setting an oil tanker loose on the seas under command of a relapsed alcoholic has to know that he is imposing this massive risk.”

To be sure, most companies act responsibly or at the very least do not cause such harm intentionally, recklessly, or with other indicia of reprehensibility. But when companies with the power to inflict so much harm do so with a mental state sufficient to be considered “reprehensible,” the large awards are put in a different perspective. The size and the status of the defendant cannot be ignored. The punitive damage awards of $5,000 and $50,000 against the individual landowners in the trespass cases and even the larger awards in the other intentional tort cases are significant amounts because they are awarded against individuals of modest means. The $100,000 award in the trespass case involving a small corporate defendant also seems significant but does not raise eyebrows. The awards in the environmental harm cases do raise eyebrows, but their massiveness is arguably tempered by the scope of the harm and the wealth of each of the defendants. Perhaps the cases are less different after all.

The two types of cases also have in common the fact that the harm imposed does not translate fully into compensatory damages, even if for different reasons. In many of the intentional tort cases, there are no compensatory damages. The defendant’s wrongdoing in each case was the invasion of the plaintiff’s right to exclude others

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230 The Exxon Valdez was carrying 53 million gallons of oil when it ran aground on Bligh Reef. Experts estimated that 11 million gallons of oil were discharged in the grounding of the ship, but that if Captain Hazelwood had succeeded in his efforts to back the ship off Bligh Reef, significantly more oil, perhaps the entire cargo, would have been lost. See In re The Exxon Valdez, 296 F. Supp.2d 1071, 1077-78 (D. Alaska 2004), vacated and remanded, 472 F.3d 600 (9th Cir. 2006).

231 In re the Exxon Valdez, 472 F.3d at 615.

232 Id.

233 Id.

234 Id.

235 The importance of who the defendant is in a punitive damage analysis is highlighted in the Exxon Valdez case, where the jury awarded punitive damages of $5,000,000 against Captain Hazelwood and $5 billion against Exxon. In reviewing the awards, the court found that “[w]hat is sufficient to effect just and not excessive deterrence of Captain Hazelwood, and what is sufficient to effect just and not excessive deterrence of the Exxon defendants are vastly different.” In re The Exxon Valdez, 236 F. Supp.2d 1043, 1065 (D. Alaska 2002), rev’d, 270 F.3d 1215 (9th Cir. 2003), on remand, 296 F. Supp.2d 1071 (D. Alaska 2004).
from his or her property or person, as well as society’s interest in maintaining the integrity of those rights generally. Our current civil justice system, however, has not translated the invasion of these rights into compensatory damages. In many ways, the harm suffered by the individuals is a form of emotional distress, but one that often does not have a physical manifestation and therefore generally is not recoverable under theories of intentional or negligent infliction of emotional distress.\(^{236}\) If the violation of the right is coupled with physical harm, harm to property or harm to chattels, the plaintiff of course can recover that physical harm or property damage as compensatory damages. Even in those cases, however, there is still no value assigned to the invasion of the right itself, and thus compensatory damages do not encompass the full value of the harm.

This gap is easy to see when damages are nominal. It is not so easy to see when damages are in the millions of dollars. But the problem is the same in both cases. In the environmental harm cases, courts are able to place a monetary value 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. The court even can sometimes attempt to value harm to 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 prevents such valuation. These difficulties are discussed below.

1. **Standing limitations in 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.\(^{237}\) In many of public nuisance cases, the plaintiff is a state or local government with presumptive standing to recover for harm to the public right. When the plaintiff is a private party, however, standing limitations apply.\(^{238}\) In order to recover damages in a private action for public nuisance, the plaintiff must have suffered a “special injury,” i.e., harm of a kind different from that suffered by other members of the general public. In interpreting this requirement, courts have generally found that the plaintiff must suffer an economically-recognizable injury through injury to person, profits, land, or some other economic right.\(^{239}\)

Such recognizable injury generally does not include damage to natural resources that does not take the form of a direct economic loss. In another lawsuit flowing from the *Exxon Valdez* spill, the Court of Appeals for the Ninth Circuit held that a

\(^{236}\) See, e.g., *Restatement (Second) of Torts* § 306 (requiring plaintiff to suffer illness or other “bodily harm” to recover for negligent infliction of emotional distress); *Restatement (Second) of Torts* § 46 (requiring 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* 667-74 (6th ed. 2003) (discussing development of tort for intentional infliction of emotional distress).

\(^{237}\) See *Restatement (Second) of Torts* § 821B. See also id. at § 821B(2) (criteria for deciding if interference is unreasonable).

\(^{238}\) See, e.g., Antolini, supra note 146, at, 757-60 (proposing changes to public nuisance doctrine that presently limit plaintiff standing to seek recovery for community-based social and environmental problems).

\(^{239}\) See, e.g., Madden & Boston, supra note 16, at 66-78 (plaintiff has suffered special injury if plaintiff sustains personal injury, harm to privately-owned lands or chattels).
class of Alaskan Natives could not bring a public nuisance action to recover for harm to their subsistence way of life. The way of life harmed by the spill was described as the ability to depend on “the preservation of uncontaminated natural resources, marine life and wildlife . . .” which is part of the plaintiffs’ natural habitat and lives. In affirming the lower court’s dismissal of the action, the court of appeals agreed with the district court that the plaintiffs’ non-economic subsistence claims were not of a “kind” different from those suffered by other members of the public, although they might be different in degree. The court noted that the plaintiffs’ economic loss claims associated with the spill had been part of an earlier settlement, and stated that current legal doctrine could not value the alleged non-economic injury.

Instead, the plaintiffs’ remedy could be no more than the benefit they received along with other Alaskans in the substantial payments Exxon had made to local, state and federal governments to restore the environment. To be sure, the standing problem in this case is tempered by the fact that federal, state, and local governments had already recovered $1 billion in connection with environmental harm. Thus, this was not a situation where the plaintiffs were acting to fill a “gap” in government enforcement of environmental protection efforts. In many cases, however, private tort actions are the only practical means of attempting to value and recover for damages to natural resources. As a result, the decision remains instructive for other private party actions in that the court refused to place a value for purposes of standing or recovery on any injury to private parties that was not a traditional pecuniary loss.

Similar limitations apply to private nuisance claims but for difference reasons. A private nuisance is a “nontrespassory invasion of another’s interest in the private use and enjoyment of land.” Because the plaintiff is seeking to recover for interference with land the plaintiff owns rather than for a public right, the problem is less one of standing but of remedy. A defendant is liable for private nuisance if the invasion is (1) intentional and unreasonable or (2) unintentional and negligent, reckless or subject to strict liability for abnormally dangerous activities or conditions. Because the interest to be protected is the invasion of use and enjoyment of land, the remedy generally consists of diminution in value or restoration costs. 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 of the plaintiff.

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240 In re The Exxon Valdez, 104 F.3d 1196 (9th Cir. 1997).
241 Id. at 1197.
242 Id. at 1198.
243 Id. at 1197-98. See also Id in re The Exxon Valdez, 1994 WL 182856 (D. Alaska 1994) (lower court order dismissing claims and stating that plaintiffs seek a recovery “not founded” on any recognized legal theory and the barriers the plaintiffs face in asserting non-market claims of cultural damage).
244 See RESTATEMENT (SECOND) OF TORTS § 821D.
245 See id., § 822.
246 See id., § 922. The Grefe decision discussed earlier remains unusual, however, in that the plaintiff recovered restoration costs without first incurring those costs or obtaining government approval for a remediation plan, and because the restoration costs so significantly exceeded the value of the property. See Grefe v. Alpha Technical, 901 So. 2d 1117, 1139-42 (La. Ct. App. 1995) (allowing recovery of restoration costs of $56 million even though market value of property was $1.5 million and court could not force the plaintiff to use the money for cleanup); MADDEN & BOSTON, supra note 16, at 256-271.
Federal statutes enacted for environmental protection purposes have similar limitations. The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the Clean Water Act (“CWA”) and the Oil Pollution Act (“OPA”) all contain provisions where federal and state governments and Indian tribes can recover for natural resource damages. 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,” including the reasonable cost of assessing such loss or injury. The OPA contains a similar provision in the case of oil discharges and specifically describes the measure of damage for natural resources as (1) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resource; (2) the diminution in value of those natural resources pending restoration; plus (3) the reasonable cost of assessing those damages. Private parties and local governments, however, cannot recover for natural resource damages under any of these laws and are instead limited to recovering their own costs of investigating and remediating releases of hazardous substances.

Moreover, although state and federal governments recovered $1 billion in natural resource damages in the Exxon Valdez oil spill, claims for natural resource damages remain far less frequent than claims to recover cleanup costs. Indeed, many argue that natural resource damage provisions are significantly underutilized. This is due in large part to the difficulty of valuing such damages.

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247 See 42 U.S.C. §§ 9607(a)(4)(C) and 9607(f) (CERCLA provisions allowing recovery for natural resources damages caused by release of hazardous substance); 33 U.S.C. § 13321(f)(4) (CWA provision allowing recovery of costs of removal of 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(a) and (d) (allowing recovery of natural resource damages and setting forth measure of damages as the cost of restoring, rehabilitating, replacing or acquiring the equivalent of the damages natural resources; the diminution in value of those natural resources pending restoration; plus the reasonable cost of assessing those damages).

248 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).


250 See 33 U.S.C. § 2706(d).


253 See, e.g., 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 CERCLA natural resource damage provision has “enormous potential” for recovery of damages but actual experience has been disappointing, with only 50 suits brought since 1980 and only two that have gone to trial); AMY ANDO ET AL., NATURAL RESOURCE DAMAGES ASSESSMENT: METHODS AND CASES 2 (Ill. Waste Management and Research Center 2004) (discussing the various statutes that allow recover for natural resource damage but detailing the difficulty states face in bringing such actions and developing valuation techniques to conduct damage assessments).

254 See, e.g., Symposium, The Role of State Attorneys General in National Environmental Policy, Natural Resource Damages Panel, 30 COLUM. J. ENVT'L. L. 449, 462-63 (2005) (expressing concern that damages associated with smaller spills, while frequent, often are not pursued by states because of the time and money in bringing such lawsuits); Barry Breen, Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law, 24 WAKE FOREST L. REV. 851, 867-86 (1989) (stating that the experience of natural resource damage claims as of 1989 “is largely one of missed
and the failure of federal agencies to promulgate regulations to help in the valuation process. In addition, the statutory prohibition on local government suits for natural resource damages means those governmental entities with the most knowledge of and interest in the problem are precluded from acting.

These various limitations on standing and remedy mean that in a private party tort action to recover for environmental harm, the compensatory damages rarely will value fully all the harm caused by the defendant’s misconduct. This is a major gap in the punitive damages framework because there are many cases of significant environmental harm where there is no government plaintiff. With limited financial resources sometimes coupled with a lack of political will, private lawsuits are often the only legal means of addressing harm to the environment.

2. Valuation limitations

Beyond standing problems there are valuation problems. These exist even in cases where a federal or state government plaintiff can recover for natural resource damages under statutory or common law theories. Once claims for direct property losses and diminution in market value are addressed, natural resources have values that are not fully captured in the market system. What is the value of a seal? Of opportunities” with relatively few federal or state claims filed). But see Gerald F. George, Litigation of Claims for Natural Resource Damages, SE98 ALI-ABA 397, 399 & n.2 (2000) (stating that claims for natural resource damage under CERCLA have become “commonplace” with 67 claims resolved by the federal government as of 1996 and payments totaling over $135 million but noting that few claims have gone to trial, resulting in little case law).


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 only the extraordinary case, such as the Exxon Valdez disaster, that warrants widespread notice and action” leading to federal and state governmental involvement).

See Alexandra B. Klass, Common Law and Federalism in the Age of the Regulatory State, 92 IOWA L. REV. (forthcoming 2007) (discussing lack of federal enforcement of environmental law and need for increased role of state and local governments and private parties in environmental protection efforts); Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 ECOLOGY L.Q. 755, 757-60 (2001) (discussing interest of scholars and practitioners in reigniting private party actions and common law remedies to address lack of federal enforcement of environmental laws); Barry Breen, Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law, 24 WAKE FOREST L. REV. 851, 873 (1989) (stating that 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 environmental compliance and recover for natural resource damages).

See Ohio v. U.S. Dept. of 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, they nonetheless reflect utility derived by humans from a resource, and thus prima facie ought to be included in a damage assessment.”); PLATER ET AL., supra note 255, at 183-194 (discussing difficulty of valuing natural resources).
a bird? Of a day at the beach? Of the ability to prevent another Exxon Valdez disaster in the future?²⁵⁹

Scholars have created terms such as “use value,” to attempt to capture values for things not traded in the marketplace by assigning an attributed market value.²⁶⁰ “Consumptive value” attributes a value to lost resource uses by sportsmen or tourists who would have taken wildlife in hunting or fishing pursuits if not for the harm to the resource.²⁶¹ “Nonconsumptive uses” refer to the ecosystem’s value to photographers, bird watchers and others who gain appreciation from nature.²⁶² These nonconsumptive uses include an “existence value” which is how much a person is willing to pay to know that the resource is there, even if they do not yet actively use or enjoy it.²⁶³ Such uses also include an “option value,” which is how much a person is willing to pay to reserve the option to use that resource in the future.²⁶⁴

One approach to the problem is to develop economic methods for estimating some of these values, all of which create a hypothetical human market for resources.²⁶⁵ One of these methods, the Contingent Valuation Method (“CVM”) sets up “hypothetical markets to elicit an individual’s economic valuation of a natural resource.”²⁶⁶ CVM involves interviews and surveys with individuals in order to place a value on resources based on what the interviewee would be willing to pay for the resource.²⁶⁷ As early as 1989, the Court of Appeals for the D.C. Circuit approved the use of CVM in state and federal natural resource damages actions for ascertaining use and option values of resources.²⁶⁸ There is a significant amount of scholarly writing supporting and criticizing CVM, but the debate shows that it remains a major challenge to value natural resources in the context of civil litigation.²⁶⁹

²⁵⁹ See, e.g., Thompson, supra note 255, at 58-61 (discussing difficulties of valuing non-market commodities such as natural resources and discussing problems with contingent valuation method (“CVM”) of calculating “nonuse” values in natural resource damages cases); Symposium, The Role of State Attorneys General in National Environmental Policy, Natural Resource Damages Panel, 30 Colum. J. Envtl. L. 449, 454-45 (2005) (discussing efforts to value that represents the loss of natural resources including use of contingent valuation surveys).
²⁶⁰ See PLATER ET AL., supra note 255, at 188.
²⁶¹ Id.
²⁶² Id.
²⁶⁴ See Ohio, 880 F.2d at n.72 (explaining option value).
²⁶⁵ PLATER ET AL., supra note 255, at 188.
²⁶⁶ Ohio, 880 F.2d 432, 475 (D.C. Cir. 1989) (quoting 43 C.F.R. § 11.80(a)(1)).
²⁶⁷ Id. at 475.
²⁶⁸ Id. at 476-79 (sustaining Interior Department regulations relying on CVM for calculating option and use values).
An ecological and economic framework that also attempts to quantify those values is the growing field of “ecosystem services.” Ecosystem services are defined as “the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life.”

Ecosystems are a key component of our natural capital, but historically have not been recognized and given monetary value by society because they are “free.” A growing body of literature presents the case for valuing and thus increasing protection for natural resources such as wetlands, anti-soil erosion efforts, improved water quality through water purification, species diversity, climate stability, healthy forests, and clean air. This work attempts to provide a mechanism to capture the value of ecosystem services as well as quantify and promote service values.

At this point in time, however, these economic methods and legal theories have yet to be translated into anything resembling a clear legal doctrine. 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.” There is significant confusion regarding the appropriate measure of damages for such claims and there have been few efforts by the state or federal governments to recover for

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270 Gretchen C. Daily, Introduction: What are Ecosystem Services?, in NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 1, 3 (Gretchen C. Daily ed., 1997). Ecosystem services support “ecosystem goods” such as seafood, forage, timber, biomass fuels, natural fiber, and pharmaceutical and industrial products. Id.


272 See, e.g., NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, supra note 270 (collection of articles on economic and ecological issues surrounding ecosystem services); J.B. Ruhl, Equitable Apportionment of Eco-system Services: New Water Law for a New Water Age, 19 J. LAND USE & ENVTL. L. 47 (2003) (arguing that ecosystem services values should be used to fashion interstate water allocation policy); James Salzman, Creating Markets for Ecosystem Services: Notes from the Field, 80 N.Y.U. L. REV. 870 (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 (2000) (analyzing environmental trading markets (ETMs) such as wetland banking programs, air pollution trading programs, and species habitat programs and suggesting modifications to such programs to more accurately capture the value of nonfungible resources); James Salzman, Valuing Ecosystem Services, 24 ECOLOGY L.Q. 887 (1997) (reviewing NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, supra note 270); Barton H. Thompson, Jr., Markets for Nature, 25 WM. & MARY ENVT'L. L. & POL’Y REV. 261 (2000) (discussing use of markets and economic incentives to protect the environment); Symposium, Ecosystem Services, 20 STAN. ENVTL. L.J. 309 (2001).


274 PLATER ET AL., supra note 255, at 942.
such harm as opposed to out-of-pocket remediation costs. Indeed, the Exxon Valdez case where Exxon agreed to pay state and federal governments approximately $1 billion for “environmental damage” over a period of ten years remains an anomaly.276 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.”277 This is because the need for legal certainty requires reducing environmental degradation to a monetary damage claim even though natural resources are public environmental assets with recreational and aesthetic value beyond their commercial value.278

In sum, both the intentional tort cases and environmental harm cases illustrate situations where the harm caused by the defendant is not valued or is only partially valued. Both types of cases involve harm the judicial system currently does not value economically. As regards punitive damages though, the absolute numbers are sufficiently small in the intentional tort cases that the valuation problem does not result in significant problems in applying substantive due process limitations. By contrast, because the numbers are so big in the environmental cases, courts have difficulty seeing the significant harm that remains unvalued. This is particularly true where the plaintiff is not a public entity acting as a trustee for public resources. The next Part attempts to create a framework to address the valuation issues in both types of cases.

IV. VALUING HARM AND APPLYING RATIOS

This Part introduces the beginning of a framework for awarding punitive damages that more fully recognizes all harm and is consistent with the Supreme Court’s substantive due process requirements. It ends with some suggestions concerning potential legislative and judicial initiatives to avoid concerns that a full valuation of harm will result in “windfall” punitive damages to plaintiffs in environmental harm cases.

A. Awarding punitive damages in intentional tort cases with small or nominal damages

First, there needs to be a different framework for evaluating the intentional tort cases and the environmental harm cases. Even though there is an undervaluation of harm in both types of cases, in the intentional tort cases the harm that is not valued is still personal to the plaintiff. It is the plaintiff’s right to exclude or to personal integrity that has been invaded. As a result, it seems appropriate to award any increase in punitive damages to the plaintiff. The punitive damages can be seen as a substitute for the emotional distress that goes unvalued in the case, just as it was a substitute in other types of emotional harm cases in earlier times.279 There is little concern regarding plaintiff “windfalls” in these cases. The total awards are modest

275 Id. at 942-45.
277 See Binger, supra note 269, at 1030.
278 Id.
279 See, e.g, Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 437 n.11 (2001).
and in order to achieve optimal punishment and deterrence in these often interpersonal disputes, the plaintiff herself should receive the award.

The same is not true in the environmental harm cases. If we attempt to value harm to natural resources beyond the plaintiff’s direct economic loss, it is not so clear that increased punitive damages based on a full valuation of harm should be awarded to the plaintiff. If the punitive damages are based on harm to resources not “owned” by the plaintiff but instead by the public, the public should receive the portion of the punitive damage award based on the harm to public resources, minus some amount awarded to the plaintiff as an incentive for bringing the suit. These proposals are discussed below.

Thus, it is helpful to come up with a separate framework for cases where all or a large portion of the harm goes unvalued as compensatory damages but the harm is focused on the individual plaintiff. Such a framework can apply to the personal, intentional tort cases such as defamation, trespass, or violation of civil rights. In each of these types of cases, the court was able to conduct a full due process analysis without adhering to single-digit ratios. In many of these cases, the court still reduced the amount of punitive damages. These reductions, however, were invariably based not on any ratio requirement but instead on an analysis of reprehensibility of conduct, the financial status of the defendant, other state statutory factors and the purposes of punitive damages. Each of these courts recognized that a ratio of compensatory to punitive damages was not helpful in the analysis because compensatory damages did not represent the harm the defendant caused. There was no attempt to place a dollar amount on the harm that went unvalued but simply recognition of its existence, which then justified placing little or no reliance on the ratio between compensatory and punitive damages.

Not surprisingly, there is no discussion in these cases that awarding the damages to the plaintiff would result in a “windfall” even though there is no award of compensatory damages. This is because the courts recognize that the plaintiff has been harmed in a way that cannot be translated into compensatory damages. Even if the courts are not expressly allowing punitive damages to serve a compensatory purpose, they implicitly still allow punitive damages to serve as a stand-in for the harm that goes uncompensated as well as meet the punitive and deterrent purposes of punitive damages. As a result, it seems perfectly appropriate that the plaintiff be the beneficiary of the punitive damage award.

In these 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 the invasion of the personal or property right. Courts need not attempt to actually measure that harm. Instead, they should recognize expressly that such harm exists and, applying BMW and State Farm, give sufficient deference to jury awards to affirm those awards that exceed a single-digit ratio. In sum, courts should stick with the approach laid out by many courts already, with the addition of an explicit recognition of the harm to the plaintiff that is not valued.
B. Awarding punitive damages in environmental harm cases

The environmental harm cases present a more difficult problem than the intentional torts case. First, should the approach be to abandon single-digit ratios as in the personal tort cases or, in the alternative, to attempt to actually value the harm to natural resources through restoration costs and environmental valuation techniques? If an appropriate valuation is performed, there does not appear to be a need to depart from single-digit ratios in the first place.

Second, in the environmental harm cases, the harm that goes unvalued is not the type of harm we see as personal to the plaintiff as in the intentional tort cases. Instead, the harm is to natural resources that are owned by the public. The private plaintiff is attempting to recover for his or her own pecuniary loss but is also attempting to “speak” for the environment. Currently, statutory limitations and common law standing doctrines do not generally allow private citizens to recover damages for injury to natural resources. Therefore, if we attempt to place a value on the harm to public resources, it is not clear the plaintiff should be the beneficiary of all the punitive damages that flow from the harm. Moreover, the Court’s recent decision in Williams v. Philip Morris USA raises the issue of whether allowing a punitive damage award to be based on part on harm to the environment would result in impermissible punishment for harm to nonparties. Each of these issues is discussed in turn.

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 harm in cases brought by state or federal governments is difficult enough without trying to address it in private party cases. I conclude that there should be a two-pronged approach to the problem. In some cases, valuation of harm is at least possible. These cases are ones where a state or federal government, whether a plaintiff or not, has attempted to value the harm through restoration costs or other economic indicators. This process should become more sophisticated as quantification of nonuse values for natural resources develops through further refinement of CVM or new methods of valuation. As that happens, existence and option values for natural resources can and should be added to restoration costs to attempt to value total harm. In the meantime, courts should take more seriously restoration costs in assessing total harm for purposes of reviewing punitive damage awards even if the court finds it inappropriate to award such costs as compensatory damages.

In Grefer, for instance, there was no assessment of damage to natural resources but there were other indicators of total harm. In reaching its decision, the court relied heavily on the estimated costs of restoration in reviewing the punitive damage award. By doing so, the court at least approached a calculation of total harm to natural resources by which to compare punitive damages. With that data, a single-digit ratio, even at a 2-1 ratio, did not risk undervaluing the harm and creating

280 See supra notes 238-39 (standing limitations on public nuisance claims); note 251 (statutory limits on bringing actions for natural resource damages).
281 See supra notes 265-69 (discussing Contingent Valuation Method for assessing non-use values).
insufficient punishment and deterrence for the wrong. Also, in *Grefer*, the court allowed the plaintiff to recover restoration costs as compensatory damages. The court could, however, have refused to award restoration costs as too speculative but still used those costs as its total harm number in assessing punitive damages. In this way, there is a total harm number against which to measure punitive damages but plaintiffs are not necessarily being awarded significant sums as compensatory damages that they may never use for restoration at all.

The *Exxon Valdez* case presents a different scenario. In that case, there were numerous assessments of natural resource damages which ultimately led to the $1 billion settlement with state and federal governments. Those amounts were not included, however, in the total harm value for assessing punitive damages in the case brought by the commercial fisherman. That is because the state and federal governments had already recovered for that loss through its settlement so it was inappropriate to include it in the total harm value in assessing punitive damages. Such a result was appropriate and the district and appellate courts were correct in attempting to come up with a total harm amount based solely on the actual and potential economic harm caused by the spill. In other cases, however, where natural resource damages were not subject to a separate settlement, it might very well be appropriate to include them in a punitive damage assessment.

2. *Recognizing unvalued environmental harm where valuation is difficult*

But what should happen where there is no assessment of anything approaching total harm either through restoration costs or an assessment of natural resource damages? Judicial analysis in those cases should follow the intentional tort cases discussed above and allow punitive damage verdicts with high single-digit ratios or ratios exceeding single-digits. 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 still could not fully value total harm. Even after including all voluntary payments by Exxon in the total harm amount, “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.*” The court relied on these uncertainties to support a higher ratio of punitive damages. The court thus followed the approach of courts in the intentional torts cases in that it recognized there was unvalued harm and relied on that recognition to support a higher ratio. While the Ninth Circuit disagreed that the ratio should be as high as nearly 10-1, it did agree that that total harm should far exceed the compensatory damages awarded in the case.

284 *See In re The Exxon Valdez*, 472 F.3d 600, 601 (9th Cir. 2006).
286 *Id.* at 1104.
287 *In re The Exxon Valdez*, 472 F.3d at 624.
In the *Johansen* case discussed above, the court of appeals also attempted to value harm beyond compensatory damages but necessarily took a different approach. In that case, the court allowed a 100:1 ratio of punitive damages to compensatory damages. The court recognized the disparity between punitive damages and compensatory damages but reasoned that the compensatory damages in the case did not sufficiently value the harm to the environment and the state’s interest in deterring environmental pollution. The court did not attempt to place a dollar value on the state’s interest in protecting the environment or the actual environmental harm in that case. Instead, it recognized that the invasion of the state’s interest was there, and that the harm was there, and conducted its ratio analysis with that in mind.

In sum, in any environmental case brought by a private party without a corresponding government action to recover for natural resource damages, there are two approaches. First, there is a possibility of attempting to value total harm through natural resource damage assessments, restoration costs, as well as out-of-pocket economic losses. In cases where significant valuation information is available to assess total harm (or close to it), there is a stronger argument for remaining within single-digit ratios. This is similar to cases today involving large claims for pain and suffering and other non-pecuniary harm. 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 non-market injury that has occurred. We can recognize the non-market harm to the environment, even if the plaintiff is not financially harmed by the injury, by including it as part of the total harm against which punitive damages are measured.

In many private party environmental cases, however, there is little or no data to evaluate environmental harm beyond the plaintiff’s pecuniary losses associated with cleanup costs or diminution in value to property. Moreover, because of the difficulties and uncertainties in valuing environmental harm, it may be too burdensome for individual plaintiffs to retain a fleet of experts and prepare the complicated economic studies courts likely will require to value environmental harm. In such situations, courts should take another approach. Where there remains significant uncertainty regarding valuing total harm and no reliable data exists, courts can simply recognize the existence of unvalued harm and place less emphasis on the need for single-digit ratios in reviewing a jury award.

In this way, courts can rely on the example of the intentional tort cases as well as the history of how punitive damages related to compensatory damages prior to the widespread recovery for non-pecuniary loss. In the intentional tort cases, courts

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289 *Johansen*, 170 F.3d at 1339.
290 Id. at 1338.
291 *See, e.g.*, McDougald v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989) (stating that recovery for non-pecuniary injury is recognized because it “is as close as the law can come in its effort to right the wrong.”); *Levit*, supra note 80, at 140 (arguing that allowing recovery for non-pecuniary harm requires courts to be sensitive to the “real nature” of injuries and prevents a “hopelessly inauthentic account of humanity” that would ensue under a fiction where only physical injuries “actually hurt.”); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 74 (1993) (compensation for pain and suffering allows the justice system to recognize the wrong and signify its weightiness and it is not of “overwhelming significance that this thing, money, is unrelated to the harm suffered . . . .”); Dobbins, supra note 80, at 885 (contending that allowing recovery of nonuse values as part of natural resource damages serves to value these losses in the same way as recovery for non-market pain and suffering damages in tort suits).
today recognize that there are violations of rights that do not easily translate into a compensatory award. This makes compensatory damages an inappropriate benchmark for punitive damages. Likewise, prior to the mid-19th century there was a reduced ability to obtain compensation for many types of non-pecuniary harm (and the mid-20th century for harm resulting in pure emotional distress). According to the Supreme Court, punitive damages stepped in to fill that void and provide a means of valuing or even compensating for that harm.

This approach raises the issue of whether the Court’s recent decision in *Williams v. Philip Morris USA* prohibits a punitive damage award that is based in part on unvalued harm to natural resources where those natural resources are not “represented” by a governmental entity with standing to seek relief for those damages. I argue that it does not. First, the decision does not prevent juries from taking into account harm to nonparties but only that they could consider such harm solely as part of the reprehensibility of the defendant’s conduct. As a result, so long as courts are careful to instruct juries that evidence regarding harm to natural resources should be used only as part of determining the reprehensibility of the defendant’s conduct, *Williams* should not pose a bar to allowing harm to natural resources to result in higher ratios of punitive damages to compensatory damages.

Second, and perhaps more important, *Williams*, like the Court’s other punitive damages cases, implicitly assumes that the harm to “nonparties” can be valued and recovered as compensatory damages (whether economic or non-economic damages). The focus of *Williams*, like the Supreme Court punitive damages cases that preceded it, is not only with large punitive damage verdicts but also large non-economic compensatory damages verdicts that can be recovered by multiple tort victims across the country. 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. As a result, *Williams* arguably need not apply at all to cases that fit the exception to the BMW/State Farm single-digit ratio presumption. In the natural resources damages cases, the harm is not to “nonparties” that can bring their own suits for damages, but to public natural resources which, even if represented by state and federal governments, can rarely achieve full economic valuation in our legal system today. Thus, *Williams* need not be a bar to the framework presented here, so long as proper instructions focus the jury on using harm to natural resources as part of the reprehensibility analysis of punitive damages.

An additional problem still remains. Once that total harm valuation is recognized as absent or actually valued through use of restoration costs or restoration costs plus non-use values, the plaintiff must establish whether or not she will be incurring some or all of those costs. If the plaintiff cannot establish she will be incurring those costs (the likely scenario in most cases), the plaintiff should receive only some portion of the punitive damages with the remainder going to state or nonprofit environmental agencies to remediate the resource. That issue is discussed below.

292 See supra Part III.
293 See supra notes 80-82, and accompanying text.
296 *Williams*, 127 S. Ct. at 1063-64.
C. Apportioning punitive damages in environmental harm cases

The proposal that private or municipal plaintiffs should be able to sue for punitive damages based on harm to public natural resources raises squarely the issue of apportionment. In many or even most of these cases, there will need to be some apportionment of punitive damages between the private plaintiff and the government responsible for the affected natural resources. Such apportionment addresses concerns of plaintiff “windfalls” and ensures that any punitive damages awarded based on “wrongs” to the public go to the public. There currently is little precedent for such apportionment in environmental cases but the building blocks are there to create it.

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

The judicial analysis in the intentional tort and environmental harm cases discussed in earlier Parts is consistent with 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 somehow to compensate or value harm to society and to protect individual rights and resources. In the Jacque case from Wisconsin, the supreme court focused on society’s interest in preserving the integrity of the legal system and protecting the interests of individual landowners. In the Johansen case, the Court of Appeals for the Eleventh Circuit focused on the state’s interest in deterring environmental pollution in allowing larger than single-digit ratios.

Likewise, in the Grefer case from Louisiana, the court of appeals reviewed the remediation estimates with reference to the state’s interest in cleaning up the property and its role as a trustee for public

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297 See Sharkey, supra note 68, at 351.
298 Id. at 351-52.
299 Id. at 389.
300 Id. at 390.
301 Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon and Utah have statutes that require some percentage of punitive damage awards in some classes or all classes of cases to be paid to the state or some agency within the state. See Sharkey, supra note 68, at 373, 375-80.
302 Id. at 380-86, 402-14, 414-15 (discussing judicial apportionment of punitive damages between the plaintiff and the state in the absence of controlling legislation).
304 Johansen v. Combustion Eng’r Co., 170 F.3d 1320, 1338 (11th Cir. 1999).
natural resources. Each of these cases focused on the state’s interest in the private dispute before the court.

Each of these courts characterized the state’s interests as one of deterring similar wrongful conduct in the future. 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 serve to compensate the state for violation of its interest in addition to serving its traditional punitive and deterrent functions. 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 class of cases are paid to state funds. Of the eight states with such statutes, Alaska, Indiana, Iowa, Missouri, Utah, Oregon, and Illinois impose a split recovery in all types of cases whereas in Georgia the statute applies only to product liability cases. Alaska, Missouri and Utah require 50% of the punitive damage award to go to a state fund, Oregon requires 60%, Georgia, Indiana and Iowa require 75% and Illinois leaves the percentage to the discretion of the trial court. In some states these amounts are deposited in the general fund while in others the legislation directs that the money go to civil reparations funds, a criminal reparation fund, and the like.

Currently, none of these states focus on cases involving environmental harm. It would not be difficult, however, to amend these statutes and create others to provide that a portion of the punitive damage award in a private party environmental harm case go to funds administrated by the state department of natural resources or 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 but not monetized in order to allow a ratio of punitive damages to compensatory damages above single digits (like in Johansen), the court should award the amount of punitive damages exceeding a single-digit ratio to the state unless the plaintiff has or will be restoring the natural resources. In each of these cases, the legislation should ensure that the plaintiff receives its compensatory damages, any punitive damages based on the plaintiff’s own restoration costs, a full recovery of attorneys’ fees, and some additional percentage of the punitive damages based on harm to public resources.

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306 See, e.g., Jacque, 563 N.W.2d at 160-61; Johansen, 170 F.3d at 1333; Grefer, 901 So. 2d at 1137-38.
307 See Sharkey, supra note 68, at 377-78 (citing and quoting statutes). In addition, since 2003, six states have proposed legislation that would deny plaintiffs any portion of punitive damage 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, 403 (2006).
308 Sharkey, supra note 68, at 377-78.
309 Id. at 379-80.
310 Existing split recovery legislation in some states already ensures that the state does not receive its percentage 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
This last component—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. This percentage split could be modeled on the qui tam provisions that are part of federal and state false claims act laws. Such laws allow private parties to sue on behalf of the government to recover stolen government funds after notice of the suit to the government. As an incentive for private parties to bring such suits, this legislation directs courts to award them between 15 and 30 percent of the funds recovered.311

This type of “split” could be available not only pursuant to legislation but also through the courts’ inherent common law authority. Sharkey details examples where courts have engaged in judicial split-recovery remedies in the absence of applicable legislation. In these cases courts have directed some portion of punitive damages to go to specific state or nonprofit funds to mitigate plaintiff windfall gains and promote societal interests the defendants had violated.312 While critics may charge that such actions are inappropriate judicial activism, there is significant support in legal theory and case law for courts to use common law authority to shape legal remedies in the absence of statutes to the contrary.313 As a result, courts can direct some portion of punitive damage 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 at least anecdotes (if not empirical data) of juries who questioned whether they had authority to create a split-recovery scheme in environmental cases. In the Grefer case from Louisiana, the appellate court noted that during the jury deliberations below, the foreperson sent a note to the trial court inquiring whether any of the punitive damage award would “go to compensate the people in the community.”314 Likewise, in a 2002 trial involving environmental contamination and punitive damages in the U.S. District Court for the District of 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 these funds are distributed? Meaning, can we specify that these funds must be used to clean up this property? Or go to the [Minnesota Pollution Control

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311 See, e.g., 31 U.S.C. § 3730(d) (providing that private parties can obtain between 15 and 25 percent of the recovery or settlement if the government decides to proceed with the suit after notice, and between 25 and 30 percent of the recovery or settlement if the government decides not to proceed with the suit); The False Claims Act Legal Center, State False Claims Acts, (showing states with state false claims act and providing links to the text of such laws), http://www.taf.org/statefca.htm.

312 See Sharkey, supra note 68, at 380-86 (citing e.g., Dardinger v. Blue Cross & Blue Shield, 781 N.E.2d 121 (Ohio 2002) (remitting $49 million punitive damage award in bad faith insurance claim case to $10 million and awarding two-thirds of that amount to a cancer research fund established by the court after attorneys fees were paid); Miller v. Cudahy, 592 F. Supp. 976, 1009 (D. Kan. 1984) (affirming an award of $10 million in punitive damages to the plaintiff based on defendant’s intentional acts of pollution but holding award in abeyance, contingent upon defendant’s agreement to undertake a cleanup), aff’d in part, rev’d in part, 858 F.2d 1449 (10th Cir. 1988)).

313 See, e.g., Klass, supra note 257; Sharkey, supra note 68, at 424.

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

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. But did that have to be the answer? I argue that it does not.

Legislative and judicial actions to implement split recovery of punitive damages in environmental harm cases will serve multiple, positive goals. First, it will ensure that the punitive and deterrent purposes of punitive damages are fully implemented by basing the punitive damage award on all the harm, whether incurred by the private plaintiff or the public. Second, it will provide some measure of compensation to the absent public plaintiff who, for lack of resources, politics or other reasons is not acting 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 attempting to recover for their own related private losses. If plaintiffs know that they can obtain attorneys fees, the portion of the punitive damage award related to their own out-of-pocket losses, as well as a portion of the “public” punitive damages, there will be sufficient incentives for such plaintiffs to 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. This encouragement will come through the partial removal of the existing concern over private plaintiffs receiving an inappropriate “windfall” in receiving the full amount of punitive damages.

Finally, this more nuanced approach to punitive damages will further illuminate the fact that there cannot be a single approach to punitive damages. As shown in earlier Parts, the Supreme Court’s current jurisprudence in this area is based on a set of concerns that relate primarily to fraud, products liability and personal injury cases with fears of excessive non-pecuniary damages and excessive total awards. These concerns have little place in most environment harm cases where uncertainties in valuation more often result in undervaluation than the overvaluation. If courts more fully recognize harm that is difficult to value and address this issue explicitly, they will be implementing the Supreme Court’s direction in BMW and State Farm in a more thoughtful and comprehensive manner.

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 juries and state courts, they are now subject to exacting federal constitutional due process review. Throughout the Supreme Court’s journey in this

316 See id.; Grefe, 901 So. 2d at 1150 n.26 (indicating that trial court instructed the jury that the entire punitive award would go only to the plaintiffs).
317 See Williams v. Philip Morris USA, 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).
area, judicial and public attention has focused on the billion dollar awards against
large corporations and the high non-pecuniary damage awards that support high
punitive damage awards. This focus has resulted in insufficient attention to cases
where harm to individual rights, public rights or public resources is undervalued or
not valued at all. This Article attempts to shed light on these latter cases through the
study of intentional tort and environmental harm cases and provide the beginnings of
a framework for addressing these cases. If courts can attempt to value or at least
acknowledge harm that is not included in a compensatory damage award, they can
better implement the Supreme Court’s due process objectives while retaining the
effectiveness of punitive damages.