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Source: *Ethics and the Environment*, Vol. 15, No. 2 (Fall 2010), pp. 1-30

Published by: Indiana University Press

Stable URL: <https://www.jstor.org/stable/10.2979/ete.2010.15.2.1>

REFERENCES

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LESSONS FROM THE *EXXON* *VALDEZ* OIL SPILL

*A CASE STUDY IN RETRIBUTIVE AND
CORRECTIVE JUSTICE FOR HARM TO THE
ENVIRONMENT.*

JAMES LISZKA

The settlements surrounding the *Exxon Valdez* oil spill prove to be an interesting case of retributive and corrective justice in regard to damage to the ecology of the commons, particularly in light of the recent Deep-water Horizon spill in the Gulf of Mexico. After reviewing the harm done to the ecology of Prince William Sound by the spill, and an account of Exxon Corporation's responsibility, I examine the details of the litigation, particularly the Supreme Court decision in this matter. In the early settlement, there is a clear disproportion between damage awards to plaintiffs representing the current economic users of Prince William Sound versus the trustees for the Sound's commons. I argue that the disproportion reveals not only a thoroughly economic understanding of ecological commons, but bias in the treatment of its current economic users, as opposed to an understanding of such ecologies as true commons shared over generations. I argue that such biases fail reasonable moral tests and do not stand up to common principles of retributive justice. I end by suggesting a legal maneuver to correct such tendencies.

John Muir, who had seen enough natural beauty for ten life times,

ETHICS & THE ENVIRONMENT, 15(2) 2010 ISSN: 1085-6633

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simply fumbles his words when it comes to describing Prince William Sound:

one of the richest, most glorious mountain landscapes I ever beheld—peak over peak lying deep in the sky, a thousand of them, icy and shining.... and great breadth of sun-spangled, ice-dotted waters in front.... grandeur and beauty in a thousand forms awaiting us at every turn in this bright and spacious wonderland. (quoted in Horton 1989, 164)

Prince William Sound, which sits at the northernmost part of the Gulf of Alaska, defines the water border of the Chugach National Forest. Established by Teddy Roosevelt in 1907, it is next in size only to the Tongass National Forest—the largest in the nation—which, along with the Wrangell-St. Elias National Park, forms a crescent along the south central and south east coasts of Alaska. Over twenty one years ago, on March 24, 1989, the beauty and biota of Prince William Sound were seriously damaged by the *Exxon Valdez* oil spill then the largest in North American waters. Walter Meganack, now deceased chief of Port Graham, had perhaps the most striking description of the effect of the disaster and its aftermath: “Never in the millennium of our tradition have we thought it possible for the water to die, but it’s true.... We walk the beaches, but instead of gathering life we gather death” (quoted in Braund 1993, 70; Kearnes 1996).

The spill occurred a short distance from the port of Valdez on Bligh Reef, as the ship traveled outside normal traffic lanes, releasing 11.2 million gallons of North Slope crude into the pristine waters of the Sound.¹ The oil continued to spread for 56 days, while Exxon, Alyeska Corporation and the Coast Guard attempted to figure out how to respond to the enormity of the spill. Eventually, oil reached as far as 470 miles southwest of the spill origin. Besides contamination of beaches in the Prince William Sound, significant amounts of oil were found along the eastern edge of the Kenai Peninsula, the Alaskan Peninsula through the Shelikof Strait, and parts of Kodiak Island. The spill affected nearly 1300 miles of shoreline, approximately the length of shoreline from New Jersey to South Carolina. Altogether the oil spill encompassed 900 square miles. Of the 257,000 barrels spilled, 32,500 were recovered by cleanup efforts, 77,100 evaporated, leaving 147,400 barrels remaining in the environment. Recent studies on selected beaches in the Sound have still found significant remnants of oil deposits (see Short et al. 2004).

After the spill, the State of Alaska and the U.S. government, as trustees of the Sound, pursued criminal charges and engaged in civil proceedings to recover compensation from Exxon Corporation for damages. These were settled relatively quickly in 1991. It was a different story in the case of the fishermen, tour operators, Native groups, and other economic users of the Sound affected by the spill. Despite significant awards in civil proceedings that took place in 1994, appeals by Exxon continued for the next fourteen years. The case ended in the Supreme Court in 2009, with a decision in *Exxon v. Baker* to reduce the original punitive award. The 9th Circuit Court of Appeals subsequently ruled that Exxon must also pay interest on the reduced award and, uncharacteristically, Exxon Corporation will not appeal that decision. Given the culmination of the court cases and the vantage of over twenty years, the *Exxon Valdez* oil spill proves to be an excellent case study for assessing issues of retributive and corrective justice for serious harm to pristine environments that also serve as economic commons, and is particularly relevant in light of the Deepwater Horizon spill in the Gulf of Mexico (see Author's Note). The case also raises important issues concerning intergenerational justice, and whether we should consider harm to future generations in such matters.

One central issue in this whole matter is the initial disparity of punitive awards to the public trustees for the natural resources of the Sound on the one hand, and the current users of those resources on the other, particularly in comparison to the estimated damages in both cases. Although conservative estimates put the damage to the Prince William Sound ecology around three billion dollars, the State of Alaska and the U.S. government, as trustees of the commons, sought only one billion dollars in compensation; the trustees agreed to punitive awards of \$150 million, \$125 million of which was forgiven, based on cooperation with federal and state prosecutors. Although estimates of economic harm to users of the Sound was around \$500 million, far less than harm to the general ecology of the Sound, the amount initially awarded for punitive damages to fishermen, tourist boat operators, canners, fish processors, and Native subsistence users was \$5 billion—a ratio of ten to one, far exceeding the ratio for the trustees. Compensatory awards to this group of \$287 million equal the estimated damage when they are added to the \$300 million Exxon voluntary gave to these users out of court. Granted that Exxon spent about \$2.8 billion in voluntary cleanup costs, these addressed both the harms to the

commons and the harms to the current users of the Sound and, so, should be factored out of the consideration. The upshot of this disparity is that damages to the economic interests of users of Prince William Sound—as much as those were deserved—were given more weight than restoration of the commons, a resource for all current and future users of the Sound. Bias toward current users was borne out by popular expressions of outrage and media focus in Alaska and elsewhere during the fourteen year period of litigation on the plight of the fishermen and Alaskan Natives, as they attempted to recover damages to their livelihoods from the Sound. Yet, the fact that there was not more outrage directed toward the settlements with the state reveals a deeper problem in the ethical logic and attitudes toward the commons and issues of obligations to future generations. This raises significant issues in retributive and corrective justice and proper conceptualization of harm. Indeed, my claim here will be that this initial disparity in awards does not pass reasonable moral tests.

In order to develop this case, some background and explanations are needed, including an accounting of the actual damages done by the spill in Prince William Sound, Exxon's responsibility and liability for that environmental damage, the punishments for the damages, the legal reasoning both at the Appeals and Supreme Court level, all of which can, finally, lead to the ethical analysis of retributive and corrective justice for harm to the environment, in the context of intergenerational issues.

THE HARM OF THE SPILL TO THE PRINCE WILLIAM SOUND

The effect of the *Exxon Valdez* oil spill on the biota of Prince William Sound was considerable.² According to Exxon Valdez Oil Spill Commission reports, the toll among birds in the region included: 250 bald eagles (with 151 carcasses recovered), 50–500 Black Oystercatchers, 22,000 common murrelets, 12,000–14,000 marbled murrelets, 838 cormorants, 200 harlequin ducks, 300 pigeon guillemots—about half of their population in the region—and 400 loons.

Among fish populations, official reports showed that nearly half of the Pacific herring eggs laid in 1989 in the area of the spill were exposed to oil during early development, leading to a collapse of the population in 1993 and 1994. Pink salmon were also severely affected, and oil had reached over one third of their spawning streams in areas near the spill. This species of salmon also showed considerable declines after 1990.

Sea mammals were also greatly affected. Over 1000 sea otter carcasses were recovered, and it was estimated that perhaps as many as 2800 died from the spill. An estimated 300 harbor seals died directly from the spill. In the short run, their population declined by forty-three percent in the oiled areas. Observations of Killer Whale pods showed disruptions in their populations—of the 36 known to inhabit this region, seven were missing when observed six days after the spill; a year later six more were missing.

Intertidal and subtidal ecologies were significantly damaged. Mussels, clams and bivalves, snails, sea stars, and crabs were especially hit; invertebrates and vegetation such as fucus seaweed, kelp, and eelgrass were damaged in these oiled areas. Eelgrass was of particular concern since it serves as important nesting sites for birds.

A study by Gardner Brown, completed in 1992, estimated the replacement costs of these birds and mammals at \$75 million (1992). A study by Richard Carson et al., estimated the loss of passive use values of the Sound around \$2.8 billion (1992).³ Considering these two types of harms alone, the total amount of damage was estimated to be about \$2.9 billion. Some estimates put the cost at \$15 billion (Parrish 1991). The harm may be ongoing, since fairly recent studies sponsored by the Exxon Valdez Oil Spill Commission (EVOS) identified the continuing presence of oil on the beaches, and the persistence of damage to a number of species (Short et al. 2004; Alaska Fisheries Science Center Reports 2001). Although the bald eagle, black oystercatchers, pink salmon, river otters, and sockeye salmon are considered recovered still, after nearly 20 years, clams, common loons, cormorants, common murrelets, harbor seals, harlequin ducks, intertidal invertebrates, killer whales, marbled murrelets, mussels, pacific herring, pigeon guillemot, and sea otters are considered not to be recovered or still recovering (Exxon Valdez Oil Spill Commission 2008).

Damage done to the economic users of Prince William Sound focused primarily on injuries to species harvested by fishermen and subsistence users, including an eighty-five percent decline in the Pacific herring population and pink salmon spawning streams, estimated to be about \$287 million dollars. Recreational and sportfishing was greatly affected initially as well, with estimates of around \$580 million in damage (Carson and Hanemann 1992). There was also a decline in tourism and an affect on the industry as the result of the spill, approximated to be \$5.5 million in

the year of the spill (McDowell Group 1990). The total for these estimates was about \$870 million (\$300 million of which Exxon made in voluntary payments to fishermen).

RESPONSIBILITY AND LIABILITY FOR THE HARM

Under ordinary legal and ethical frameworks, and assuming responsibility to be a configuration of causation, accountability, and *mens rea*, a strong case can be and was made for Exxon's ethical responsibility and legal liability for the oil spill.⁴ Several books at the time—some clearly partisan—addressed the particulars of actions and motivations by the principals involved in the spill (see Davidson 1990; Keeble 1991; Piper 1993). The National Transportation Safety Board investigated the accident and determined that the probable causes of the grounding were:

1. The failure of the third mate to properly maneuver the vessel, possibly due to fatigue and excessive workload;
2. The failure of the master to provide a proper navigation watch, possibly due to impairment from alcohol;
3. The failure of Exxon Shipping Company to supervise the master and provide a rested and sufficient crew for the *Exxon Valdez*;
4. The failure of the U.S. Coast Guard to provide an effective vessel traffic system;
5. The lack of effective pilot and escort services (National Transportation Safety Board Report 1989).

Certainly the proximate cause of the spill was the failure of the helmsman, Robert Kagan, to follow direct steering orders from Third Officer, Gregory Cousins. Following the causal chain upward, Captain Joseph Hazelwood's decision to allow an unrated officer, Gregory Cousins, to navigate Prince William Sound was critical; moreover his decision to leave normal shipping lanes, and not supervise the return to the regular course was a grave mistake. Above all, the decision for a known alcoholic to drink prior to taking on duties as master of the *Exxon Valdez* also places him at fault. But, above all, as captain of the vessel, he was accountable for the primary running and safety of the ship. Indeed, Brian O'Neill, chief lawyer for the plaintiffs in the 1994 civil case against Exxon argued that Hazelwood had acted recklessly on the basis of so many negligent

acts: “everybody makes a mistake but they don’t make three in a row” (Levin et al 1991, 73). In effect, he argued, three contiguous, negligent acts amounted to a case of recklessness on the part of Hazelwood. Thus, rightly, Captain Joseph Hazelwood was found to be responsible for the discharge of oil into the Sound (Keeble 1991, 46).⁵

The liability of Exxon is also now well established with the Supreme Court’s *Exxon v. Baker* ruling. Under *Restatement of Agency* interpretations (1957: Sect 219), and despite Exxon’s arguments to the contrary,⁶ Exxon could be held liable for the actions of its employees on its vessels, as the Supreme Court affirmed. First, Exxon failed to properly supervise Hazelwood—whose drinking problem was well known to them. Second, Exxon abetted stressful conditions on board by insisting on reductions of crews, thus placing more work pressures on existing crews. Also, to the extent that Exxon failed to properly supervise its partly owned subsidiary—Alyeska pipeline—the responsibility for the extent of the spill was also manifest. Indeed Exxon admitted as much when Frank Iarossi, head of Exxon Shipping, announced at a press conference on March 25, 1989 that Exxon accepted responsibility for the spill (Keeble 1991, 33).

During the Exxon trial, lawyers for the litigants outlined the following propositions (Levin et al. 1991, 1–11): Exxon failed to ensure that the *Exxon Valdez* was sufficiently maintained with respect to crew manning, training and competence, and avoidance of crew fatigue—all of which contributed to the catastrophe on March 24, 1989. These were specifically laid out as follows:

1. Exxon tried to save money by reducing manning. The vessel was reduced from a crew of twenty-four to fourteen. Other companies operated profitably with five deck officers rather than four, and with a complement of seventeen rather than the ten Exxon authorized.
2. Exxon gave little concern to the level of competence of its crew. Two licensed watch officers is standard practice among most shippers; but the *Exxon Valdez* had none on the bridge at the critical times of navigation through the Sound. Cousins had testified on May 16, 1989 that he was incompetent to handle Exxon Valdez. He was not licensed to pilot Prince William Sound, and Robert Kagan had been reported as an incompetent helmsman.

3. Exxon gave little concern to the training of the crew. Gregory Cousins went to Page Navigation School, which is a home-study program.
4. Exxon gave little concern to the level of fatigue of the crews.
5. Exxon was aware of the risks involved with these practices.

In general, Exxon's behavior passes reasonable tests for vicarious responsibility and negligence in the matter of the oil spill. Larry May has provided clear criteria for such an assessment (1991, 321):

A corporation is vicariously negligent for the harmful acts of one of its members if:

- a. causal factor—the member of the corporation was enabled or facilitated in his or her harmful conduct by the general grant of authority given to him or her by corporate decision; and
- b. fault factor—appropriate members of the corporation failed to take preventative measures to thwart the potential harm by those who could harm due to the above general grant of authority, even though:
 1. the appropriate members could have taken such precautions, and
 2. these appropriate members could reasonably have predicted that harm would occur.

Exxon's behaviors and decisions fit these criteria. It is clear from the evidence provided that Exxon knew about Hazelwood's drinking problems and arrest for Driving While Intoxicated. But despite that knowledge, they allowed him to operate a vessel that had the potential for creating the disaster that it did. Second, as discussed, they made deliberate decisions that reduced crew levels and competence for the complexity of transport involved.

Although Exxon's responsibility for the spill is established, it could certainly be mitigated, if the actions of other entities involved in the spill were also negligent. Alyeska Pipeline Service Company's response to the spill was, as we know, dismal. The Alyeska Pipeline Service Company was originally the result of a consortium of oil companies, and Exxon had a twenty percent share in company (Davidson 1990, 80). As part of the original trans-Alaska pipeline agreement in 1970–71, Alyeska was cre-

ated to be the principal agency responsible for the cleanup and prevention of oil spills, both on the land, and throughout the Prince William Sound (Davidson 1990, 81). The contingency plan negotiated with the State of Alaska in 1987 made it clear precisely how Alyeska would respond to a spill, including the kinds of equipment, names of the cleanup personnel, response times, lists of subcontractors, and other relevant material (Alyeska Pipeline Company 1987).⁷ The plan made it clear how fast Alyeska was to respond to various spill scenarios, including one that projected a 200,000 barrel spill. Alyeska was expected to respond to such a spill in about five and a half hours, but they actually took fourteen hours to respond to the *Exxon Valdez* oil spill, and the equipment was clearly inadequate for any serious spill. Indeed the single barge that was available for oil recovery at the time of the *Exxon Valdez* spill was lying in dry dock waiting for repairs (Keeble 1991, 20–21). Exxon had actually tried in the past to get more cleaning equipment up to Alaska, their requests had been vetoed each time by the other oil company partners in Alyeska—most likely British Petroleum, since it had the majority share.⁸ In the end it appeared that each company was gambling that it would not be the one to cause the spill, and the Coast Guard and the State of Alaska was gambling that the oil companies would be able to clean up their mess, since they knew that federal resources would certainly be inadequate to respond to a large spill.

Some have argued that the Alaska Department of Environmental Conservation and the U.S. Coast Guard should also take some of the blame since Alyeska's unpreparedness was well known to them through the concerned reports of their field agents, but never took any serious corrective actions (Keeble 1991: 18, 84, 95; see Davidson 1990, 90–91).

Although certainly the magnitude and effect of the spill would have been less had Alyeska been able to respond in a timely and competent way, there is no doubt that Exxon could still be held responsible for the spill itself. From the Coast Guard's point of view, it was presumed that those responsible for the spill would also be responsible for its cleanup. Moreover, since Alyeska was partly owned by Exxon, there was really no legal way to reach down into Alyeska without also reaching up to Exxon in any case. Thus, it could be argued that Alyeska's poor performance was not a significant mitigating factor in responsibility for harm done by the spill. Of course, for its part, officials from Alyeska were happy to slip behind the scenes and let Exxon take the blame. Although one can certainly

blame watchdog agencies for not doing their jobs properly, common sense would suggest that they should not be held responsible for the spill or, conversely, to claim that Exxon's responsibility for the spill should be attenuated because the Department of Environmental Conservation had not done its job properly. This is equivalent to saying that a bank robber should not be held accountable for the robbery since the police force was inadequate.

PUNISHMENTS FOR THE HARM

Concerning the legal actions taken in the matter of the spill, Joseph Hazelwood was charged on four counts under state law: criminal mischief in the second degree, driving a watercraft while intoxicated, reckless endangerment, and negligent discharge of oil. In March 23 of 1990 Hazelwood was found innocent of the first three charges and convicted on the fourth—a misdemeanor, and was sentenced to 1000 hours of clean-up service to be spread over a period of years. He was also fined \$59,000. On appeal, it ended with a sentence to pick up Anchorage area trash, and to perform community service at a local homeless shelter, Bean's Café, in Anchorage, Alaska.⁹ In a July 1990 administrative hearing before the Coast Guard, charges of drunkenness and misconduct against Hazelwood were dismissed, but he pleaded no contest to charges of violating Coast Guard policy by drinking liquor less than four hours before taking command of a vessel, and of improperly leaving the vessel's bridge while it was headed for Bligh Reef. The sentence was a nine month suspension of his master's license. Hazelwood was fired by Exxon shortly after the accident, and has not been employed as master of any vessel since. He now works for the law firm that represented him in his criminal trial in 1990.

In regard to Exxon Corporation, in the settlement with the State of Alaska and the United States, approved by the U.S. District Court on October 8, 1991, it was fined \$125 million for violation of the Clean Water Act (33 U.S.C. sect 1311 (a), 33 U.S.C., sect 1319 (c)(1)(a)), the Refuse Act (33 U.S.C. Sect 407, 411), and the Migratory Bird Treaty Act (16 U.S.C., sects 703, 707(a)). It was also fined another \$25 million for other provisions of the Migratory Bird Treaty Act. However, of the \$150 million, it paid only \$25 million in fines, ostensibly for good behavior, including recognizing responsibility for the oil spill, cooperation with the federal investigation, money spent in cleanup response (approximately \$2.1 billion, most of

which was thought to be ineffective), and other improvements in its codes and operations. It also paid \$100 million in restitution, half of which went to the State of Alaska, the other to the federal government. The agreement awarded \$900 million in compensatory damages to the State of Alaska. As mentioned, studies conducted by state and federally funded scientists estimated damage to the Sound's environment to be around \$3 billion, with at least one estimate putting it at \$15 billion (Parrish 1991). Later in 2006, after some period of indecision, the State of Alaska under Governor Frank Murkowski pursued a “re-opener” option—under a 1991 Plea Agreement with Exxon Corporation for its violation of the Clean Water and the Migratory Bird Treaty Acts in the spill—for payment of an additional \$100 million for unforeseen natural resource damages. In this case, there was sufficient scientific evidence to indicate ongoing damages and damages beyond those anticipated at the time of the initial agreement (see Short et al. 2004).

In June of 1994, a jury in the *Baker v. Exxon* case in Anchorage awarded a group of plaintiffs composed of commercial fisherman, processors, Alaska Native villagers, corporations, and other affected parties, \$287 million in compensatory damages (with \$300 million in voluntary payments made by Exxon), and \$5 billion in punitive damages—the largest ever for any corporation at that time.¹⁰ The award was based on the amount of profit calculated for Exxon in 1989. The award was appealed to the 9th Circuit on June 19th, 1997.¹¹ The 9th Circuit ruled in favor of Exxon on Nov. 7, 2001, remanding the case back to U.S. District Judge, H. Russel Holland, who had made the original award. Holland reconsidered and reduced the award to \$4.5 billion on January 28, 2004. In appealing that decision by Holland, a three-judge panel of the 9th U.S. Circuit Court of Appeals ruled further in favor of Exxon and reduced the amount Exxon should pay in damages to \$2.5 billion (*Baker et al. v. Exxon Corp.* 2006). On further appeal, the 9th Circuit Court, in May, 2007, declined to reconsider the damages award any further, at which point Exxon appealed to the Supreme Court. The latter's decision on June 25, 2008, was to reduce the damages amount to \$500 million, based on the principle that “the award should be limited to an amount equal to compensatory damages” (*Exxon Shipping v Baker* 2008). The 9th Circuit ruled that Exxon also owes approximately \$500 million in interest on the award, bringing the total to \$1 billion.

ETHICAL TESTS OF THE PUNISHMENTS

The initial results of litigation from the spill show a clear disparity between the compensatory and punitive awards to current users of the Sound, as compared to the trustees of the commons, representing the interests of both current and future generations. Whereas the ratio of compensatory award to actual damages for the trustees of the Sound was one third of actual damages, it was one to one for the current users; whereas the ratio of punitive award to actual damages for current users of the Sound was ten to one, for trustees the ratio was considerably less. This disparity cannot pass reasonable moral tests and, ultimately, it did not pass legal tests in the Courts—leading to a reduction of punitive damages to current users that was more in conformity with the awards made to the trustees.

A few clarifications are needed in order to justify this claim. It is common to make a distinction between retributive and corrective justice or rectification, where the latter has the goal of compensating a victim for unjust harms, as Aristotle suggests (*Nic. Ethics* 1130b30–33), while the former has the goal of punishing perpetrators. Generally speaking, punishments in our legal system follow this division, and are results of either criminal or civil prosecution. Criminal prosecution has to do with retributive justice for the violation of laws that involve acts such as murder, assault, battery, theft, fraud, and so forth. Civil or tort law, on the other hand, concerns corrective justice, or rectification of harms, usually by means of compensating the victims for harm done by perpetrators, or those who can be held liable for the actions of perpetrators. Even though tort law generally has the purpose of rectification of harms rather than retribution, for all practical purposes, it has evolved to include a retributive dimension in the form of punitive awards in addition to any compensatory ones.

There are thought to be at least three common justifications for retribution (see Kenny 1978; Hare 1986; Oldenquist 1988; Holmgren 1983; Cotton 2000). One deontologically based justification, expressed classically by Kant, rests on the notion of moral desert—that the behavior deserves punishment, simply put, and that is why it should be done (see Kant 1785: 137ff). A common consequentialist justification is deterrence, with the thought that sufficient punishment will not only deter the perpetrator from similar behavior in the future, but will serve to deter others as well. Punishment as a form of rehabilitation is also considered as a justification,

although weakly (see Kenny 1978: 69), and for that reason I will focus on the first two.

In moral desert theories, the underlying principle of punishment is that it should be based on the severity of the crime, the so-called proportionality theory. In the case of consequentialist theories, the basis of punishment is that it should be sufficient to deter a reasonable person. There are two standard criticisms of the deterrence theory which, reasonably, make it less preferable than the moral desert theory (see Ellis 2003: 337f). The first is that if the purpose is to not only to deter the perpetrator but other possible perpetrators, then the perpetrator is treated unfairly by being made an example for others. Second, if more severe punishments for a crime will be a more effective deterrent than lesser punishments, then there is no reason not to employ the most severe punishments in order to have the most effective deterrence. The result is the likelihood of a drift toward more severe punishments in a legal system, ending in similar extreme punishments for reasonably disparate crimes. For example, recently in China, Zheng Xiaoyu, head of China's drug and food agency, was sentenced to death for accepting bribes for approving suspicious drug production licenses. If there are reasonable differences in seriousness between murder and bribery, yet they entail similar severe punishments, then the basic fairness of punishments is lost—something presumably that would be desirable in any ethical system of punishment.

Although the moral desert and proportionality theories are not without fault (Ryberg 2005), they do have the strength of disposing a system toward fairer practices of punishment in this respect. Moreover, even if deterrence is not the justification for the punishment, deterrence can be in most cases an indirect, practical result of such a system of punishments. Thus, a proportionality theory avoids the weaknesses of deterrence yet still can retain its strengths.

Proportionality is often thought in a cardinal and ordinal way (see Perry 2006, 182; Von Hirsch 1996). In the former, the concern is in benchmarking punishment relative to the type of crime, that is, whether the kind of punishment fits the crime. For example, in *Coker v. Georgia* (1977), the Supreme Court ruled that the death penalty was “grossly disproportionate” punishment for the crime of rape. Benchmarking can vary from jurisdiction to jurisdiction, or, historically within the same jurisdiction. What crimes deserved capital punishment in the United States, for example, de-

scribes an interesting historical trend. Indeed, the current capital punishment debate can be considered a cultural exercise in such benchmarking.

Ordinal proportionality, on the other hand, is concerned to ensure that punishments are normalized relative to one another, so that greater crimes generally receive greater sanctions than lesser crimes do, within that type. As we say, not only should 'the punishment fit the crime,' it should also be 'proportionate to the crime.' For example, if damage is done to property, and fines are considered to be the appropriate benchmarking sanction, are sanctions as practiced scaled properly relative to lesser and severe damage? Unfairness results in this case when severe damage to property receives less sanction than minor damage to property (see Perry 2006, 181–82; Von Hirsch 1996). A case in point is *BMW v. Gore* (1996). The plaintiff discovered that the vehicle he bought, presented as new by a BMW dealership, had in fact been repainted before he bought it because it had been scratched in transit. The jury awarded \$4,000 in compensatory damages, but \$4 million in punitive damages. The Alabama Supreme Court reduced this to \$2 million on appeal. The U.S. Supreme Court weighed in on the matter, with Justice Stevens writing for the majority opinion. Even though he acknowledged a purpose of punitive damages as deterrence of future actions, he seemed more concerned about the fairness of the award which, in his view, violated the Due Process Clause of the Fourteenth Amendment. In the Court's opinion, the ratio of 500 to 1 of punitive award to actual damages was, indeed, grossly excessive and disproportionate, and reduced it to 4 to 1, which has now become a standard for this type of harm.

In both retributive and corrective justice, fairness concerns avoidance of excess and defect: For retributive justice, punishment should not be excessive relative to the crime, and relative to similar cases; for corrective justice, compensation should not be significantly less or more than what is required to rectify the harm. Reasonable reflection on the Exxon case shows that justice has not been served in the *Exxon Valdez* oil spill, on the basis of the proportionate theory. Since greater harm was done to the commons than to the livelihoods of users of the commons, ordinal principles of retributive justice were violated here in the matter of the punitive awards, while intuitive principles of corrective justice were not met in the case of compensatory awards for the trustees. In that case, either compensatory and punitive awards needed to be adjusted upwards

for the trustees, or downwards for the generational users—the latter of which turned out to be the case in the Supreme Court’s ruling in *Exxon v. Baker*.

THE LEGAL REASONING IN THE EXXON VALDEZ CASE

It is interesting to compare the legal reasoning involved in the *Exxon Valdez* case with the ethical reasoning just elaborated. A reasonably received view is that ethical discourse serves as a corrective to laws and a guide to legal decision-making (see Dworkin 1986)—and this is the position taken here, with the full recognition that it may be disputed by legal positivists such as H.L.A. Hart (1994). Indeed, particularly in *Exxon v. Baker*, the Supreme Court does appeal to fairly philosophical notions of fairness and proportionality to address the punishments in this case. In the majority opinion, Justice Souter gave a clear account of the principal historical justifications in case law and the received view for fair punitive damages. He outlined three historical positions: punitive awards are justified to address the enormity of the harm; they are justified to the extent that they deter and serve “for example’s sake”; finally, they are justified when they address intangible harms not captured by compensatory awards (*Exxon v. Baker* 2008: 18). In an interesting combination of the theories of moral desert and deterrence, Justice Souter, quoting *N.Y. Pattern Jury Instruction* (2007: 278), asserts that the received view is retribution and deterrence: “The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant...and thereby to discourage the defendant...from acting in a similar way in the future” (*Exxon v. Baker* 554 U.S. 18 2008).

Given this principal justification, the fairness of the punitive award is measured by the following: The proportion of the amount of punitive award to compensatory damages (*Exxon v. Baker* 554 U.S. 25 2008); proportionate and not excessive amounts (*Exxon v. Baker* 554 U.S. 29 2008); predictability and consistency of the award (*Exxon V. Baker* 554 U.S. 25 2008). In the latter case, “a penalty should be reasonably predictable in its severity, so that even Justice Holmes’s ‘bad man’ can look ahead with some ability to know what the stakes are in choosing one course of action or another” (*Exxon v. Baker* 554 U.S. 29 2008). For this reason, determining a limiting amount on punitive awards is justified. The Court decided, given various methodologies, pegging punitive to compensatory damages

using a ratio or maximum multiple was the best alternative. In this case, a ratio of one-to-one, punitive to compensatory awards was considered the reasonable maximum for maritime cases (*Exxon V. Baker* 2008: 41). Justice Breyer's dissent was based on the claim that the last ratio determined by the 9th Circuit was justified given the reprehensible behavior of Exxon (*Exxon V. Baker* 2008: 2–3). We can see at work here a tendency toward a proportionate theory of punishment, with the aim of preventing drift towards more severe and excessive punishments. Even though Souter indicates deterrence as a justification for the punishments, proportion seems to serve as an overriding corrective to that view.

The Supreme Court was silent about the matter of punitive damages to the commons itself, although the 9th Circuit Court of Appeals in its deliberation on Exxon's first appeal was not, and for that reason, the ruling by the U.S. 9th Circuit Court of Appeals is an interesting one. Judge Kleinfeld found the punitive damages assigned to Exxon excessive for precisely the reason that the harm was merely economical, while inferring that harm to the *ferae naturae*, if considered, may have been more significant and serious. Relying on *BMW v. Gore* (1996: 559) discussed above, and the criteria established by the Supreme Court at that time for grossly excessive awards, Kleinfeld notes that since the harm inflicted by Exxon on the plaintiffs was purely economic, and involved no violence or deceit, and was meant to expressly exclude environmental harm, then the \$5 billion dollar award was indeed excessive, above the four to one ratio recommended for actual harm at that time. Nor could the plaintiffs make claims on behalf of purely environmental harm to the Sound. Citing its own ruling in *Alaska Sport Fishing Association v. Exxon Corp* (1994), the 9th Circuit rejected the association's right to sue on behalf of the general public, on the basis of general public interest in the *ferae naturae*, a role reserved for the state *parens patriae*, the legal trustees of the commons: The award "vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment." (*Exxon v Baker* 2004:1090).¹² Interestingly and ironically, Exxon used similar reasoning in its defense to the Supreme Court. They argued that whatever the availability of maritime punitive damages at common law, the Clean Water Act preempts them. Since punitive damages were already assessed under the Clean Water Act and so addressed, they cannot be then assessed additionally for users of the damaged resources (see *Exxon v Baker* 2008: 14).

HARM TO THE COMMONS AND ISSUES OF INTERGENERATIONAL JUSTICE

The claim that the differential assignments of compensatory and punitive awards to current users of Prince William Sound and the trustees of the Sound do not pass reasonable moral tests still rests on the assumption that we have some duties to future generations and that, in some sense of the word, we can harm them. If those assumptions are false, then bias toward current users of the commons is warranted, particularly those whose livelihoods are most dependent upon those commons. If that assumption is false, it also encourages the priority of the interests of current users of the commons, thus the eventual degradation of commons for future use, leading to a classic tragedy of the commons (Hardin 1968).

There is some evidence for a cross-cultural disposition of current generations to plan benevolently for future generations (Weiss 2002). There also appears to be some agreement about our obligations in that regard—as suggested by the 1987 Brundtland Report and the 1997 UNESCO *Declaration on Responsibilities Towards Future Generations*. However, despite these intuitions and dispositions, there are several well-known, nagging concerns about such obligations. It seems problematic to say that our actions will harm non-existent beings and, consequently, it is problematic to consider what is fair retribution for harm to potential persons in future generations. Intuitively, contracts or commitments with non-existent persons seem difficult to conceptualize since, in principle, these are asymmetrical: we can harm or benefit future generations, but they cannot harm or benefit us, and most contracts are based on mutual benefit (or avoidance of mutual harm). For the same reason, the acknowledgement of rights of non-existent peoples, based on some notion of contract, also seems problematic. All of this makes it difficult to justify the sacrifices needed by the present generation for beings we will not know, and for results that we will not live to enjoy. As Derek Parfit has famously argued, since we do not know what future generations may want, it is difficult in any case to determine whether we will be benefiting or harming them by our actions (1986).

Although certainly, thorough address to all these issues pertaining to future generations is beyond the scope of this article, it is possible to address the most germane ones contextually to this case, understanding Prince William Sound as a commons. First, since we are primarily con-

cerned about retributive and corrective justice, a proper notion of harm has to be articulated. Standard notions of harm typically require comparison: at a certain time, some group of persons are in a certain state, at another time they are in a second state that is worse off than the first, and another group of persons have caused the second state to occur (the culpability or justification for that harm being another matter). Since future persons do not yet exist, there are no comparative states for those persons, and the so-called non-identity paradox kicks in: if the action considered as a harm causes people to come into existence into that state, it cannot really be considered harm, since alternative actions would likely lead to their non-existence, making them worse off (see Schwartz 1978: 181ff; Parfit 1984: 361ff). Thus, depleting the resources and damaging the ecology of Prince William Sound would certainly harm those affected in present generations, but it is not clear whether it would harm those affected in future generations since it might be the condition for their coming into existence. Ironically, if the Sound is harmed sufficiently so that it could not support human life, there may be no future users of the Sound at all, thus no harm done to future generations under this definition.

An alternative concept of harm that might better fit our intuitions concerning duties to future generations is the so-called *threshold* concept of harm. Under this view a person can be harmed by another if an action by the other person causes them to fall below a certain threshold (McMahan 1998: 223ff; Shiffrin 1999). In this case, the person need not have been caused to change from one state to another in a way that worsened his or her condition, only that certain actions caused them to be in a particular state that is considered to be below a certain threshold. For example, if a present generation were to pollute the air to a condition that is patently unhealthy and toxic for a subsequent generation, then any existent individual in the future generation could be said to have been harmed, even if the alternative would be that they would not exist otherwise. This relies on an impersonal principle of harm rather than the person-affected principle that constitutes the more temporal notion of harm. What matters is the *type* of harm, rather than *who* is harmed. This concept of harm conforms more to our intuitions as to why we would want to engage in conservation and prevent damage to our ecological commons, since no matter who follows us in time, their condition will be unsatisfactory, below a certain threshold, if there is serious degradation to the environ-

ment. It is a position consistent with a sufficientarian view of obligations to future generations (see Page 2007). It is also more consistent with the proportionality theory of retributive justice, since the concern there is with the type of harm, regardless of the person. Even in the case of ordinal proportionality, the concern is not with any one particular person, but rather if the punishments are scaled proportionately among them.

The difficulty with the threshold concept of harm is that it may not work as well in cases in which the harm is more localized. It is much more reasonable to say that we harm future generations if we foul the air to a point where it is nearly toxic, or accelerate climate change that results in significant global environmental damage, than if we harm the ecology of Prince William Sound to the point where it has little benefit as a commons. However, this may be resolved as a matter of scale. Although severe damage to a local ecology may not have a universal effect in the way in which damage to the atmosphere might, it would have enormous implications for a sub-population that relies heavily on that ecology for its use-value, or for larger populations that value it for its passive use. Thus, future generations of commercial fishers, subsistence users, cannery workers, and the like, will be harmed by damage to the use-value of the Sound. Similarly, there will be harm to a larger population who value the Sound for its passive use. There is another consideration in concern with local ecologies. If sustainable treatment of local ecologies is dismissed because it does not have sufficient universal impact, still cumulatively such attitudes could create negative global effects for future generations as critical local ecologies are decimated. The threshold notion of harm is also more consistent with our practices concerning the regulation of local commons. Indeed the resources of the Prince William Sound commons are regulated to ensure sustainable fishing, to enforce strong pollution standards for vessels operating on the waters, to protect Alaska Native subsistence, to monitor timber harvesting practices that might affect waterways, to protect sea and animal species, and to ensure a level of water quality. In effect, these commons are treated as if their use will be continuous into the indefinite future.

If this addresses the problem of why we should consider harm to future generations, there are still considerations that could attenuate our calculation of that harm. Often cost-benefit approaches argue that the value of a benefit—and correspondingly a harm—diminishes as it is pro-

jected into the future, and so should be “discounted.” Discounting is said to be justified for the following reasons: First, under the assumption that the societies of future generations will be wealthier and consume more than current generations, benefits consumed in current generations will have more marginal utility than if the same benefits are deferred and consumed in future generations. If a barrel of oil can go further in the current generation towards energy production than in a future generation, it would seem of more benefit generally to use that barrel in the current generation rather than save it for a future one. When we also take into consideration opportunity costs, a stronger case appears for this preference, since a barrel of oil used today, rather than conserved for tomorrow might produce more benefit for the future than if it is not invested today. Thus, if transportation of oil through Prince William Sound had both direct and indirect impacts on the current economy which, in turn, allowed future generations to inherent greater economic and social benefits than they would otherwise, should it not be reasonable for them also to assume the risks involved in harm to those ecologies held in common? Another way of putting this is to say that if benefits to future generations should be discounted, then so should harms, if they result from the production of benefits. If we took standard discount rates, which range anywhere from two to seven percent (Heal 2007: 59, 72), then a conservative discount rate of five percent per year would mean that the estimated damage to the commons of about \$3 billion would equal, in a mere 34 years, what the current users of the Sound received in damages.

The methodology of discounting has a number of recognized limitations (see Weisbach and Sunstein 2007; Weston 2009: 56), and Derek Parfit’s classic objections still hold weight (1984: 480ff). Some harms are not diminished by time. The loss of the passive-use values for Prince William Sound does not diminish over time, thus there are no opportunity costs to consider in this regard if harm to the Sound results from exploiting its use-value. Whether future generations are better off than us, even if the use of the Sound contributes to their improved condition, does not diminish the harm resulting from the loss of its passive-values. Moreover, such a claim addresses aggregate welfare; those most negatively affected may, in fact, be future users of the Sound, and so their condition will not be better off than current generations.

CONCLUSION

My attempt here has been to show that the initial disparities of punitive and compensatory awards between current users and the trustees of Prince William Sound cannot pass meaningful moral tests. This claim rests on the establishment or justification of the following:

1. The harm to the ecology of the Prince William Sound commons was significantly *greater* than the harm to the economic interests of the current generational users of the Sound;
2. The harm to the ecology of the commons had greater *impact* than harm to the economic interests of its current generational users since the use value of the Prince William Sound commons depends on the health of its ecology.
3. Harm to the passive-use values of the Sound should be taken into consideration when evaluating the damage to Prince William Sound.
4. We have an obligation to consider the harm to future generations as well as current generations in regard to the damage to Prince William Sound.

The initial disparity of awards showed a bias toward current users of the commons. Such disparities in retributive justice for damage to ecological commons have a number of consequences. First, when punitive awards for short-term economic users of the commons exceeds those for harm to the resources of the commons, this ironically undermines the economic value of the commons. Even under any cost-benefit analysis, the short-term economic value of the use of natural resources cannot be greater than the total value of the natural resource. Thus, the more value found in the total consideration of the commons, the more the value short-term use of that environment will have.

Second, unless rulings dramatically change, such disparities will eventually not stand up in courts—as the legal saga of the *Exxon Valdez* case has shown. Under appeal by Exxon, the \$5 billion in punitive damages was determined to be excessive by the 9th Circuit Court of Appeals, and eventually by the Supreme Court, ending in an award of \$500 million, based on a one to one ratio of punitive to compensatory damages.

Finally, such disparities might diminish the sense of culpability and

remorse for those who would pollute pristine commons, since disproportionate awards to economic users will be viewed as inherently unfair by violators who will, then, as in the case of Exxon, pursue legal appeals more vigorously. If punitive awards to the trustees of the commons are at least on a ratio of one to one with compensatory awards, that alone should be sufficient to deter the risky behavior of users of the commons, but an even stronger deterrence effect will result when proportionately balanced punitive awards to users are added.

The principal lesson that may be derived from the *Exxon Valdez* oil spill is that, like it or not, concerns about harm to the commons from such acts of pollution are not only anthropocentrically framed, but primarily focus on harms as they affect current users—even when this defies reasonable ethical tests. As a remedy to that bias, I would make a practical proposal that compensatory and punitive damages for short-term, economic users of the commons should be tied to compensatory and punitive damages to trustees of the commons in such a manner that the former do not exceed the latter. By tying punitive and compensatory damages for economic users to those for the commons as a whole, this implicitly gives weight to the total value of the affected environment, and not always just in terms of its contemporary use-value. This proposal is clearly consistent with the Supreme Court criteria of a one to one ratio between compensatory and punitive damages. Moreover, it can reasonably meet the criteria for retributive justice set out by Justice Souter in the *Exxon v. Baker* opinion: fairness in terms of proportion between compensatory and punitive damages, effective deterrence, and consistency in expectation of punishment. Finally, it would also motivate trustees, such as state governments, to seek maximum compensatory and punitive awards from polluters in order to ensure reasonable compensatory and punitive awards to its constituencies, who would pressure government trustees to do so because of economic self-interest.

It is not surprising that the political realities of the situation in Alaska contributed to the amount of compensatory and punitive damages the state was willing to pursue. Alaska is economically dependent upon oil production, and its rather modest demands for compensatory and punitive damages likely reflected some appeasement of the oil companies. The fact that the State in 2006, under Governor Frank Murkowski's leadership, seriously hesitated to pursue a "re-opener" option of \$100 million under the 1991 Plea Agreement with Exxon Corporation for its violation

of the Clean Water and the Migratory Bird Treaty Acts in the spill, lends some credence to this claim.

It would be interesting to analyze the causes of this bias toward current users of the commons. Public press and attention to the drama of their plight over the last 21 years has been hot and heavy, while outrage—yet alone concern—for the diminutive award to the State or the failure of the State to get fair compensatory and punitive damages, was barely voiced. The bias toward the economic users of the Sound exemplifies Christopher Stone's lament that there is no way to challenge the polluter's actions save at the behest of or on behalf of another human being who is able to show an invasion of his or her rights (1996). The outcome of the *Exxon Valdez* settlements may be considered a correlate to Garrett Hardin's notion of the tragedy of the commons: if it is the case that self-interested use of the commons tends to destroy the commons and, therefore, is contrary to the self-interest of the users, it is also contrary to their self-interest to give more weight to punitive damages for the users of the commons than to the commons itself (see Hardin 1968).

AUTHOR'S NOTE

As this article was coming to press, the Deepwater Horizon oil spill occurred in the Gulf of Mexico. As of this writing, British Petroleum has completed a static kill of the leaking well, although a permanent sealing of the well will require two additional risky procedures. Assuming these work, and even by the most conservative estimates, the spill has exceeded the *Exxon Valdez* event by twenty times and the Ixtoc leak in the Bay of Campeche by one-and-a-half times, to become the world's worst accidental oil spill. As the Deepwater Horizon spill and its aftermath unfolds, the parallels with the *Exxon Valdez* disaster are striking, so much so that many Alaskans directly involved in that 1989 spill were invited by Louisiana citizens to share their experiences. First, in terms of the response to the spill, there was a lack of effective planning and continuing confusion about what course to take, leading to the spread of the spill and the inevitable fouling of beaches and sensitive environments. Second, there appear to be similar patterns of corporate response to the spill, with an initial pledge to make everything right, but a suspicion that corporations will, in the long run, litigate their way out of responsibility as they did in the *Exxon Valdez* matter. Third, there is an over-emphasis by government and corporate officials on short-term damages to the tourism and

fishing industries, with an under-emphasis of the long-run damages to the ecological commons. In a bit of irony, Alaska Congressman Don Young, in public statements made on June 3, 2010, claimed that the Gulf oil spill “is not an environmental disaster,” because oil seepage is a “natural phenomenon” and, consequently the Gulf “will recover.” Interpretations of a report released by NOAA on August 4, 2010, will reinforce this attitude (Lubchenco, et al. 2010). The report indicates that 75% of the spilled oil in the Gulf has been evaporated, recovered, or dispersed into the Gulf. That still leaves nearly 53 million gallons in the Gulf, five times the size of the Exxon Valdez spill. For these reasons, it is even more important to attend to the lessons learned from the *Exxon Valdez* oil spill.

NOTES

1. For a detailed account of events leading up to the spill, see Liszka 2002, 113–114.
2. A research industry—literally—has grown up around the Exxon Valdez oil spill. Partly funded by the federal government, the Exxon Valdez Oil Spill settlement, partly by Exxon Corporation, and partly by universities simply interested in research of the effects of oil on the Sound, there are hundreds of published articles related to the recovery of Prince William Sound. The Exxon Valdez Oil Spill Trustee Council offers a bibliography of the published research on recovery of the Sound that it has sponsored (<http://www.evostc.state.ak.us>). The Exxon Valdez Oil Spill Trustee Council organized a conference ten years after the spill, “Legacy of An Oil Spill: 10 Years After the Exxon Valdez,” in Anchorage, Alaska on March 23–26, 1999, summarizing these results. On the basis of this research and more recent research, the Trustee Council has divided injured resources into the following categories: recovered, recovering, not recovering, recovery unknown, and not affected. Sea lions, brown bears, Sitka black-tailed deer, crabs, shrimp, were among species not considered notably damaged by the spill. As of the most recent update (2008), the bald eagle is thought to have recovered from the spill. Among recovered species, include common loons and murrelets, cormorants, dolly varden, harbor seals, pink salmon, river otters, and sockeye salmon. Among those still recovering are Black oystercatchers clams, harlequin ducks, killer whales, mussels, sea otters, and intertidal communities generally. Among those not recovered are pacific herring and pigeon guillemots, while the status of cutthroat trout, Kittlitz’s murrelets, marbled murrelets, rockfish, and subtidal communities generally, are unknown. The Exxon-sponsored research ten years later disputed many of these findings (abstracts of some of the more critical research in 1999 are no longer available online; see Platt 1997 for a review of the controversies). In 1999, Exxon’s Vice President, Frank Sprow,

was quoted as saying that “Prince William Sound is a robust, healthy, thriving place today” (KTUU, 1999).

3. Passive use values encompass what economists refer to as option values, existence values (the value of something’s existence), and other nonuse values. The contingent value method uses survey questions to elicit people’s values for private or public goods or services by determining what they would be willing to pay for specified changes in the quantity or quality of such goods or services or what they would be willing to accept in compensation for well-specified degradations in the provision of these goods or services.
4. For a detailed analysis of these three conditions of responsibility, see Liszka 2002, 97–113; the analysis of responsibility and liability in the *Exxon Valdez* oil spill is discussed in Liszka 2002, 113–117, but refined and contextualized here.
5. In a program commemorating the ten-year anniversary of the oil spill, produced by KTUU in Anchorage, Alaska, and aired on March 24, 1999, Hazelwood apologized for his actions to the public. He has consistently stated that he was prevented from doing so by his lawyers until all his appeals had been exhausted. In that interview he said, “I do apologize. I don’t know what apology would be appropriate. I still don’t know what would be enough.” He also claimed that he was “always respectful of the environment,” and that he’s “not Darth Vader, just an ordinary person.” Indeed, Judge Johnstone, who had presided over the criminal trial of Hazelwood said that Hazelwood struck him as a “perfectly good person, except for this one thing” (Pagano 1998).
6. As based on *The Amiable Nancy* (1818), in which the Supreme Court decided in this particular case that the owners of the vessel were not responsible for the Captain’s decision to plunder a neutral vessel during the War of 1812.
7. The Alyeska Spill Contingency Plan was mandated by The Clean Water Act of 1973. This required a national strategy for pollution control, and led to the National Oil and Hazardous Substance Response System, guided primarily by the National Contingency Plan (see Environmental Protection Agency Regulations 40 CFR, Part 300). The latter set the nation’s policy for pollution control and response, and states could use the federal program alone, or they had the opportunity to add special provisions or regulations to it. A state, then, could enact stricter pollution controls than the federal government, but it could not weaken them below the global federal regulations. The State of Alaska’s plan was reasonable and certainly not excessive in its demands; in fact, arguments could be made that it was a relatively weak plan. Alaska is a state whose economy is primarily dependent upon taxes on oil revenues. Consequently, the state agencies and the legislature may have felt pressure to be accommodating to the oil companies and their partners, such as Alyeska.
8. See a statement by Fred Garibaldi, BP vice president and chairman of Alyeska’s owners committee (Epler 1989: A7). George Nelson, who was Alyeska’s

president at the time of the spill, was also a BP executive. See a statement by L.R. Beynon for Alyeska Pipeline Service Co, made during the Department of Interior, Trans-Alaska Pipeline hearing, Feb. 25, 1971; see also Alyeska's testimony before the National Transportation Safety Board, May 19, 1989.

9. The history of these appeals is very complicated. After the 1990 trial which found Hazelwood guilty of only the charge of negligent discharge of oil, Hazelwood's lawyers made an initial appeal. In 1992, the Alaska Court of Appeals threw out the conviction. Under federal law, a master of a vessel who reports an oil spill himself is entitled to immunity. Judge Johnstone argued, however, that since the oil spill would have been discovered by the Coast Guard nineteen minutes after the spill, then all the evidence collected after that point was admissible. The Alaska Court of Appeals argued that Judge Johnstone erred in this matter. The case was taken to the Alaska Supreme Court in 1993, which reversed the Court of Appeals decision, arguing that the inevitable discovery of the spill could be considered as a basis for letting the evidence in; it then sent the case back to the Court of Appeals. In March of 1996, the Court of Appeals ruled that the Hazelwood conviction should be tossed out on the basis of a wrong definition of 'negligence.' Judge Johnstone argued to the jury that the prosecutors need only prove Hazelwood acted with simple negligence, defined as "a deviation" from the standard of care that a reasonable person might expect. Hazelwood's lawyers argued that the prosecutors needed to prove that he acted with criminal negligence, defined as "a gross deviation" from the reasonable-person standard (i.e., recklessness). On appeal to the State Supreme Court, the Court of Appeals ruling was rejected in October of 1997, and sent back to them for reconsideration. Finally on July 3, 1998, the Appeals Court upheld the sentencing of Hazelwood to 1000 hours of community service. By then, of course, Johnstone's original intention to have Hazelwood help clean up the oil spill was foiled.
10. The settlement was divided as follows:

\$2.9 billion	commercial fishermen in the spill area
\$85 million	commercial fisherman other areas
\$300,000	non-native subsistence users
\$80 million	fish processors
\$70 million	aquaculture associations
\$35 million	fishing tenders
\$20 million	cannery workers
\$10 million	area businesses
\$250 million	Natives
\$145 million	Native corporations
\$80 million	municipalities
\$5 million	personal injury
\$160 million	real property

\$500,000	personal property
\$300,000	recreational use
\$1.15 billion	attorney fees

11. The first appeal was made in February of 1996. U.S. District Judge Russell Holland issued a ruling denying Exxon's motion to throw out the appeal based on contention of jury misconduct and tampering.
12. According to the Memorandum of Agreement and Consent Decree between the United States and State of Alaska (1991), Section 311 of the Clean Water Act establishes liability to the U.S. and to states for destruction of natural resources resulting from the discharge of oil. The United States and the State are considered trustees of the natural resources. Specifically the U.S. Department of the Interior and the administrator of the NOAA are designated federal trustees for the purposes of the Clean Water Act. The Alaska State Department of Environmental Conservation and the Department of Fish and Game, as well as the Attorney General are designated state trustees:

“it is in furtherance of their statutory and trust responsibilities to ensure that all injuries, loss or destruction to state and federal natural resources are fully compensated and to ensure that such compensation is used in accordance with law.” (United States v Alaska 1991: 4)

“natural resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies....” (United States v Alaska 1991; see Clean Water Act 1972:§2701 (20))

REFERENCES

- Alaska Fishery Science Center. 2001. *Quarterly Research Reports*. July–September. *Alaska Sport Fishing Association v. Exxon Corp* (34 F.3d 769 1994).
- Alyeska Pipeline Service Co. 1987. Oil Spill Contingency Plan, Prince William Sound.
- The Amiable Nancy*, 16 U.S. 3 Wheat. 546 (1818).
- Aristotle. *Nicomachean Ethics*. 1975. H. Rackham, trans. Cambridge, MA: Harvard University Press.
- Baker et al. v. Exxon Corp*, 472 F.3d 600, (9th Cir. 2006).
- BMW v. Gore* 517 U.S. 559 (1996).
- Boulding, Elise. 1978. The Dynamics of Imaging Futures. *World Future Society Bulletin* 12 (5): 1–8.
- Braund, Stephen, et al. 1993. *Effects of the Exxon Valdez Oil Spill on Alutiq Culture and People*. Anchorage: Stephen R. Braund and Associates.
- Brown, Gardner. 1992. *Replacement Costs of Birds and Mammals*. Seattle: University of Washington.

- Brundtland, Gro H., et al. 1987. *Our Common Future: Report of the World Commission on Environment and Development*. World Commission on Environment and Development. Annex to United Nations, General Assembly document A/42/427, August 2.
- Carson, Richard, et al. 1992. *A Contingent Valuation Study of Lost Passive Use Values Resulting From the Exxon Valdez Oil Spill*. A Report to the Attorney General of the State of Alaska. November 10.
- Carson, Richard and Hanemann, W. Michael. 1992. *A Preliminary Economic Analysis of Recreational Fishing losses Related to the Exxon Valdez Oil Spill*. A Report to the Attorney General of the Sate of Alaska. December 18, 1992.
- Clean Water Act, 33 U.S.C.1321 (1972; amended 1990).
- Coker v. Georgia* 433 U.S. (1977).
- Cotton, Michele. 2000. Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment. *American Criminal Law Review* 37: 1313–29.
- Davidson, Art. 1990. *In the Wake of the Exxon Valdez* San Francisco: Sierra Books.
- Department of Interior. 1971. Transcripts of Hearing on Trans-Alaska Pipeline. Exhibit 48. Vol. 3. Anchorage, AK, Feb. 25.
- Dworkin, Ronald. 1986. *Law's Empire*. Cambridge, MA: Harvard University Press.
- Ellis, Anthony. 2003. A Deterrence Theory of Punishment. *The Philosophical Quarterly* 53(212): 337–51.
- Environmental Protection Agency. 2008. Regulations. Title 40. Part 300. October 23.
- Epler, Patti. 1989. Promises Ring Hollow, *Anchorage Daily News*, Oct 29.
- . 1989. Paper Tiger, *Anchorage Daily News*, Oct. 22.
- Exxon Valdez Oil Spill Commission. 2008. <http://www.evostc.state.ak.us> .
- Exxon Shipping v Baker* 554 U.S. 1 (2008).
- Exxon Valdez v Baker*, 296 F. Supp.2d 1071, 1090 (D. Alaska 2004).
- Ferrell, David. 1995. *The Just Society*. Cambridge, UK: Cambridge University Press.
- Hardin, Garrett. 1968. The Tragedy of the Commons. *Science* 162(3858): 1243–48.
- Hare, R.M. 1986. Punishment and Retributive Justice. *Philosophical Topics* 14: 211–23.
- Hart, H.L.A. 1994. *The Concept of Law*. Oxford, UK: Clarendon Press.
- Heal, Geoffrey. 2007. Discounting: A Review of the Basic Economics. Symposium on Intergenerational Equity and Discounting. *University of Chicago Law Review* 74 (1):59–77.
- Holmgren, Margaret. 1983. Punishment as Retribution. *Criminal Justice Ethics* 2: 36–49.

- Horton, Tom. 1989. Paradise Lost. *Rolling Stone*. December 14, 165–73.
- Kant, Immanuel. 1999 [1785]. *Metaphysical Elements of Justice*. John Ladd, trans. New York: Hackett Publishing.
- Keeble, John. 1991. *Out of the Channel*. New York: Harper Collins.
- Kenny, Anthony. 1978. *Freewill and Responsibility*. London: Routledge and Kegan Paul.
- Kernes, Susan. 1996. Native Responses to the Exxon Oil Spill. Audiotape. Alaska Humanities Forum.
- KTTU. 1999. Televised report. “The Exxon Valdez Oil Spill,” Anchorage, Alaska, aired Anchorage, Alaska, March 24.
- Levin, Fishbein, Sedran and Bernana Law Offices. 1991. Transcripts. Anchorage. May 28.
- Liszka, James. 2002. *Moral Competence*, 2nd edition. Upper Saddle River, NJ: Prentice-Hall.
- Lubchenco, Jane, McNutt, Marcia, Lehr, Bill, Sogge, Mark, Miller, Mark, Hammond, Stephen, and Conner, William. 2010. *Deepwater Horizon/BP Oil Budget: What happened to the oil?* Washington, D.C.: National Oceanic and Atmospheric Administration Report, August 4.
- May, Larry. 1991. Vicarious Agency and Corporate Responsibility. *The Spectrum of Responsibility*. P. French, ed. New York: St. Martin’s Press.
- McDowell Group. 1990. *An Assessment of the Impact of the Exxon Valdez Oil Spill on the Alaska Tourism Industry. Phase I: Initial Assessment*. Juneau, Alaska.
- McMahan, Jeff. 1998. Wrongful Life: Paradoxes in the Morality of Causing People to Exist. In *Rational Commitment and Social Justice: Essays for Gregory Kavka*, pp. 208–47. Jules Coleman, ed. Cambridge, UK: Cambridge University Press.
- Migratory Bird Treaty Act, 16 U.S.C., § 703, §707(a).
- National Transportation Safety Board. 1989. Grounding of U.S. Tankship Exxon Valdez on Bligh Reef, Prince William Sound Near Valdez, AK March 24, 1989. National Transportation and Safety Board Report Number: MAR-90-04, adopted on 7.31.1990.
- New York Pattern Jury Instruction*, Civil, No. 2 (2007).
- Oldenquist, Andrew. 1988. An Explanation of Retribution. *Journal of Philosophy* 85: 464–78.
- Pagano, Roseanne. 1998. Appeals Court Upholds Hazelwood Sentence. *Anchorage Daily News*, July 3.
- Page, Edward. 2007. Justice Between Generations: Investigating a Sufficientarian Approach. *Journal of Global Ethics* 3(1): 3–20.
- Parfit, Derek. 1984. *Reasons and Persons*. Oxford, UK: Oxford University Press.
- Parrish, Michael. 1991. Secret Studies Put Spill Damages at 15 Billion. *Los Angeles Times*. November 19.

- Perry, Ronen. 2006. The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory. *Tennessee Law Review* 73(163): 177–236.
- Piper, Ernest. 1993. *The Exxon Valdez Oil Spill. Final Report, State of Alaska Response*. Anchorage: Alaska Department of Environmental Conservation.
- Platt, John. 1997. Alternative Interpretations of Oil Spill Data. *BioScience* 47(4): 202–03.
- Refuse Act 33 U.S.C. § 407, §411.
- Restatement of the Law Second: Agency, 2d*. 1957. Vols. 1–8. Washington, D.C.: American Law Institute.
- Ryberg, Jesper. 2005. *The Ethics of Proportionate Punishment: A Critical Investigation*. Berlin: Springer.
- Schwartz, Thomas. 1978. Obligations to Posterity. *Obligations to Future Generations*. R.I. Sikora and Brian Barry, eds. Philadelphia: Temple University Press.
- Shiffrin, Sheana. 1999. Wrongful Life, Procreative Responsibility, and the Significance of Harm. *Legal Theory* 5: 117–48.
- Short, J.W., Lindeberg, M.R., Harris, P., Maselko, J. M., Pella, J.J., and Rice, S.D. 2004. An estimate of oil persisting on beaches of Prince William Sound, 12 years after the Exxon Valdez oil spill. *Environmental Science and Technology* 38(1), 19–25.
- Stone, Christopher. 1996. *Should Trees Have Standing?* New York: Oceana Publications.
- United Nations Educational, Scientific, and Cultural Organization. 1997. *Declaration on the Responsibilities of the Present Generations Towards Future Generations*. General Council Resolution 31. Article 4. U.N.E.S.C.O. 29th Session. Document 29 C. Nov. 12.
- United States of America v State of Alaska, Civil Action No. A 91-081 CV, Memorandum of Agreement and Consent Decree, Aug 29, 1991.
- Von Hirsch, Andrew. 1996. *Censure and Sanctions*. New York: Oxford University Press.
- Weisbach, David and Sunstein, Cass. 2007. Introduction. Symposium on Intergenerational Equity and Discounting. *University of Chicago Law Review* 74 (1): 1–2.
- Weiss, Edith Brown. 2002. Intergenerational Fairness and Rights of Future Generations. *Intergenerational Justice Review* 1 (6): 24–35.
- Weston, Burns. 2009. *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice*. Burlington: Vermont Law School Publications.