

any specific public policy, without examination of costs and alternatives. All that the historian of ideas can plausibly demonstrate is that redistributive policies should not be rejected on the grounds that they are inherently illiberal or represent a betrayal of the great liberal legacy. Without justifying the welfare state, we can nevertheless revoke the bragging license of its enemies.

— Stephen Holmes

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Valuing Nature: Assessing Damages for Oil Spills

Six years ago the *Exxon Valdez*, an oil supertanker, ran aground on Bligh Reef in Alaska's Prince William Sound. Eleven million gallons of oil poured through its cracked hull, fouling the Sound, contaminating thousands of miles of coastline, and destroying fish and wildlife. As noted in a draft restoration plan prepared in 1993, the oiled areas included "a National Forest, four National Wildlife Refuges, three National Parks, five State Parks, four State Critical Habitat Areas, and a State Game Sanctuary."

The courts have held Exxon liable for the harm it caused in Prince William Sound. In a 1991 civil settlement, for example, the corporation agreed to pay \$900 million in damages to the federal government and the state of Alaska. A criminal plea agreement required additional restitution. More recently, a federal jury in Anchorage, having found that Exxon and the tanker captain had acted recklessly, ordered the company to pay \$5 billion in punitive damages. This award went to thousands of fishermen and other Alaskans who claimed to have suffered losses from the spill. In an earlier phase of the trial, the same jury awarded the plaintiffs \$286 million in compensatory damages.

In press accounts of the trial, evidence that Exxon and its agents engaged in morally wrongful conduct received considerable attention. Without minimizing the significance of Exxon's wrongs, however, it is

important to be clear that if we require Exxon to take responsibility for the oil that leaks from its tankers, we need not rely on the idea that the company deserves to be punished. There may be reasons for holding Exxon liable apart from its moral wrongs. This is important because, unfortunately, we can expect oil spills to continue occurring, and they may not occur only in connection with morally wrongful conduct. An oil spill will sometimes happen as a mere accident, the outcome of comparatively innocent sloppiness — behavior which may not deserve punishment. If we set aside, for purposes of this discussion, the wrongful aspect of Exxon's conduct, we may then focus on the important policy issue of how we, as a society, should respond when environmental disasters are merely accidental. We may, that is, consider the grounds for imposing liability. In this discussion, the relevant moral ideas will be those underlying the law of tort rather than those underlying the law of crime.

Principles of Tort Law

Tort law requires those who in certain circumstances harm others to provide compensation to those who are harmed. Tort suits may arise from comparatively innocent incidents of a sort common in modern life: one motorist nods off and accidentally collides into another; a customer slips and falls on a poorly main-

tained floor in a grocery store. Tort law requires people or corporations to pay for harm they cause even when the harmful action is not criminal.

Tort law is common law. It exists largely as a matter of judicial tradition and not legislative action. In this country, much of the law of oil spills has been formalized and made part of federal code. But the underlying moral idea is the same. Sometimes harmdoers must pay for the consequences of their actions even when these consequences do not arise from behavior so evil as to deserve punishment.

There is, however, one problem with using the model of tort law to understand the moral basis of liability in the case of oil spills. Liability for an oil spill, like any liability imposed in law, must be fair, not whimsical or arbitrary. In the event that liability consists in a demand for a specific amount of money, there must be a reason for fixing on that particular amount. Difficulties in fixing damages for oil spills distinguish oil spill cases from garden-variety tort cases. In the case of accidents involving only damage to personal property, we can often base damages on the cost of repairing or replacing the damaged property. But in the case of damage to nature, the loss is not definable in economic terms alone. The harm done to Prince William Sound, for example, cannot be understood solely in terms of the commercial losses resulting from the spill; the impact of the *Valdez* disaster does not seem reducible to the lost revenues of fisheries or the tourist industry. Nor does the lost pleasure of the few tourists who might have visited the Sound appear to exhaust the spill's impact. But if we don't measure the harm in these ways, what alternatives do we have?

One possibility is to measure the damage in terms of the cost of *restoring* the Sound. Indeed, in actions against oil companies for spills, restoration is a commonly discussed remedy. Yet there are limits on how much the concept of restoration can explain. Once humans cause a catastrophe in nature, we lose our grip on what it means to "restore" it in any standard sense of that term.

The concept of restoration is most often used in art. One might restore a damaged painting, for example, or a sculpture from which some parts have broken off. But it is not clear what it might mean to restore a scene in nature. The concept of nature refers etymologically to that which is born, which arises independently of human manipulation, which is not in any sense artificial. One appeal of nature is its independence from our will, its confirmation of the magnificence of things beyond us. In this respect, restoring nature differs from restoring art. Because it has no life of its own, a broken sculpture might be reassembled in ways that preserve its distinctive value. A natural setting, however, involves a life of its own in ways that resist application of the idea of restoration.

If the value of nature lies in its independence from us, then restoring it must be understood as an act of reinvigoration by which a natural scene regains the vitality to evolve according to its own character. It does not follow that we should eschew the aim of restoring nature, but rather that this aim must involve helping nature to take its own course or heal itself, and not simply fixing broken parts. Perhaps that is why much of the restoration effort actually undertaken at Prince William Sound seems misguided. As an article in *Time* explains, Exxon "squandered" vast sums of money on "ill-conceived cleanup techniques and heroic rescues." These included the cleaning of several hundred otters, "many of which died anyway," at a cost of \$80,000 each, and the "use of scalding-hot, pressurized seawater to hose down beaches" — a tactic which left the beaches "almost sterile, empty of the limpets and other intertidal creatures" whose existence is essential to the local ecosystem.

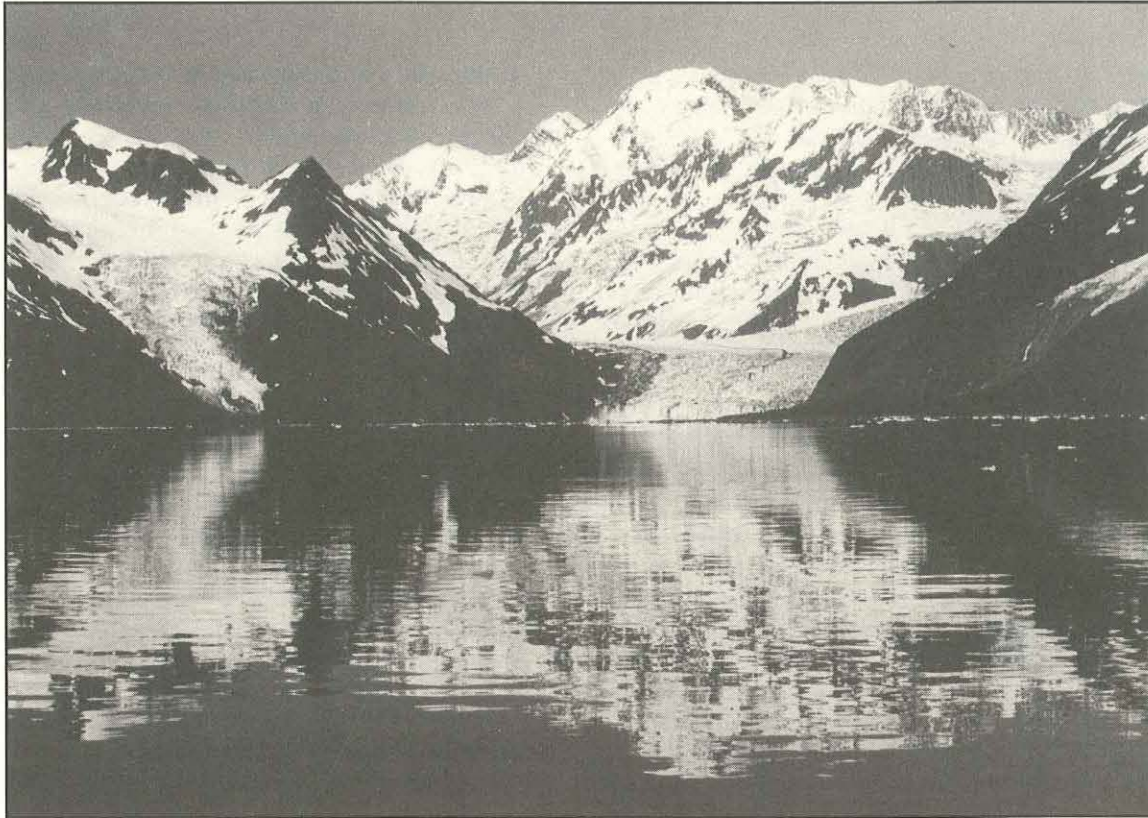
If we often do best by merely aiding nature in the process of self-healing and if vigorous cleanup measures risk slowing the ecological process, then "restoration" by the oil companies may prove comparatively modest and inexpensive. Yet even if this form of restoration is the most appropriate, it only mitigates the harm to nature; it does not undo it. Once a magnificent natural setting has been fouled, the "insult" remains even after the injury has been repaired.

Nonuse Values

Much oil company lobbying has been directed at limiting corporate liability for disasters such as the *Valdez* spill. The effort has been not so much to limit liability for commercial loss, or the lost pleasure of tourists, or the costs of restoration, but instead to limit or eliminate liability for what economists call nonuse or existence values. Nonuse values, it may seem, have the potential to be valued at a staggeringly and unpredictably high dollar amount.

Nonuse value is a peculiar category, invented by economists in the 1970s as a response to complaints that the analysis of value in purely commercial or hedonic terms leaves out something important. Nonuse value is easy to define in the negative: it is the value that something has apart from its commercial value and apart from the pleasure produced by viewing it; in its positive sense, nonuse value is the value of knowing that a particular thing or place exists.

Some economists have developed a technique for attaching an economic interpretation or dollar amount to nonuse value and non-market goods more generally: contingent valuation. In rough terms, contingent valuation proceeds by surveying people about how much they would be willing to pay for a specific improvement or protection of a good, and then multiplying the average amount a person is willing to pay by the number of



*Surprise glacier in Harriman Fjord, Prince William Sound
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people in the population. One might conduct a contingent valuation study of damage to Prince William Sound, then, by first determining how much people would have been willing to pay to prevent the damage, and multiplying this number by the number of people in some relevant population. Some courts have found contingent valuation useful in measuring damage to nature. After all, to assign monetary damages, one needs numbers, and contingent valuation apparently lacks competition as a number generator. Yet writers have long been skeptical about contingent valuation, and the attack from the social science community is increasingly pronounced.

Some of the nation's most distinguished economists and psychologists recently released a set of papers arguing that contingent valuation is methodologically unsound and lacks scientific validity. Indeed, many of these scientists argue that the flaws in contingent valuation are so deep that no amount of improvement in the technique will salvage it. People lack meaningful preferences regarding how much they would be willing to pay to protect nature from disaster. They concoct arbitrary answers to contingent valuation survey questions, and their answers to these questions are mere artifacts of the surveys. Thus, these scientists argue, judges who rely on the surveys to produce

numbers measuring damages for oil spills would do just as well to spin a roulette wheel. Of course, not all scientists agree that contingent valuation is hopeless. For example, the Department of Commerce, through one of its agencies, the National Oceanic and Atmospheric Administration, recently asked a panel of economists to develop recommendations for making contingent valuation studies valid. But no argument shows that following their recommendations will salvage contingent valuation.

If the case the social scientists make against contingent valuation seems cogent, the policy implications of their work remain open to dispute. Their studies were sponsored by a consortium of oil companies, and when the oil lobby reprinted them in a packet made available to legislators and lawyers, the packet included a paper by one of its lawyers. He suggests that in the face of the impossibility of measuring nonuse values, we should be satisfied with requiring oil companies to pay for what we can measure — things such as commercial loss and restoration costs. That is, we should cease holding oil firms responsible for nonuse harm in oil spill cases.

Yet there are grounds for resisting the oil lobby's suggestion that we cease making oil companies pay for nonuse harm. The fact that economists have trouble

with nonuse value provides little reason for doubting the importance of nonuse value but some reason for doubting that we should look to economics to answer all our social policy conundrums or to explain all that matters to us as a society.

There are plenty of things in common experience whose value seems primarily what economists call a nonuse value but whose character falls outside the economist's net. Indeed, the value of a scene of natural beauty like Prince William Sound lies neither in the amount of money we might produce by exploiting it commercially nor in the amount of happiness that we get from viewing it. Rather, its value lies in its cultural and aesthetic identity. All this means, in practical terms, is that when we try to articulate to one another why the Sound matters, facts about its market value have far less explanatory force than facts about its role in our history and its magnificence as a piece of wilderness.

The economically recalcitrant character of nonuse value may seem even more obvious in another kind of example. The mere discussion of this example, I fear, may seem offensive. But this only helps to establish a point I wish to make, that some of the values most important to us are independent from and even at odds with the market values that paradigmatically concern economists.

Consider the body of a dead national hero — say, John F. Kennedy — resting in its grave. Now suppose that groundskeepers inadvertently destroy it. Something terrible has happened. How should we understand it? How should we gauge our loss? Restoration value gets us nowhere; it is abhorrent to consider restoring the decayed pieces of a corpse. Nonetheless, there is no commercial loss, since we didn't charge people to look at the Kennedy corpse or gravesite, and the loss to concessionaires in the vicinity of Arlington National Cemetery is irrelevant. What we lose in the workmen's error verges on the sacred, and we do not mourn it because of any commercial setbacks. Nonuse values are real. If the body were destroyed, we would suffer a loss and economists would be right to worry about it. It remains an open question whether they can analyze the loss.

Nonuse values, then, may be compromised in tragic accidents like the destruction of a gravesite. Such accidents are therefore events that possess moral significance apart from issues of economic loss and apart from issues of the evil of the people who cause the accidents. Failing to acknowledge this significance is a sign of moral insensitivity. That there is nothing we can do about the destruction of the corpse in our example does not imply that we should ignore it and feel nothing. Admittedly, though, it remains a hard problem to determine what the accident means or what is required of us if we are to take this accident seriously.

Consider a more mundane example of an accident that causes noneconomic harm but which nonetheless must be taken seriously. Imagine that you are standing in the aisle of a bus when it comes unexpectedly to a stop. You lose your balance and fall on a person seated nearby. Even if you learned that you had not harmed him, bodily or economically, it would be insensitive of you to make no gesture of apology or regret for what had happened. Your fall, even though unintentional, compromises the sanctity of his person. Common decency suggests feeling some responsibility for this. You would therefore apologize even though the fall was not your fault. To stand up silently and walk off constitutes a failure to acknowledge the significance of what you have done to your fellow passenger. It announces that the sanctity of his person means little to you; it is a direct insult to him.

The ritual of apologizing or expressing regret is an important device for acknowledging the moral significance of accidents. The bus accident may be a comparatively trivial example of this phenomenon, but the reliability of human responses in such cases seems a prerequisite for the existence of a moral community. If we had no disposition to make such responses, it would demonstrate a lack of mutual concern and respect.

Payment of damages is a socially compelled ritual for the expression of regret; forcing a harmdoer to pay is symbolic recognition of the importance of the suffering of accident victims. Forcing a person to pay doesn't mean that he actually feels regret, but it does mean that we as a society refuse to acquiesce in a failure to feel regret. A forced apology is an apology even if an unfelt one.

It may seem that expressing regret by paying money is needlessly tacky and expensive. But in a society like ours, in which relations are largely and necessarily impersonal, we lack obvious alternatives. Requiring the payment of money as acknowledgment of the moral significance of causing harm seems better than simply ignoring the harm.

It may be important that we as a society recognize the significance of tragic accidents like the oil spill in Prince William Sound. The system of accident law provides a mechanism for expressing the seriousness of this concern. People often characterize what matters most to them as priceless. A scene of beauty in nature, such as Prince William Sound, is an example. When the priceless is compromised, it seems hard to specify a particular sum of money payment which expresses decent concern for the harm done — even though that is what court-imposed liability for accidents ordinarily requires.

What conclusions can we draw from the elusiveness of determining dollar amounts commensurate to nonuse values? It may seem that this elusiveness

implies that any dollar amount imposed by a court will be arbitrary and thus violate the basic requirement that a law applied against someone be fair. But this would be a rash conclusion. Arbitrariness in this variety of case can be limited by judges who review damage awards to assure their consistency with comparable cases. It can be further limited by assuring that the level of damages is not ordinarily so high as to pose a threat to the vitality of a normally functioning firm.

Even if we limit arbitrariness in oil spill cases, we cannot eliminate it. Attaching monetary value to non-market goods will always have some measure of arbitrariness. But it would be presumptuous to suppose that all arbitrariness can be removed from the law. Adopting any legal rule involves settling on a convention and sticking with it, a process that necessarily contains an arbitrary component. Moreover, even if burdens imposed by law contain a degree of arbitrariness, they may nonetheless serve to limit the arbitrariness of other burdens people confront. Accidents themselves are deeply arbitrary, instances of bad luck to their victims and of things gone wrong in ways outside the plans of people who cause them. In the case of oil spills, there is no reason that the weight of the arbitrary

should fall entirely on the shoulders of the public. By imposing liability for compromising nonuse values on firms like the Exxon Corporation, we do not mete out an excessive burden, and the burden of arbitrariness is more fairly shared.

— Alan Strudler

Sources: Exxon Valdez Oil Spill Trustee Council, *Draft Exxon Valdez Oil Spill Restoration Plan* (November 1993); Keith Schneider, "Exxon is Ordered to Pay \$5 Billion for Alaska Spill," *New York Times* (September 17, 1994); *Reuters Business Report* (November 16, 1994); *The Economist* (August 17, 1991); Thomas A. Campbell, "Natural Resource Damage Assessments: A Glance Backward and a Look Forward," *Baylor Law Review*, vol. 45 (Spring 1993); Peter A. Diamond and Jerry A. Hausman, "Contingent Valuation: Is Some Number Better than No Number?," *Journal of Economic Perspectives*, vol. 8, no. 4 (Fall 1994); Michael Lemonick, "Alaska's Billion-Dollar Quandary," *Time* (Sept. 28, 1992); Jerry A. Hausman, ed., *Contingent Valuation: A Critical Assessment* (North-Holland, 1993); *Federal Register*, vol. 58, no. 10 (January 15, 1993).

Futile Treatment and the Ethics of Medicine

Ryan Nguyen was born six weeks prematurely on October 27, 1994, with a weak heartbeat and poor blood flow to his organs. His physicians at Sacred Heart Medical Center in Spokane, Washington, employed heroic measures to revive him. A few weeks after his birth, it became clear to Ryan's doctors that the aggressive medical interventions keeping him alive were futile and should be withdrawn. Ryan had multiple medical problems including kidney failure, bowel obstruction, and brain damage. To survive, he would require kidney dialysis for approximately two years followed by a kidney transplant, a feat most consulting experts on kidney disease agreed was "virtually impossible to pull off." According to one consultant, a professor of pediatrics and director of the kidney program at Children's Hospital and Medical Center in Seattle, "long-term dialysis would not only be inap-

propriate, but would be immoral . . . it would prolong pain and agony in a child that has no likelihood of a good outcome."

As is often the case, some physicians could be found who disagreed with generally accepted practice standards. When Nghia and Darla Nguyen, Ryan's father and mother, rejected the Sacred Heart doctors' prognosis for their baby, they sought out such physicians. Denying that Ryan had brain damage and believing that his kidneys were getting better, the Nguyens approached four other medical centers requesting dialysis and other life-prolonging treatments for Ryan. Each time, they were turned down on the ground that aggressive lifesaving measures were futile.

The Nguyens' search continued. A self-described "pro-life attorney," Russell Van Camp, agreed to represent them. Mr. Van Camp accused the Sacred Heart