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Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts

JAMES R. COX*

I. Introduction

Few aspects of the law applicable to environmental tort claims are as challenging as the question of the manner in which damages should be equitably apportioned. Traditional paradigms that have evolved from interests in promoting economic efficiency fail to take into account the unique character of cases involving environmental contamination. Such cases invoke public interests that are rarely considered in more traditional property-damage cases, such as those involving erosion, flooding or harm to appurtenances.

This article argues that traditional doctrines that allow the award of restoration damages in limited circumstances should be reformed in order to allow the broader application of such awards. The article will first review some of the various policy rationales that support such an evolution of the law. It will then turn to a discussion of the various doctrines applicable to restoration-damage awards. Finally, the article will suggest that courts involved in the adjudication of environmental tort claims should consider the expansion of existing equitable trust doctrines and apply them to awards of environmental restoration damages. Such an expansion would remove the perception that toxic-tort plaintiffs are unjustly enriched by cash awards that may exceed the value of the affected property, and would permit the creation of a framework that would ensure that damage awards are actually expended for property cleanup.

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II. Review of Public-Policy Issues Applicable to Cases of Environmental Contamination

Before turning to an examination of existing doctrines applicable to awards of restoration damages, a review of some of the public interests involved in an environmental tort case is in order. The most obvious of these is the public's interest in the health and safety of its citizens.

A. The Public's Interest in the Health and Safety of its Citizens

Members of the public have a clear interest in protecting themselves from unknowing and unexpected exposures to harmful contaminants. Proponents of strict property-right protections might contend that a property owner has the right to permit hazardous conditions to exist on his or her property, subject only to the state's right to bring an enforcement action under applicable environmental statutes. Such a simplistic view ignores the fact that cases involving claims of property contamination are replete with competing interests that transcend generations and property lines; and state enforcement agencies with limited budgets cannot be presumed to adequately represent politically powerless neighbors and future generations.

Some members of the community–children in particular–cannot be expected to observe property boundaries in every situation, and should not be forced to rely on the benevolence and attentiveness of an owner of contaminated property. Moreover, an argument exists that other members of the community, including those who engage in outdoor recreational activities like hunting or fishing, should not be forced to rely on the owners of contaminated property to restrict access to areas of contamination. Even where property owners may have acted to adequately restrict access to contaminated property by unknowing members of the general public, the same restrictions might not prevent access by pets, livestock and wildlife.

The public also has an interest in preventing the spread of contamination to adjoining properties and to groundwater. Hazardous chemicals that are subject to erosion processes, leaching or aeolian transport may readily migrate onto adjoining properties. Such contaminants may also pose a risk to animals and plant life that can facilitate the spread to surrounding areas. Even the most thorough attempts by a property owner to restrict access to prop-

erty are not likely to prevent contaminant migration. Therefore, the public has an interest in ensuring the neutralization or removal of harmful contamination that exists on private property. For all of these reasons, a paradigm that permits the award of damages based on the cost of environmental restoration in a tort action, to a party that is motivated to actually expend those funds on cleanup, is one that is grounded in sound public policy.

B. The Public's Economic Interests

Because of the many uncertainties that exist with regard to the migration of, and the public's potential access to, harmful environmental contaminants, property values are sure to be affected in areas that surround the polluted property. Such effects can reduce resale values and tax revenues. The public therefore has an interest in effectuating cleanup to protect these values.

With specific regard to the sum of money that represents the cost of cleanup, the public has an interest in allocating that sum of money to the person or entity that is most likely to effectuate cleanup promptly and effectively. In general, although as between a property owner and a polluter, the owner might at first glance be seen as the party who is more likely to effectuate cleanup, such might not always be the case. For example, a non-resident owner of contaminated property may be willing to abandon the property and enrich himself personally with cleanup funds awarded to him in a tort action. In contrast, a polluter–who may be a prior owner, neighbor, or the holder of leasehold or easement–who has lost on the issue of liability may wish to expend the cleanup funds himself. He may do this in order to bring certainty to the process of foreclosing further liability as to future plaintiffs, or to improve his relations with the public. Nevertheless, awards of restoration damages generally presume that the recipient of such an award, having expended the resources associated with litigation and demonstrated the facially stronger interest in remediation, will actually use the award to effectuate cleanup.

In addition to the foregoing interests, the public has an economic interest in preventing the need for the expenditure of public funds to effectuate cleanup. Such an expenditure may become necessary if the party who is allowed to retain cleanup funds becomes insolvent, or is otherwise unable or unwilling to actually perform the necessary cleanup. By requiring the polluter to pay for cleanup, external costs become incorporated into the product whose manufacture or processing caused the contamination, thus

eliminating an effective subsidy to the polluter and permitting alternative products and industries to compete on a level playing field. Parochial interests may prefer the subsidy at the expense of environmental interests, however, thus fostering the proverbial "race to the bottom" of environmental standards or the creation of environmental "sacrifice zones".

Finally, the public has an interest in deterring the conduct that resulted in the contamination in the first instance. By making an example of those who engage in conduct that is negligent, reckless, or intentionally designed to result in the contamination of property, the public may deter the commission of similar wrongdoings elsewhere. In the interest of preserving enforcement resources, the public may prefer to leave the litigation of such matters to private litigants. The punitive aspect of allowing awards of restoration damages that exceed property values may thus tip the balance toward the allowance of such awards to parties who are likely to effectuate cleanup.

C. The Interest in Intergenerational Equity

Unlike the chattels and appurtenances that may be subject to a more traditional property-damage case, land is a finite natural resource. The public has an interest in preserving that resource for the benefit of future generations. Similarly, groundwater that may be affected by environmental contamination is a resource that should be managed and preserved for the benefit of a community's descendants. This concern for "intergenerational equity"[1] is one that evokes a strong public interest, and that calls for the expenditure of cleanup funds such as those that may be the subject of an award of restoration damages.

Having addressed the various public interests that call for the expenditure of funds–on the part of someone, at least—to effectuate the cleanup of contaminated property, the discussion that follows will turn to an examination of the various doctrines that have emerged within the common law that permit the award of restoration damages in certain instances.

1. *See generally*, Edith Brown Weiss, *Intergenerational Equity*, *in* GLOBAL ACCORD 333-53 (Nazli Choucri ed. 1993).

III. Overview of Doctrines Applicable to Awards of Restoration Damages

Various doctrinal developments within the common law have resulted in the formulation of criteria that permit the award of restoration damages in cases involving claims of tortious harm to land. Perhaps the most oft-cited of these can be found within the *Restatement (Second) of Torts*. According to that treatise:

> § 929 Harm to Land From Past Invasions
> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
> (a) the difference between the value of the land before the harm and the value after the harm, *or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred . . . .*[2]

The comments to this *Restatement* provision elaborate this principle:

> [T]he reasonable cost of replacing . . . land in its original position is ordinarily allowable as the measure of recovery. . . . If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm. . . .
>
> On the other hand, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building.[3]

The principles set forth in the *Restatement* have provided the basis for a number of the decisions of courts that have addressed the issue of restoration damages. In spite of this fact, decisions relying on the *Restatement* have resulted in surprisingly little of the consistency and predictability that might otherwise have allowed for the efficient allocation of resources and the achievement of policy objectives. The sections that follow will highlight some of the factors, derived from the *Restatement* paradigm, that have influenced courts' decisions as to the issue of restoration damages.

2. RESTATEMENT (SECOND) OF TORTS § 929 (1979) (emphasis added).
3. *Id.* cmt. b.

A. Preferences for Diminution-in-Value and Trial-Court Discretion

Several fundamental principles can be derived from the somewhat cryptic rule set forth in Section 929 of the *Restatement*. The first of these is the observation that the "general rule" appears to be that under normal circumstances, an award of damages in a property-damage case should be measured by the diminution in property value that results from the tortious conduct. Only in "appropriate cases" can an award exceed that amount, and be measured instead by the cost of restoration. The *Restatement* provides no guidance as to what constitutes an "appropriate case," but appears to leave such determination entirely to a court's discretion. The provision states in an accompanying comment, however, that even in such an appropriate case, where restoration costs are "disproportionate" to the diminution in value, damages should default back to the difference in value before and after the harm.[4] Even where restoration costs are *disproportionate*, however, where "there is a reason personal to the owner for restoring the original condition," the disproportionality of the amount may be ignored, and the full cost of restoration awarded.[5]

The lack of a bright-line rule for determining what is an "appropriate case" for an award of restoration damages—absent a disproportionately high cost of restoration—has been the exercise of a great deal of discretion by trial courts. Some courts have elucidated the need for such discretion and etched it into their opinions. An example of a case that has applied the *Restatement,* and derived therefrom a preference for discretion, can be found in the case of *Board of County Commissioners of Weld County v. Slovek*.[6] In that case, plaintiffs brought action against a county-owned gravel pit after water from the pit flooded plaintiffs' property.[7] Upon concluding that the county had been negligent in the manner in which it had maintained its property, the trial court awarded damages based on the diminution in value of the damaged property.[8] The court rejected plaintiffs' argument that damages should be measured by the full cost of restoration.[9] Plaintiffs appealed, arguing that where property constitutes a private resi-

4. *Id.*
5. *Id.*
6. 723 P.2d 1309 (Colo. 1986).
7. *Id.* at 1311.
8. *Id.* at 1311-13.
9. *Id.*

dence and the plaintiff has an interest in having the property restored, plaintiffs should be entitled to those cost-of-repair damages proximately caused by defendant's negligence.[10] Relying on the *Restatement*, the Supreme Court of Colorado upheld the Colorado Court of Appeals' reversal of the award, holding that

> [i]f the damage is reparable, and the costs, although greater than original value, are not wholly unreasonable in relation to that value, and if the evidence demonstrates that payment of market value likely will not adequately compensate the property owner for some personal or other special reason, we conclude that the selection of the cost of restoration as the proper measure of damages would be within the limits of a trial court's discretion.[11]

It is important to note that in *Slovek*, the Supreme Court of Colorado refused the Court of Appeals' invitation to establish a bright-line rule holding that where plaintiffs have a personal reason to have the property restored–as where the property is the site of plaintiffs' private residence–the cost of restoration should become the *prima facie* measure of damages.[12] Instead, according to the Colorado Supreme Court:

> [T]he *Restatement (Second) of Torts* provides that "in an appropriate case" the property owner should be allowed to choose as the measure of damages either the diminution of market value or "the cost of restoration that has been or may be reasonably incurred." *The Restatement* does not explicitly define what is an "appropriate case." However, in justifying the deviation from the market value standard, a *Restatement* comment relies on such factors as the nature of the owner's use of the property . . . and the nature of the injury–in particular, whether the injury is reparable and at what cost. . . .

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10. *Id.* at 1313 (citing Slovek v. Bd. of County Comm'rs, 697 P.2d 781, 783 (Colo. Ct. App. 1984)).

11. *Slovek,* 723 P.2d at 1317.

12. *Id.* at 1313. According to the appellate court:

> We agree with plaintiffs' contention that where, as here, the property is a private residence and the plaintiffs' interest is in having the property restored, plaintiffs are entitled to those "cost of repair" damages proximately caused by defendant's negligence. The award of such repair costs will more effectively return plaintiffs to the position they were in prior to the injury.

Id. (quoting Slovek v. Bd. of County Comm'rs, 697 P.2d 781, 783 (Colo. Ct. App. 1984)).

> We agree that the factors enumerated in [the] *Restatement* . . . are important in determining whether a case is appropriate for application of "cost of restoration" [damages]. . . . We conclude, however, that the considerations governing what is an "appropriate case" for departure from the market value standard *are not susceptible to reduction to a set list and that no formula can be devised that will produce litmus-test certainty* and yet retain the flexibility to produce fair results in all cases. . . . *We prefer to leave the selection of the appropriate measure of damages in each case to the discretion of the trial court*, informed by the considerations previously discussed.[13]

While the reluctance of the courts to establish "bright-line" rules for determining whether an award of restoration damages is appropriate in a particular case may be seen as a laudable attempt to retain discretion in the trial courts to determine the propriety of such damages, it may also be seen as a reluctance or inability to engage in a detailed analysis of the various policy factors that are involved. The absence of such an analysis is especially conspicuous in cases of environmental contamination, in which profound public-policy interests are at odds with each other. Moreover, a court's abdication of its responsibility to consider competing interests and attempt to establish a bright-line rule leaves uncertainty in an area in which unpredictability is itself a cost, as well as a barrier to cleanup and redevelopment. Nevertheless, the section that follows traces the evolution of one such bright-line rule that has done little more than expand the realm of confusion.

B. The Temporary/Permanent Damage Distinction

Whereas some courts have refused to establish an unwavering rule regarding the appropriateness of awards of restoration damages, a number of courts have held that where damage to property is "temporary and subject to restoration," the proper measure of damages is the cost of restoration. Where the harm is permanent, however, damages are measured only by the diminution in the property's value.[14]

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13. *Id.* at 1315-16 (emphasis added) (citations & footnotes omitted).

14. *See, e.g.*, Buras v. Shell Oil Co., 666 F. Supp. 919, 923 (S.D. Miss. 1987); Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979); G&A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379 (Alaska 1974); State v. Diamond Lakes Oil Co., 66 S.W.3d 613 (Ark. 2002); Kratze v. Indep. Order of Oddfellows, Garden City Lodge #11, 500 N.W.2d 115 (Mich. 1993); R&S Dev., Inc. v. Wilson, 534 So. 2d 1008 (Miss. 1988); Amoco Prod. Co. v. Carter Farms Co., 703 P.2d 894 (N.M. 1985); Millers Mut. Fire Ins.

The opinion in the Mississippi case of *R&S Development, Inc. v. Wilson*[15] presents a standard formulation of the rule regarding temporary versus permanent damage. In that case, plaintiffs brought an action against a developer who was found to have improperly bulldozed an alleyway across plaintiffs' land.[16] In assessing the proper measure of damages, the court ruled:

> As a general rule, the measure of damages for injury to land is the difference in value of the land before and after the trespass. However, this rule applies only in cases of permanent injury to realty. Where, as in this case, the injury to the land "is temporary and subject to restoration, the proper measure of damage is the cost of restoration."[17]

When the terms "temporary" and "permanent" are given their literal meaning, the distinction between temporary and permanent damages makes little sense, especially insofar as the categorization of environmental contamination in one manner or the other may determine the appropriate measure of damages. Virtually all such contamination can be deemed as "temporary" to the extent that chemical contaminants eventually break down into less harmful agents. Likewise, such contamination may be deemed "permanent" to the extent that such degradation may take millennia to occur. Moreover, even after cleanup, residual contamination and stigma may remain with the property virtually forever.

In an apparent attempt to mold the temporary/permanent distinction into a more workable rule, courts have resorted to defining the terms "temporary" and "permanent" in a manner that relates little to the longevity of the contaminants' hazardous character. The opinion in the case of *Highland Industrial Park, Inc. v. BEI Defense Systems Co.*,[18] describes such an approach. In that case, a property owner sued a military rocket manufacturer after the latter had contaminated leased property.[19] On the issue of the appropriate measure of damages, the court granted summary judgment in favor of plaintiff, ruling that

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Co. of Tex. v. Wildish Constr. Co., 758 P.2d 836 (Or. 1988); Bean v. Sears, Roebuck & Co., 276 A.2d 613 (Vt. 1971).

15. 534 So. 2d 1008 (Miss. 1988).

16. *Id.* at 1009-11.

17. *Id.* at 1012 (citations omitted) (quoting *Buras*, 666 F. Supp. at 923).

18. 192 F. Supp. 2d 942 (W.D. Ark. 2002).

19. *Id.* at 942-43.

> [t]he law in Arkansas is clear that the proper measure of compensation for damage to property is either the cost of repair or restoration of the damaged property or the difference in the value of the property immediately before the damage and the value of the property immediately after the damage. . . . [W]here restoration is not possible, because the damage is permanent, then diminution in value becomes the remedy that best effectuates the goal of compensatory damages.
>
> BEI . . . bases it [sic] arguments on a proffered definition of 'permanent damage' gleaned from a tortured attempt to trace the development in Arkansas law of the concept that whether damage is permanent "depends upon its connection with the soil." This Court finds that Arkansas decisions are much more clear in their development of the concept that designation of damage as temporary *hinges upon the potential for repair or restoration.*[20]

The court ruled that on the facts before it, no reasonable jury could conclude otherwise than that the damage was remediable and therefore temporary.[21] Thus, although the defendant in *Highland Industrial Park* may have attempted to return the rule distinguishing temporary and permanent damages to an interpretation that more accurately reflects the rule's literal meaning—at least as it would be applied to a case of property contamination—the court rejected such literal interpretation and clarified that the rule does not mean what it actually says.

Reference to strained explanations of the temporary/permanent distinction in the case law confirms the proposition that the rule makes little sense, except to the extent that the term "temporary" is deemed to be synonymous with the phrase: "subject to restoration." Consider, for example, the rule recited by the Alabama Supreme Court in the case of *Borland v. Sanders Lead Co.*[22] In that case, the court reversed a trial court's denial of liability to plaintiff landowners who lived adjacent to a lead smelter that emitted noxious gases.[23] As to the rule to be applied by the trial court on remand with regard to the issue of damages, the court held:

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20. *Id.* at 944-45 (citing *inter alia* Bush v. Taylor, 197 S.W. 1172 (Ark. 1917); Benton Gravel v. Wright, 175 S.W.2d 208 (Ark. 1943)) (emphasis added).

21. *Id.* at 947.

22. 369 So. 2d 523 (Ala. 1979).

23. *Id.* at 525-26.

> [I]n determining the amount of damages recoverable by a plaintiff whose property has been trespassed upon, . . . it must first be determined whether the alleged intrusion is of a permanent nature or of a continuing nature. If the injury is permanent . . . [t]he measure of damages means the difference in the fair market value of the property before and after the trespass . . . .
>
> If the nature of the injury is continuous (i.e., during the tenure of the trespass), the plaintiff can recover for the use of his property or its fair rental value. (Also, plaintiff may be able to recover the cost of restoration if this, plus rental value, is less than the diminution in value.)[24]

It is important to note initially that the court in *Borland* framed the distinction that determines the measure of damages as one that classifies the injury as either "permanent" or "*continuous,*" rather than permanent or *temporary*. In so doing, the opinion may provide insight into the origins of the so-called temporary/permanent distinction in the first instance. By describing a "continuous" injury as one that exists "during the tenure of the trespass," the court appears to make a distinction between those damages that occur only for the duration of a polluter's activity, and thus abate when he ceases that activity or vacates the premises;[25] and permanent damages that last beyond the lessee's or prior owner's tenancy. The *Borland* court's use of the term "continuous" lends it a meaning that is synonymous with the ordinary definition of the word "temporary."[26] In the case of residual hazardous contamination, of course–a case that essentially did not exist among the early cases defining the law applicable to property damages–applying the *Borland* characterization would result in virtually *all* such damages' being characterized as "permanent." The redefinition of the term "temporary" such that it is synonymous with the phrase "subject to restoration" may thus be seen as an attempt by courts to create inroads into an anachronistic paradigm that otherwise would *never* have allowed awards of restoration damages in cases of contamination–at least to the extent that such damages exceed the property's diminution in value.[27]

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24. *Id.* at 531 (emphasis added).

25. *See id.*

26. *See id.* ("If the nature of the injury is continuous (i.e., *during the tenure of the trespass*). . . .") (emphasis added).

27. *See R&S Dev.*, 534 So. 2d at 1012-13; *G&A Contractors,* 517 P.2d at 1386. According to the court in *G&A Contractors*:

> The test whether damages to real estate are permanent or temporary is whether the act producing the injury is productive of all of the damage

The tortured analyses of courts attempting to apply *Borland*-like reasoning to cases of environmental contamination lends support to the contention that the temporary/permanent distinction simply does not provide a workable paradigm in such cases. The fact that most courts applying the rule have qualified the term "temporary" to mean "subject to restoration" reveals a recognition of this postulate. Environmental contamination can usually be seen as having both remedial and non-remedial components. The remediable component may be considered to be that element of contamination which is above applicable regulatory requirements, or which exceeds other reasonable and appropriate threshold levels or quantities.[28] The non-remedial component may be deemed to be that level of contamination which falls within regulatory action levels, or which otherwise cannot be remediated without an unreasonably exorbitant expenditure of funds. A more reasoned approach than the one set forth in *Borland*, therefore, would employ separate measures of damages for the two components of contamination, awarding restoration damages for the remediable fraction, and diminution-in-value damages for the remainder.[29]

> which can result from the injury, and no further damage can ensue, or whether the injury is intermittent and occasional, *or the cause thereof capable of being remedied, removed or abated.* In the former case the damages are permanent and in the latter case the damages are temporary.

G & A Contractors, 517 P.2d at 1386 (emphasis added) (quoting Riddle v. Baltimore & Ohio R. Co., 73 S.E.2d 793, 803 (W. Va. 1952)).

28. The concept of an "applicable or relevant and appropriate requirement," or "ARAR", is derived from federal "Superfund" law, as enacted pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000). Pursuant to CERCLA, plaintiffs may recover the necessary costs of responding to a release or threatened release of a hazardous substance. 42 U.S.C. § 9607. In addition to other costs, such response costs may include the cost to remediate property to within applicable or relevant and appropriate requirements (ARARs). *Id.* § 9621(d).

29. Several courts have "severed" components of the harm in this manner, awarding restoration damages for that portion of damage that is subject to restoration and diminution-in-value damages for the remainder. *See, e.g.*, Morris v. Ciborowski, 311 A.2d 296, 299 (N.H. 1973) (allowing cost to restore land as a result of encroachment of airport onto property, in addition to diminution-in-value damages as a result of increased overflights); Anderson v. Bauer, 681 P.2d 1316, 1324 (Wyo. 1984) (allowing cost to repair damage to homes causing water leaks, in addition to reduction-in-value damages due to "public awareness of a water problem.").

C. Limitations on Recovery Defined by the Value or Diminution-in-Value as a Result of the Harm

The question of whether in some instances there is a limitation on the recovery of restoration damages where the costs of restoration exceed some limitation, such as the market value of the property or the diminution in the property's value as a result of the harm, is an important one that bears further examination. Notably, *Restatement* section 929 contains no limitation on recovery other than one that limits restoration damages where such an award would be disproportionate to the diminition in the property's value.[30]

A thorough review of the various formulations of limitations on recovery of restoration damages was conducted by the court in *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Servicing Company*.[31] In that case, the owner of an apartment complex brought action against a gas service supplier after the supplier's equipment malfunctioned, causing a fire that damaged the complex.[32] In reviewing the state of the law in other jurisdictions applicable to property-value limitations on awards of restoration damages, the court observed:

> [S]ome jurisdictions have placed . . . restrictive limits on when an owner whose property has been tortiously damaged can recover the full cost to repair or restore. . . . [M]any of these courts essentially limit the owner's damage to the lesser of cost to repair and diminution in market value caused by the damage. Other courts, although applying cost to restore as the appropriate measure of damages in all cases of reparable injury to property, use the fair market value of the property before the injury . . . as a ceiling on the damage award.[33]

The court in *Roman Catholic Church* similarly reviewed the various criticisms of value-based limitations on the recovery of restoration damages:

> Recently, courts and commentators have criticized these types of simplistic tests which require the automatic application

30. *See* RESTATEMENT (SECOND) OF TORTS § 929 cmt. b and accompanying text (1979).

31. 618 So. 2d 874 (La. 1993).

32. *Id.* at 875.

33. *Id.* at 877 (citing S. Ind. Gas & Elec. Co. v. Ind. Ins. Co., 383 N.E.2d 387, 395 (Ind. 1978); "L" Invs., Ltd. v. Lynch, 322 N.W.2d 651, 653 (Neb. 1982); Stratford Theater, Inc. v. Town of Stratford, 101 A.2d 279, 280 (Conn. 1953)).

> of limitations on an owner's recovery of the cost to restore or repair his damaged property. "Such ceilings on recovery not only seem unduly mechanical but also seem wrong from the point of view of reasonable compensation. If the plaintiff wishes to use the damaged property, not sell it, repair or restoration at the expense of the defendant is the only remedy that affords full compensation. . . . [Moreover,] '[t]o hold that appellant is without remedy merely because the value of the land has not been diminished, would be to decide that by the wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his property, or else perform the work of restoration at his own expense.'"[34]

As a result of these and other observations regarding the appropriate measure of damages, the court in *Roman Catholic Church* set forth a "rule of thumb" that incorporated no strict property-value limitation, except to the extent that the full cost of restoration may be limited to diminution-in-value where:

> the cost of restoring the property in its original condition is disproportionate to the value of the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs.[35]

As has been stated, reference to Section 929 of the *Restatement* reveals that there is no property-value limitation contained within the *Restatement* provision itself. An argument can be made, however, that such limitation derives from the qualification, contained within Section 929, that the provision relates only to "harm to land resulting from a past invasion *and not amounting to a total destruction of value.*"[36] Nevertheless, the provision itself is silent with respect to harm occurring to land that *equals or exceeds* the value of the property.

The comment to the *Restatement* provision at issue is equally cryptic with regard to the question whether in the absence of a

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34. *Id.* (quoting Henniger v. Dunn, 162 Cal. Rptr. 104, 108 (Cal. Ct. App. 1980); Dandoy v. Oswald Bros. Paving Co., 298 P. 1030, 1031 (Cal. Ct. App. 1931)) (citations omitted).

35. *Id.* at 879. *But cf.* Corbello v. Iowa Prod., 2003 La. LEXIS 613 (La. 2003) (holding that the damage limitations set forth in *Roman Catholic Church* do not apply in a breach-of-contract case).

36. RESTATEMENT (SECOND) OF TORTS § 929(1) (1979) (emphasis added).

"personal reason" to fully restore property, a property-value limitation exists. Comment 'b' to Section 929 states that

> [e]ven in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. . . .
>
> On the other hand, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building.[37]

The first of these sentences appears to make clear that absent a personal reason to restore, there is no limitation on recovery defined by the value of the property. In the second, however, the hypothetical seems to suggest that *only* where there is such a personal reason can there be recovery that exceeds the property's value. The result is a degree of ambiguity as to the question whether under the *Restatement*, there is any limitation on recovery of restoration damages based on the value of the property. Nevertheless, as observed by the court in *Roman Catholic Church*, some courts have removed any such uncertainty and have affirmatively decided that such a limitation exists, at least where there is no exception for personal reasons.[38]

The problem of discerning whether the law imposes a limitation on recovery of restoration damages based on the value, or diminution-in-value, of property, is compounded in a case that involves environmental contamination. Consider, for example, a hypothetical case involving such damage, in which there has been no state or federal enforcement action, and yet the contamination on the property exceeds regulatory thresholds. In such an instance, restoration costs may well exceed the appraised value of the property, and yet a market analysis might show that a willing buyer might purchase the property for a positive value and take the risk that there will be no such enforcement action in the foreseeable future. Thus, there has been no total destruction of market value, and yet restoration costs would exceed the property's worth. In jurisdictions that limit awards to the property's value or diminution-in-value in such instances, the remaining expense of cleanup must be borne by the owner. There is thus a strong disincentive to actually effectuate cleanup, and an incentive instead to simply sell

37. *Id.* cmt. b.

38. *See Roman Catholic Church*, 618 So. 2d at 879.

the property to someone who is willing to take the risk that cleanup may never be required.

Finally, the cited case law and the *Restatement* do not make clear whether the value-based limitation should be waived for public, rather than personal reasons. While the desire to effectuate cleanup may be considered "personal", a consideration of the manner in which cleanup costs should be allocated implicates public interests that are not a necessary element of traditional doctrines applicable to awards of restoration damages. The section that follows will examine the "personal reasons" exception in more detail.

D. The "Personal Reasons" Exception to Value-Based Limitations on the Recovery of Restoration Damages

According to the comments to Section 929 of the *Restatement*, if

> the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm.[39]

An example of a decision addressing the "personal-use" exception may be found in the case of *St. Martin v. Mobil Exploration & Producing U.S.*[40]

In *St. Martin*, the court addressed a situation in which defendant oil companies had been found to have breached their duties to maintain spoil banks along access canals that traversed certain Louisiana marshlands, as a result of which substantial portions of the marsh had eroded.[41] The trial court awarded damages based on the cost of restoring the marshland, valued at $10,000 per acre, rather than on any devaluation of the property's market price of $245 per acre.[42]

On appeal, the Fifth Circuit Court of Appeals initially reviewed Louisiana precedent applicable to the award of restoration damages. According to the court:

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39. RESTATEMENT (SECOND) OF TORTS § 929 cmt. b (emphasis added).
40. 224 F.3d 402 (5th Cir. 2000).
41. *Id.* at 403-04.
42. *Id.* at 410.

> Under *Roman Catholic Church v. Louisiana Gas Serv. Co.*, restoration damages in excess of property value are available only where there is "a reason personal to the owner for restoring the original condition or there is a reason to believe that plaintiff will, in fact, make the repairs."
>
> In the present case, the district court found that the St. Martins have demonstrated genuine interest in the health of the marsh through their efforts on behalf of the Mandalay Wildlife Refuge, including a $140,000 gift to the Nature Conservancy to support its creation of the refuge . . . and continuing aid through the donation of labor and resources. The St. Martins live adjacent to the marsh in question, and Mr. St. Martin has used it for hunting and other recreational purposes for a considerable period of time. . . . Michael St. Martin attempted repairs of the canal banks . . . and undertook other restorative projects. Under these circumstances, the St. Martins' case falls within the *Roman Catholic Church* allowance of greater than market value damages.[43]

The court in *St. Martin* focused on plaintiffs' recreational use of the property in question, and their continuing care for its preservation in the form of restorative work and donations of labor and resources, to conclude that plaintiffs had personal reasons for restoring the property that entitled them to restoration damages.[44] The question left open by both the cited case law and the *Restatement*, however–a question that is central to the principal thesis of this article–is whether restoration costs may exceed the total value of the property where there are arguably no *personal* reasons, but rather *public policy* reasons–such as the desirability of protecting unknowing members of the public and preserving property for future generations–for nevertheless awarding the full cost of restoration. The troublesome nature of this unanswered question is confounded by the fact that courts applying the "personal-use" exception have focused on plaintiffs' residential and recreational uses of their properties, rather than the public's interest in having the property restored. Cases invoking the exception have often involved situations in which the plaintiff's private residence has been located on the property, or he or she has intended to use it recreationally.[45] A few cases have focused on

43. *Id.* at 410-11 (citation omitted) (quoting *Roman Catholic Church*, 618 So. 2d at 879-80).

44. *Id.* at 409.

45. *E.g.*, Keitges v. VanDermeulen, 240 Neb. 580, 590-91 (1992) ("[W]hen the owner of land intends to use the property for residential or recreational purposes . . .

plaintiffs' private interests in developing their properties commercially.[46] Still others have focused on plaintiffs' aesthetic or historical interests.[47] In any event, it is clear that the "personal-reasons" exception to any limitation on damages based on property value, or on diminution-in-value, does not provide a clear basis for determining that an award of restoration damages is appropriate in a case involving environmental contamination.

E. Limits on Recovery Based on Proportionality or Reasonableness

Having shown that the "personal-reasons" exception to any perceived property-value or proportionality requirement contained within the *Restatement* and interpreting case law provides no clear basis for determining whether the full cost of restoration should be awarded in an environmental case, and having shown further that the *Restatement* itself is unclear as to the question whether there should be some limitation on recovery based on property value or diminution-in-value, the discussion will turn to an examination of the extent to which the requirement of "proportionality" or "reasonableness" have been interpreted to limit such an award.

The principal language of Section 929 of the *Restatement* contains no limitation on damages based on any measure of proportionality. The comment to Section 929, however, states that "[i]f . . . the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a [personal reason to restore], damages are measured only by [diminution-in-value]."[48]

It is important to recall that the general rule set forth in the *Restatement* provides that restoration damages are equally available to plaintiffs as are diminution-in-value damages, subject only to the limitation that it be an "appropriate case." As stated, however, the comment to *Restatement* Section 929 contains the further limitation of "proportionality". The "personal-reasons" exception, as established pursuant to the same comment, is *not* an exception

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the owner is not limited to the difference in value of the property before and after the damage . . . .").

46. *E.g.*, *G&A Contractors, Inc.*, 517 P.2d 1379.

47. *E.g.*, Maloof v. United States, 242 F. Supp. 175, 183 (D. Md. 1965) (highlighting plaintiff's desire to create "a shrine to John Hanson and to establish a cultural center where artists could congregate and where he could display his art treasures").

48. RESTATEMENT (SECOND) OF TORTS § 929 cmt. b (1979).

to any general rule establishing diminution-in-value as a measure of damages, but rather *an exception to the proportionality requirement.* Thus, under the literal language of the *Restatement*, the cost of restoration is only limited by the requirements of "appropriateness" and "proportionality", and the latter limitation does not apply if there is a "personal reason" for allowing the full cost of restoration in any event.

It is also important to note that the proportionality requirement contained within the *Restatement* utilizes as a yardstick the *diminution* in value of the property as a result of the harm, not the value of the property itself.[49] This fact brings to light several important observations. First, it must be possible that the costs of restoration may be disproportionate to the diminution in value of a parcel of property, and yet not exceed the total value of the property. If this were not the case, it would not make sense for Section 929 to limit its scope to instances of harm "not amounting to a total destruction of value,"[50] while still providing a proportionality requirement. However, the converse must also be true: it must be possible for restoration costs to exceed the value of the property, and yet not be disproportionate to the reduction in value. In such an instance, the *Restatement* does not make clear what the appropriate measure of damages should be. The full range of options exists, of course, including: the diminution in the property's value; the full value of the property; or the full cost of restoration.

Where the cost of restoration *is* found to be excessive or disproportionate to either the value of property or its diminution as a result of the harm at issue, both the *Restatement* and the opinion in *Roman Catholic Church* articulate a curious result.[51] Specifically, in such an instance, both authorities hold that the "default" measure of damages should be the diminution in the property's value.[52] However, if justifications exist for awarding restoration damages except to the extent of the *disproportionate* amount,[53] why should a court not reduce the award in such instances to the cost of restoration that is *not* disproportionate, rather than to an

49. In contrast, the court in *Roman Catholic Church* formulated the rule of proportionality using the value of the property as a yardstick. *Roman Catholic Church*, 618 So. 2d at 879.

50. RESTATEMENT (SECOND) OF TORTS § 929(1) (1979).

51. *See Roman Catholic Church*, 618 So. 2d at 879-80; *see also supra* text accompanying note 46.

52. *Roman Catholic Church*, 618 So. 2d at 879-80; RESTATEMENT (SECOND) OF TORTS § 929 cmt. b.

53. *See Roman Catholic Church*, 618 So. 2d at 880.

amount arbitrarily represented by some fraction of the property's value? It would seem that no clear justification exists to do the latter. In the case of *Roman Catholic Church*, at least, the rule set forth by the court would seem to be dicta to that extent—as the court ultimately awarded the full cost of restoration[54]—and the question remains whether the court might have reformulated the rule it articulated in a case in which the full cost of restoration were found to be unreasonable or disproportionate.

The court in *Roman Catholic Church* conducted an extensive review of case law applying the "reasonableness" or "proportionality" exception. According to the court: "[T]he courts often state that some limits exist to the amount that can be recovered: e.g., the repair must be 'practical' and 'reasonable', expenditures are allowable unless 'wholly disproportionate to the value of the land,' or 'disproportionate to actual injury,' or 'economically wasteful.'"[55] However, "extensive damages are often awarded as cost of restoration."[56] "In only a few cases have courts refused to award the full cost to restore because the expense was truly exorbitant."[57]

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54. *Id.*

55. *Id.* (quoting Bd. of County Comm'rs v. Slovek, 723 P.2d 1309, 1316 (Colo. 1986)).

56. *Id.* at 879 (citing Morris v. Ciborowski, 311 A.2d 296, 298-99 (N.H. 1973) ($16,000.00 to replace trees); Berg v. Reaction Motors Div., 181 A.2d 487, 491-92 (N.J. 1962) (awarding $25,605.00 for structural damage from jet engine testing although diminution in value was $3,700.00); G&A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379, 1387 (Alaska 1974) (awarding $12,550.00 for restoring vegetation to a few acres of tract purchased for $4,000.00 per acre); Gross v. Jackson Township, 476 A.2d 974, 975-76 (Pa. 1984) (awarding $9,674.00 for replanting shrubs removed by construction in widening a road); Melton v. United States, 488 F. Supp. 1066, 1069, 1075 (D.D.C. 1980) ($90,000.00 to complete a $40,000.00 restoration job); Trinity Church v. John Hancock Mut. Life Ins. Co., 502 N.E.2d 532, 533 n.3, 536 (1987) (awarding $3.6 million to repair structural damage to an historic church building even though church had no present intention to restore)); *see also* Highland Indus. Park Inc. v. BEI Def. Sys. Co., 192 F. Supp. 2d 942, 945 (W.D. Ark. 2002) (refusing to limit an award of restoration damages, noting that "awards for rectification of hazardous waste contamination, often at costs 'grossly disproportionate' to land value, are regularly upheld and often statutorily mandated.").

57. *Roman Catholic Church*, 618 So. 2d at 879 (citing Henninger v. Dunn, 162 Cal. Rptr. 104, 106, 109 (Cal. Ct. App. 1980) (holding $241,257.00 to restore trees and undergrowth "manifestly unreasonable" in relation to land value which increased from $179,000.00 to $184,000.00 because defendant bulldozed unauthorized road on land); Maloof v. United States, 242 F. Supp. 175, 184-88 (D. Md. 1965) (holding cost to replace vegetation limited to $77,660.00 to approximate but not duplicate actual pre-existing condition); Ewell v. Petro Processors of La., Inc., 364 So.2d 604, 608-09 (La. App. 1st Cir. 1978) (holding owners of one-eighth undivided interest in 550 acres of land injured by toxic waste were limited in recovery to the value of their interest, $25,000.00, where cost of restoration sought was $170 million)).

The case of *Ewell v. Petro Processors of Louisiana, Inc.*[58] presents an interesting application of the proportionality requirement in an environmental case. In *Ewell*, plaintiffs owned an undivided interest in land located adjacent to property on which defendant had operated a commercial industrial waste disposal facility, at which drums of toxic waste had been buried.[59] Some of the wastes had leaked onto plaintiffs' property.[60] The court affirmed the jury's finding of liability on the defendant.[61] In assessing the proper measure of damages, the court observed:

> We think that the proper measure of damages must be determined from the circumstances of each case, considering such factors as the extent of the damage; the use to which the property may be put; extent of economic loss, both as to value and income; and the cost of and practicability of restoration . . . .
>
> [The property's] value was set at $375.00 per acre, or slightly over $200,000.00 for the 550 acres affected, by the only expert witness who testified as to that point. The restoration of the property . . . would cost 170 million dollars. . . .
>
> Under those circumstances, we are of the opinion that the proper measure of damages is the diminution in value of the affected property. . . . The jury obviously accepted the testimony of plaintiffs' witnesses, since they awarded the full value of their interest in the property to plaintiffs. We cannot say that this finding is manifestly erroneous . . . . In view of our finding that the jury made the maximum award permissible under the circumstances of this case, we see no point in detailing or commenting on these rulings.[62]

Several aspects of the court's opinion in *Ewell* warrant further consideration. First, although the court does not invoke the *Restatement* or other precedent establishing a strict proportionality limitation on restoration damages, both the court and the jury apparently considered the 170-million-dollar restoration cost to be exorbitant in relation to the value of plaintiffs' interest in the property.[63] As a result, the court determined that it was of the opinion "that the proper measure of damages is the diminution in

58. 364 So.2d 604 (La. Ct. App. 1978).
59. *Id.* at 606.
60. *Id.*
61. *Id.* at 609.
62. *Id.*
63. *See id.*

value of the affected property."[64] In spite of this determination, the court affirmed the award of damages measured by the full value of plaintiffs' interest in the property.[65]

Secondly, the glaring omission from the court's opinion in *Ewell* are the interests of the state and the general public in having the property cleaned up. In the absence of an award of the full cost of restoration, where is the incentive, or indeed the requirement, to clean up the property? Certainly the court's and the jury's refusal to award restoration costs would likely have been tempered by the observation that there was likely no affirmative requirement that the plaintiffs actually use the award to clean up the property, nor had there apparently been any enforcement action on the part of the state requiring such cleanup. As a result, from one point of view, the defendants may be seen to have secured the use of a dangerous and inexpensive disposal facility, without the necessity of resort to a costly permitting and oversight process. Moreover, the result creates within the defendants a disincentive to apply strict measures to contain the release of pollution, and arguably places on taxpayers the requirement to fund and effectuate cleanup sometime in the distant future. From another point of view, plaintiffs in such an instance should not receive a windfall in the form of restoration damages simply because the state has not acted to effectuate cleanup.

The section that follows will examine in more detail the extent to which evidence of a plaintiff's intention to clean up–or alternatively, a statutory obligation to do so–impacts the analysis of whether an award of the full cost of restoration is warranted.

F. Intention or Obligation to Clean Up

As has been observed, a principal impediment to an affirmative rule establishing the full cost of restoration as the default measure of damages in cases involving damage to property is the concern that the plaintiff will not actually use the award to effectuate cleanup. This was the concern that motivated the court in *Roman Catholic Church* to establish a "rule of thumb" holding that disproportionate damages should not be awarded unless "there is a reason to believe that the plaintiff will, in fact, make the repairs."[66] The court in *St. Martin* found such evidence in

64. *Ewell*, 364 So. 2d at 609.
65. *See id.*
66. *Roman Catholic Church*, 618 So.2d at 879.

plaintiffs' "attempted repairs of the canal banks . . . and . . . other restorative projects,"[67] and affirmed the award of the full cost of restoration.[68]

One court has developed a novel and well-reasoned exception to its own general rule limiting damages to the value of the property in an environmental case. In *Nischke v. Farmers & Merchants Bank & Trust*,[69] the court addressed a situation in which plaintiffs' property had been contaminated by a leaking underground storage tank. In addressing the appropriate measure of damages, the court observed:

> [T]he general rule in Wisconsin is that a property owner's damages are the lesser of the cost of repair or the property's diminished value. The rationale for this rule is to ensure a property owner only recovers her actual loss. . . . [A]warding the cost of repair in excess of [the property's] value would give the property owner a windfall and be an inefficient use of economic resources . . . . However, we conclude that the general rule is inapplicable in this case. . . .
>
> . . . .
>
> . . . [T]he discharge of a hazardous substance is an environmental hazard to the citizens of Wisconsin . . . . Under [the Wisconsin code], Nischke has a duty as a landowner in possession of discharged hazardous substances to take remedial measures to restore the environment.
>
> Thus, assuming the [defendant] was the negligent cause of the leak, its negligence has made Nischke legally obligated to incur costs to restore her property. These are recoverable as the normal measure of compensatory damages, despite the fact such expenses may exceed the diminution in fair market value.[70]

In its opinion, the court in *Nischke* responded to any suggestion or implication that in the event the state did not commence an enforcement action to ensure cleanup, plaintiff might be unjustly enriched.[71] According to the court, plaintiff's "obligation to take [remedial] measures does not hinge upon the [enforcement agency]'s caseload or whether it has brought an enforcement action against her."[72] This observation focuses on the fundamental

67. *St. Martin*, 224 F.3d at 411; *see supra* text accompanying notes 40-46.
68. *St. Martin*, 224 F.3d at 404, 411.
69. 522 N.W.2d 542 (Wis. Ct. App. 1994).
70. *Id.* at 551-52.
71. *Id.*
72. *Id.* at 552.

paradox associated with an award of restoration damages: if plaintiff is not required by an enforcement action, or by a third-party civil action brought by neighboring property owners, to actually use the award to clean up the property, how are the public's interests, and those of future property owners, protected?

The aforementioned paradox could conceivably be resolved if the court in such an instance were to establish a constructive trust for the benefit of the property, or on behalf of present, future and adjoining landowners. The trustee in such an instance would possess a fiduciary duty to ensure effective cleanup of the property. This hypothesis will be examined more fully below.[73]

G. Restoration Damages as a Punitive Measure

Some courts appear to have been more amenable to an award of restoration damages that exceeds property value-based limitations where the conduct of the defendant has been particularly egregious. The New Hampshire case of *Morris v. Ciborowski*[74] presents such an instance.

In *Morris*, defendant airport owner had repeatedly approached plaintiff, an adjoining landowner, for the purpose of attempting to negotiate the purchase of plaintiff's land.[75] Defendant desired the land in order to establish a "clear zone" around the airport that would permit defendant to obtain approval from the New Hampshire Aeronautics Commission to operate the airfield commercially.[76] Plaintiff refused each of defendant's offers to purchase the property, whereupon defendant bulldozed the property in any event, "clear[ing] part of the parcel he had continually tried to buy, destroying or removing shrubs and trees, boundary lines, fences, fouling a brook, and interfering with [plaintiff's] other incidents of ownership."[77] The court affirmed an award of damages measured by both the cost to restore plaintiff's property and the diminished value associated with increased overflights as a result of the modification.[78]

In assessing the propriety of the trial court's award of restoration damages, the court in *Morris* did not stop with simple resort to traditional doctrines that permit such an award. Instead, the

73. *See infra* Part IV.
74. 311 A.2d 296 (N.H. 1973).
75. *Id.* at 298.
76. *Id.* at 297-98.
77. *Id.* at 298.
78. *Id.* at 299.

court continued its analysis by pointing to the egregiousness of defendant's conduct. According to the court: "We cannot say on the record before us that the verdict 'exceeds any rational appraisal of the damages or is manifestly exorbitant' in view of the evidence of malice which permitted the application of a more liberal rule of damages."[79]

While there appear to be very few decisions that address the proposition that a defendant's egregious conduct might justify an award of restoration damages where such an award might otherwise be limited, such a proposition may draw support from decisions of courts sitting in equity. An example of such a decision may be found in the Colorado case of *Golden Press, Inc. v. Rylands*.[80]

In *Rylands*, plaintiffs brought action against a neighboring property owner who had constructed a building that partially encroached plaintiffs' property.[81] The trial court granted an injunction directing defendant to remove those offending portions of the building.[82] On appeal, the court addressed the propriety of the trial court's grant of injunctive relief:

> Where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may well require its restoration regardless of the expense of removal as compared with damage suffered therefrom; but where the encroachment was in good faith, we think the court should weigh the circumstances so that it shall not act oppressively. . . . Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages.[83]

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79. *Id.* at 299 (quoting Jackson v. Leu-Pierre, 296 A.2d 902, 904 (N.H. 1972)) (citing Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 68 (N.H. 1972) ("[W]hen the act involved is wanton, malicious, or oppressive, the compensatory damages awarded may reflect the aggravating circumstances.") (citations omitted); Loney v. Parsons, 284 A.2d 910 (N.H. 1971)); *cf.* Chevron Oil Co. v. G.B. Snellgrove, 175 So. 2d 471, 474 (Miss. 1965) ("As a general rule, the measure of damages in action[s] for . . . injury to land *where there is no willful trespass* is the difference in value in the before-and-after damage to the premises." (emphasis added)).

80. 235 P.2d 592 (Colo. 1951).

81. *Id.* at 593.

82. *Id.* at 594.

83. *Id.* at 595 (citing *inter alia* 5 JOHN NORTON POMEROY'S EQUITY JURISPRUDENCE § 508 (3d. ed. 1905)).

Insofar as the award of an injunction requiring a defendant to expend the costs of restoration does not seem to offend equitable notions of fairness–at least to the extent that the defendants' conduct has been egregious–an award of damages measured by the cost of restoration in a similar instance should not be deemed contrary to common-law principles. The question remains as to how such basis for an award of restoration damages might interplay with otherwise-allocated punitive damage awards, or might be seen to conflict with policies against such awards in jurisdictions that forbid them.

IV. The Equitable Trust as a Precaution Against Unjust Enrichment

The principal impediment to wider acceptance of awards of the full measure of restoration damages in cases of environmental contamination is surely the concern that plaintiffs will be unjustly enriched where they are not required to expend the recovered sums on actual property restoration. As a result, the necessity of effectuating cleanup could fall on taxpayers, or on others who remotely appear in the chain of causation. Alternatively, otherwise useful parcels of property may simply be left as "sacrifice zones" whose remediation would be left to future landowners, or to the forces of nature. During the interim, the existence of hazardous toxins on the property could expose unknowing members of the public to a significant health risk. Each of these results would be contrary to the public interest.

One way to resolve the dilemma presented by this challenge to the public interest would be to allow courts awarding restoration damages to create a "constructive trust" or "equitable trust." Such a trust could be created for the benefit of future property owners, neighbors, and/or for interested members of the general public.

Judge Cardozo described a constructive trust as "the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."[84] The purpose of such a constructive trust is to prevent unjust enrichment. According to the *Restatement of Restitution*, "[a] constructive trust is imposed not because of the intention of the parties but because the

84. Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919).

person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property."[85]

The Supreme Court of Florida further elaborated the principles supporting the imposition of a constructive trust:

> A constructive trust is one raised by equity in respect of property . . . where . . . it is against equity that it should be retained by him who holds it. Constructive trusts arise purely by construction of equity, independently of any actual or presumed intention of the parties to create a trust, *and are generally thrust on the trustee for the purpose of working out the remedy.*[86]

A constructive trust imposed for the purpose of effectuating cleanup of contaminated property might also possess certain characteristics of a charitable trust. According to one author: "[a]t its simplest, a trust requires a creator, a beneficiary, a trustee, and trust property. . . . In the case of a charitable trust, which must be created to serve some public purpose, beneficiaries are often unspecified or defined only as members of the public."[87] The *Restatement (Second) of Trusts* similarly describes some of the characteristics of charitable trusts:

> In the case of a charitable trust there need not be and ordinarily is not a definite beneficiary, and the trustee is ordinarily not in a fiduciary relation to any specific person. The trustee of a charitable trust, however, is subject to duties as fiduciary similar to those to which the trustee of a private trust is subject, and he incurs similar liabilities. . . . The remedy for the violation of his duties by the trustee of a charitable trust is ordinarily at the suit of the Attorney General.[88]

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85. RESTATEMENT OF RESTITUTION § 160 cmt. b (1937); *see also* RESTATEMENT (SECOND) OF TRUSTS § 73 cmt. b (1959) ("A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.").

86. Quinn v. Phipps, 113 So. 419, 422 (Fla. 1927) (emphasis added).

87. Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 323-24 (2000) (footnotes omitted) (citing GEORGE T. BOGERT, TRUSTS 167 (1987) ("A trust may have as its purpose the accomplishment of advantages to society. Such a trust is called a public or charitable trust."); BOGERT, *supra*, at 201-07, 235-37 (discussing governmental trusts, or trusts initiated to make the life of the community safer)).

88. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. a (1959).

Just as a charitable trust does not require specific beneficiaries, the beneficiaries of an equitable trust created with an award of restoration damages could be "unspecified or defined only as members of the public."[89] Moreover, its obligations could be enforceable at the suit of the Attorney General, as well as future or neighboring property owners.

Finally, an equitable trust created for the purpose of effectuating the cleanup of property could possess certain elements of a public trust. The "public trust doctrine" that has been established within the laws of many jurisdictions incorporates these elements:

> Under American democratic theory, the nation's people possess an abstract form of sovereignty over the land and its natural resources that may be termed original ownership. In creating the government, the people delegated many powers and duties to its sovereign authority, including managerial responsibilities over the country's resources. In trust terms, the people designated the government as trustee of the land and other natural resources and themselves as beneficiaries. This framework is particularly analogous to that of a charitable trust, which may incorporate a public purpose, government trustee, and generalized beneficiaries.[90]

The public trust analogy is particularly applicable to the public's interest in intergenerational equity that would be implicated by an award of restoration damages. As noted by one court, "[t]he beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res."[91]

A wide variety of res have been found to be subject to the public trust. Some of these include water resources;[92] submerged lands;[93] hospital property;[94] railroad property;[95] and funds administered by public officials.[96]

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89. Manus, *supra* note 87, at 324.

90. *Id.*

91. *In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, 9 P.3d 409, 455 (Haw. 2000) (quoting Ariz. Cent. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991)).

92. *See, e.g., id.*

93. *See, e.g.*, Ill. Cent. R. Co. v. Illinois, 146 U.S. 387 (1892).

94. *See, e.g.*, Fowler v. Norman Mun. Hosp., 810 P.2d 822 (Okla. 1991).

95. *See, e.g.*, Pueblo & Ark. Valley R. Co. v. Taylor, 6 Colo. 1 (Colo. 1881).

96. *See, e.g.*, Allen v. State, 939 S.W.2d 270 (Ark. 1997).

The creation of an equitable "cleanup trust" has been suggested by at least one court sitting in bankruptcy. Specifically, in the case of *AL Tech Specialty Steel Corp. v. Allegheny International, Inc.*,[97] the district court faced a situation in which the bankruptcy court had disallowed the CERCLA cost-recovery claim[98] of AL Tech, a bankruptcy creditor and subsequent owner of contaminated property, against Allegheny International, the prior owner and bankruptcy debtor.[99] The bankruptcy court had held that the claim should be disallowed pursuant to Section 502(e)(1)(B) of the Bankruptcy Code,[100] which requires that the court must disallow any claim as to which the claimant and the debtor are mutually liable to a third-party creditor.[101] Allegheny had argued that the CERCLA claim was one that should be asserted in the first instance by the Environmental Protection Agency.[102] The district court disagreed, noting that "AL Tech does not seek to recover response costs owed to, or incurred by, the EPA, the DEC, or any other third party, but instead seeks to recover response costs it has directly incurred and will directly incur in the future."[103]

In ruling against the bankruptcy debtor on the issue of the viability of the CERCLA claim, the district court addressed the principal concern of the bankruptcy judge:

> The bankruptcy court expressed concern that allowance of AL Tech's claims could result in double liability to the debtor if AL Tech fails to clean up the sites and the EPA then brings an action against debtor for remediation of the hazardous sites. Such possibility troubles this Court as well. However, the gravity of this possibility can be diminished. For example, . . . as suggested by AL Tech, the bankruptcy court can require that any distributions on AL Tech's claim be placed in a trust to be expended on the remediation of the waste sites. . . . Creation of a trust to be expended on contingent claims is a frequently used mechanism for insuring that such funds are properly disbursed. In the present case, use of a trust would be an effective means of

97. 126 B.R. 919 (W.D. Pa. 1991).

98. *See* 42 U.S.C. § 9607 (2000); discussion *supra* note 27.

99. *Allegheny*, 126 B.R. at 920.

100. 11 U.S.C. § 502(e)(1)(B).

101. *Allegheny*, 126 B.R. at 921.

102. *Id.*

103. *Id.* at 923.

> guaranteeing that distributions on AL Tech's claim be used to remediate the waste sites.[104]

One court, following *Allegheny* and facing a concurrence of the parties regarding the manner in which the claim's proceeds should be administered, oversaw the establishment of a cleanup trust.[105]

Clearly, it would be well within the authority of a court sitting in equity to establish a constructive or equitable trust using the proceeds of an award of restoration damages. Just as public and charitable trusts may establish a vague or uncertain class of beneficiaries, including current and future members of the public, so too could an equitable trust created for the purpose of remediating environmental contamination on a specific parcel of property be established for the benefit of the present and future neighboring community. The trustee could be designated as the current property owner, a special master designated for the purpose of ensuring remediation, or a specific governmental agency or entity. The right to enforce the fiduciary relationship could be specifically defined by the court, or vested in an arm of the state government. In this manner, a court addressing a claim for restoration damages could establish a framework for ensuring effective remediation, while alleviating concerns over plaintiffs' unjust enrichment.

V. The Recommended Reforms in Practice

The principal thrusts of the foregoing discussion have been the recommendations that, insofar as the issue of restoration damages is concerned, (1) the temporary/permanent distinction should be abandoned to the extent that it has been used to determine whether damages should be measured by the diminution in value of contaminated property, or rather the full cost of restoration; (2) an alternative paradigm should be created that awards restoration damages for those areas and/or fractions of contamination that can cost-effectively be remediated, and that awards diminution-in-value damages as to those that cannot; (3) arbitrary limitations on recovery of restoration damages based on the market value of property, proportionality or another yardstick should be dispensed with; and (4) as to sums of money actually tendered

104. *Id.* at 924 (citations omitted); *see also* Francis E. Goodwyn, *Claims Estimation and the Use of the "Cleanup Trust" in Environmental Bankruptcy Cases*, 9 AM. BANKR. INST. L. REV. 769, 807-13 (2001).

105. *See In re* Harvard Indus., Inc., 138 B.R. 10, 14 (Bankr. D. Del. 1992).

pursuant to an award of restoration damages, those sums should be placed into an equitable cleanup trust, which should be administered for the benefit of future property owners and members of the public. The discussion that follows will describe the manner in which these recommendations, if implemented, might have affected the outcome of a case such as that presented to the court in *Ewell v. Petro Processors of Louisiana, Inc.*[106]

Recall that in *Ewell*, plaintiffs owned an undivided interest in land located adjacent to property on which defendant had operated an industrial waste disposal facility, at which drums of toxic waste had been buried.[107] Some of the wastes had leaked onto plaintiffs' property.[108] The court described the property as swamp land that "prior to being polluted . . . was used seasonally for grazing of cattle, and, non-commercially, for hunting and fishing. Its only other commercial use was for the growing of timber."[109] After reviewing Louisiana law as to the issue of the measure of damages, the court in *Ewell* found that the proper measure of damages must be determined from the individual circumstances of the case. In light of the fact that the property was valued at $200,000, whereas restoration of the property, according to plaintiffs, would cost 170 million dollars, the court found that the jury's award representing the diminution in the property's value was "the maximum award permissible under the circumstances."[110]

Several questions come to mind when reviewing the facts in *Ewell* in light of the discussion above. First, who now pays for the cleanup of the property? Should it be left to the taxpayer, or to future generations? Or should the negligent polluter be given the reward of an inexpensive, unpermitted disposal facility that costs him only the market value of the property, which he would have had to have paid in any event? Should this prime Louisiana marshland be left in its polluted state, endangering native species and human visiters? Based on the court's pronouncement in *Ewell*, the only function of the courts is to ensure that the owner's financial interest in the property is compensated. There is no consideration of the public's interest in health and safety, equity, deterrence, or environmental aesthetics.

106. 364 So. 2d 604, 608-09 (La. Ct. App. 1978); *see* discussion *supra* text accompanying notes 61-68.

107. *Ewell*, 364 So. 2d at 606.

108. *Id.* at 605-06.

109. *Id.* at 609.

110. *Id.*

Consider how the outcome in *Ewell* might have been different given the paradigm proposed herein. First, a jury considering the facts of the case would have been asked to determine what portion of the property could be remediated cost-effectively, in contrast to the level of contamination that can be allowed to remain without exposing persons, flora and fauna to unnecessary or undue harm. These levels can be determined with reference to regulatory or other applicable or reasonable and appropriate requirements.[111] Where the defendant's conduct has been particularly egregious, such fact can be used to adjust the cost-benefit equation.[112]

Once the factfinder has determined the appropriate measure of damages to be used for restoration, the sum of money representing that amount can be placed into a trust created for the benefit of future owners, neighbors, and/or the general public. The trustee can be a professional mediator, scientist, governmental entity, landowner, or other trusted designee of the court. Such a trust would possess elements of a constructive trust because it would be designed to prevent the unjust enrichment of the property-owner/plaintiff, who might otherwise use the proceeds for a selfish purpose.[113] The trust would also possess the characteristics of a charitable trust, insofar as it would be designated for the public purposes of protecting human health and the environment, and to the extent that the trust's beneficiaries would be unspecified, or defined as members of the general public.[114] Finally, the cleanup trust would derive authority from the public-trust doctrine, insofar as it can be said that the people designated the government as trustee of their land and other natural resources in the first instance.[115] Pursuant to the doctrine, to the extent that an entity claiming ownership of property has defiled those resources, the government's designee is authorized to intervene and allocate the funds necessary to protect those resources on behalf of the trust's beneficiaries, which would be comprised of present and future members of the general public.

Once an "equitable cleanup trust" is created, certain aspects of the trust could be left to the discretion of the court. For example, the court could designate the parties who would be allowed to challenge the propriety of disbursements from the trust, and the

111. *See supra* text accompanying note 27.
112. *See supra* part III.G.
113. *See supra* text accompanying notes 80-82.
114. *See supra* text accompanying notes 89-91.
115. *See supra* text accompanying notes 95-101.

procedures by which they could do so. Provisions for the payment of attorneys' fees and experts' fees could be incorporated into the decree establishing the trust. If proceeds were left in the trust upon completion of cleanup activities, the court could determine whether such proceeds should be returned to the parties, or to an alternative public purpose. Such considerations could be left to the courts in particular jurisdictions. Nevertheless, it seems clear that utilization of the mechanism of an equitable cleanup trust would bear enormous advantages over existing doctrines for allocation of environmental damages.

VI. Conclusion

From the standpoint of a plaintiff whose property has become contaminated by environmental pollutants, damage remedies that are designed to promote full restoration of property have been slow to evolve. Anachronistic limitations on recovery based on property value fail to take into account the public's interest in ensuring an effective cleanup. Exceptions to those limitations based on personal use similarly fail to take into account the public's interest, and otherwise provide a subjective and unpredictable measure of relief.

The evolution of the law applicable to awards of restoration damages have been thwarted by the perception that plaintiffs who would receive such awards would be unjustly enriched. In some cases, those fears have been mitigated by the existence of statutory obligations to effectuate cleanup, or by the punitive nature of an award representing the full cost of restoration in cases of particularly egregious conduct. Nevertheless, it appears clear that if a court were to invoke equitable doctrines permitting the establishment of an equitable trust that would administer cleanup funds, both the plaintiff's interest in a complete remedy and the public's interest in effectuating a prompt and effective cleanup would be well-served.