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THE *DEEPWATER HORIZON* OIL SPILL AND THE LIMITS OF CIVIL LIABILITY

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Abstract: This Article uses the unprecedented disaster in the Gulf of Mexico as an opportunity to critically evaluate the law pertaining to civil liability for oil pollution before and after the enactment of the Oil Pollution Act. This topic is analyzed as a derivative of a more general concern, namely the internal harmony of civil liability regimes. The Article unveils a general incongruity in American land-based and maritime tort law that surfaced through the *Exxon Valdez* litigation, and examines whether subsequent statutory reform has eliminated the problem in the limited context of marine oil pollution, using the *Deepwater Horizon* incident as a test case.

Part I systematically discusses pre-OPA law. It focuses mainly on two salient features of the *Exxon Valdez* litigation, namely exclusion of liability for purely economic losses, and punitive damages. Part II explains why pre-OPA maritime law gave rise to incongruity on the justificatory level, delineates the contours of the problem, and proposes a conceptual framework for resolution. Part III examines whether the enactment of the OPA has created a more defensible liability regime.

Following the *Deepwater Horizon* oil spill, there have been calls for raising the OPA liability caps or an even more comprehensive legislative reform. While some of the initiatives seem to have waned, this catastrophic incident, like the earlier *Exxon Valdez* case, will surely leave its mark. This article, which highlights relevant policy concerns, will undoubtedly serve policymakers in reassessing the limits of civil liability for marine oil pollution.

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INTRODUCTION

On April 20, 2010, while drilling at the Macondo Prospect, a seabed location about forty-one miles off the southeast coast of Louisiana, an explosion occurred on the *Deepwater Horizon*, a mobile offshore drilling rig.[1] The rig was owned and operated by Transocean, the world's largest offshore drilling contractor, and leased to BP, one of the world's largest energy companies and the lessee and principal operator of the Macondo field.[2] The explosion caused a blowout (an uncontrollable escape of oil), killed eleven workers, and ignited a fire that led to the sinking of the rig.[3] After the explosion, an attempt to activate the blowout preventer (BOP) failed, and oil started gushing into the Gulf of Mexico, causing horrific harm to the marine environment, fouling the shores of Alabama, Florida, Louisiana, and Mississippi, and resulting in multibillion dollar losses to the fishing and tourism industries, among others.[4] On July 15, nearly three months after the deadly explosion, BP announced that it had capped the hemorrhaging well, stopping the flow of crude oil into the Gulf.[5] On August 3 through 4, heavy drilling mud, followed by cement, was pumped from a surface vessel through a choke line into the blowout

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1. H.R. REP. NO. 111-521, at 5 (2010).

2. *Id.*

3. *Id.*

4. *See* Bryan Walsh, *With Oil Spill (and Blame) Spreading, Obama Will Visit Gulf*, TIME, May 1, 2010, http://www.time.com/time/health/article/0,8599,1986323,00.html ("[T]he Louisiana fishing industry could sustain $2.5 billion in losses, while Florida could lose $3 billion in tourism income.").

5. *See* Campbell Robertson & Henry Fountain, *BP Caps Its Leaking Well, Stopping the Oil After 86 Days*, N.Y. TIMES, July 15, 2010, http://www.nytimes.com/2010/07/16/us/16spill.html.

preventer to completely seal the well.[6] Two relief wells were drilled to ensure permanent plugging of the gusher,[7] and on September 19 a federal official announced that the Macondo well was effectively dead.[8] But while the flow has stopped, the legal saga has only just begun.

More than two decades ago, the *Exxon Valdez* oil spill shocked America. The notorious supertanker ran aground on Bligh Reef off the Alaskan coast on March 24, 1989, spilling eleven million gallons of crude oil into Prince William Sound.[9] Exxon spent $2.1 billion in cleanup efforts, pleaded guilty to criminal violations occasioning fines, settled a civil action by the United States and Alaska, and paid $303 million in voluntary settlements with private parties, principally fishermen.[10] Subsequent civil litigation has spanned nearly two decades. This litigation resulted in a $287 million compensatory damages award to commercial fishermen and a settlement with Alaska Natives,[11] and culminated in a recent U.S. Supreme Court ruling on the proper amount of punitive damages.[12] At the time, the *Exxon Valdez* spill was the worst environmental disaster in U.S. history.[13] But it has been dwarfed by the *Deepwater Horizon* catastrophe, which can now claim the dubious title of the world's largest accidental release of oil. According to the most recent estimate, 4.9 million barrels (more than 200 million gallons) of oil were released from the well, of which approximately 800,000 barrels were captured by BP, leaving more than four million barrels to gush into the Gulf.[14] BP spent billions of dollars on containment and cleanup.[15] Nearly 170,000 claims were submitted to BP's claims offices, and later to the Gulf Coast Claims Facility,[16] by September 3.[17] Over two hundred

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6. *See* Clifford Krauss, *'Static Kill' of the Well is Working, Officials Say*, N.Y. TIMES, Aug. 4, 2010, http://www.nytimes.com/2010/08/05/us/05spill.html.

7. *See id.*; Henry Fountain, *Relief Well to Be Completed in Gulf*, N.Y. TIMES, Aug. 13, 2010, http://www.nytimes.com/2010/08/14/us/14spill.html.

8. Henry Fountain, *U.S. Says BP Well Is Finally 'Dead'*, N.Y. TIMES, Sept. 19, 2010, http://www.nytimes.com/2010/09/20/us/20well.html.

9. Exxon Shipping Co. v. Baker, 554 U.S. 471, 476–78 (2008).

10. *Id.* at 479.

11. *Id.* at 481.

12. *Id.* at 489–514.

13. *See* George J. Church, *The Big Spill: Bred from Complacency, the* Valdez *Fiasco Goes from Bad to Worse to Worst Possible*, TIME, Apr. 10, 1989, at 38.

14. *See* Campbell Robertson, *U.S. Puts Oil Spill Total at Nearly 5 Million Barrels*, N.Y. TIMES, Aug. 2, 2010, http://www.nytimes.com/2010/08/03/us/03flow.html.

15. Press Release, BP, Update on Gulf of Mexico Oil Spill (Sept. 3, 2010), http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064849.

16. "The Gulf Coast Claims Facility ('GCCF') is an independent claims facility for submission and resolution of claims of Individuals and Businesses for costs and damages incurred as a result of

lawsuits—representing tens of thousands of victims—were filed against BP by mid-June 2010,[18] and Gulf coast states sought payouts for lost revenue and other damages.[19] BP, Transocean, and other parties will probably spend many years litigating these claims and negotiating settlements.

This Article, which follows up on my recently published work,[20] uses the unprecedented disaster in the Gulf of Mexico as an opportunity to critically evaluate the law pertaining to civil liability for oil pollution before and after the enactment of the Oil Pollution Act (OPA).[21] This topic is analyzed as a derivative of a more general concern: the internal harmony of civil liability regimes. This Article unveils a general incongruity in American land-based and maritime tort law that surfaced through the *Exxon Valdez* litigation, and examines whether subsequent statutory reform has eliminated the problem in the limited context of marine oil pollution, using the *Deepwater Horizon* incident as a test case.

The emphasis on the award of punitive damages in recent literature on the *Exxon Valdez* spill has overshadowed an extremely important part of the litigation, namely the wholesale rejection of numerous claims for purely economic loss by the federal district courts in the early 1990s. Thus, on the one hand, liability for economic loss was strictly limited under the exclusionary rule instituted in *Robins Dry Dock & Repair Co. v. Flint*,[22] leaving many victims of the *Exxon Valdez* disaster uncompensated.[23] On the other hand, liability was expanded through an award of punitive damages to relatively few successful claimants. While these two components of the litigation might not seem incompatible

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the oil discharges due to the *Deepwater Horizon* incident on April 20, 2010 . . . . BP has agreed to contribute funds to an escrow account to be used to pay claims submitted to the GCCF." *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/faq (last visited Jan. 8, 2011).

17. *See* Press Release, *supra* note 15.

18. *See* Jef Feeley & Margaret C. Fisk, *BP Suits Should Be Sent to New Orleans, U.S. Says*, BUSINESSWEEK, June 17, 2010, http://www.businessweek.com/news/2010-06-17/bp-suits-should-be-sent-to-new-orleans-u-s-says-update2-.html.

19. Neil King et al., *States Weigh Big Claims Against BP*, WALL ST. J., June 28, 2010, http://online.wsj.com/article/SB10001424052748704846004575332932978558908.html.

20. Ronen Perry, *Economic Loss, Punitive Damages, and the* Exxon Valdez *Litigation*, 45 GA. L. REV. 407 (2011) [hereinafter Perry, *The* Exxon Valdez]; Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. ILL. L. REV. 1573 [hereinafter Perry, *The Economic Bias*].

21. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 507 (codified at 33 U.S.C. §§ 2701–2719) (2006).

22. 275 U.S. 303 (1927).

23. *But see infra* notes 260–71 and accompanying text.

from a simple doctrinal perspective, they are inconsistent on a deeper theoretical level.

The exclusionary rule and the punitive damages doctrine are both exceptions to general principles of private law. The rule barring recovery for purely economic loss is an exception to the general principle that one whose unreasonable conduct caused foreseeable harm to another is liable for that harm, which is probably the most fundamental principle in modern tort law.[24] The exclusionary rule reduces the extent of liability to prevent adverse consequences, such as over-deterrence or undue punishment.[25] Punitive damages are an exception to the general principle that tort damages should restore the victim to the pre-tort condition (*restitutio in integrum*), which is the most fundamental principle in the modern law of remedies.[26] These damages are used as a supplementary sanction in exceptional cases where compensatory damages do not provide the necessary levels of deterrence and retribution.[27]

When both the exclusionary rule and the punitive damages doctrine are applicable to a particular case, they simultaneously increase and decrease the wrongdoer's liability. The exclusionary rule limits liability to prevent over-deterrence, over-punishment, etc., whereas the punitive damages doctrine expands liability to enhance deterrence and retribution. When applied in tandem these rules cancel out each other's allegedly legitimate effects. Increasing and decreasing liability simultaneously is unwarranted not only because it makes the application of at least one rule frivolous, but also because it comes at the price of two problematic deviations from general principles of private law, along with a distributive concern: numerous plaintiffs are denied recovery for actual losses caused by the defendants' wrongdoing, while others obtain damages that significantly exceed their actual loss.

This Article thus sets out to elucidate a general problem that surfaced in an oil pollution case, and to examine whether it has been solved in the limited context of marine oil pollution by the OPA. Part I discusses pre-OPA laws applicable to marine oil spills using the *Exxon Valdez* incident as a test case. Part II explains why pre-OPA maritime law gave rise to

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24. *See, e.g.*, Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 773 (2006) (explaining that the no-recovery rule is an exception to general negligence doctrine).

25. *See infra* Part I.A.1.a.

26. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979); *cf.* United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) ("The fundamental principle of damages is to restore the injured party . . . to the position he would have been in had it not been for the wrong of the other party.").

27. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

incongruity on the justificatory level, delineates the contours of this problem, and proposes a conceptual framework for resolution. Generally, it holds that where liability must be expanded beyond the limits set by the exclusionary rule in order to obtain certain levels of deterrence and retribution, relaxing the exclusionary rule and allowing more victims to recover is a more defensible path than awarding punitive damages to very few claimants. The former simply extends the application of two general principles of tort law, whereas the latter is based on problematic exceptions to these universal principles and generates distributive injustice. Part III examines whether the enactment of the OPA has created a more defensible liability regime, using the *Deepwater Horizon* incident as a test case. Note that although the problem identified in this Article is manifested in the *Exxon Valdez* litigation, it is not limited to oil spills. Therefore, even if the OPA has provided a more defensible liability regime, it has done so only with respect to marine oil pollutions. The general problem still stands and has to be resolved through judicial creativity or legislative reform.

Three methodological comments must be made at this stage. First, while civil liability for oil pollution has been the subject of international conventions for decades, the United States has chosen to hew its own way and not to join the international system. In 1969, following the Torrey Canyon spill in the English Channel,[28] an international conference adopted the International Convention on Civil Liability for Oil Pollution Damage (known as the CLC).[29] The CLC imposed strict but limited liability on owners of ships from which oil was discharged for cleanup costs and private damages and introduced compulsory liability insurance.[30] The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage,[31] adopted two years later, set up an international fund which provided compensation in excess of the vessel owner's liability under the CLC, or where the owner is insolvent or not liable under the CLC.[32] The original

28. *See* Mans Jacobsson, *Compensation for Oil Pollution Damage Caused by Oil Spills from Ships and the International Oil Pollution Compensation Fund*, 29 MARINE POLLUTION BULL. 378, 378 (1994); Beth Van Hanswyk, *The 1984 Protocols to the International Convention on Civil Liability for Oil Pollution Damages and the International Fund for Compensation for Oil Pollution Damages: An Option for Needed Reform in United States Law*, 22 INT'L LAW. 319, 320–21 (1988); Sidney A. Wallace & Temple L. Ratcliffe, *Water Pollution Laws: Can They Be Cleaned Up?*, 57 TUL. L. REV. 1343, 1355 (1983).

29. Nov. 29, 1969, 973 U.N.T.S. 3, 9 I.L.M. 45.

30. *See* Van Hanswyk, *supra* note 28, at 321; Wallace & Ratcliffe, *supra* note 28, at 1356–57.

31. Dec. 18, 1971, 1110 U.N.T.S. 57, 11 I.L.M. 284.

32. *See* Wallace & Ratcliffe, *supra* note 28, at 1356, 1358–59.

conventions were practically replaced by the 1992 Protocols which increased liability caps and raised the maximum amount payable by the fund.[33]

The international scheme was endorsed by most countries, including many common law jurisdictions.[34] But the United States, which participated in the international negotiations and signed the original conventions, has ratified neither, mainly because compensation under the international scheme—which would have been exclusive if adopted—was deemed too low.[35] This is still the case today, following the enactment of the OPA. Although the bill authorized implementation of the two conventions, the Senate adamantly objected.[36] So the OPA merely expresses

> the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.[37]

The higher caps of the OPA, along with the likelihood of additional liability under state law, make ratification of these conventions by the United States practically impossible, because they cannot be "as effective as Federal and State law."[38] Because this Article purports to critically evaluate the structure of the American liability regime, a detailed analysis of the international system is excluded despite its outstanding global significance.

Second, although this Article uses the *Deepwater Horizon* incident as a test case, it focuses only on pollution-related harm. The recent catastrophe in the Gulf of Mexico demonstrates other risks associated

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33. *See* Jacobsson, *supra* note 28, at 378; Thomas J. Wagner, *Recoverable Damages Under the Oil Pollution Act of 1990*, 5 U.S.F. MAR. L.J. 283, 288 (1993).

34. *See, e.g.*, *Protection of the Sea (Civil Liability) Act 1981* (Cth) s 3–12 (Austl.); *Protection of Sea (Oil Pollution Compensation Funds) Act 1993* (Cth) schs 1–3 (Austl.); Marine Liability Act, S.C. 2001, c. 6, §§ 47–105 (Can.); Liability for Oil Pollution Damages Act, 2004, SH No. 274 (Isr.); Merchant Shipping Act, 1995, c. 21, §§ 152–82 (U.K.).

35. *See* Van Hanswyk, *supra* note 28, at 323, 326; Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 1 (1990).

36. *See* ENVIRONMENTAL LAW INSTITUTE, OIL POLLUTION DESKBOOK 16–17 (1991).

37. Pub. L. No. 101-380, § 3001, 104 Stat. 507–08 (1990).

38. *See* George J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 ENVTL. L. 237, 240–45 (1991); Rodriguez & Jaffe, *supra* note 35, at 24; Steven R. Swanson, *OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135, 140 (2001).

with oil production and transportation, particularly the risk of personal injury and death. Eleven employees lost their lives following the explosion and seventeen were injured. These consequences are governed by federal legislation and, to some extent, by general maritime law. The Jones Act establishes a cause of action for negligence against an employer for an injury or death caused to a seaman in the course of employment.[39] To qualify as a seaman, an employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission," and he or she must have "a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature."[40] Mobile drilling rigs, such as the *Deepwater Horizon*, have long been considered vessels for the purposes of the Jones Act.[41] So at least some of the surviving victims of the explosion, along with relatives of the deceased, may have a cause of action under this Act. Non-fatal injuries might also be recoverable under general maritime law,[42] while fatalities are also covered by the Death on the High Seas Act (DOHSA).[43] Marine employees who do not qualify as seamen may recover from their employers under the Longshore and Harbor Workers' Compensation Act (LHWCA),[44] which Congress extended to injuries occurring as the result of operations conducted on the outer continental shelf.[45] The importance of liability for physical injuries is undisputed,

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39. 46 U.S.C. § 30104 (2006 & Supp. 2009); Gillespie v. U.S. Steel Corp., 379 U.S. 148, 154 (1964) ("[T]he Act gave recovery only for negligence."). The Jones Act limits recovery to pecuniary loss. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

40. Chandris, Inc. v. Latsis, 515 U.S. 347, 368 (1995) (alteration in original) (quoting McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991)) (internal quotation marks omitted).

41. *See, e.g.*, Producers Drilling Co. v. Gray, 361 F.2d 432, 437 (5th Cir. 1966) (holding that the Jones Act covers barges designed to serve as mobile drilling platforms); Offshore Co. v. Robison, 266 F.2d 769, 779–80 (5th Cir. 1959) (same).

42. *See, e.g.*, Gosnell v. Sea-Land Service, Inc., 782 F.2d 464, 467 (4th Cir. 1986) ("Jones Act negligence and unseaworthiness [under general maritime law] are two separate and distinct claims.").

43. 46 U.S.C. § 30302 (2006). This Act preempts any action for wrongful death under general maritime law. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624–25 (1978). It coexists with the Jones Act in cases of wrongful death of seamen on the high seas. Heath v. Am. Sail Training Ass'n, 644 F. Supp. 1459, 1467 (D.R.I. 1986). But the Jones Act also applies to non-fatal injuries on the high seas and to wrongful death *not* on the high seas. DOHSA also limits recovery to pecuniary losses. 46 U.S.C. § 30303.

44. 33 U.S.C. §§ 901–950 (2006).

45. 43 U.S.C. § 1333(b) (2006). Seamen cannot recover under the LHWCA, 33 U.S.C. § 902(3)(G) (2006), so the LHWCA and the Jones Act are mutually exclusive. *Chandris*, 515 U.S. at 355–56. An employer's liability under the LHWCA is exclusive, 33 U.S.C. § 905(b) (2006), and therefore precludes liability under general maritime law and the DOHSA. Stansbury v. Sikorski Aircraft, 681 F.2d 948, 951 (5th Cir. 1982).

but a critical appraisal of civil liability for oil pollution should not be eclipsed by a painstaking discussion of the law applicable to accidental losses not related to the pollution itself.

Third, this Article acknowledges the likelihood of civil and criminal fines for oil pollution, and the interrelation between the severity of these sanctions and the extent of civil liability for the same conduct. For instance, the Federal Water Pollution Control Act (FWPCA)[46] provides that the owner and operator of any vessel or facility from which oil is discharged into or upon the navigable waters of the United States, adjoining shorelines, or the waters of the contiguous zone, shall be subject to a civil penalty in an amount up to $25,000 per day of violation or $1000 per barrel of oil discharged.[47] Criminal and civil fines may then be considered in assessing the reasonableness of a punitive damages award.[48] However, this Article focuses on civil liability, and therefore does not provide a comprehensive analysis of relevant criminal and civil penalties.

I. LIABILITY IN THE PRE-OPA ERA

This Part discusses pre-OPA law applicable to marine oil spills, using the *Exxon Valdez* incident as a test case. Part I.A focuses on general maritime law. Part I.A.1 shows that relational economic losses are generally irrecoverable under general maritime law and reviews the main justifications for the exclusionary rule. While Exxon was found liable for the lost catch of commercial fishermen and Alaska Natives under an established exception to the exclusionary rule, the court rejected all other claims for relational losses ensuing from the spill. Part I.A.2 explains the concept of punitive damages and its dominant justifications and discusses the chronicles of the punitive award in the *Exxon Valdez* litigation. Part I.B reviews pre-OPA federal legislation pertaining to civil liability for oil pollution, such as the Trans-Alaska Pipeline Authorization Act. Part I.C discusses relevant state legislation, such as the Alaska Environmental Conservation Act, which was invoked by the claimants in the *Exxon Valdez* litigation.

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46. 33 U.S.C. §§ 1251–1387 (2006).

47. *Id.* § 1321(b)(3), (b)(7)(A).

48. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21–22 (1991).

A. General Maritime Law

1. Purely Economic Losses

a. The Exclusionary Rule

Aquatic pollution may have harsh and widespread repercussions. In addition to harm to wildlife and natural resources,[49] property damage,[50] and possibly bodily injuries, various economic losses may ensue. Commercial fishermen, oystermen, crabbers, and the like may lose their livelihood. Customers of these fishermen, such as seafood restaurants, retail shops, or canned food manufacturers, may incur additional expenses or even shut down temporarily, and suppliers of services and goods to the local fishing industry may lose profit. Owners of shoreline hotels, resorts, recreational areas, and other tourist-based businesses may suffer economic loss. Owners and charterers of ships unable to sail across the area of the spill, as well as owners of cargo delayed by the obstacle, may also incur loss. Those involved in the real estate industry in coastal states, such as builders, real estate agents, bankers, and lawyers, may face a decline in business. Suppliers, customers, employees, and relatives of any of the above may lose profits or incur unanticipated expenses.

These economic losses may be classified as relational losses. A relational economic loss is a loss of profits or an expense that stems from physical injury to the person or property of a third party or to an ownerless resource.[51] Starting with *Anthony v. Slaid*,[52] and with very few deviations, American courts have consistently denied recovery for this kind of loss.[53] The leading authority for the exclusionary rule is *Robins*

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49. The state may recover for this harm as a trustee of the public. *See, e.g.*, Maine v. M/V Tamano, 357 F. Supp. 1097, 1099–1102 (D. Me. 1973); Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1066–67 (D. Md. 1972); California v. S.S. Bournemouth, 307 F. Supp. 922, 929 (C.D. Cal. 1969); *see also* Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 670–72 (1st Cir. 1980) (upholding a statute allowing a state agency to recover).

50. These are generally recoverable. *See, e.g.*, Oppen v. Aetna Ins. Co., 485 F.2d 252, 257 (9th Cir. 1973); Salaky v. Atlas Tank Processing Corp., 120 F. Supp. 225, 226–28 (E.D.N.Y. 1953).

51. *See* Perry, *The Economic Bias*, *supra* note 20, at 1574.

52. 52 Mass. 290, 291 (1846) (holding that an extra expense incurred following a personal injury to a third party was “too remote and indirect”).

53. *See also* Ins. Co. v. Brame, 95 U.S. 754, 758–59 (1877) (holding that an insurance company cannot recover an amount paid under a life insurance policy following the intentional killing of the insured by the defendant because the loss was too remote); Conn. Mut. Life Ins. Co. v. N.Y. & New Haven R.R., 25 Conn. 265, 274, 276–77 (1856) (same).

Dry Dock & Repair Co. v. Flint,[54] in which the U.S. Supreme Court held that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."[55] Notwithstanding its explicit reference to a contractual relationship between the plaintiff and the immediate victim of the wrong, and to the defendant's unawareness of such relationship, this case was broadly interpreted to exclude liability for any relational economic loss, whether the relationship between the two victims was contractual or noncontractual,[56] known or unknown to the doer of the wrong.[57] Further attempts to restrict the court's ruling to lost profits as opposed to positive outlays,[58] to negligence as opposed to other forms of action (e.g., nuisance),[59] or to maritime law as opposed to land-based common law,[60] have also failed.

Federal courts have generally accepted the broad interpretation of *Robins Dry Dock* and have applied it to the great majority of relational loss cases.[61] Only a few narrow exceptions have been recognized.[62] Most

54. 275 U.S. 303 (1927).

55. *Id.* at 309. For further discussion of this case, see Henry D. Gabriel, Testbank*: The Fifth Circuit Reaffirms the Bright Line Rule of* Robins Dry Dock *and Fails to Devise a Test to Allow Recovery for Pure Economic Damages*, 31 LOY. L. REV. 265, 267–71 (1985); Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock v. Flint, 20 J. LEGAL STUD. 249 (1991); David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under* Robins Dry Dock, 18 J. MAR. L. & COM. 157 (1987).

56. *See, e.g.*, Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 625 (1st Cir. 1994); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51 (1st Cir. 1985); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1021, 1023–24 (5th Cir. 1985); *In re* Oriental Republic Uru., 821 F. Supp. 950, 954 (D. Del. 1993); *In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 677 (E.D. Mich. 1992).

57. *See, e.g.*, Steele v. J & S Metals, Inc., 335 A.2d 629, 630 (Conn. Super. Ct. 1974); PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1060–61 (La. 1984); Ferguson v. Green Island Contracting Corp., 355 N.Y.S.2d 196, 197–99 (N.Y. App. Div. 1974).

58. *See, e.g.*, *Barber Lines*, 764 F.2d at 51–52; *In re Cleveland Tankers*, 791 F. Supp. at 677.

59. *See, e.g.*, *Barber Lines*, 764 F.2d at 56–57; *Testbank*, 752 F.2d at 1030–31; Dick Meyers Towing Serv. v. United States, 577 F.2d 1023, 1025 n.4 (5th Cir. 1978); Rickards v. Sun Oil Co., 41 A.2d 267, 269 (N.J. 1945).

60. *See, e.g.*, *Ballard Shipping*, 32 F.3d at 627–28; *In re* Nautilus Motor Tanker Co., 900 F. Supp. 697, 703 (D.N.J. 1995).

61. *See, e.g.*, Taira Lynn Marine Ltd. No. 5 v. Jays Seafood, Inc., 444 F.3d 371, 377–81 (5th Cir. 2006); Getty Ref. & Mktg. Co. v. M/T Fadi B, 766 F.2d 829, 832–33 (3d Cir. 1985); *Barber Lines*, 764 F.2d at 51–52; *Testbank*, 752 F.2d at 1021–28; Hercules Carriers, Inc. v. Florida, 720 F.2d 1201, 1202 (11th Cir. 1983); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 152–53 (5th Cir. 1983); Kingston Shipping Co. v. Roberts, 667 F.2d 34, 35 (11th Cir. 1982); Marine Navigation Sulphur Carriers v. Lone Star Indus., Inc., 638 F.2d 700, 702 (4th Cir. 1981); Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212, 213–14 (5th Cir. 1980); Louisville & Nashville R.R. v. M/V Bayou LaCombe, 597 F.2d 469, 472–74 (5th Cir. 1979); *Dick Meyers Towing Serv.*, 577 F.2d at 1024–25; Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957, 958 (5th Cir. 1972).

state courts have also embraced the bright-line rule.[63] Only a few courts have replaced it with a more generous approach. The New Jersey Supreme Court, for example, held that one owes a duty of care to take reasonable measures to avoid the risk of causing purely economic loss to particular individuals or individuals comprising an identifiable class with respect to whom one knows or has reason to know are likely to suffer such loss from one's conduct.[64] Still, the *Restatement (Second) of Torts* explicitly endorsed the majority view.[65]

The exclusionary rule is an exception to the general principle that one whose unreasonable conduct caused foreseeable harm to another is liable for that harm.[66] Overriding a general principle requires defensible reasons; if these reasons cease to exist, the exception must be set aside and the general principle should be reinstated.

Some of the common justifications for denying liability for relational economic losses turn on the fear of open-endedness. In *Ultramares Corp. v. Touche*,[67] Justice Cardozo observed that allowing claims for purely economic loss may expose the wrongdoer to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[68] Although *Ultramares* was not a relational loss case, the same rationale has been invoked in numerous relational loss cases as the principal reason for exclusion of liability.[69] The validity of this argument rests on two assumptions: a real likelihood of open-endedness and its undesirability.

The soundness of the first assumption, open-endedness, seems self-evident. A negligent infliction of personal injury may result in economic

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62. *See* Perry, *The Economic Bias*, *supra* note 20, at 1613–17.

63. *See, e.g.*, Conn. Mut. Life Ins. Co. v. N.Y. & New Haven R.R., 25 Conn. 265, 275 (1856); Koskela v. Martin, 414 N.E.2d 1148, 1151 (Ill. App. Ct. 1980); Gosch v. Juelfs, 701 N.W.2d 90, 91 (Iowa 2005); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1103 (N.Y. 2001); Aikens v. Balt. & Ohio R.R., 501 A.2d 277, 278–79 (Pa. Super. Ct. 1985).

64. People Express Airlines v. Consol. Rail Corp., 495 A.2d 107, 116 (N.J. 1985); *see also* Mattingly v. Sheldon Jackson Coll., 743 P.2d 356, 359–61 (Alaska 1987).

65. RESTATEMENT (SECOND) OF TORTS § 766C (1979) ("One is not liable to another for pecuniary harm not deriving from physical harm to the other.").

66. *See Bernstein*, *supra* note 24.

67. 174 N.E. 441 (N.Y. 1931).

68. *Id.* at 444.

69. *See, e.g.*, Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985); *In re* Waterstand Marine, Ltd., No. 87-1516, 1988 U.S. Dist. LEXIS 3242, at *12–13 (E.D. Pa. 1988); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 979–80 (E.D. Va. 1981); Byrd v. English, 43 S.E. 419, 420 (Ga. 1903). Stapleton observes that the concern with indeterminate liability is one of the three crude ideas used to rationalize the exclusionary rule. Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory*,*"* 50 UCLA L. REV. 531, 536 (2002).

loss to the victim's relatives, customers, creditors, suppliers, employers, and partners; the loss of each of those may economically affect others, and so on. Similarly, injuring a factory may cause economic loss to its suppliers, distributors, consumers, business partners, and employees; owners of businesses where employees customarily shop may lose profits; and so forth. Theoretically, such proliferation of economic losses is boundless, so the potential number of relational victims is vast and indeterminate. This phenomenon may be termed "the ripple effect."[70] The larger the number of valid claims, the more extensive the liability; and if the potential number of victims is large and uncertain, potential liability is also large and uncertain. I have conceded elsewhere that the assumption of open-endedness may be unsound in certain types of cases.[71] In some fact situations the number of potential victims is limited and reasonably foreseeable.[72] Moreover, a multiplicity of victims does not necessarily yield multiple actions and extensive liability, because not all victims sue[73] and not all claimants recover.[74] However, these reservations do not apply to catastrophic oil spills, where the number of victims is not only uncertain ex ante but potentially enormous, where procedural mechanisms reduce per capita cost of litigation thereby inducing victims to sue, and where the defendant may be a deep-pocketed corporation.

Regarding the second assumption, undesirability, three aspects of the "ripple effect"[75] should be distinguished: the number of victims, the extent of liability, and uncertainty about both. The potential number of victims (the first aspect of the ripple effect) may in itself have some normative significance. For example, denial of liability in cases of multiple victims may be an efficient way to secure ex post loss spreading.[76] Furthermore, allowing numerous relational victims to

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70. *See, e.g.*, Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 302 (Can.) (La Forest, J., dissenting); Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 LAW Q. REV. 249, 266, 285 (1991).

71. *See* Perry, *The Economic Bias*, *supra* note 20, at 1600–01.

72. *See* Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 55–57 (1972).

73. *Cf*. John Summers, Comment, *The Case of the Disappearing Defendant: An Economic Analysis*, 132 U. PA. L. REV. 145, 145, 150 (1983) (discussing cases where the injurer is insolvent or it is too costly for the victim to bring an action against the injurer).

74. *See* Gabriel, *supra* note 55, at 266, 282 (explaining that the ordinary principles of tort liability, such as proximate cause, serve as rough screening devices).

75. *See supra* note 70.

76. *See* Robert Hayes, *The Duty of Care and Liability for Purely Economic Loss*, 12 MELB. U. L. REV. 79, 114 (1979); Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711, 761–63 (2004) [hereinafter Perry, *Relational*

recover may open the door to a mass of litigation which might overwhelm the courts,[77] although this problem may be solved at least in part through procedural mechanisms such as consolidation of actions or class actions in appropriate cases.[78]

At any rate, the relevance of the potential number of claimants largely depends on the rough correlation between the number of valid claims and the extent of tort liability (the second aspect of the ripple effect). The likelihood of extensive liability is deemed normatively relevant for several reasons. First, from a retributive justice perspective, allowing recovery for relational losses may give rise to an extreme disproportion between the severity of the sanction and the gravity of the wrong.[79] An insignificant and perhaps absentminded deviation from the objective standard of care cannot justify the imposition of such an onerous penalty.[80] Second, the marginal deterrent effect of tort liability may diminish to zero, because at a certain point no further precautions are available or because the expected payment is limited by defendants' financial capacity or statutory caps.[81] Allowing recovery where the marginal benefit in terms of deterrence is smaller than the administrative cost involved is economically wrong. In other cases, the fear of unconstrained liability may unduly restrict potential tortfeasors' freedom

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Economic Loss]; Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 738 (2006).

77. Dundee Cement Co. v. Chem. Labs., Inc., 712 F.2d 1166, 1172–73 (7th Cir. 1983); Stevenson v. E. Ohio Gas Co., 73 N.E.2d 200, 203 (Ohio Ct. App. 1946); Caltex Oil (Austl.) Pty v Dredge "Willemstad" (1976) 136 CLR 529, 562–63 (Austl.) (Stephen, J., concurring); Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 153 D.L.R. 4th 385, 404 (Can.); John G. Rich, *Negligent Interference with Prospective Economic Advantage*—J'Aire Corp. v. Gregory, 1980 UTAH L. REV. 431, 434; Ann O'Brien, Note, *Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss*, 31 ARIZ. L. REV. 959, 966 (1989).

78. *Caltex Oil* (1976) 136 CLR at 606 (Murphy, J., concurring); Christopher V. Panoff, Note, *In re* the Exxon Valdez, Alaska Native Class v. Exxon Corp.*: Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 ENVTL. L. 701, 711–12 (1998).

79. *See, e.g.*, Aikens v. Balt. & Ohio R.R., 501 A.2d 277, 279 (Pa. Super. Ct. 1985); Phoenix Prof'l Hockey Club, Inc. v. Hirmer, 502 P.2d 164, 165 (Ariz. 1972); RESTATEMENT (SECOND) OF TORTS § 766C cmt. a (1979); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1534, 1538 (1985) (asserting that abhorrence of disproportionate penalties for wrongful behavior is the most plausible explanation for judicial reluctance to allow recovery for pure economic loss); *see also* Gabriel, *supra* note 55, at 266; Hayes, *supra* note 76, at 82; O'Brien, *supra* note 77, at 967; Rich, *supra* note 77, at 434.

80. *But cf.* Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1931–32 (2002) (criticizing this type of argument).

81. Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985); Donald Harris & Cento Veljanovski, *Liability for Economic Loss in Tort*, *in* THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS 45, 53 (Michael Furmston ed., 1986).

of action and hinder socially beneficial initiatives and activities.[82] Third, from an ex post perspective, unconstrained liability may be "crushing."[83] Businesses whose activities are generally beneficial might be overburdened, their operation might be impaired, and some may even collapse. Fourth, as the extent of potential liability grows, insurance companies may refuse to cover liability, demand an unreasonable premium, or set an upper limit for the cover, thwarting loss spreading. Fifth, if potential liability is truly very large, potential injurers' motivation to purchase liability insurance—where available—shrivels and losses are not spread.[84] Sixth, from an interest-hierarchy distributive perspective, assuming that any defendant has a limited pool of assets that all successful claimants ultimately need to share, denial of liability for relational losses may be required to guarantee full recovery for injuries to physical interests which may be considered more deserving of legal protection.[85] This argument loses much of its force where the primary injury is to a tangible resource. Even if the superiority of life and bodily integrity is undisputed,[86] a distinction between property damage and purely economic loss in terms of interest hierarchy is hard to justify.[87] Seventh, from a compensatory perspective, when defendants have limited funds, each victim may end up with compensation for a very small fraction of his or her loss, rendering the costly process futile.[88]

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82. *See Phoenix Prof'l Hockey Club*, 502 P.2d at 165; *Aikens*, 501 A.2d at 279; Andrew W. McThenia & Joseph E. Ulrich, *A Return to Principles of Corrective Justice in Deciding Economic Loss Cases*, 69 VA. L. REV. 1517, 1520 n.17 (1983); Roger B. Godwin, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664, 676–79 (1964); O'Brien, *supra* note 77, at 967–68; Rich, *supra* note 77, at 435.

83. Dundee Cement Co. v. Chem. Labs., Inc., 712 F.2d 1166, 1171 (7th Cir. 1983); Leadfree Enters., Inc. v. U.S. Steel Corp., 711 F.2d 805, 808 (7th Cir. 1983); Bruce Feldthusen, *Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?*, 8 TORT L. REV. 33, 49 (2000).

84. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 240 (1987) (showing that injurers whose assets are lower than the harm they may cause can be in a better position without insurance); Harris & Veljanovski, *supra* note 81, at 53 (noting that potential defendants may underinsure if they believe they are judgment-proof).

85. Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 352–53, 355 (Can.) (La Forest, J., dissenting); Geistfeld, *supra* note 80, at 1933–35, 1937–38, 1943, 1950 (applying this argument to emotional and economic losses).

86. *See, e.g.*, Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 125 (2001) (observing that physical injury is more disruptive to the pursuit of one's life plan than a loss of money).

87. *See* Christopher Harvey, *Economic Losses and Negligence—The Search for a Just Solution*, 50 CAN. BAR REV. 580, 584 n.22 (1972).

88. Dominion Tape of Can., Ltd. v. L.R. McDonald & Sons, Ltd. (1971), 21 D.L.R. 3d 299, 300 (Can.) ("[A] judgment pompously engrossed which cannot be executed for want of sufficient assets on the part of the judgment debtor [turns the trial] into a futile exercise.").

The third aspect of the ripple effect is that the extent of potential liability—the number of potential victims and the particulars of individual harms—is uncertain, leaving potential injurers incapable of preparing for contingencies.[89] Furthermore, first-party insurance is arguably a more efficient means of spreading losses than liability insurance associated with tort liability,[90] and uncertainty related to the ripple effect augments the advantages of the former. While first-party insurance covers well defined injuries to the insured's interests, liability insurance covers third parties' losses, whose number and extent are unknown in advance.[91]

A second set of justifications for the exclusionary rule concerns the proper level of deterrence, regardless of the fear of open-endedness. The conventional economic justification for *Robins Dry Dock* is that many financial losses—particularly relational losses—are not true social costs.[92] According to economic theory, efficient deterrence requires internalization of the social cost of every inefficient act by the actor.[93] In assessing social costs, it is important not to add private losses that reflect "wealth transfers," namely diminution of personal wealth that generates corresponding gains to others.[94] Such gains do not mitigate the private loss, but cancel it out in the calculation of the externalized social cost.[95] Internalization of private losses irrespective of the parallel gains may lead to over-deterrence. Arguably, many relational economic losses correspond to resulting economic gains. If the competitors of an interrupted business can easily increase their production during the interruption at no cost beyond normal production costs, their gain will offset the unfortunate business' loss. The farther demand is from its peak, the smaller the market share of the interrupted business, and the shorter the interruption, the easier it is for the competitors to stand in for the unfortunate business without destabilizing market equilibrium. Because demand is seldom at its peak,[96] economic loss caused by a

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89. *See* ROBBY BERNSTEIN, ECONOMIC LOSS 200–01 (1993); FRANCIS TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 371–72 (3d ed. 1999); Stapleton, *supra* note 70, at 543–44.

90. *See infra* notes 115–16 and accompanying text.

91. *See* Posner, *supra* note 76, at 737–38.

92. *See* W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 1 (1982).

93. *See, e.g.*, Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 16 (2000).

94. *See* Bishop, *supra* note 92, at 4–7; Perry, *Relational Economic Loss*, supra note 76, at 733.

95. *See* Bishop, *supra* note 92, at 4; Perry, *Relational Economic Loss*, supra note 76, at 733.

96. *See* Posner, *supra* note 76, at 737.

temporary disturbance to production in a single business significantly exceeds the social cost in most cases.[97] Moreover, consumers and producers can use inventories to meet demand during the interruption and, under these circumstances, profits are postponed or shifted with no significant social cost. To conclude, exclusion of liability for relational losses prevents internalization of private losses that do not reflect a true social cost.[98]

Another deterrence-based justification turns on the fact that the injurer is already liable for the physical injury. The marginal deterrent effect obtained from holding the injurer liable for a relational loss may be nil whenever the cost of taking optimal care is lower than the ensuing reduction in expected liability for physical injuries.[99] Alternatively, the marginal deterrent effect of a relational claim may be lower than the administrative cost involved in shifting the additional loss.[100] So even if all relational losses were true social costs, allowing recovery might not be cost-justified.

A third set of justifications for the exclusionary rule focuses on plaintiffs' ability to protect themselves. Traditionally, courts viewed contract law as the appropriate venue for economic loss claims.[101] However, this perception has taken varying forms in different contexts. For example, a common argument in shoddy products cases was that allowing the buyer or the user to sue the seller or the producer in tort might undermine or circumvent the contractual allocation of risk.[102] In

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97. Considerable social costs may occur once in a while. But identifying these rare cases and trying to evaluate the respective social costs is not worthwhile. The cost of gathering and processing the necessary information is significantly higher than the social cost that would consequently be internalized. *See* Bishop, *supra* note 92, at 17.

98. *See* Bishop, *supra* note 92, at 4. This view is now firmly established in the academic literature. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 251 (1987); SHAVELL, *supra* note 84, at 138–39; Feldthusen, *supra* note 83, at 50–51; Bruce Feldthusen & John Palmer, *Economic Loss and the Supreme Court of Canada: An Economic Critique of* Norsk Steamship *and* Bird Construction, 74 CAN. B. REV. 427, 436, 439 (1995); Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1, 19–22, 31–32, 36–37 (1994); McThenia & Ulrich, *supra* note 82, at 1531; Posner, *supra* note 76, at 736–37. Stapleton observes that this is one of the three crude ideas used to rationalize the exclusionary rule. Stapleton, *supra* note 69, at 536–37.

99. *See* Harris & Veljanovski, *supra* note 81, at 52–53.

100. *See* BERNSTEIN, *supra* note 89, at 163; Bruce Feldthusen, *Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow*, 17 CAN. BUS. L. J. 356, 378–79 (1991); Posner, *supra* note 76, at 740; *see also* Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 301 (Can.) (La Forest, J., dissenting).

101. *See* Stapleton, *supra* note 69, at 536, 551.

102. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 872–73 (1986) ("Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort

relational economic loss cases the abstract perception of the contract-tort interrelation has assumed a somewhat different form.[103] Many judges and scholars contend that the typical relational victim could protect his or her interest through a contract with the primary victim and that failing to do so justifies exclusion of liability for several reasons.[104] First, a victim who was aware of the financial risk and could easily protect against it, but refrained from doing so, arguably assumed the risk.[105] Second, where a potential victim enters a contract and agrees to bear a certain risk, the risk is usually priced into the contract, and the potential victim is thereby compensated ex ante for bearing it.[106] Non-pricing of the risk indicates that it was deemed insignificant by the parties and, as such, not worthy of the tort system's attention. Third, tort litigation is wearisome and costly, so if one can protect one's interest more simply and cheaply, one should be encouraged to do so. Fourth, consensual transactions are generally preferable to collective intervention. A possible response to this line of argument is that protection through contract is frequently impractical due to asymmetric bargaining power,[107] lack of information about potential risks,[108] the prohibitive cost of negotiating contractual provisions for every contingency,[109] or the absence of any contractual link between the plaintiff and the primary victim.

A more sophisticated version of the same argument is that where an injury to a certain person or to a person's property may result in economic losses to others, and where transaction costs are low, the law seeks to "channel" economic losses through the primary victim to save the cost of multiple tort actions.[110] A channeling contract is a contractual arrangement whereby the primary victim agrees to indemnify relational

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involved in this case because the parties may set the terms of their own agreements . . . Since a commercial situation generally does not involve large disparities in bargaining power . . . we see no reason to intrude into the parties' allocation of the risk." (citation omitted)).

103. *See* Stapleton, *supra* note 69, at 551–54.

104. *See, e.g.*, Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985); John G. Fleming, *Tort in a Contractual Matrix*, 3 TORT L. REV. 12, 18–19 (1995).

105. *See* David Howarth, *Economic Loss in England: The Search for Coherence*, *in* CIVIL LIABILITY FOR PURE ECONOMIC LOSS 27, 48 (Efstathios K. Banakas ed., 1996).

106. *But see* Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 374 (Can.).

107. *Id.* at 351 (La Forest, J., dissenting); *id.* at 374.

108. *Id.* at 351 (La Forest, J., dissenting).

109. *See* William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347, 366 (1986).

110. Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 283 (1982).

victims for their losses.[111] Channeling saves the costs of litigating independent relational loss claims and may thus be economically desirable.[112] According to this argument, the law encourages channeling by denying recovery for relational losses and allowing recovery for economic losses that have been shifted to the primary victim.[113] I have shown elsewhere why this argument is unpersuasive.[114] More importantly, the argument does not apply to economic losses caused by oil pollution, because oceanic resources have no owner with whom potential victims can negotiate channeling provisions.

A related justification for the exclusionary rule derives from the notion of loss-spreading. The underlying assumption is that first-party insurance is a more efficient means of spreading relational losses than liability insurance associated with tort liability.[115] The cost of information required for evaluating the risk is usually lower in the case of first-party insurance, because there is no need to assess third parties' expected losses. The costs of establishing the right for compensation are also lower, because first-party insurance does not hinge on tort litigation or tort negotiation. Exclusion of liability induces potential victims to insure themselves against prospective personal losses, and potential injurers not to insure themselves against liability for these losses. It thereby guarantees efficient loss spreading while preventing double insurance.[116]

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111. *Id*.

112. *Id.*

113. *Id.*

114. Perry, *The Economic Bias*, *supra* note 20, at 1601–04. I will not provide a full explanation here, so as not to be repetitive. Generally, the channeling theory "is valid only if four conditions are met: (1) allowing recovery for the shifted loss is in itself warranted, (2) the costs of negotiating channeling provisions are truly lower than the subsequent reduction in administrative costs, (3) the traditional legal dichotomy encourages potential victims to negotiate channeling arrangements that they would not otherwise consider, and (4) there is no better way to minimize administrative costs." *Id.* at 1602. In *The Economic Bias*, I showed that in most cases, one or more of these conditions will not be met.

115. Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985); Louisiana *ex rel*. Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985); Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 153 D.L.R. 4th 385, 404 (Can.); Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 350 (Can.) (La Forest, J., dissenting); Feldthusen & Palmer, *supra* note 98, at 437, 443–44; James, *supra* note 72, at 52–53; Michael MacGrath, *The Recovery of Pure Economic Loss in Negligence—An Emerging Dichotomy*, 5 OXFORD J. LEGAL STUD. 350, 375 (1985); O'Brien, *supra* note 77, at 968.

116. *Can. Nat'l Ry. Co.* (1992), 91 D.L.R. 4th at 352, 354 (La Forest, J., dissenting); Feldthusen, *supra* note 83, at 48–49; James, *supra* note 72, at 54–55. Ambiguous liability formulas (such as "proximity") frequently result in double insurance.

Another self-protection argument is that exclusion of liability for relational losses gives potential victims an incentive to take precautions to prevent harm[117] and gives actual victims an incentive to mitigate damages by diverting means of production used in the interrupted activity to other lucrative uses.[118] For example, to avoid loss in cases of accidental power failure, businesses can install stand-by systems ex ante, or they can try to make up for the loss by doing more work when the interruption ends.[119] Similarly, where a towed barge sinks, the tugboat owners will not suffer economic loss if they use their vessel to haul another ship;[120] and when a factory is damaged and closed for repairs, workers will not incur loss if they obtain alternative employment.[121] A possible response is that the defenses of comparative negligence and mitigation of damages provide the necessary incentives.[122] They do so at a somewhat higher administrative cost than exclusion of liability,[123] but in a less arbitrary manner.

Lastly, the exclusionary rule is said to provide a certain and easily applicable limitation on tort liability.[124] As a "bright-line rule,"[125] it enables potential injurers and victims to better prepare for contingencies,[126] impels actual victims to avoid fruitless litigation, thereby saving its cost, and makes the administration of tort actions by the courts easier and less costly.[127] A possible response is that justice is more important than certainty[128]—otherwise there would be no liability at all. Liability should be limited in a just and principled manner, not through arbitrary bright lines. A milder version of the argument is that

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117. *See Barber Lines*, 764 F.2d at 55.

118. *See* Hayes, *supra* note 76, at 114.

119. Spartan Steel & Alloys, Ltd. v. Martin & Co., [1972] 3 All E.R. 557, 563–64 (C.A.) (Eng.).

120. *See* Bishop, *supra* note 92, at 23–24.

121. *See id.* at 17–18. However, one may say that if workers of the damaged factory find alternative employment they displace other workers. *See* Mario J. Rizzo, *The Economic Loss Problem: A Comment on Bishop*, 2 OXFORD J. LEGAL STUD. 197, 205 (1982).

122. SHAVELL, *supra* note 84, at 144–46.

123. Goldberg, *supra* note 98, at 17.

124. Candlewood Navigation Corp. v. Mitsui OSK Lines, Ltd., [1985] 2 All E.R. 935, 945 (P.C.) (appeal taken from N.S.W.) ("[The rule draws] a definite and readily ascertainable line."); Leigh & Sillavan, Ltd. v. Aliakmon Shipping Co., [1986] 2 All E.R. 145, 153–54 (H.L.) (Eng.) ("simple to understand and easy to apply").

125. *See* Gabriel, *supra* note 55, at 265.

126. Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 335 (Can.); O'Brien, *supra* note 77, at 967.

127. Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1028–29 (5th Cir. 1985) ("[The rule] operates as a rule of law and allows a court to adjudicate rather than manage.").

128. *See* Gabriel, *supra* note 55, at 278, 284.

certainty may be relevant but not decisive: it must be weighed against other relevant factors. A less certain set of rules may be warranted if it yields fairer or more efficient outcomes. It is thus highly doubtful that certainty can justify a blanket exclusion of recovery for all relational losses.

b. The Commercial Fishermen's Exception

Relational economic losses are generally irrecoverable under *Robins Dry Dock*.[129] This common law rule, when applied to marine pollution, has a single well-defined exception. Courts have consistently allowed commercial fishermen, oystermen, crabbers, etc., to recover for lost fishing profits following a tortious diminution of aquatic life. The exception originated in *Union Oil Co. v. Oppen*,[130] in the wake of the Santa Barbara oil spill of 1969.[131] The Court of Appeals for the Ninth Circuit upheld the exclusionary rule,[132] but relied on existing exceptions to conclude that precedent did not foreclose examination of commercial fishermen's claims against the polluter on their merits.[133] The court explained that the chief element in determining whether a defendant owed a duty of care to the plaintiff was the foreseeability of the risk, and that the defendants in this case undoubtedly realized that negligence on their part might result in a substantial oil spill that would diminish aquatic life and injure commercial fishermen.[134] It opined that the direct causal link between the impact of escaping oil on aquatic life and plaintiffs' losses, public disapproval of environmental harm, the policy of preventing such harm, and the fact that the oil company was the cheapest cost avoider, also pointed to the existence of a duty of care.[135] Yet the court took pains to emphasize that its holding "does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill."[136] Thus, recovery for pollution-related economic harms is

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129. *See, e.g.*, *Testbank*, 752 F.2d at 1021, 1028–29.

130. 501 F.2d 558, 570 (9th Cir. 1974).

131. *See* ROBERT O. EASTON, BLACK TIDE: THE SANTA BARBARA OIL SPILL AND ITS CONSEQUENCES (1972).

132. *Union Oil*, 501 F.2d at 563–64.

133. *Id.* at 565–68.

134. *Id.* at 568–69.

135. *Id.* at 569–70.

136. *Id.* at 570.

strictly limited to commercial marine harvesters.[137] Moreover, the exception does not apply to fishermen who engage in commercial fishing without licenses required by the state.[138]

According to the prevailing view, the fishermen's exception is based on unique environmental concerns.[139] Several judges have even suggested that this is not a genuine exception because fishermen have a constructive "proprietary interest in fish in waters they normally harvest," making their loss equivalent to property damage rather than purely economic.[140] At any rate, this exception is well established. More than a decade after *Oppen*, the Fifth Circuit upheld the general rule of no recovery for purely economic losses consequent on marine pollution, but recognized an exception for commercial fishermen.[141]

c. The Exxon Valdez *Litigation*

Following the *Exxon Valdez* incident in 1989, over 200 lawsuits, involving more than 30,000 claims, were brought in federal and state courts.[142] Exxon's liability to commercial fishermen was undisputed.[143] In fact, Exxon undertook a voluntary claims program, ultimately paying out $303 million, principally to fishermen whose livelihoods were disrupted from 1989 through 1994.[144] Moreover, 10,000 commercial fishermen were allowed to sue in federal court and subsequently

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137. Other victims are not entitled to recover. *See, e.g.*, Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1026–29 (5th Cir. 1985).

138. *See* Blue Gulf Seafood, Inc. v. TransTexas Gas Corp., 24 F. Supp. 2d 732, 734–35 (S.D. Tex. 1998); Golnoy Barge Co. v. M/T Shinoussa, 841 F. Supp. 783, 785–86 (S.D. Tex. 1993). The court in *Union Oil* made clear that the plaintiffs "lawfully and directly make use of a resource of the sea . . . in the ordinary course of their business," implying that the exception does not apply to unlawful harvesting. *Union Oil*, 501 F.2d at 570.

139. *See* Channel Star Excursions, Inc. v. S. Pac. Transp. Co., 77 F.3d 1135, 1138 (9th Cir. 1996) ("*Union Oil* is limited to the environmental sphere; if it is under admiralty law, it can only be said to have carved out a unique exception to the *Robins Dry Dock* rule by placing a duty on oil drillers to fish and the marine ecosystem.").

140. *Testbank*, 752 F.2d at 1027 n.10; Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 978 (E.D. Va. 1981). This, of course, is a clear fiction. *See* McThenia & Ulrich, *supra* note 82, at 1525–28.

141. *Testbank*, 752 F.2d at 1028–29; *see also* Slaven v. BP Am., Inc., 786 F. Supp. 853, 861 (C.D. Cal. 1992) (holding that the exception was not affected by *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986), which upheld the *Robins Dry Dock* rule in a products liability case); Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973) (allowing fishermen's cause of action under a theory of public nuisance); Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1223, 1227 (Fla. 2010) (allowing fishermen's cause of action in negligence).

142. *See* Goldberg, *supra* note 98, at 1.

143. *In re* Exxon Valdez, 767 F. Supp. 1509, 1511, 1518 (D. Alaska 1991); *In re* Exxon Valdez, No. A89-0095-V, 1994 U.S. Dist. LEXIS 6009, at *21, *23 (D. Alaska Mar. 23, 1994).

144. *In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1078 (D. Alaska 2004).

recovered $286.8 million in compensatory damages, based on the market value of the fish they would have caught but for the spill.[145] Note, however, that even fishermen were allowed to recover only the value of their lost catch; they were denied recovery for the reduction in value of their fishing permits[146] and for lost profits from other businesses.[147] Similarly, there was no dispute that Alaska Natives had a right to recover economic damages "flowing from loss of fishing resources," and their claims for harvest damages were settled.[148] Indeed, the fact that the U.S. Supreme Court allowed fishermen and Alaska Natives to recover punitive damages indicates that it implicitly acknowledged their standing to claim compensatory damages.[149]

In contrast, other claims were generally rejected under the *Robins Dry Dock* doctrine. The district court dismissed, inter alia, claims by providers of goods (such as fishing gear), services (such as maintenance and repair of fishing boats), and accommodation to commercial fishermen;[150] by businesses that relied on an uninterrupted supply of seafood by local fishermen, including fish tenderers,[151] seafood wholesalers,[152] seafood processors,[153] taxidermists,[154] and even the Cordova Air Service;[155] and by businesses that relied on the commercial fishing industry as both consumers and suppliers, such as a business that produced fishing baits from salmon carcasses.[156] The district court also rejected claims by employees of the above businesses, such as cannery workers,[157] as well as providers of goods and services to these

145. Exxon Shipping Co. v. Baker, 554 U.S. 471, 480 (2008).

146. *In re* Exxon Valdez, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 5995, at *2–5 (D. Alaska Mar. 23, 1994).

147. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 6009, at *23 (a fisherman may recover for lost fishing income, but not for lost income from distributing fishing gear).

148. Alaska Native Class v. Exxon Corp., 104 F.3d 1196, 1197–98 (9th Cir. 1997).

149. *See* John P. Jones, *The Sky Has Not Fallen Yet on Punitive Damages in Admiralty Cases*, 83 TUL. L. REV. 1289, 1293 (2009).

150. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 6009, at *11–12, *17 (dismissing claims by suppliers of goods and services to commercial fishermen); *In re* Exxon Valdez, 767 F. Supp. 1509, 1511, 1514 (D. Alaska 1991) (dismissing claims by fishing lodges).

151. *In re* Exxon Valdez, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20555, at *3–4 (D. Alaska Jan. 26, 1994); *Exxon Valdez*, 767 F. Supp. at 1511, 1514.

152. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 20555, at *3–4.

153. *Id.* at *3–4; *Exxon Valdez*, 767 F. Supp. at 1514.

154. *In re* Exxon Valdez, No. A89-095, 1992 U.S. Dist. LEXIS 22495, at *16 (D. Alaska Dec. 23, 1992); *Exxon Valdez*, 767 F. Supp. at 1514.

155. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 6009, at *16.

156. *Id*. at *15.

157. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 20555, at *3–4.

businesses, including the Kodiak Electric Association, which suffered reduced power usage by seafood processors,[158] and a company selling refrigeration systems to those associated with the fishing industry.[159]

The court likewise dismissed claims related to the tourism and leisure industry, including loss of enjoyment claims by sport fishermen, photographers, and kayakers,[160] and—more importantly—economic loss claims by guides for sport fishermen and nature lovers,[161] boat charterers,[162] and the like. Finally, district courts in Alaska and California dismissed more tenuous claims brought by scientists who allegedly lost income from scientific activities, research funding, future intellectual property, etc., and were unable to capture and sell sea otters to aquariums and zoos;[163] the Old Harbor Native Corporation, which allegedly lost profit due to congressional disapproval of an exchange of Native Corporation lands for oil exploration rights in the Arctic National Wildlife Refuge following the oil spill;[164] and California drivers, who had to pay higher prices for gasoline following the spill.[165]

2. *Punitive Damages*

a. *The Punitive Damages Doctrine*

Punitive damages are sums awarded to tort claimants beyond their actual harm.[166] The idea of non-compensatory damages was known in ancient legal systems,[167] but the modern doctrine of punitive damages dates back to the mid-eighteenth century. Originating in England,[168] the

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158. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 6009, at *15.

159. *Exxon Valdez*, 1992 U.S. Dist. LEXIS 22495, at *5–6, *16.

160. *In re* Exxon Valdez, 767 F. Supp. 1509, 1514 (D. Alaska 1991).

161. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 6009, at *10–11.

162. *Exxon Valdez*, 767 F. Supp. at 1514.

163. *Exxon Valdez*, 1994 U.S. Dist. LEXIS 6009, at *12–14 ("[S]cientists are not fishermen and otters are not fish which may be lawfully taken and sold.").

164. *In re* Exxon Valdez, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20556, at *5–7 (D. Alaska Mar. 23, 1994).

165. Benefiel v. Exxon Corp., No. CV-90-2184, 1990 U.S. Dist. LEXIS 13251, at *2 (D. Alaska July 27, 1990). The Ninth Circuit did not contest the ruling with regard to the maritime tort, and focused instead on the claim under TAPAA, discussed below. Benefiel v. Exxon Corp., 959 F.2d 805, 807–08 (9th Cir. 1992).

166. *See, e.g.*, Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 893 (1991).

167. *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming The Tort Reformers*, 42 AM. U. L. REV. 1269, 1285–86 (1993).

168. *See* Wilkes v. Wood, [1763] 98 Eng. Rep. 489, 498–99 (C.P.) ("[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a

doctrine was soon imported to America.[169] A fierce debate over the legitimacy of punitive damages erupted in the mid-nineteenth century between Simon Greenleaf and Theodore Sedgwick. Apart from a fierce controversy about the proper interpretation of the case law,[170] Greenleaf advocated a clear distinction between private and public law,[171] insisting that a plaintiff in tort could not be permitted to vindicate the state's interests,[172] whereas Sedgwick believed a division between the public and private interests was "entirely fanciful and imaginary."[173] The U.S. Supreme Court settled the dispute in *Day v. Woodworth*,[174] holding that the jury in a tort action could inflict exemplary, punitive, or vindictive damages on the defendant based on the enormity of his wrong rather than the measure of the plaintiff's harm. The Court opined that despite past controversy, "repeated judicial decisions for more than a century are to be received as the best exposition of what the law is . . . ."[175]

Three points deserve mention. First, since 1818 it has been clear that punitive damages are available not only in land-based common law but also under general maritime law.[176] Second, by the end of the nineteenth century, most jurisdictions allowed punitive damages awards not only against individuals but also against corporations. At that time there was still some controversy about the availability of the remedy against corporations liable under the doctrine of respondeat superior.[177] This

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satisfaction to the injured person, but likewise as a punishment."); Huckle v. Money, [1763] 95 Eng. Rep. 768 , 769 (K.B.) (introducing the term "exemplary damages").

169. *See* Genay v. Norris, 1 S.C.L. (1 Bay) 6, 6 (1784) (allowing "exemplary damages"); *see also* Coryell v. Colbaugh, 1 N.J.L. 77, 77 (1791) (instructing the jury "not to estimate the damages [according to] actual loss; but to give damages for *example's* sake." (emphasis in original)).

170. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 276–87 n.2 (9th ed. 1863) (insisting that damages were always compensatory); THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 666 (3rd ed. 1858) (contending that courts permitted punitive damages in exceptional cases); Simon Greenleaf, *The Rule of Damages in Actions Ex Delicto*, 9 L. REP. 529, 530–38 (1846–47) (insisting that damages were always compensatory).

171. *See* Rustad & Koenig, *supra* note 167, at 1299.

172. Greenleaf, *supra* note 170, at 529–30.

173. SEDGWICK, *supra* note 170, at 671.

174. 54 U.S. 363, 371 (1851).

175. *Id.*; *see also* Denver & Rio Grande Ry. v. Harris, 122 U.S. 597, 609–10 (1887) ("The right of the jury in some cases to award exemplary or punitive damages is no longer an open question in this court."); McWilliams v. Bragg, 3 Wis. 424, 431 (1854). *But cf.* Fay v. Parker, 53 N.H. 342, 382, 397 (1872) (holding that punishment is "out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies" and that the idea of punitive damages "is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.").

176. The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818).

177. *See* Rustad & Koenig, *supra* note 167, at 1295–97.

controversy remains unsettled.[178] Third, while punitive damages were originally awarded in cases of malicious and mean-spirited conduct, the doctrine has been gradually expanded to cases of recklessness and even gross negligence.[179] These three developments laid the foundations for the punitive damages award in the *Exxon Valdez* case.

In the twentieth century, the punitive damages doctrine was somewhat restrained. In several states, the plaintiff was required to satisfy a higher standard of proof, such as "clear and convincing evidence," to obtain punitive damages.[180] Moreover, in many states, punitive damages were subject to a statutory cap.[181] Finally, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary penalties on a tortfeasor.[182] A punitive damages award is therefore subject to substantive due process review.

How does a court determine if a punitive damages award is excessive? In *BMW v. Gore*,[183] the United States Supreme Court held that in reviewing awards of punitive damages under the Due Process Clause, courts ought to consider three guideposts.[184] The first is the degree of reprehensibility of the defendant's misconduct.[185] Factors relevant in determining the degree of reprehensibility include the type of harm caused, victims' vulnerability, defendant's intentional malice or reckless disregard for health and safety of others, repetitive misconduct, and defendant's efforts to mitigate the harm caused.[186] The second

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178. *See* Dorsey D. Ellis, *Fairness and Efficiency in the Law off Punitive Damages*, 56 S. CAL. L. REV. 1, 63 (1982) ("[some courts] hold that an employer may be liable for punitive damages for wrongful acts committed by employees in the course of their employment . . . [Others] limit vicarious punitive damage liability to those situations where wrongful acts were committed or specifically authorized or ratified by a managerial agent, or were committed by an unfit employee who was recklessly employed or retained.").

179. *See* Rustad & Koenig, *supra* note 167, at 1305–07; *see also* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) (punitive damages may be awarded for reckless indifference to the rights of others); Ellis, *supra* note 178, at 20.

180. *See* Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 483 (1993).

181. *See id.*

182. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433–34 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–55 (1993).

183. 517 U.S. 559 (1996).

184. *Id.* at 575–85.

185. *Id.* at 575–80.

186. *See In re* Exxon Valdez, 490 F.3d 1066, 1085–89 (9th Cir. 2007).

guidepost is the disparity between the plaintiff's actual or potential harm and the punitive damages award.[187] In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[188] the Court held that a single-digit ratio between punitive and compensatory damages was more likely to accord with due process;[189] but it emphasized that greater ratios could be consistent with the Due Process Clause where "a particularly egregious act has resulted in only a small amount of economic damages."[190] The third guidepost is the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases.[191]

One of the most fundamental principles in the modern law of torts is that damages should restore the victim to the pre-tort condition (*restitutio in integrum*).[192] Punitive damages are non-compensatory by definition. So although the specific goals of the punitive damages doctrine are yet to be explored, it is clearly inconsistent with the fundamental remedial maxim.[193] Just like the exclusionary rule, punitive damages are an exception that needs to be justified, and if its justifications cease to exist, the general principle must be reinstated.

In the past it was very frequently said that the aim of punitive damages was "to punish and deter,"[194] but this wording is somewhat misleading because punishment—as this word is currently understood—is not a purpose but a mechanism. Punishment may be defined as

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187. *BMW*, 517 U.S. at 580–83.

188. 538 U.S. 408 (2003).

189. *Id.* at 425.

190. *Id.* (quoting *BMW*, 517 U.S. at 582). Perhaps *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), is the type of exceptional case envisioned by the *State Farm* Court: compensatory damages were $19,000, the defendant acted in a "malicious and fraudulent" manner, and punitive damages were set at $10 million. *Id.* at 462

191. *BMW*, 517 U.S. at 583–85.

192. *See supra* note 27.

193. *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 469 n.216 (1996) (Stevens, J., dissenting) ("Tort law is tied to the goal of compensation (punitive damages being the notable exception) . . . .").

194. *See, e.g.*, *BMW*, 517 U.S. at 568; Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989); Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67 (1981); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). The same language was used in professional and academic literature. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(1) (1979); Howard A. Denemark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931, 935–36 (2002); David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369, 372–73 (1965). This language was also used in jury instructions. S*ee* RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 98 (3d ed. 1993).

"imposing a sanction,"[195] and may have various goals, such as retribution, deterrence, appeasement of the victim, incapacitation of the wrongdoer, and education.[196] Saying that punitive damages are meant to punish is tautological. But the word "punish" has not been used in vain. Courts and scholars sometimes use the terms "punishment" and "retribution" interchangeably. Whenever courts say that punitive damages are supposed to "punish and deter," they seem to suggest that punitive damages are aimed at retribution and deterrence.[197] Recent American case law and literature use this more accurate terminology.[198]

Retribution may be defined as imposing a sanction that corresponds to individual moral desert.[199] The wrongdoer deserves to be punished on account of her wrongful conduct, and ought to be punished fairly regardless of the consequences of her punishment.[200] Retributive justice does not require that the sanction be identical to the wrong committed; it merely insists on proportionality between the severity of the sanction and the gravity of the wrong.[201]

Again, awarding non-compensatory damages is inconsistent with the corrective structure of tort law. Therefore, punitive damages are awarded merely at the margins, where courts feel that a compensatory award is an *extremely lenient* sanction in relation to the gravity of the defendant's

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195. *Cf.* George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52 (1999).

196. *See id.* (describing various purposes of punishment).

197. *See, e.g.*, Ellis, *supra* note 178, at 1, 4 (observing that the term "punishment" implies retribution); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 310 (1983) (same).

198. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 474, 492 (2008); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 356–57 (2003); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2081 (1998).

199. *See* Fletcher, *supra* note 195, at 52 (1999) ("[B]y the use of the . . . term 'retributive,' I simply mean imposing punishment because it is deserved on the basis of having committed a crime.").

200. Retributive justice is therefore *retrospective*, in that it looks backward to the particular wrongdoing, not forward to the consequences of the sanction.

201. *See* TONY HONORÉ, RESPONSIBILITY AND FAULT 13, 83–84, 92, 123, 138 (1999); Peter Cane, *Retribution, Proportionality, and Moral Luck in Tort Law*, *in* THE LAW OF OBLIGATIONS 141, 143, 160–61 (Peter Cane & Jane Stapleton eds., 1998); Tony Honoré, *The Morality of Tort Law—Questions and Answers*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 87 (David G. Owen ed., 1995); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1690 (1992); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 530–32 (1987).

conduct.[202] In other cases, the discrepancy between the gravity of the wrong and the severity of the sanction is left untouched for the sake of corrective justice.[203] As observed by the United States Supreme Court:

> It should be presumed a plaintiff has been made whole for her or his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve retribution or deterrence.[204]

Now egregious conduct may give rise to various types of sanctions, both legal (criminal, administrative, civil, or disciplinary) and extra-legal (such as reputational harm). To avoid disproportion between the overall burden imposed on the defendant and the gravity of the wrong, these sanctions must be taken into account in deciding whether punitive damages may be awarded in a specific case, and in determining their amount. Some jurisdictions have barred punitive damages in a civil action following or pending criminal conviction for the same conduct.[205] However, the prevailing view in the United States is that criminal conviction does not bar punitive damages, although it should be taken into account in determining the extent of the award.[206]

Deterrence is the second dominant justification for punitive damages.[207] The additional sanction may serve to deter the specific defendant from repeating the wrong and others from committing similar wrongs.[208] Two questions arise in this respect. First, what types of wrongfulness do punitive damages aim to deter? The simplistic answer, following the Benthamite tradition, conflates the end and the means. Deterrence is such an integral and distinctive feature of utilitarian and economic theories of law that a sanction must deter inefficient conduct. But American courts seem to have a somewhat different intuition. For

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202. *See, e.g.*, David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 364 (1998).

203. Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts*, 73 TENN. L. REV. 177, 228 (2006).

204. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).

205. *See* Walther & Plein, *supra* note 194, at 384.

206. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991); *In re* Exxon Valdez, 270 F.3d 1215, 1226 (9th Cir. 2001); RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979); Annotation, *Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages*, 98 A.L.R. 3d 870 (1980).

207. *See supra* notes 194–98 and accompanying text.

208. *See* Ellis, *supra* note 178, at 3.

instance, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[209] the U.S. Supreme Court opined that the deterrent function of punitive damages was not exclusively efficiency-oriented: "Citizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct."[210]

The second question is why deterrence of unwarranted conduct requires extra-compensatory damages. After all, ordinary compensatory damages already serve to deter.[211] Modern theorists have proposed three answers. First, compensatory damages are insufficient if the wrongdoer might escape liability for the wrongful conduct.[212] Efficient deterrence entails internalization of the harm caused by wrongful conduct to the extent that such harm reflects true social cost. However, there is a series of factors—external to substantive tort law—that let many wrongdoers off scot-free. Punitive damages may be used to overcome problems of under-enforcement.[213] Under this perception, total damages should be the actual harm multiplied by the reciprocal of the probability that the defendant *will* be found liable when she *should* be found liable; punitive damages would then consist of the excess of total damages over compensatory damages.[214] Indeed, courts have deemed heavier punitive awards justifiable when wrongdoing is hard to detect (increasing chances of getting away with it),[215] or when the harm and the corresponding compensatory award are small (providing low incentive to sue).[216] Second, compensatory damages might not provide a sufficient incentive if the wrongdoer derives morally illicit gains—financial or non-financial—from the wrongful conduct.[217] Third, compensatory

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209. 532 U.S. 424 (2001).

210. *Id.* at 439–40.

211. *See* Ellis, *supra* note 178, at 7; Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 137 (1982).

212. *See also* LANDES & POSNER, *supra* note 98, at 160–65, 184–85, 223–24; SHAVELL, *supra* note 84, at 148; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873–74 (1998); Sharkey, *supra* note 198, at 365–68; Sunstein et al., *supra* note 198, at 2075, 2082.

213. *See supra* note 212.

214. For further discussion of this rationale, see *supra* note 211.

215. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

216. *Id.*

217. *See* Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989) ("If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss."); Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 79, 98 (1982) ("[P]unitive damages should be

damages might not suffice if some of the actual harm caused by wrongful conduct is legally non-compensable.[218] I have critically assessed these arguments elsewhere.[219]

b. The Exxon Valdez *Litigation*

The United States Supreme Court ruling on punitive damages in the *Exxon Valdez* case arose from commercial fishermen's and Alaska Natives' actions against Exxon. The factual basis for the punitive damages award was simple. The *Exxon Valdez* captain, a relapsed alcoholic, had consumed enough alcohol to incapacitate a non-alcoholic shortly before boarding the vessel and inexplicably exited the bridge during a critical maneuver, leaving a tricky course correction to unlicensed subordinates.[220] Although the captain's superiors knew he had completed an alcohol treatment program, it was unclear whether they also knew about his relapse.[221] On trial, the jury found Exxon reckless (hence potentially liable for punitive damages) under instructions providing that a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment.[222] Thereafter, in 1994, the jury awarded $287 million in compensatory damages to commercial fishermen (from which prior voluntary payments were deducted).[223] The jury also awarded $5000 in punitive damages against the captain and $5 billion against Exxon.[224] For more than a decade the issue went back and forth between the district court and the court of appeals,[225] until the latter remitted the

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computed at a level that offsets the illicit pleasure of noncompliance or the exceptional costs of compliance that motivated the injurer.").

218. *See* Ellis, *supra* note 178, at 28.

219. Perry, *The* Exxon Valdez, *supra* note 20, at 30–32.

220. Exxon Shipping Co. v. Baker, 554 U.S. 471, 477–78 (2008).

221. *Id.* at 476–77.

222. *Id.* at 480.

223. *Id.* at 480–81.

224. *Id.* at 481.

225. These are the relevant decisions in chronological order: *In re* Exxon Valdez, 1995 Am. Mar. Cases 1956 (D. Alaska 1995); *In re* Exxon Valdez, 270 F.3d 1215, 1236, 1241, 1246 (9th Cir. 2001); *In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002) (reducing the punitive award to $4 billion); Sea Hawk Seafoods, Inc. v. Exxon Corp., No. 30-35166, 2003 U.S. App. LEXIS 18219, at *1–2 (9th Cir. Aug. 18, 2003); *In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004) (increasing the award to $4.5 billion).

punitive damages award to $2.5 billion.[226] Exxon appealed to the United States Supreme Court.

On its appeal, Exxon raised three arguments. Its first argument was that it was an error to instruct the jury that a corporation was responsible for the reckless acts of employees in a managerial capacity while acting in the scope of their employment.[227] Put differently, a court cannot award punitive damages under maritime law against shipowners for actions by underlings not "directed," "countenanced," or "participated in" by the owners.[228] The plaintiff, on the other hand, argued that maritime law should conform to land-based common law, in which punitive damages can be awarded against a principal because of an act by an agent where "the agent was employed in a managerial capacity and was acting in the scope of employment."[229] The Court was equally divided on this question, and therefore left the Ninth Circuit's opinion undisturbed without setting a precedent on this matter.[230]

Exxon's second argument was that the Federal Water Pollution Control Act (FWPCA)[231] preempted the maritime law remedy of punitive damages.[232] The U.S. Supreme Court rejected this argument, finding that there was no clear indication of congressional intent to occupy the entire field of pollution remedies, and that punitive damages for private harms would have no frustrating effect on the FWPCA's remedial scheme.[233]

Exxon's last argument was that the $2.5 billion punitive damages award exceeded the bounds justified by the underlying goals of this remedy.[234] The Court reiterated the view that punitive damages are aimed at retribution and deterrence, and limited to cases of "enormity," in which a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference to others' rights, or even more deplorable behavior.[235] The Court observed that in recent decades the median ratio of punitive to compensatory awards had remained less than

226. Baker v. Exxon Mobile Corp., 490 F.3d 1066, 1073, 1095 (9th Cir. 2007); Baker v. Exxon Mobile Corp., 472 F.3d 600, 602, 625 (9th Cir. 2006).

227. Exxon Shipping Co. v. Baker, 554 U.S. 471, 482 (2008).

228. *Id.* at 483 (quoting The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558–59 (1818)).

229. *Id.* at 484. The rule is set forth in the RESTATEMENT (SECOND) OF TORTS § 909(c) (1979).

230. *Baker*, 554 U.S. at 484.

231. 33 U.S.C. §§ 1251–1387 (2006).

232. *Baker*, 554 U.S. at 484–86.

233. *Id.* at 488–89.

234. *Id.* at 489–90.

235. *Id.* at 492–93.

1:1, and that there has been no marked increase in the percentage of cases with punitive awards.[236] It opined, however, that the unpredictability of high punitive awards was in tension with their punitive function because of the implication of unfairness that an eccentrically high punitive verdict carries.[237] A penalty should be reasonably predictable in its severity, to enable every person to know what the stakes are in choosing one course of action over another; and a penalty scheme ought to threaten defendants with a fair probability of suffering in like degree for like damage.[238] The Court concluded that awards at or below the empirically established median would roughly express jurors' sense of reasonable penalties in cases like the case at bar, which have no earmarks of exceptional blameworthiness (such as malice or avarice), and raise no unique obstacles to enforcement (such as a modest harm or low likelihood of detection). Accordingly, and given the need for predictability, the Court held that a 1:1 ratio was a fair upper limit in such maritime cases, therefore reducing the punitive damages award to $507.5 million.[239] Cases in which the defendant's conduct is more egregious than reckless are not so limited.[240]

B. Federal Legislation

Prior to the enactment of the Oil Pollution Act, oil spills were governed by a patchwork of federal legislation. Section 13 of the Rivers and Harbors Act of 1899[241] provides that it is unlawful to discharge or cause a discharge of "any refuse matter of any kind" into any navigable water of the United States. Courts have consistently held, however, that this section does not confer a private cause of action on victims of discharge.[242] The FWCPA provided recovery for government cleanup and restoration costs, but did not address private losses.[243] Section 311 of this Act prohibits "[t]he discharge of oil or hazardous substances. . . in

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236. *Id.* at 497–99.

237. *Id.* at 500–03.

238. *Id.* at 502–03.

239. *Id*. at 512–15.

240. *See* Jones, *supra* note 149, at 1302.

241. 33 U.S.C. § 407 (2006).

242. *See* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1031 n.15 (5th Cir. 1985); Evansville v. Ky. Liquid Recycling, Inc., 604 F.2d 1008, 1011–12 (4th Cir. 1979); Yates v. Island Creek Coal Co., 485 F. Supp. 995, 996–97 (W.D. Va. 1980); Burgess v. M/V Tamano, 373 F. Supp. 839, 844–45 (D. Me. 1974).

243. *See* Van Hanswyk, *supra* note 28, at 327; Wallace & Ratcliffe, *supra* note 28, at 1344–45.

such quantities as may be harmful" to U.S. controlled waters,[244] and provides for administrative and civil penalties for various violations.[245] But this section also does not allow recovery for harm caused to private entities.[246]

Three statutes addressed oil pollution liability and compensation, but only with regard to incidents related to specific ventures. The first was the Trans-Alaska Pipeline Authorization Act (TAPAA),[247] invoked by many claimants in the *Exxon Valdez* case. The Act imposed strict liability for damages resulting from marine pollutions, apparently without the *Robins Dry Dock* limit;[248] yet its scope was very limited. First, it applied only to oil pollution, not to the release of other hazardous substances.[249] Second, it only covered incidents related to the operation of the Trans-Alaska Pipeline System.[250] Third, it granted a cause of action only against certain classes of polluters, namely owners and operators of vessels onto which oil transported through the Trans-Alaska pipeline was loaded at the pipeline's terminal facilities.[251] Finally, the TAPAA set rigid liability caps. In the case of a discharge from a vessel, liability could not exceed $100 million, of which the owner and operator of the vessel were liable for the first $14 million, and the Trans-Alaska Pipeline Liability Fund was liable for the balance.[252]

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244. 33 U.S.C. § 1321(b)(3) (2006).

245. *Id.* § 1321(b)(6)–(7).

246. *See, e.g.*, Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1014 (E.D. La. 1993); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 982 (E.D. Va. 1981).

247. 43 U.S.C. §§ 1651–1656 (2006).

248. *In re* Exxon Valdez, No. A89-095, 1992 U.S. Dist. LEXIS 22495, at *13 (D. Alaska Dec. 23, 1992); Slaven v. BP Am., Inc., 786 F. Supp. 853, 858–60 (C.D. Cal. 1992); *In re* Exxon Valdez, 767 F. Supp. 1509, 1515 (D. Alaska 1991); *In re* Glacier Bay, 746 F. Supp. 1379, 1386 (D. Alaska 1990). *But cf.* Benefiel v. Exxon Corp., No. 90-2184, 1990 U.S. Dist. LEXIS 13251, at *2–3 (C.D. Cal. July 27, 1990) (holding that *Robins Dry Dock* applies to claims under TAPAA). On appeal, the Ninth Circuit affirmed the district court's decision without directly discussing the applicability of *Robins Dry Dock*. It held that plaintiffs' losses were "remote and derivative" and fell "outside the zone of dangers against which Congress intended to protect when it passed TAPAA." Benefiel v. Exxon Corp., 959 F.2d 805, 807 (9th Cir. 1992); *see also* David P. Lewis, Note, *The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?*, 10 ALASKA L. REV. 87, 116–30 (1993) (supporting the district court's position).

249. 43 U.S.C. § 1653(c)(1) (2006).

250. *Id.*

251. *Id.*

252. *Id.* § 1653(c)(3). The pipeline operator "collect[s] from the owner of the oil . . . a fee of five cents per barrel," and the collection ceases upon the accumulation of $100 million. *Id.* § 1653(c)(5).

Robins Dry Dock applied to any damages in excess of the $100 million recoverable under the TAPAA.[253]

Similarly, the Deepwater Port Act (DPA) imposed strict but limited liability for removal costs and damages that resulted from a discharge of oil from deepwater ports or vessels proceeding to or from such ports.[254] The DPA also established a fund that was available for compensation in excess of the statutory cap, originally up to $100 million.[255] Lastly, the Outer Continental Shelf Lands Act (OCSLA), as amended in 1978, applied to discharges from offshore facilities on the outer continental shelf and from vessels carrying oil from these facilities.[256] The OCSLA imposed strict liability on the owner and operator of the offshore facility or the vessel, subject to statutory caps, and established the Offshore Oil Pollution Compensation Fund that covered losses not otherwise compensated up to $200 million. Although cases like the *Deepwater Horizon*, which occurred on the outer continental shelf, would have been governed by the OCSLA prior to 1990,[257] the liability sections of this Act—like those of the DPA—were repealed by the Oil Pollution Act of 1990.[258]

C. State Law

Apart from common law remedies, most coastal states and the five Great Lakes states have enacted water pollution legislation with strict liability provisions.[259] The main question was whether oil pollution victims could pursue claims under state law, in particular where such claims did not conform to federal maritime law.

For instance, in an attempt to circumvent the harsh implications of *Robins Dry Dock* in the *Exxon Valdez* case, many claims were brought under the Alaska Environmental Conservation Act,[260] which imposes

253. *Exxon Valdez*, 767 F. Supp. at 1515; *see also Exxon Valdez*, 1992 U.S. Dist. LEXIS 22495, at *12–13.

254. 33 U.S.C. §§ 1501–1524 (2006); Van Hanswyk, *supra* note 28, at 328–29.

255. This amount was reduced by the Deepwater Port Act Amendments of 1984, Pub. L. No. 98-419, § 4(a), 98 Stat. 1607, 1608–09 (1984).

256. 43 U.S.C. §§ 1811–1824 (2006); Van Hanswyk, *supra* note 28, at 329–30.

257. "Outer Continental Shelf" includes "all submerged lands lying seaward and outside of the area of lands beneath navigable waters [under state jurisdiction], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a) (2006).

258. *See* Pub. L. No. 101-380, §§ 2003–2004, 8102 104 Stat. 507, §§ 2003–2004, 8102 (1990).

259. *See, e.g.*, Rodriguez & Jaffe, *supra* note 35, at 10–11.

260. ALASKA STAT. § 46.03.822–.824 (2006).

strict liability for damages, including economic losses, caused by unauthorized release of hazardous substances. A controversy emerged regarding the possible preemption of this provision by general maritime law. Under *Southern Pacific Co. v. Jensen*,[261] state legislation may incidentally affect maritime affairs, unless it "contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[262] The federal district court in Alaska held that *Robins Dry Dock* applied to claims brought against Exxon under the Act, because state law may not conflict with federal maritime law.[263] Other courts interpreting comparable legislation in other states in the late 1980s and early 1990s, including the Fifth Circuit, reached similar conclusions.[264]

However, both the Alaska Supreme Court and the Ninth Circuit on appeal from the District Court of Alaska, decided that *Robins Dry Dock* did not preempt liability for purely economic loss under state law,[265] and this seems to be the dominant view today.[266] According to this stance,

261. 244 U.S. 205 (1917).

262. *Id.* at 216; *see also* Askew v. Am. Waterways Operators, 411 U.S. 325, 339 (1973).

263. *In re* Exxon Valdez, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20555, at *5–7 (D. Alaska Jan. 26, 1994); *In re* Exxon Valdez, No. A89-095, 1992 U.S. Dist. LEXIS 22495, at *17–20 (D. Alaska Dec. 23, 1992); *In re* Exxon Valdez, 767 F. Supp. 1509, 1515–16 (D. Alaska 1991). More accurately, the district court held that *Robins Dry Dock* applied to claims under the Alaska Act against entities not liable under the TAPAA, and to claims against entities liable under the TAPAA in excess of the TAPAA cap. Because the vessel owner and operator are liable for only $14 million under the TAPAA, damages claimed against the vessel-interest-defendants in excess of $14 million were subject to *Robins Dry Dock*. *In re* Glacier Bay, 865 F. Supp. 629, 637 (D. Alaska 1991).

264. *See* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1021, 1031–32 (5th Cir. 1985) ("[F]ederal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct . . . The *Robins* rule has proved to be a workable and useful tool in our maritime jurisprudence. To permit recovery here on state law grounds would undermine the principles we seek to preserve today."). The Fifth Circuit reiterated this stance in a slightly different context in IMTT-Gretna v. Robert E. Lee S.S., 993 F.2d 1193, 1195 (5th Cir. 1993). *See also In re* Ballard Shipping Co., 810 F. Supp. 359, 364–66, 368–69 (D.R.I. 1993) (interpreting R.I. GEN. LAWS § 46-12.3-4 (1991)); *In re* Oriental Republic Uru., 821 F. Supp. 950, 955–56 (D. Del. 1993) (discussing DEL. CODE ANN. tit. 7, § 6207 (1991)).

265. *In re* Exxon Valdez, 270 F.3d 1215, 1251–53 (9th Cir. 2001); Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 767–69 (Alaska 1999).

266. *See* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994) (finding that the Rhode Island Act is not preempted by the admiralty clause); Slaven v. BP Am., Inc., 786 F. Supp. 853, 864–65 (C.D. Cal. 1992) (holding that state law claims that go beyond *Robins* are not preempted); *cf. In re* Nautilus Motor Tanker Co., Ltd., 900 F. Supp. 697, 702–05 (D.N.J. 1995) (holding that maritime law does not preempt New Jersey's common law, which does not automatically deny recovery for purely economic loss).

Robins Dry Dock is not a "characteristic feature" of maritime law because it neither originated nor has exclusive application in maritime law.[267] Moreover, to determine whether state law "interferes with the proper harmony and uniformity" of maritime law, a court needs to apply a balancing test that weighs state and federal interests on a case-by-case basis.[268] The balance in this case tips in favor of the state: "Alaska's strong interest in protecting its waters and providing remedies for damages resulting from oil spills outweighs the diminished federal interest in achieving interstate harmony through the uniform application of *Robins*."[269] Consequently, the Ninth Circuit reversed the district court's rulings on this issue, and remanded the case for reconsideration of several economic loss claims under Alaska law.[270] Following this decision, Exxon apparently settled these claims.[271] Still, as in the case of the TAPAA, recovery for economic losses hinged on the intricacies of a special legislative scheme.

II. THE GENERAL PROBLEM: SIMULTANEOUS APPLICATION OF THE EXCLUSIONARY RULE AND THE PUNITIVE DAMAGES DOCTRINE

This Part explains why pre-OPA maritime law gave rise to incongruity on the justificatory level. Part II.A shows that simultaneous application of the exclusionary rule and the punitive damages doctrine pulls the limits of civil liability in opposing directions. Each seems to negate at least some of the warranted effects of the other, and applying the two in a single case futilely violates general principles of tort law and generates distributive injustice. Part II.B delineates the contours of the problem, showing that although it surfaced in a marine oil pollution setting, it is essentially a general weakness of maritime and land-based common law. Part II.C proposes a conceptual framework for resolution. The main idea is that where liability must be expanded beyond the limits set by the exclusionary rule to obtain certain levels of deterrence and retribution, relaxing the exclusionary rule and allowing more victims to recover is more defensible than awarding punitive damages to a very few successful claimants.

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267. *Exxon Valdez*, 270 F.3d at 1251; *Kodiak*, 991 P.2d at 767.

268. *Exxon Valdez*, 270 F.3d at 1251.

269. *Id.* at 1252–53; *Kodiak*, 991 P.2d at 769.

270. *Exxon Valdez*, 270 F.3d at 1253.

271. *See, e.g.*, Sea Hawk Seafoods v. Exxon Corp., 484 F.3d 1098, 1099–1100 (9th Cir. 2007) (noting that a claim brought by a seafood processor under Alaska law was settled).

A. The Adverse Consequences of Simultaneous Application

Liability for purely economic loss and punitive damages were treated as distinct legal matters throughout the *Exxon Valdez* litigation, and this is indisputably correct from a purely doctrinal perspective. However, the two matters are interlinked on a deeper level. To understand the essence of the problem, let us assume first that the exclusionary rule sets a justifiable limit on liability. The main purpose of this rule is to address the specter of indeterminate and potentially enormous liability. The fear of overwhelming the court system with numerous claims proved exaggerated in the *Exxon Valdez* litigation, where the use of procedural methods, such as consolidation of actions, alleviated the judicial burden to a practicable level.[272] Although the Court rejected many claims, thousands of claims were handled quite efficiently. Still, the likelihood of extensive liability, correlated with the prospect of numerous claims, is troubling for various reasons. Most importantly, extensive liability may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong; unduly restrict the freedom of action of potential tortfeasors; crush productive businesses; and make liability insurance not worthwhile to insurers and potential injurers alike. However, if the exclusionary rule reduces liability to a normatively defensible level, an award of punitive damages necessarily increases the extent of liability beyond that level.[273] And if in certain types of cases an expansion is justified, how can liability for economic loss still be denied on the grounds of the need to reduce liability?

Two arguments relating to defendants' limited funds require special attention. First, given the limited pool that all successful claimants ultimately need to share, liability for relational losses may prevent full recovery for injuries to physical interests, which may be more worthy of legal protection. Second, each victim may end up with compensation for a very small fraction of his or her loss, making the costly process futile. Both arguments assume that allowing recovery for economic losses would extend liability beyond the defendant's capacity. But if the exclusionary rule sets the appropriate limit, an award of punitive damages generates a similar problem. Assume, for the sake of argument, that under the exclusionary rule liability perfectly matches the defendant's capacity. In this case, an award of punitive damages to *all*

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272. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 479 (2008) ("The remaining civil cases were consolidated into this one against Exxon . . . .").

273. For example, if the exclusionary rule makes liability insurance more readily available, punitive damages (if covered by liability insurance) may reinstate the problem.

successful claimants will be futile and wasteful in terms of administrative costs, because it will not change the ultimate payment to each claimant. An award of punitive damages to *some* of the successful claimants will result in under-compensation of the others.

Another aspect of the ripple effect of economic losses is that the extent of potential liability is uncertain, leaving potential injurers incapable of preparing for contingencies. The exclusionary rule is said to eliminate most of this uncertainty. Yet an award of punitive damages, subject only to general constitutional guideposts, reinstates a high degree of uncertainty into the system, as the U.S. Supreme Court in the *Exxon Valdez* case observed.[274] Potential injurers cannot accurately predict the extent of compensatory damages, which serve as a benchmark for punitive damages, or the ultimate ratio between punitive and compensatory damages. The 1:1 ratio, which reduces uncertainty to some extent, applies only in maritime law, and even there it may be relaxed in certain circumstances.

The conventional economic justification for *Robins Dry Dock* is that many financial losses are not true social costs. Thus, exclusion of liability prevents over-internalization, hence over-deterrence.[275] But, again, if limiting liability is required to prevent over-deterrence, an award of punitive damages increases the extent of liability beyond the normatively defensible level. And if in certain types of cases an expansion is nonetheless justified, there is no reason to prefer a non-compensatory sanction to compensation for actual losses. An economic theorist might argue that each of the two rules deals with a different problem: the exclusionary rule prevents internalization of private losses that do not correspond to social costs, and punitive damages are used to overcome problems of under-enforcement. These two problems entail independent modifications of the extent of liability, so the simultaneous application of the two rules is justified. Because this appears to be a general challenge to my thesis, I discuss it at length below.

Another deterrence-based justification for the exclusionary rule turns on the fact that the injurer is already liable for the physical injury. The marginal deterrent effect obtained from holding the injurer liable for relational economic losses is said to be lower than the administrative cost involved in shifting the additional loss.[276] In cases like the *Exxon Valdez*, liability for harm to natural resources, property damage, and

274. *Exxon Shipping*, 554 U.S. at 499–500, 502.

275. *See supra* notes 92–98 and accompanying text.

276. *See supra* notes 99–100 and accompanying text.

marine harvesters' economic losses (under the fishermen's exception), together with criminal fines, might provide sufficient deterrence. If so, awarding punitive damages may not be cost-justified. Although the cost of assessing punitive damages in a particular case is probably lower than the cost of handling additional claims, the administrative cost is still significant, as illustrated by the *Exxon Valdez* litigation,[277] and may outweigh the benefit in terms of marginal deterrence. Again, if in certain cases an expansion of liability is necessary to achieve the twin goals of retribution and deterrence, the justification for denying recovery for economic losses no longer applies.

Many contend that the typical relational victim could protect his or her interests through a contract with the primary victim, and that failing to do so justifies exclusion of liability. I have demonstrated the weaknesses of this argument elsewhere.[278] In particular, protection through contract is frequently impractical. Marine pollution cases provide a clear example of impracticability, because oceanic resources have no owner with whom potential victims can bargain. So even if the contractual protection argument is valid in other contexts, it is generally irrelevant here.

A related explanation for the exclusionary rule is the need to incentivize victims to take precautions and to mitigate damages. Admittedly, an award of punitive damages does not fully cancel out this benefit, because punitive damages can be awarded only to those who have a valid cause of action, and relational victims have none. However, incentivizing potential victims is a relatively weak and uncommon justification for the exclusionary rule, because the doctrines of comparative negligence and mitigation of damages can provide the necessary incentives. In any case, losses attributable to the victim's imprudence, before or after the accident, are not social costs externalized by the injurer. So denying recovery for such losses not only provides an incentive to potential victims, but also prevents over-deterrence of potential injurers. Awarding punitive damages under these circumstances once again adds a deterrent beyond the warranted level.

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277. First, the jury needed to consider whether Exxon was reckless, hence potentially liable for punitive damages. *Baker*, 554 U.S. at 479–80. Second, the jury had to determine the proper amount of punitive damages. *Id.* at 480. These steps have a price. Moreover, the two judgments may be challenged in appellate courts. In fact, the question of the proper amount in the *Exxon Valdez* case went back and forth between the district court and the court of appeals and was decided by the U.S. Supreme Court nearly fifteen years after the initial judgment.

278. *See supra* notes 103–05 and accompanying text.

Finally, the exclusionary rule is said to provide a certain and easily applicable limitation on tort liability. I have opined that liability should be limited in a just and principled manner, not through arbitrary bright lines.[279] But even if simplicity were a valid justification for blanket exclusion of liability, the benefit would once again be counterbalanced by an award of punitive damages. The U.S. Supreme Court explained that the real problem with punitive damages is the stark unpredictability of the awards; while the median ratio of punitive to compensatory awards falls within a reasonable zone, the variance is quite high.[280] Although the Court set an upper limit to this ratio in cases of recklessness tried under maritime law, it left a relatively high degree of uncertainty in cases of more reprehensible conduct, as well as in land-based common law. The common law, despite constitutional constraints, is incapable of eliminating the uncertainty associated with punitive damages.

Now let us look at the other side of the coin. Punitive damages aim to increase liability to a normatively desirable degree. They are awarded where courts feel that a compensatory award is an extremely lenient sanction with regard to the gravity of the defendant's conduct, or that an additional extra-compensatory sanction is required to secure the necessary level of deterrence. If compensation for actual harm is insufficient to obtain proper levels of retribution and deterrence, it seems odd that an extra-compensatory supplement intended to increase liability to a desirable level, namely punitive damages, is accompanied by a significant reduction in overall liability for actual harm through the exclusionary rule. If liability should exceed actual harm, denial of recovery for a substantial portion of the aggregate loss is counterintuitive, not to say absurd.

In sum, if in a particular case there is good reason to set liability below actual harm, as the exclusionary rule does, liability should be limited, and the effects of such limitation should not be canceled out by a subsequent increase in overall liability. If, on the other hand, there is good reason to increase liability beyond actual harm, as the punitive damages doctrine does, liability should increase, and the effects of the expansion should not be alleviated by wholesale denial of recovery for some of the actual harm. But what if in the particular case there are legitimate reasons to reduce liability, along with equally legitimate reasons to expand liability? The question should then be whether—all

279. *See supra* note 128 and accompanying text.

280. *Exxon Shipping*, 554 U.S. at 497–500.

things considered—the scope of liability must equal, exceed, or be less than actual harm. In the absence of a specific reason to conclude otherwise, liability must equal actual harm. If liability must fall short of actual harm, a reasonable limitation of liability is warranted, while punitive damages are not. If liability must exceed actual harm, punitive damages are warranted and exclusion of liability for some of the provable loss is not. Either way, the exclusionary rule and the punitive damages doctrine should not be applied simultaneously.

As implied above, one may argue that the exclusionary rule and the punitive damages doctrine are intended to solve separate and independent problems and entail incommensurable modifications in the scope of tort liability. Arguably, one set of justifications requires a certain reduction, while another requires an unequal expansion. Thus, the two rules should be allowed to apply simultaneously, each in accordance with its own rationale. A traditional economic version of this argument might be that the exclusionary rule prevents internalization of private losses that do not correspond to social costs,[281] whereas the punitive damages doctrine addresses problems of under-enforcement.[282] For example, assume that a wrongful conduct causes a $1 million loss to private entities, of which $100,000 constitutes true social cost, and that the probability of escaping liability is 0.75. In accordance with the two-layer approach the court should award compensatory damages to the extent of the social cost, namely $100,000, and subsequently award $300,000 in punitive damages ($100,000/0.25–$100,000) to make up for cases of impunity.

The answer is simple. The normatively desirable scope of liability always equals, exceeds, or is less than actual harm. If, considering the justifications of the exclusionary rule on the one hand, and those of punitive damages on the other, the court concludes that liability must be equal to or lower than actual harm, as in the foregoing example, awarding punitive damages while denying recovery for actual harm is implausible from conceptual and distributive justice perspectives. Both the exclusionary rule and the punitive damages doctrine are exceptions to general principles of private law. Victims of wrongful conduct should generally be allowed to recover for their losses, and every victim should be restored, as much as possible, to the pre-tort condition. If there is reason to limit liability, it should be done with minimal encroachment on these fundamental principles. Within the appropriate limit, it is better to

281. *See supra* notes 92–98 and accompanying text.

282. *See supra* notes 211–16 and accompanying text.

allow more victims to recover for their actual loss than to deny such recovery in violation of the principle of liability for wrongful harm, while bestowing a windfall on a few claimants in violation of the principle of *restitutio in integrum*.[283] Besides being conceptually problematic, the two-layer approach is inferior from a distributive justice ("fairness") perspective: if liability is limited, the limited amount should be distributed according to merit. It is unreasonable to prioritize enrichment of the already compensated few over compensation to additional deserving victims. In the numerical example, the law should endeavor to compensate victims for actual harm up to the desirable extent of approximately $400,000.[284]

Similarly, if after considering all relevant factors the court concludes that total liability must exceed the aggregate loss, all victims should be compensated for their established losses, and punitive damages should be awarded in addition. The traditional two-layer approach of the common law to cases of this sort, namely denying recovery for economic losses and then awarding punitive damages to successful claimants, requires an exceptionally large award of punitive damages to make up for the partial compensation. A smaller amount of punitive damages would reduce total liability to an undesirable level. Moreover, because many victims have no standing, the exceptional punitive award is distributed among relatively few claimants. Thus, instead of allowing recovery to all victims who incurred real harm and keeping the average windfall modest, the law bestows a substantial windfall on a very few claimants, while leaving many victims with nothing.

B. The Scope of the Problem

I have shown that the exclusionary rule and the punitive damages doctrine were applied in tandem in the *Exxon Valdez* litigation, and explained why this was problematic. In this subpart I demarcate the boundaries of the problem. First, I extract the precondition of in tandem application of the two rules from the *Exxon Valdez* case itself. Then I examine whether and to what extent the problem identified here transcends the unique setting of massive maritime pollution.

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283. Punitive damages are generally seen as a windfall to someone who has already been fully compensated. Smith v. Wade, 461 U.S. 30, 59, 87 (1983) (Rehnquist, J., dissenting).

284. Of course, we need to decide who will ultimately share this amount. I provide some guidelines in Part II.C., *infra*, understanding that courts will have to work out the details on a case-by-case basis.

With regard to the precondition, the *Exxon Valdez* litigation is illustrative. The exclusionary rule applies only when the interference with the plaintiff's economic relation is unintentional.[285] Traditionally, punitive damages are awarded when the defendant's conduct was outrageous, because his or her acts were done with an evil motive or with reckless indifference to the rights of others;[286] but in some jurisdictions even gross negligence suffices.[287] So application of the two rules in tandem may occur in cases of recklessness, of which the *Exxon Valdez* case is an example, and possibly in cases of extreme negligence.[288] The problem does not arise in cases of ordinary negligence, where punitive damages are currently precluded.[289] Intentional conduct, on the other hand, can yield simultaneous application of the exclusionary rule and the punitive damages doctrine, even though the former does not apply to intentional interference with economic relations. This is so because a mean-spirited tort to the person or property of one person may unintentionally cause economic loss to others who are economically dependent on the intended victim. In these cases, the unintended relational losses will be irrecoverable under *Robins Dry Dock*, while punitive damages may be deemed appropriate due to the gravity of the wrong.

The incoherence transcends the unique setting of a massive maritime pollution. First and foremost, it is not limited to maritime law. As explained in Part I, both rules are well-established not only in maritime law, but also in land-based common law.[290] They may collide in similar circumstances in nearly all jurisdictions. There are, of course, numerous nuances. For instance, punitive damages may be capped in some states, and caps may vary.[291] Similarly, some courts may recognize exceptions to the exclusionary rule, and these exceptions may also vary from one

285. Intentional interference is actionable. *See* RESTATEMENT (SECOND) OF TORTS §§ 766–766B (1979).

286. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

287. *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 887 (W.Va. 1992); Rustad & Koenig, *supra* note 167, at 1305–07.

288. Recklessness is a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts that would disclose the danger to any reasonable person; gross negligence is a significant deviation from the objective standard of reasonable care. *See* Ellis, *supra* note 178, at 21.

289. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979).

290. *See supra* notes 60, 63, 176 and accompanying text.

291. *See* Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1338–49 (2005).

jurisdiction to another.[292] But the clash between the two rules may surface in almost all states.[293] In fact, the problem might be even more acute under state law, where juries often have more discretion regarding the size of punitive damages awards, making them more unpredictable. This works against the exclusionary rule in terms of promoting certainty.

Moreover, the problem is not limited to environmental disasters. It was not noticed until a very salient event occurred and high-profile litigation ensued, but it may arise whenever unintended economic losses ripple out from a physical injury caused by intentional, reckless or—in some jurisdictions—grossly negligent conduct. For example, suppose that picketers recklessly injure a generator or a cable that supplies electricity to an industrial zone. The factories in the area will not be allowed to claim damages for their unintended economic losses.[294] But the injurers' recklessness may be a sufficient ground for awarding punitive damages. The picketers' liability will be simultaneously limited by the exclusionary rule, and expanded by the punitive damages doctrine. Similarly, assume that a vehicle driven recklessly by an intoxicated driver collides with a bridge, thereby blocking the highway over the bridge and the navigable waterway under it, causing economic loss to thousands. Drivers and ship owners will not be able to recover for these losses,[295] but the gravity of the wrong might enable the bridge owner to claim punitive damages, in addition to compensation for property damage.

Arguably, the problem of contradictory adjustments of the extent of liability was ultimately evaded in the *Exxon Valdez* case. The Ninth Circuit found that the Alaska Environmental Conservation Act was not preempted by *Robins Dry Dock*,[296] enabling at least some of the relational victims to claim damages. This does not undermine my thesis. First, the Alaska Environmental Conservation Act is an esoteric state statute of limited application. It seemingly solves the problem in a specific type of events (unauthorized release of hazardous substances) that take place in a limited geographical area. The problem may still

292. *See* Perry, *Relational Economic Loss*, supra note 76, at 779.

293. However, Nebraska does not allow punitive damages at all. Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989).

294. *See, e.g.*, Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212, 214 (5th Cir. 1980); Byrd v. English, 43 S.E. 419, 421 (Ga. 1903).

295. *See, e.g.*, Channel Star Excursions, Inc. v. S. Pac. Transp. Co., 77 F.3d 1135, 1137–38 (9th Cir. 1996); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51–53 (1st Cir. 1985); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (5th Cir. 1983); Kingston Shipping Co. v. Roberts, 667 F.2d 34, 35 (11th Cir. 1982); Kinsman Transit Co. v. Buffalo, 388 F.2d 821, 821–22 (2nd Cir. 1968).

296. *In re* Exxon Valdez, 270 F.3d 1215, 1251–53 (9th Cir. 2001).

arise in other types of cases and in other jurisdictions. Second, the Ninth Circuit neither recognized the problem nor endeavored to resolve it. Its decision focused on the proper interpretation of *Jensen* concerning preemption, not on the proper scope of liability in the common law of torts (maritime or land-based). So it is unclear whether the ultimate scope of Exxon's liability was indeed warranted, all relevant factors being considered. Even if it was, this outcome was haphazard rather than planned. Interestingly, the Ninth Circuit in its 2001 decision allowed claims under the Alaska act,[297] but ordered the district court to reduce the award of punitive damages.[298] This would have been consistent with the normative proposition of this Article if the ultimate scope of liability had been determined after a conscious and careful consideration of the various concerns underlying the exclusionary rule and the punitive damages doctrine.

C. Guidelines for Resolution

The preceding analysis reveals an awkward phenomenon. Courts may simultaneously apply rules that pull the bounds of liability in opposite directions: the exclusionary rule reduces while the punitive damages doctrine increases liability, both for seemingly legitimate reasons. In cases of in tandem application, either rule cancels out the effects of the other, at least to some extent. So far, I have implied that courts need to determine the proper scope of liability, in accordance with the various considerations outlined in Part I, and then give the fullest possible effect to general principles of tort law—liability for wrongful harm and *restitutio in integrum*—with the necessary limit in mind. Neither the exclusionary rule nor the punitive damages doctrine should be applied separately, without regard to the rationale and effects of the other. In this subpart, I propose a possible framework for implementing these conclusions, assuming once again that the justifications for both rules have merit.

The simplest case is that of ordinary negligence (or non-culpable conduct) resulting in physical injury and relational economic losses. In this case, only the rationale for the exclusionary rule is relevant, and liability should be limited accordingly. But if intentional, reckless, or grossly negligent conduct is involved, the traditional justifications for punitive damages emerge and call for an expansion of liability. In such a

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297. *Id.*

298. *Id.* at 1246–47.

case, the court must first determine the extent of the necessary expansion.

If the normatively desirable scope of liability is equal to or lower than the aggregate loss, including relational economic losses, the court should allow recovery for actual harm incrementally up to the desirable amount, and preclude punitive damages. As Jane Stapleton observed, British Commonwealth courts have already recognized that "while the total extent of economic loss and the total number of victims in an economic loss case may be indeterminate, this . . . need not be fatal to a claim."[299] There is no legal problem of indeterminacy if the law, on a normatively justifiable basis, can restrict those who can sue, and this normatively justified class is reasonably determinate.[300] The real question then is what the normatively justifiable formula for limiting liability should be. As the expansion of liability is mandated by the underlying rationale of punitive damages, the formula must comply with this rationale. Therefore, the limit of liability may reasonably be set according to the gravity of the defendant's wrong. The graver the conduct, the more relational victims are compensated.[301] Specifically, any expansion of liability will enable another sphere of relational victims, whose losses are more remote from the primary injury, to obtain compensation.[302] As liability for actual losses is expanded to the exact level mandated by the twin goals of retribution and deterrence, the need for an additional sanction ceases to exist. Relaxing the exclusionary rule enables the court to align the scope of compensatory damages with the defendant's culpability and makes punitive damages redundant.

As explained, expanding liability for actual harm is better than strict adherence to the exclusionary rule and a simultaneous award of punitive damages. The exclusionary rule and the punitive damages doctrine are both exceptions to general principles of private law. If there is reason to limit liability, it should be done with minimal encroachment on these principles. The proposed method better serves the principle of liability

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299. Stapleton, *supra* note 69, at 544.

300. *Id.*

301. The idea that the degree of reprehensibility of the defendant's conduct may be relevant in deciding whether to allow recovery for purely economic loss is not unprecedented. *See, e.g.*, J'Aire Corp. v. Gregory, 598 P.2d 60, 63 (Cal. 1979). However, in *J'Aire*, as opposed to paradigmatic relational loss cases, there was no physical injury, and the plaintiff was the only one who suffered economic loss; *see also* O'Brien, *supra* note 77, at 969, 972 (concluding based on California case law that liability for negligent infliction of economic loss is imposed only when the defendant's conduct is significantly below that of a reasonable person).

302. *Cf.* Stapleton, *supra* note 69, at 544–45 (stating that directness may be the normatively justifiable basis for expanding liability for economic loss).

for foreseeable harm caused by unreasonable conduct by allowing more victims to recover for their actual losses, and better serves the principle of *restitutio in integrum* by avoiding extra-compensatory windfalls. Moreover, it is superior from a distributive justice perspective, as it prioritizes compensation to more victims over enrichment of the already-compensated few.

If the normatively desirable scope of liability exceeds the aggregate loss, including relational economic losses, the court should allow recovery by relational victims, and award punitive damages up to the necessary level. This is preferable to in tandem application of the exclusionary rule and the punitive damages doctrine. Allowing recovery to all victims who have incurred real harm, and keeping the average windfall (in the form of extra-compensatory damages) modest, is better than bestowing a substantial windfall on a very few victims, while leaving many others with nothing. Here, too, relaxing the exclusionary rule would be based on the concept of incremental expansion of liability according to the gravity of the wrong.[303]

This proposed reform entails not only modification of substantive law, but also some procedural adjustments. Most notably, to apply the new model it is necessary to determine at a relatively early stage if and to what extent expansion of liability is warranted. Without this preliminary ruling the court cannot decide whether additional claims for economic loss should be dismissed or allowed to proceed. In fact, a preliminary decision of this sort was made in the *Exxon Valdez* litigation. The jury was asked to consider whether Exxon was reckless—hence potentially liable for punitive damages—before making any decision on compensatory damages.[304] A preliminary ruling on the gravity of the wrong is also necessary under the OPA to determine whether liability caps apply, as I explain below.

III. OIL POLLUTION LIABILITY IN THE OPA ERA

This Part examines whether the enactment of the Oil Pollution Act has created a more defensible oil pollution liability regime. Part III.A presents the current liability regime, using the *Deepwater Horizon* incident as a test case. Part III.A.1 systematically analyzes the relevant provisions of the OPA, including the imposition of strict liability on specific parties, defenses, recoverable damages, liability caps, and the

303. Liability will be expanded to the exact level mandated by the traditional goals of punitive damages.

304. Exxon Shipping Co. v. Baker, 554 U.S. 471, 479–80 (2008).

implications of defendants' degree of fault. Part III.A.2 discusses the role of state law within the current scheme. Part III.B acknowledges that the OPA maintains some correlation between the scope of liability and the gravity of the defendant's conduct, and that the expansion of liability in cases of severe misconduct better corresponds to the general principles of tort law and to distributive concerns. This subpart demonstrates, however, that the OPA does not set the proper limits on liability because it is insensitive to the traditional justifications for exclusion of liability for economic losses on the one hand, and for expanding liability in the case of severe misconduct on the other hand.

A. The Current Liability Scheme

1. The Oil Pollution Act

Congress attempted to enact comprehensive oil pollution legislation from the mid-1970s, and several bills were introduced and discussed by the late 1980s.[305] Only the *Exxon Valdez* catastrophe, and a series of smaller, highly publicized oil spills in subsequent months, galvanized public and political support for legislative reform.[306] The Oil Pollution Act of 1990[307] was approved by the Senate by a vote of 99-0, and by the House of Representative by a vote of 360-0, and was signed by President George H.W. Bush on August 18, 1990.[308] Because it was enacted in the wake of the *Exxon Valdez* spill, the OPA did not apply to any of the claims arising from that incident. So the highly complex two-decade litigation that followed the *Exxon Valdez* spill did not shed much light on the new statute. Judicial decisions concerning the OPA are sparse, so the forthcoming *Deepwater Horizon* litigation may generate an interesting discussion of various interpretive questions.

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305. *See* OIL POLLUTION DESKBOOK, *supra* note 36, at 3, 195; Elizabeth R. Millard, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331, 338–40 (1993); Van Hanswyk, *supra* note 28, at 338–40; Wallace & Ratcliffe, *supra* note 28, at 1361–62, 1366–67.

306. Although a series of smaller spills occurred later in 1989 and 1990, the *Exxon Valdez* incident was undoubtedly the main catalyst. *See* Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 CASE W. RES. L. REV. 1, 7–8 (1997); Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L. J. 481, 482 (2000); John H. Cushman, *Conferees Agree on Bill to Cover Cost of Oil Spills*, N.Y. TIMES, June 29, 1990, http://www.nytimes.com/1990/06/29/us/conferees-agree-on-bill-to-cover-cost-of-oil-spills.html.

307. 33 U.S.C. §§ 2701–2762 (2006).

308. *See* Millard, *supra* note 305, at 368; Rodriguez & Jaffe, *supra* note 35, at 11 n.68.

The OPA provides that "each responsible party for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages . . . that result from such incident."[309] The Act clearly applies to the *Deepwater Horizon* case. The exclusive economic zone extends to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. At the time of the incident, the drilling rig was located at Macondo Prospect, approximately forty-one miles off the southeast coast of Louisiana, well within the U.S. exclusive economic zone.[310] Moreover, the oil spread to U.S. territorial waters and shorelines.

The Act holds the "responsible party" for a vessel or a facility from which oil is discharged strictly liable for removal costs and "damages."[311] In the case of a vessel, the "responsible party" is the owner, operator, or demise charterer of the vessel; in the case of an offshore facility, the "responsible party" is "the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act . . . for the area in which the facility is located."[312] BP is clearly a responsible party for the oil spill, as a lessee of the area in which the *Deepwater Horizon* was located.[313] Technically, BP's partners in the Macondo Prospect—Anadarko Petroleum (with a twenty-five percent working interest) and Mitsui (with a ten percent interest)—may also be held liable.[314] Transocean is also a responsible party, because the *Deepwater Horizon* was a "mobile offshore drilling unit" (MODU), which is not only an offshore facility or a part thereof, but also a vessel,[315] and Transocean was the owner and operator of this vessel.[316]

309. 33 U.S.C. § 2702(a) (2006).

310. The OPA defines "exclusive economic zone" as: "the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983." 33 U.S.C. § 2701(8). According to the proclamation "[t]he Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured." Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983), *available at* http://www.archives.gov/federal-register/codification/proclamations/05030.html.

311. 33 U.S.C. § 2702(a) (2006).

312. *Id.* § 2701(32)(C).

313. *Id.*

314. *See* John Schwartz, *Liability Questions Loom for BP and Ex-Partners*, N.Y. TIMES, June 24, 2010, http://www.nytimes.com/2010/06/25/us/25liability.html.

315. 33 U.S.C. §§ 2701(18), 2704(b) (2006).

316. *See* CURRY L. HAGERTY & JONATHAN L. RAMSEUR, DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 9 (2010), *available at* http://www.fas.org/sgp/crs/misc/R41262.pdf.

Not surprisingly, the Coast Guard officially named both BP and Transocean as "responsible parties" in the incident.[317] According to Transocean officials, the company's contract with BP obliges the latter to indemnify the former for the costs and liabilities incurred following the spill.[318] Still, BP has already paid claims and might seek reimbursement from other parties.

The OPA recognizes three limited defenses to liability. It provides that a responsible party is not liable for removal costs and damages where the spill was caused *solely* by (1) an act of God, (2) an act of war, or (3) an act or omission of a third party.[319] The first two apply in extremely unusual circumstances. The third (act of a third party) is narrowed down in two critical respects.[320] First, it does not apply where the third party was an employee, an agent or a person whose conduct occurs "in connection with any contractual relationship" with the responsible party.[321] At least one court has broadly interpreted the term "any contractual relationship" to include any commercial contact, even in the absence of a formal contract.[322] So even if the manufacturer of the blowout preventer used by BP (Cameron International) and the cement contractor (Halliburton) were negligent,[323] and their negligence was the sole cause of the accident, BP will not be absolved. Second, the third defense applies only if the responsible party exercised due care with respect to the oil concerned and took precautions against foreseeable acts of third parties and their foreseeable consequences.[324] No defense is available if the responsible party failed or refused to report the incident, provide reasonable cooperation and assistance in connection with cleanup efforts, or comply with orders issued with regard to cleanup.[325]

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317. *See* Tom Zeller, *BP Is in the Spotlight for Now, but 3 Other Companies Could Share the Blame*, N.Y. TIMES, May 8, 2010, http://www.nytimes.com/2010/05/09/business/09blame.html.

318. *See* Schwartz, *supra* note 314.

319. 33 U.S.C. § 2703(a) (2006).

320. *Id.* § 2703(a)(3).

321. *Id.*

322. Int'l Marine Carriers v. Oil Spill Liab. Trust Fund, 903 F. Supp. 1097, 1105–06 (S.D. Tex. 1994).

323. *See, e.g.*, John M. Broder, *Panel Says Firms Knew of Cement Flaws Before Spill*, N.Y. TIMES, Oct. 28, 2010, http://www.nytimes.com/2010/10/29/us/29spill.html ("Halliburton officials knew weeks before the fatal explosion of the BP well in the Gulf of Mexico that the cement mixture they planned to use to seal the bottom of the well was unstable but still went ahead with the job."). The National Commission's letter is available at http://graphics8.nytimes.com/packages/pdf/science/spilldoc.PDF.

324. 33 U.S.C. § 2703(a)(3) (2006).

325. *Id.* § 2703(c).

The responsible party is liable, first, for removal costs incurred by the United States, a state, or an Indian tribe, and by any person who carries out cleanup activities in accordance with the National Contingency Plan prepared and published under the FWPCA.[326] The OPA generally limits a responsible party's liability for removal costs and damages. For example, in the case of a discharge from a large double-hull vessel, liability is limited to the greater of $1900 per gross ton or $16,000,000.[327] But in the case of an oil spill from an offshore facility, the responsible party's liability for removal costs (as opposed to damages) is unlimited.[328] The *Deepwater Horizon* was a MODU—a vessel and an offshore facility—so the OPA allocates liability as follows: the MODU's owner or operator (Transocean) is liable for removal costs and damages up to the relevant tonnage-based cap, and the party responsible for the offshore facility (BP and its partners) bears unlimited liability for removal costs in excess of the MODU's share.[329]

In addition to removal costs, the OPA enumerates six categories of recoverable "damages":[330] (1) harm to natural resources[331] (recoverable by a trustee), namely the cost of restoring or rehabilitating the environment and the diminution in value of natural resources pending restoration;[332] (2) injury to real or personal property, including consequential economic loss (recoverable by the owner or lessee of the property); (3) loss of subsistence use of natural resources; (4) loss of taxes, royalties, rents, fees or net profit shares (recoverable by the United States or a state); (5) loss of profits or impairment of earning capacity due to an injury to property or natural resources; (6) costs of providing public services during or after removal activities. The OPA does not authorize compensation for personal injuries.

The fifth category of recoverable damages seems to embrace economic losses caused by an injury to natural resources or to property not belonging to the plaintiff, namely relational economic losses. But the OPA does not clarify which classes of claimants are covered by this provision. The House Conference Report explains that "[t]he claimant need not be the owner of the damaged property or resources to recover

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326. *Id.* §§ 2701(19), 2702(b)(1).

327. *Id.* § 2704(a)(1).

328. *Id.* § 2704(a)(3).

329. *Id.* § 2704(b).

330. *Id.* § 2702(b)(2).

331. *Id.* § 2701(20) (defining natural resources as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources.").

332. *Id.* §§ 2702(b)(2)(A), 2706(d).

for lost profits or income,"[333] but provides only a single example: "a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources."[334] Alas, fishermen were entitled to compensation even under pre-OPA maritime law, as explained at length above.[335] The question is whether the OPA expanded liability beyond the traditional bounds. According to the conventional view, the OPA completely supersedes *Robins Dry Dock*, and allows recovery for purely economic losses resulting from oil spills,[336] although at least one court has held the opposite position.[337]

But even if the majority view prevails, claimants under the OPA may be required to satisfy a proximate cause test. In discussing a claim brought under TAPAA by California drivers who had to pay higher prices for gasoline following the *Exxon Valdez* spill, the Ninth Circuit held that plaintiffs' losses were "remote and derivative . . . [and] fall outside the zone of dangers against which Congress intended to protect when it passed TAPAA."[338] Presumably, the OPA will be construed and applied in a similar manner.[339]

The question of liability for purely economic losses is likely to arise in the *Deepwater Horizon* litigation and out-of-court negotiations. If BP was grossly negligent, its liability under the OPA will not be limited, as explained below. Under those circumstances, the scope of liability for purely economic losses will have a considerable impact on BP's condition. If, on the other hand, BP was not grossly negligent, liability for purely economic losses will dilute the pool available for compensating traditional tort claimants. Either way, at least one party will have a clear interest in bringing up the economic loss issue.

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333. *See supra* Part I.A.1.b.

334. H.R. REP. NO. 101-653, at 103 (1990) (Conf. Rep.).

335. *Id.*

336. *See In re* Exxon Valdez, 270 F.3d 1215, 1252 (9th Cir. 2001); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630–31 (1st Cir. 1994); Sekco Energy, Inc.v. M/V Margaret Chouest, 820 F. Supp. 1008, 1014–15 (E.D. La. 1993); Harrington, *supra* note 306, at 8–13; Kiern, *supra* note 306, at 531–32; Rodriguez & Jaffe, *supra* note 28, at 15; Swanson, *supra* note 38, at 152–55; Sturla Olsen, Comment, *Recovery for the Lost Use of Water Resources: M/V Testbank on the Rocks?*, 67 TUL. L. REV. 271, 286–88 (1992); Cameron H. Totten, Note, *Recovery for Economic Loss Under* Robins Dry Dock *and the Oil Pollution Act of 1990:* Sekco Energy, Inc. v. M/V Margaret Chouest, 18 TUL. MAR. L.J. 167, 171–73, 177 (1993).

337. *In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 678–79 (E.D. Mich 1992) ("[§ 2702(b)(2)(E)] allows damages only for 'loss of profits . . . due to the injury, destruction, or loss of real property, personal property, or natural resources.' None of the claimants . . . have alleged 'injury, destruction, or loss' to their property.").

338. Benefiel v. Exxon Corp., 959 F.2d 805, 807 (9th Cir. 1992).

339. *See* Olsen, *supra* note 336, at 287.

The party responsible for an offshore facility incident is liable for "damages" up to a $75 million limit.[340] The *Deepwater Horizon* was a MODU, so the OPA allocates liability for "damages" as follows: the MODU's owner or operator (Transocean) is liable for removal costs and damages up to a tonnage-based cap, as explained above, and the party responsible for the offshore facility (BP and its partners) is liable for damages in excess of the MODU's share and up to the $75 million cap (in addition to unlimited liability for removal costs).[341] Transocean's overall liability for removal costs and damages based on tonnage is estimated at $65 million,[342] leaving BP liable not only for most of the removal costs, but also for a significant portion of the "damages."[343] Calls have been made to raise liability caps following the *Deepwater Horizon* oil spill, but retroactive application of such an amendment seems unlikely.[344] In any event, regardless of the statutory cap, BP agreed to establish a $20 billion escrow account over a three-and-a-half-year period to satisfy legitimate and objectively verifiable claims including natural resource damages and state and local response costs.[345]

The statutory limits do not apply if the incident was caused by gross negligence or willful misconduct of the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party; or by violation of an applicable federal safety, construction, or operating regulation by any of these parties.[346] In other words, where punitive damages might be appropriate under general maritime law due to the severity of the defendant's conduct, the OPA responds to the exceptional severity by removing liability caps. Additionally, the caps do not apply if the responsible party failed or refused to report the incident, to provide reasonable cooperation and assistance in cleanup efforts, or to comply with orders issued with regard to cleanup.[347]

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340. 33 U.S.C. § 2704(a)(3) (2006).

341. *Id.* § 2704(b).

342. *See* HAGERTY & RAMSEUR, *supra* note 316, at 11.

343. Note that the statutory limit on Transocean's liability applies to the total of removal costs and "damages," so only part of the $65 million will actually cover "damages." BP will be liable for "damages" in excess of this part, up to $75 million.

344. *See, e.g.*, Mike Soraghan, *White House Proposes Bill to Lift Caps on Offshore Oil Spill Liability*, N.Y. TIMES, May 12, 2010, http://www.nytimes.com/gwire/2010/05/12/12greenwire-white-house-proposes-bill-to-lift-caps-on-offs-45047.html.

345. *See* H.R. REP. NO. 111-521, at 6 (2010).

346. 33 U.S.C. § 2704(c)(1) (2006).

347. *Id.* § 2704(c)(2).

The ultimate determinations of fact in the *Deepwater Horizon* case may be difficult to predict, but preliminary investigation indicates that a claim of gross negligence may arise.[348] For instance, newspaper reports indicate that several days before the explosion, BP officials chose, partly for financial reasons, to use a type of casing for the well that the company knew was the riskier of two options.[349] Allegedly, the blowout preventer (BOP) was not properly tested even though it was leaking on at least three occasions.[350] Moreover, while it was known that the blind shear ram—a BOP component that cuts off an uncontrollable well—might fail, especially at considerable depths, neither Transocean nor BP took steps to outfit the *Deepwater Horizon*'s blowout preventer with a second blind shear ram.[351] Furthermore, the BOP did not have a remote-control shut-off switch ("acoustic switch"), a last-resort protection mechanism; it is not required by U.S. regulators, but is mandatory in Brazil and Norway, and is used by other major oil companies even where not mandatory.[352] At an investigative hearing conducted by the Coast Guard, a BP official testified that in the days before the explosion, BP continued drilling for oil "despite internal reports of a leak on a critical safety device on the rig."[353] An interim report of a team of experts commissioned by Interior Secretary Kenneth Salazar concluded, inter alia, that "[n]umerous decisions to proceed . . . despite indications of hazard, such as the results of repeated negative-pressure tests, suggest an insufficient consideration of risk and a lack of operating discipline . . . . The net effect of these decisions was to reduce the available margins of safety . . . ."[354]

The OPA responds to gross negligence by removing liability caps. On the other hand, the Court of Appeals for the First Circuit held a decade

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348. *See, e.g.*, Schwartz, *supra* note 314 (quoting the CEO of BP's partner Anadarko Petroleum, saying that "BP's behavior and actions likely represent gross negligence or willful misconduct.").

349. *See* Ian Urbina, *Documents Show Early Worries About Safety of Rig*, N.Y. TIMES, May 30, 2010, http://www.nytimes.com/2010/05/30/us/30rig.html.

350. *See id.*

351. *See* David Barstow et al., *Regulators Failed to Address Risks on Oil Rig Fail-Safe Device*, N.Y. TIMES, June 20, 2010, http://www.nytimes.com/2010/06/21/us/21blowout.html.

352. *See* Russell Gold et al., *Leaking Oil Well Lacked Safeguard Device*, WALL ST. J., Apr. 28, 2010, http://online.wsj.com/article/SB10001424052748704423504575212031417936798.html.

353. *See* Robbie Brown, *BP Kept Drilling After Report of Leak, Worker Says*, N.Y. TIMES, July 20, 2010, http://www.nytimes.com/2010/07/21/us/21hearings.html.

354. DONALD C. WINTER, INTERIM REPORT ON CAUSES OF THE DEEPWATER HORIZON OIL RIG BLOWOUT AND WAYS TO PREVENT SUCH EVENTS 3 (Nov. 16, 2010), http://online.wsj.com/public/resources/documents/spillreport20101116.pdf. The interim report identified several factors that precipitated the disaster, including flawed cementing operations, BOP failures, and unsatisfactory operating management processes. The final report is expected in June 2011.

ago that punitive damages were not allowed under this Act.[355] The court explained that the OPA set forth a comprehensive list of recoverable damages and that the absence of punitive damages from the list was a good indication of Congress's intention to exclude such damages.[356] The federal district court in Oregon added that the victim's "opportunity . . . to overcome [the cap] with a showing of gross negligence" also pointed to the same congressional intent.[357] It noted, however, that the OPA only applied to property damage and economic losses, so if an oil spill resulted in personal injury or loss of life, punitive damages would still be available under general maritime law, unless preempted by another federal statute.[358]

Still, assuming that the punitive damages issue has been settled would be imprudent. The OPA unequivocally states that "[e]xcept as otherwise provided in this Act, this Act does not affect admiralty and maritime law."[359] Punitive damages were not explicitly excluded, so the saving clause arguably preserves this remedy. Moreover, in *Exxon Shipping Co. v. Baker*,[360] the U.S. Supreme Court rejected the argument that the FWPCA preempted the maritime law doctrine of punitive damages.[361] The Court's reasoning is pertinent. First, it addressed the argument that "because the saving clause[362] [which mentions only liability for property damage] makes no mention of preserving punitive damages . . . they are preempted."[363] The Court correctly observed that this type of argument equally applied to other categories of damages not specifically mentioned in the FWPCA saving clause, such as personal injuries resulting from oil spills, and that no one would dare say that recovery for these injuries was consequently preempted.[364] Analogously, the absence of punitive damages from the list of recoverable damages under the OPA cannot justify their preemption, because physical injuries are also absent and clearly not preempted. The *Exxon* Court subsequently addressed the

355. S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 64–66 (1st Cir. 2000).

356. *Id.* at 65; *see also* Clausen v. M/V New Carissa, 171 F. Supp. 2d 1127, 1133 (D. Or. 2001) ("[T]he OPA has precluded an award of punitive damages under any general maritime or admiralty law theory for any claim for which the OPA could provide relief.").

357. *Clausen*, 171 F. Supp. 2d at 1133–34.

358. *Id.* at 1134.

359. 33 U.S.C. § 2751(e) (2006).

360. 554 U.S. 471 (2008).

361. *Id.* at 487–88.

362. 33 U.S.C. § 1321(o) (2006).

363. 554 U.S. at 488.

364. *Id.* at 488–89.

alternative claim that the FWPCA preempted punitive damages but not compensatory damages, finding that "nothing in the statutory text points to fragmenting the recovery scheme this way."[365] Finally, the Court emphasized that "to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law."[366] The OPA, just like the FWPCA, does not do so.[367]

From the victims' perspective, the OPA liability cap is further curtailed by the Oil Spill Liability Trust Fund (Fund), which consolidated, enhanced and superseded previously existing oil spill compensation funds.[368] The Fund has several sources of revenue, of which the largest is a tax collected for every barrel of crude oil received at U.S. refineries, domestic crude oil used in or exported from the United States, and petroleum products brought into the United States.[369] In principle, all claims for removal costs or damages must be presented first to the responsible party.[370] This is a prerequisite for a subsequent lawsuit.[371] If the claim is presented and the responsible party denies liability or the claim is not settled within ninety days, the claimant may elect to commence an action in court against the responsible party or to present the claim to the Fund.[372] The claimant may also present a claim to the Fund where full compensation from the responsible party is unavailable.[373] But even when the statutory conditions for Fund payments are met, the Fund does not guarantee full compensation. First, it can pay up to $1 billion per incident.[374] This amount may be sufficient in the vast majority of cases, but is clearly inadequate in catastrophic

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365. *Id.* at 489.

366. *Id.*

367. Implying that it does not preclude punitive damages.

368. 26 U.S.C. § 9509(a) (2006).

369. *Id.* § 4611. This tax is suspended when the fund reaches its statutory liability limit. For other sources see, e.g., 33 U.S.C. § 2706(f) (2006) (stating that sums recovered by a trustee for an injury to natural resources and not used "to reimburse or pay costs incurred by the trustee" in accordance with the OPA, must be deposited in the fund); *id.* § 2715 (stating that after paying compensation for removal costs or damages, the Fund is "subrogated to all rights, claims, and causes of action that the [payee] has under any other law"). All amounts held by the Deepwater Port Liability Fund, the Offshore Oil Pollution Compensation Fund, and the Trans-Alaska Pipeline Liability Fund, were also transferred to the Fund. 26 U.S.C. § 9509(5)–(7) (2006).

370. 33 U.S.C. § 2713(a) (2006).

371. *See* Russo v. M/V Dubai Star, No. C09-05158, 2010 U.S. Dist. LEXIS 50967, at *6–8 (N.D. Cal. Apr. 29, 2010); Boca Ciega Hotel v. Bouchard Transp. Co., 844 F. Supp. 1512, 1514–15 (M.D. Fla. 1994); Johnson v. Colonial Pipeline Co., 830 F. Supp. 309, 310–11 (E.D. Va. 1993).

372. 33 U.S.C. § 2713(c) (2006).

373. *Id.* at § 2713(d).

374. 26 U.S.C. § 9509(c)(2)(A) (2006).

incidents of the *Deepwater Horizon* magnitude. Second, the billion dollar fund may be depleted by payments for harm to natural resources (up to $500 million) and removal costs. This may leave many individual victims with only a forlorn hope of recovery.

Note that a responsible party may seek reimbursement from the Fund of amounts it paid in excess of the statutory cap, or full reimbursement when a complete defense to liability applies.[375] If the incident was caused by gross negligence or willful misconduct of the responsible party, the cap does not apply, and the responsible party cannot seek reimbursement from the Fund.[376] At any rate, even if BP was not grossly negligent and can formally assert a claim against the Fund for sums paid in excess of the cap, it announced that it "will not seek reimbursement from the U.S. government or the Oil Spill Liability Trust Fund."[377]

In sum, the OPA—just like the pre-OPA maritime law—is sensitive to the gravity of the defendant's conduct, but it addresses this matter differently. In cases of ordinary negligence or lack of fault, the Act, unlike general maritime law, allows recovery for purely economic losses, but sets rigid liability caps, making the oil spill fund available for the payment of claims in excess of the responsible parties' liability caps. In cases of gross negligence or willful misconduct the Act responds in the following way. First, it eliminates the responsible party's liability cap. Second, it does not allow the responsible party to seek any reimbursement from the Fund. Third, arguably, it does not allow punitive damages. Put differently, while general maritime law responds to severe misconduct by allowing a very exclusive group of successful claimants to obtain extra-compensatory payments, the OPA removes the statutory limit of the defendant's liability to a much more inclusive group of recognized claimants.

A discussion of the interrelation between the OPA and pre-OPA maritime law is not limited to the availability of punitive damages against OPA defendants. Other derivatives of the general question are whether the OPA excludes recovery under general maritime law in excess of the OPA caps or against non-OPA defendants. In discussing the interrelation between the TAPAA and general maritime law following the *Exxon Valdez* incident, the district court held that general

375. 33 U.S.C. §§ 2708, 2713(b)(1)(B) (2006).

376. The responsible party can assert a claim only if it is entitled to a defense or a limitation of liability, and in the case of gross negligence liability limitation does not apply; *see also id.* § 2712(b).

377. *See* Letter from Tony Hayward, CEO, BP, to Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec. (May 16, 2010) (on file with author).

maritime law applied to any sums in excess of the statutory caps, and to any defendants not covered by the statute.[378] The OPA seems even clearer on this matter. As explained above, it states that "[e]xcept as otherwise provided in this Act, this Act does not affect admiralty and maritime law."[379] Arguably, those entitled to a remedy under general maritime law, either from "responsible parties" or from others, may pursue these claims.[380] Indeed, at least one court held that the OPA "preempts maritime law as to recovery of cleanup expenses and the cost of compensating injured persons."[381] According to this view, the savings clause "only preserves admiralty claims which are not addressed in OPA"[382] (such as collision damages or personal injuries) and "[b]ecause OPA provides a comprehensive scheme for the recovery of oil spill cleanup costs and the compensation of those injured by oil spills, the general maritime law does not apply to recovery of these types of damages."[383] But this issue has not yet been addressed by an appellate court, and is therefore far from settled. Consequently, parties involved in the *Deepwater Horizon* operation but not responsible under the OPA, such as the BOP manufacturer (Cameron International) and the cement contractor (Halliburton), may end up liable for at least some of the loss under general maritime law.

2. State Law

Apart from common law remedies, most coastal states—including those adjoining the Gulf of Mexico—have oil pollution legislation with strict, often uncapped, liability provisions.[384] State legislation naturally

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378. *In re* Exxon Valdez, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20555, at *6–7 (D. Alaska Jan. 26, 1994); *In re* Exxon Valdez, No. A89-095, 1992 U.S. Dist. LEXIS 22495, at *12 (D. Alaska Dec. 23, 1992); *In re* Exxon Valdez, 767 F. Supp. 1509, 1515–16, 1517 (D. Alaska 1991).

379. 33 U.S.C. § 2751(e) (2006).

380. *See* Harrington, *supra* note 306, at 55–58.

381. Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1447 (E.D. Va. 1996).

382. *Id.*

383. *Id.*

384. *See, e.g.*, ALASKA STAT. §§ 46.03.822–46.03.824 (2010); CAL. GOV'T CODE §§ 8670.3, .56.5 (2011); DEL. CODE ANN. tit. 7, §§ 6207–6209 (2007); FLA. STAT. ANN. §§ 376.12, .313 (West 2010); GA. CODE ANN. § 12-5-51 (2006); HAW. REV. STAT. ANN. § 128D-6 (LexisNexis 2006 & Supp. 2010); LA. REV. STAT. ANN. §§ 30:2004, 2025–2026 (2000 & Supp. 2011); ME. REV. STAT. ANN. tit. 38, §§ 543, 551–52 (2001 & Supp. 2010); MD. CODE ANN., ENVIR. §§ 4-401–4-410 (LexisNexis 2007 & Supp. 2010); MASS. ANN. LAWS ch. 21E, § 5 (2007); N.H. REV. STAT. ANN. ch. 146-A (2005 & Supp. 2010); N.J. STAT. ANN. § 58:10-23.11g (2006 & Supp. 2010); N.Y. NAV. LAW § 181 (McKinney 2004 & Supp. 2011); N.C. GEN. STAT. §§ 143-215.83–143-215.94 (2009 & Supp. 2010); OR. REV. STAT. ANN. §§ 468B.300–468B.335 (2003 & Supp. 2010); R.I. GEN. LAWS

varies with respect to recoverable losses (purely economic losses in particular), liability caps, defenses, etc.[385]

The enactment of the OPA rekindled the debate on the interplay between federal and state law. The House of Representatives' version of the bill stated that "except as provided in this Act . . . no action arising out of a discharge of oil . . . may be brought in any court of the United States or of any State"; but following staunch opposition of the Senate, environmental groups, the National Association of Attorneys General, and others, an amendment to preserve state power was introduced and ultimately passed.[386] The Senate bill similarly preserved states' authority to impose additional liability.[387] The compromise bill reported by the conference committee unsurprisingly included a savings clause.[388]

The OPA thus provided that it should not be interpreted "as preempting the authority of any State. . . from imposing any additional liability. . . with respect to the discharge of oil. . . within such State" or as modifying "the obligations or liabilities of any person under. . . State law, including common law."[389] These clauses explicitly preserved existing state common law and oil pollution legislation, and allowed subsequent expansion of liability by the states.[390] Moreover, the OPA superseded the Shipowners' Limitation of Liability Act of 1851,[391] which could limit liability under state law prior to OPA's enactment.[392] Finally, the OPA provides that it should not affect or be construed to affect "the authority of any State to establish, or to continue in effect, a fund [that pays] for costs or damages arising out of. . . oil pollution."[393]

Two questions arise in this respect. The first is whether purely economic losses in excess of the OPA limit may be recovered under

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§ 46-12-21 (2009); S.C. CODE ANN. §§ 48-43-580–48-43-600 (2008); TEX. NAT. RES. CODE § 40.202 (West 2001); TEX. WATER CODE § 26.265 (West 2008); VA. CODE ANN. § 62.1-44.34:18 (2006); WASH. REV. CODE §§ 90.56.360–90.56.370 (2010); *see also* Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1448 (E.D. Va. 1996) (observing that when OPA was enacted, twenty-four states had oil spill liability legislation, of which seventeen had no liability limits).

385. *See* Harrington, *supra* note 306, at 3, 54, 61–62.

386. *See* Millard, *supra* note 306, at 351–54 (discussing the preemption provision).

387. *Id.* at 360–61.

388. *Id.* at 364.

389. 33 U.S.C. § 2718(a) (2006).

390. *See also* United States v. Locke, 529 U.S. 89, 105 (2000) (holding that § 2718(a) was intended to preserve state laws and powers only with respect to liability and financial requirements).

391. 46 U.S.C. §§ 181–189 (2006).

392. 33 U.S.C. § 2718 (2006); *see also* Kiern, *supra* note 306, at 529–30.

393. 33 U.S.C. § 2718(b) (2006).

state law. This question may be crucial in the *Deepwater Horizon* case if liability under the OPA is limited, that is, if BP's acts fall short of gross negligence, willful misconduct, or a violation of an applicable federal regulation. Given the magnitude of the incident and the nature of the ensuing losses, allowing recovery for purely economic losses under state law may increase BP's overall liability considerably. Admittedly, the OPA has not put an end to the controversy over the possible preemption of liability under state law by *Robins Dry Dock*. Some think that the OPA allowed the states to extend liability not only beyond the limits set by the OPA, but also beyond general maritime law, including *Robins Dry Dock*.[394] Others believe that state power is still subject to *Jensen*, so there can be no liability for purely economic loss.[395] Some follow the authority of *Knickerbocker Ice Co. v. Stewart,*[396] holding that given the Framers' intent—manifested in the Admiralty Clause of the Constitution—to secure uniformity in maritime law, Congress's legislative power in this area is exclusive and non-delegable; thus, the OPA's delegation of power to the states was unconstitutional.[397]

The second question is whether punitive damages are also allowed under state law.[398] On the one hand, the OPA purports to be comprehensive, and arguably excludes punitive damages.[399] So allowing such damages under state law might contravene Congress's intentions, just as allowing them under general maritime law would. On the other hand, the OPA explicitly empowers the states to impose "any additional liability." This may cover not only liability in excess of the OPA limit in cases of ordinary negligence, but also punitive damages in cases of gross negligence or willful misconduct.[400]

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394. *See, e.g.*, *In re* Exxon Valdez, 270 F.3d 1215, 1252 (9th Cir. 2001); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630–31 (1st. Cir. 1994).

395. *See* Swanson, *supra* note 38, at 411–15.

396. 253 U.S. 149, 164 (1920).

397. *See* Harrington, *supra* note 306, at 2–3, 30–52, 71–72.

398. State regulation of punitive damages varies. A few states award them rarely, or not at all, and others permit them only when authorized by statute. Many have statutory limits, in the form of absolute caps, a maximum ratio of punitive to compensatory damages, or some combination of the two. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 494–98 (2008).

399. *See supra* notes 355–66 and accompanying text.

400. *See* Swanson, *supra* note 38, at 155 (stating that the OPA does not necessarily preempt punitive damages under state law); Paige Kohn, Note, *Oil and Water Do Not Mix: An Argument for the United States Supreme Court's Deferral to Congress in* Exxon v. Baker, 38 CAP. U. L. REV. 229, 261 (2009).

B. *A Critical Appraisal of the Current Scheme*

At first glance, the OPA seems to comply with the general guidelines set forth in Part II of this Article. In cases of ordinary negligence, liability is limited for reasons that partly overlap the traditional justifications for the exclusionary rule in general maritime law. The OPA arguably "seeks to balance the need to make industries which benefit from the transport of oil internalize the costs of pollution, while at the same time avoiding the possibility that responsible vessel owners will be driven from the industry with crippling damage awards."[401] In cases of gross negligence or willful misconduct, the OPA allows expansion of liability beyond the general caps, for reasons that overlap the traditional justifications for punitive damages. Put differently, the scope of liability is roughly correlated with the severity of the defendant's conduct.

Moreover, the expansion of liability in cases of gross negligence or willful misconduct seems more in line with the general principles of tort law and more responsive to distributive concerns. First, the OPA provides that the statutory limits do not apply if the incident was caused by gross negligence or willful misconduct of the responsible party.[402] Second, at least according to *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*,[403] the OPA does not allow punitive damages. This seems reasonable, because the OPA responds to the gravity of the conduct by removing the caps on damages. So unlike general maritime law, the OPA expands liability by allowing more victims to recover for their actual loss, not by allowing a few successful claimants to obtain a windfall while leaving all other victims uncompensated. It seemingly makes the punishment fit the crime without using extra-compensatory damages. The odd outcome of the simultaneous application of the exclusionary rule and the punitive damages doctrine—many uncompensated victims and an overcompensated few—is avoided.

However, the OPA does not provide a satisfactory solution for the fundamental problem, namely setting the proper limit on liability in light of all relevant factors. Assume first that the responsible party is guilty of mere negligence. Like general maritime law, the OPA limits liability, but differently. Rather than excluding liability for purely economic losses (subject to the fishermen's exception), the OPA allows recovery for proximately caused purely economic losses but sets a cap on overall

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401. Harrington, *supra* note 306, at 2, 17.

402. 33 U.S.C. § 2704(c)(1) (2006).

403. 234 F.3d 58, 64–66 (1st Cir. 2000).

liability. This is crucial if there is a normatively relevant difference between purely economic losses and other types of injury, or if allowing claims by more victims has other unwarranted consequences. For instance, given the limited pool that successful claimants ultimately need to share under the OPA, liability for relational economic losses may forestall full recovery for injuries to physical interests that may be deemed more worthy of legal protection. Additionally, each victim may end up with compensation for a very small fraction of his or her loss, making the costly process futile. Furthermore, liability limits are determined somewhat arbitrarily, without taking into account factors that seem relevant to determining the scope of liability. For example, if many relational economic losses are not true social costs, recovery for these losses in cases of ordinary negligence should be generally denied. Therefore, if the extent of injuries to tangible resources, including personal property and natural resources, is lower than the statutory cap, liability under the OPA—which also covers purely economic losses—will exceed the proper amount.

Now assume the defendant is guilty of gross negligence, recklessness, or willful misconduct. In that case, the OPA imposes liability for all proximately caused harm, including purely economic losses. This is clearly inconsistent with my theoretical analysis and the proposed model. I explained that even where the traditional justifications for punitive damages emerge and call for an expansion of liability, the normatively desirable scope of liability might still be lower than the aggregate loss, including relational economic losses.[404] Simply put, liability for all proximately caused harm may be excessive. The OPA seems to ignore this possibility.

Additionally, if liability is expanded beyond the default to achieve the traditional goals of punitive damages, the extent of liability should reflect the relative gravity of the wrong. The United States Supreme Court thus held that the main guideposts considered in reviewing punitive damages awards are the degree of reprehensibility of the defendant's misconduct,[405] and the ratio between punitive and compensatory damages.[406] More egregious conduct entails a higher ratio. A supplementary distinction applies in maritime law: in cases of recklessness that do not raise unique enforcement problems, the ratio between punitive and compensatory damages cannot exceed 1:1,[407]

404. *See supra* Part II.C.

405. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–80 (1996).

406. *Id.* at 580–83.

407. Exxon Shipping Co. v. Baker, 554 U.S. 471, 510–15 (2008).

though this limit does not apply in cases of more egregious conduct, such as malice or avarice.[408] The proposed model similarly determines the proper amount of damages in light of the relevant factors, including the reprehensibility of the defendant's conduct, and then allows recovery for actual losses incrementally up to the desirable amount. The OPA, on the other hand, lays down a dichotomous rule: limited liability in cases of mere negligence (or no fault), and unlimited liability in more severe cases. As long as the defendant is guilty of more than mere negligence, the scope of liability is not affected by the relative gravity of the wrong. Gross negligence, recklessness, malice, etc., are treated equally.

Moreover, the OPA seemingly precludes punitive damages. In *Exxon Shipping Co. v. Baker*,[409] the U.S. Supreme Court held that the FWPCA did not preempt punitive damages.[410] This conclusion seems defensible because the FWPCA did not provide for additional liability for actual harm in the case of gross negligence. The OPA does, so punitive damages seem redundant. However, as explained in Part II.C above, in rare cases the normatively desirable scope of liability may exceed the aggregate provable loss, including relational economic losses. In those cases, all victims should be allowed to recover, and punitive damages should be awarded up to the necessary level. As currently interpreted, the OPA does not allow punitive damages at all. An alternative—and proper—interpretation would be that while punitive damages should generally be denied, they can be awarded in very rare cases in which removing liability caps is insufficient.

Furthermore, the OPA lifts liability caps not only if the incident was caused by gross negligence or willful misconduct, but also if it was caused by "the violation of an applicable federal safety, construction, or operating regulation."[411] Such violations may at times be technical and petty. Thus, the Act enables expansion of liability even in cases that do not manifest the level of reprehensibility traditionally associated with punitive damages. Uncapped liability may be permitted even when the justifications for limiting liability apply, while the justifications for expanding liability do not.

Finally, I explained above that the exclusionary rule provided a certain and easily applicable limit on tort liability, and that the punitive damages doctrine reinstated some uncertainty due to the stark

408. *See also* Jones, *supra* note 149, at 1302.

409. 554 U.S. 471 (2008).

410. *Id.* at 488–89.

411. 33 U.S.C. § 2704(c)(1)(B) (2006).

unpredictability of the awards.[412] However, the U.S. Supreme Court held that in reviewing awards of punitive damages under the Due Process Clause, courts ought to consider three guideposts, which reduce the level of uncertainty.[413] The Court further reduced uncertainty in general maritime law (as opposed to land-based law), holding that the ratio between punitive and compensatory damages in cases of recklessness should not exceed 1:1.[414] The OPA seems quite responsive to the need for certainty in cases of ordinary negligence, but is less sensitive to this concern in cases of gross negligence, recklessness, and willful misconduct. While the extent of liability for ordinary negligence under the Act is clear-cut, liability for more serious wrongdoing is truly open-ended. There are neither limits nor guideposts, so the ultimate scope of liability is utterly unpredictable. Congress may address this problem by replacing the limited/unlimited liability dichotomy with differential limits.[415]

To conclude, the OPA represents a commendable step. It responds to reprehensible conduct by allowing more victims to recover for their actual losses, not by allowing a few successful claimants to obtain a windfall while leaving all other victims uncompensated. However, it does not fully conform to the general guidelines set forth in Part II.C. More importantly, as explained in Part II.B, the problem of simultaneous application of the exclusionary rule and the punitive damages doctrine transcends the unique setting of catastrophic oil spills. Any achievement of the OPA is limited to the esoteric case of marine oil pollution, whereas the general problem remains.

The OPA savings clauses further complicate the situation. On the one hand, allowing states to impose unlimited liability makes the most significant feature of the reform, namely liability caps, practically meaningless. As one commentator noted, Congress attempted to make responsible parties assume as much of the burden for prevention and cleanup as possible without subjecting them to financial ruin.[416] But "with a single, superficially simple provision, [Congress] upset this

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412. *Exxon Shipping*, 554 U.S. at 497–501.

413. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–85 (1996).

414. *Exxon Shipping*, 554 U.S. at 510–15.

415. Cf. CONN. GEN. STAT. ANN. § 22a–451(a) (2006 & Supp. 2010), which provides that a person who causes pollution is liable for all removal costs, that if the pollution was negligently caused, that person may be liable for damages up to 1.5 times the cost incurred, and that if the pollution was willfully caused, that person may be liable for damages equal to two times the cost incurred.

416. Harrington, *supra* note 306, at 12.

balance by permitting states to impose unlimited strict liability on vessels which discharge oil into state waters."[417] State legislation which allows unlimited recovery for purely economic losses reinstates the initial problem of open-ended liability. On the other hand, the possibility of awarding punitive damages under state law in cases of gross negligence, recklessness or malice, may be used to remedy one of the lesser flaws of the OPA. Lifting liability caps, along with criminal and civil fines, will usually provide sufficient levels of retribution and deterrence in cases of this sort. Punitive damages may nonetheless be appropriate in very exceptional cases where all other sanctions seem inadequate.

CONCLUSION

The *Deepwater Horizon* oil spill holds the dubious title of the largest accidental release of oil in world history. As opposed to the *Exxon Valdez* case, which was litigated for nearly two decades under general maritime law and area-specific legislation, the *Deepwater Horizon* incident is subject to the Oil Pollution Act, which was enacted in the wake of the *Exxon Valdez* spill. The purpose of this Article has been to illuminate a general problem in American land-based and maritime tort law that surfaced against the backdrop of the *Exxon* litigation, and to examine whether subsequent statutory reform has eliminated the problem in the limited context of marine oil pollution, using the *Deepwater Horizon* incident as a test case.

Part I discussed pre-OPA law as applied to the *Exxon Valdez* case. It first showed that relational economic losses were generally irrecoverable under *Robins Dry Dock*, and reviewed the main justifications for the exclusionary rule, including the fear of open-ended liability, the idea that many relational losses are not true social costs, victims' ability to protect themselves, and the simplicity of the bright-line rule. In accordance with the *Oppen* exception to the exclusionary rule, Exxon was found liable for the lost catch of commercial fishermen and Alaska Natives, but all other claims for relational losses were rejected. Part I then explained the concept of punitive damages and its dominant justifications, namely retribution and deterrence. In the *Exxon Valdez* case, the jury awarded the successful claimants $5 billion in punitive damages. The issue went back and forth between the district court and the court of appeals, until the U.S. Supreme Court ultimately reduced the punitive award to $507.5

417. *Id.* at 2.

million. Lastly, Part I discussed relevant federal and state legislation, such as the TAPAA, and the Alaska Environmental Conservation Act, invoked by the claimants in the *Exxon Valdez* litigation.

Part II explained why pre-OPA maritime law gave rise to incongruity on the justificatory level. Applying the exclusionary rule and the punitive damages doctrine in tandem in a particular case pulls the limits of civil liability in opposing directions. Each rule seemingly cancels out the warranted effects of the other, at least to some extent. Moreover, applying the two rules in a single case futilely violates general principles of tort law and generates distributive injustice. Part II then delineated the contours of the problem, showing that although it surfaced in a marine oil pollution setting, it is essentially a general weakness of maritime and land-based common law. Finally, Part II proposed a conceptual framework for resolution of the problem. Generally, it held that where liability must be expanded beyond the limits set by the exclusionary rule in order to obtain certain levels of deterrence and retribution, relaxing the exclusionary rule and allowing more victims to recover is a more defensible path than awarding punitive damages to a very few successful claimants.

Part III examined whether the enactment of the OPA has created a more defensible liability regime, using the *Deepwater Horizon* incident as a test case. The Act imposes strict but limited liability on parties responsible for vessels and facilities from which oil is discharged into U.S. waters. Responsible parties are liable for removal costs and various damages, including harm to natural resources and relational economic losses, up to the statutory caps. In the case of gross negligence, recklessness, or willful misconduct, liability caps are lifted, but punitive damages are apparently precluded. Put differently, while general maritime law responds to severe misconduct by allowing a very exclusive group of successful claimants to obtain extra-compensatory payments, the OPA removes the statutory limit on the defendant's liability to a much more inclusive group of recognized claimants. This seemingly simple scheme was muddled by the "savings clauses" whereby states were allowed to impose additional liability for oil discharges.

At first glance, the OPA seems to comply with the general guidelines set forth in Part II. In cases of ordinary negligence liability is limited, for reasons that partly overlap the traditional justifications for the exclusionary rule in general maritime law. In cases of more egregious conduct, the OPA allows expansion of liability beyond the general caps, for reasons that overlap the traditional justifications for punitive damages. The scope of liability is roughly correlated with the gravity of the defendant's conduct, and the expansion of liability in cases of severe misconduct better corresponds to the general principles of tort law and to distributive concerns. Part III showed, however, that the OPA did not provide a satisfactory solution for the fundamental problem. For example, in cases of ordinary negligence, where the caps apply, liability for relational losses may forestall full recovery for injuries to more important interests, and each victim may end up with fractional compensation, making the costly process futile. Also, the caps are somewhat arbitrary because they are insensitive to factors that seem relevant in determining the proper scope of liability, such as the fact that many relational losses are not true social costs. In cases of gross negligence the OPA lifts the caps altogether, although the normatively desirable scope of liability might be lower than the aggregate loss, including relational losses. Moreover, as long as the defendant is guilty of more than mere negligence, the OPA is insensitive to the relative gravity of the wrong. Furthermore, the OPA seems to preclude punitive damages, although there may be rare cases in which liability must exceed the aggregate provable loss. The savings clauses further complicate the situation. Allowing states to impose unlimited liability makes the most significant contribution of the OPA, namely liability caps, practically meaningless. But the possibility of awarding punitive damages under state law may alleviate one of its alleged shortcomings.

Following the *Deepwater Horizon* incident, there have been calls for raising the OPA caps, or an even more comprehensive legislative reform. While some of the initiatives seem to have waned, this catastrophic incident, like the earlier *Exxon Valdez* case, will surely leave its mark. I hope that in reassessing the law applicable to marine oil pollution, policymakers will find some guidance in this Article, which highlights relevant concerns. Of course, as repeatedly noted, the Article has focused on a specific fact-situation, but these concerns are general and ought to be taken into consideration in any attempt to delineate the limits of civil liability.