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ROLLING THE DICE: CALCULATING THE ODDS FOR PUNITIVE DAMAGES IN ARCTIC DRILLING

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I. INTRODUCTION

A man approaches you on the street. "I have a proposition for you," he says. The man opens his two clenched fists and reveals their contents: in one hand lays a simple, triangular four sided dice, like you have seen in a dozen board games growing up; in the other is a crisp one-hundred dollar bill. Roll a four, he tells you, and you can have the money and walk away. Roll a one, a two, or a three, however, and you'll have to pay up.

You scratch your head and ask the man the obvious question: how much will I owe if I do not roll a four? You start doing some quick math. For a ten-dollar risk, you are sure to play. For twenty, maybe you would gamble. At forty, fifty, or more, you would walk. "I have not decided yet," he says. How about I tell you the damage after you roll?

While perhaps a simplified caricature, the above hypothetical is not dissimilar to the situation that Shell and other actors face in deciding whether to commence drilling operations in the Arctic. The possible rewards of an Arctic drilling expedition are temptingly apparent, but the potential liabilities are clouded and contingent. Namely, the uncertainty surrounding the prospective award of punitive damages pursuant to an oil spill could potentially have game-changing consequences.

Following Shell's 2012 mishap-laden drilling expedition's premature halting due to an unexpected ice floe,[1] the Bureau of Ocean Energy Management (BOEM) was tasked with analyzing the environmental impact of oil and gas activities associated with Shell's Arctic lease.[2] The results of the BOEM study were sobering. Based

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1. Simon Bowers, *Shell Postpones Plans to Start Arctic Drilling Until Next Year*, THE GUARDIAN (Sept. 17, 2012), *available at* http://www.theguardian.com/business/2012/sep/17/shell-postpones-arctic-drilling-next-year.

2. Yereth Rosen, *Federal Regulators Issue Chukchi Environmental Review, Possibly a Step Toward Resuming Drilling*, ALASKA DISPATCH NEWS (Oct. 31, 2014), *available at* http://www.adn.com/article/20141031/federal-regulators-issue-chukchi-environmental-review-possibly-step-toward-resuming (announcing environmental review on Chukchi Sea); *see generally* U.S. DEP'T OF THE INTERIOR, REPORT TO THE SEC'Y OF

on scientific studies regarding the unique challenges of drilling in the Arctic, as well as considerable historical data, BOEM estimates that over the life of Shell's lease, an average of two large oil spills will occur.[3] The odds of at least one spill occurring are seventy-five percent.[4] The question then becomes: what will Shell's liability be on the three-fourths chance that a spill will occur? Because of two critical authority splits regarding the viability of punitive damages in maritime law, this question remains largely undecided.[5]

Punitive damages can dramatically alter an actor's liability in the event of an oil spill. Consider Exxon's liability after the *Exxon Valdez* disaster.[6] The company spent $2.1 billion in cleanup efforts, settled a civil action with the United States and Alaska for $900 million, pleaded guilty to criminal violations requiring fines, paid $303 million in voluntary damages to private parties, and stipulated to its own negligence in a final civil suit with private parties for another $507.5 million in compensatory damages.[7] Despite having already been punished to the tune of more than $4 billion, a jury found Shell responsible for another $5 billion in punitive damages.[8] The award for punitive damages, however, was lowered on Due Process grounds by the Ninth Circuit Court of Appeals,[9] and then again by the Supreme Court.[10]

THE INTERIOR: REVIEW OF SHELL'S 2012 ALASKA OFFSHORE OIL AND GAS EXPLORATION PROGRAM (Mar. 8, 2013), *available at* http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf (outlining potential impact of offshore extraction).

3. BUREAU OF OCEAN ENERGY MGMT., ALASKA OCS REGION, CHUKCHI SEA PLANNING AREA: DRAFT SECOND SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, 153 (Oct. 2014), *available at* http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Leasing/Lease_Sales/Sale_193/Lease_Sale_193_DraftSSEIS_vol1.pdf (outlining proposed action).

4. *Id.* at 153-54 (discussing relative odds of oil spills over course of drilling).

5. *See* Collin Eaton, *Supreme Court Could Settle Punitive Damage Question in BP Case*, THE HOUS. CHRONICLE (Sept. 5, 2014), *available at* http://www.houstonchronicle.com/business/energy/article/Supreme-Court-could-settle-punitive-damage-5737308.php (outlining reasons Supreme Court may hear suit).

6. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (holding lower court properly vacated punitive damages).

7. *Id.* at 471 (describing company's restitution efforts).

8. *Id.* (holding Shell was responsible for compensatory damages in addition to voluntary damages).

9. In re Exxon Valdez, 270 F.3d 1215, 1246-47 (9th Cir. 2001) (finding five billion dollar award excessive and lowering award to $4 billion dollars).

10. *Baker*, 554 U.S. at 514 (lowering award to five hundred seven million five hundred thousand dollars, matching total compensatory damages).

While the rules for punitive damage liability are largely settled in most areas of law,[11] an action against Shell for Arctic drilling would be heard under less-clear maritime law.[12] Maritime (or admiralty) law is a distinct body of both substantive and procedural law that is heard in the federal courts of the United States.[13] Following a tradition of admiralty law in British courts,[14] the founders codified the existence of a separate body of maritime law in Article III of the Constitution,[15] with the hope of creating a uniform body of law on the high seas to facilitate national commerce.[16] As such, the universe of case law that governs maritime oil spill claims is entirely distinct (and substantially less developed) than a similar claim on land. Several circuit splits have developed in maritime law, particularly given the Supreme Court's limited opportunities to weigh in on certain maritime issues.[17]

Two important splits regarding maritime punitive damages, each with profound importance for setting the total liability resulting from an at-sea oil spill, have recently come to the forefront. First, federal courts disagree whether the Oil Pollution Act (OPA)[18] allows for punitive damages, or if Congress intended for that statute to preempt punitive damages and act as an exhaustive recovery regime.[19] Second, federal circuit courts are in disagreement over the

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11. The same cannot be said, however, for the *amounts* of punitive damages awards, which remains hotly contested. *See, e.g.*, Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (Nov. 1982) (discussing history of punitive damages generally).

12. *See, e.g. Baker,* 554 U.S. at 475 (hearing oil-spill liabilities case under maritime law).

13. BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "general maritime law"). "General maritime law is a branch of federal common law. It is distinguished from statutory law." *Id.*

14. *Admiralty: An Overview*, CORNELL LEGAL INFO. INST., http://www.law.cornell.edu/wex/admiralty (last visited Jan. 26, 2015) (discussing sources and history of admiralty law).

15. U.S. CONST. art. III, § 2. "The judicial power [of Federal Courts] shall extend . . . to all cases of admiralty and maritime jurisdiction." *Id.*

16. *Admiralty: An Overview*, *supra* note 14.

17. *Cf.* In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico (In re Deepwater Horizon), 808 F. Supp. 2d 943, 960 (E.D. La. 2011) (holding parties' claims were displaced by Oil Production Act of 1990, which required suits to comply with act's procedures). "Only a handful of courts have had the opportunity to address [the question of punitive damages in maritime]." *Id.*

18. Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 (2012).

19. *Compare* South Port Marine v. Gulf Oil, 234 F.3d 58 (1st Cir. 2000) (holding OPA preempts availability of punitive damages in oil-spill controversies), *with In re Deepwater Horizon* (rejecting First Circuit's holding and finding punitive damages are not preempted).

proper standard for vicarious punitive liability in maritime law.[20] In other words, the courts disagree under which circumstances an employer should be liable for punitive damages attributable to the acts of its employee.

It is a particularly important time to address these splits of authority. After the British Petroleum (BP) oil spill in the Gulf of Mexico, it is highly likely that the Supreme Court will address both these splits of authority on appeal from the Fifth Circuit.[21] Professor Blaine LeCesne, an expert on the BP oil spill, said that punitive damages remain the biggest question mark in resolving BP's liabilities.[22] Were the question of punitive damages appealed, "the Supreme Court would have almost no choice but to rule on it."[23] Given the "huge financial implications" and "enormous public importance" of the question, LeCesne argues it "would be inconceivable of them not to."[24]

This paper will address both splits in authority and attempt to forecast the Supreme Court's rulings based on both legal and normative arguments. Part I will address the issue of possible OPA preemption. Part II will address the question of punitive vicarious liability.

II. STATUTORY PREEMPTION

Before having the opportunity to address the extent of vicarious punitive damages available in maritime law, a court may find the award of punitive damages is preempted by the compensation scheme created by Congress in the OPA.[25] With the Supreme Court yet to rule on the question, only a handful of courts have had the opportunity to address the issue: the First Circuit has held that the OPA is an exhaustive remedy scheme,[26] while the Eastern Dis-

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20. *Compare* Matter of P&E Boat Rentals, Inc., 872 F.2d 642, 650-51 (5th Cir. 1989) (finding Supreme Court precedent sets proper standard for punitive damages), *with* CEH, INC. v. F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (eschewing Supreme Court precedent and finding Second Restatement of Torts provides correct standard for punitive damages).

21. Eaton, *supra* note 5 (outlining reasons Supreme Court may hear suit relating to punitive damages).

22. *Id.*

23. *Id.*

24. *Id.*

25. *See, e.g.*, South Port Marine v. Gulf Oil, 234 F.3d 58, 64-66 (1st Cir. 2000) (holding OPA of 1990 policies preempt punitive damages in oil-spill suits).

26. *Id.* (holding OPA preempts punitive damages).

trict of Louisiana maintains punitive damages and OPA penalties are concurrently available.[27]

A. First Circuit

In *South Port Marine v. Gulf Oil,* the First Circuit looked to both historic and contemporary maritime law to determine that punitive damages are not available to plaintiffs under the OPA.[28]

In February of 1997, a Gulf Oil employee left a tanker unattended during the refueling process, leading nearly 30,000 gallons of gasoline to spill into the harbor.[29] A majority of the spill entered the cove belonging to South Port and caused serious damage to their docks, equipment, and electrical posts.[30] South Port asserted various claims under both the federal OPA and state common law (including negligence, private nuisance, and trespass).[31] The court found that South Port did not have a legal basis for punitive damages under any of its state common law actions, and therefore assessed the viability of punitive damages under the OPA.[32]

The court noted that Section 2702 of the OPA sets forth a list of six damages available under the OPA and "[a]bsent from that list of recoverable damages is any mention of punitive damages."[33] By negative implication, then, "Congress intended the enactment of the OPA to supplant the existing general admiralty and maritime law, which allowed certain circumstances in the area of oil pollution."[34]

The First Circuit based its reasoning largely on the Supreme Court decision of *Miles v. Apex Marine.*[35] In *Miles*, the court rejected the plaintiff's claim for loss of society damages in addition to statutory damages delineated in the Death on the High Seas Act (DOHSA).[36] In the oft-quoted language from *Miles,* the court stated: "in an area covered by statute, it would be no more appro-

27. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 808 F. Supp. 2d 943, 960-62 (E.D. La. 2011) (stating nothing in OPA will be frustrated by allowing punitive damages as traditionally sought in maritime law).

28. *South Port Maine*, 234 F.3d at 64-66 (stating definitively OPA does not provide for punitive damages).

29. *Id.* at 61 (describing spill of Boston Towing tank barge).

30. *Id.* (describing damages caused by Boston Towing spill).

31. *Id. (*listing claims brought under federal OPA and state common law).

32. *Id.* (reiterating court holding regarding viability of claims).

33. *South Port Maine*, 234 F.3d at 64 (quoting damages available under federal OPA).

34. *Id.* at 65 (quoting exceptional circumstances for oil pollution claims).

35. 498 U.S. 19, 19 (1990) (citing precedent used).

36. *Id.* at 28-29 (explaining *Miles* outcome regarding damages).

priate to prescribe a different measure of damage than to prescribe a different statute of limitations, or a different class of beneficiaries."[37] Because the *South Port* court found a significant overlap between the substance and purpose of OPA liability and any additional punitive damages liability, it deferred to congressional judgment and found punitive damages statutorily barred.[38]

B. Eastern District of Louisiana

On April 20, 2010, an explosion on the mobile offshore drilling rig, *Deepwater Horizon,* caused a blowout on the well.[39] After three months of uncontrollable oil release, British Petroleum, the lessee and principal operator of the rig, announced the hemorrhaging well had been capped—but not before 4.9 million barrels of crude oil had spilled into the gulf.[40]

Litigation pursuant to the oil spill has been prolific and high profile.[41] The possible award of punitive damages is perhaps the biggest unknown factor leading up to an appeal to the Supreme Court.[42] The district court disagreed with the decision in *South Port,*[43] citing two post-*South Port* and *Miles* Supreme Court cases to justify its departure.[44] Applying those two decisions, the Eastern District found that the "OPA does not displace general maritime law claims for those Plaintiffs who would have been able to bring such claims prior to the OPA's enactment."[45]

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37. *Id.* at 31 (quoting court dismissal of prescribing damages).

38. *South Port Maine,* 234 F.3d at 66 (describing court reasoning regarding punitive damage liability).

39. *See, e.g.*, Mika Grönahl et al., *Investigating the Cause of the Deepwater Horizon Blowout*, NEW YORK TIMES (June 21, 2010), *available at* http://www.nytimes.com/interactive/2010/06/21/us/20100621-bop.html (providing description of offshore drilling explosion).

40. Joel Achenbach & David A. Fahrenthold, *Oil Spill Dumped 4.9 Million Barrels Into Gulf of Mexico,* WASH. POST (Aug. 3, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html (giving specific data about oil spill).

41. *Id.* (providing example of extensive media coverage).

42. *Eaton*, *supra* note 5 (quoting LeCesne: "[Punitive damages liability] is the biggest unknown left in terms of BP's remaining liability").

43. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 808 F. Supp. 2d 943, 960-62 (E.D. La. 2011) (generally disagreeing with reasoning).

44. *Id.* at 960 (citing Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) and Atlantic Sounding Co. v. Townsend, 557 U.S. 404 (2009)).

45. *Id.* at 963 (establishing new law regarding OPA maritime claims).

C. Resolution: The OPA Does Not Preclude Punitive Damages

While the OPA catalogues a fairly thorough recovery regime for oil-spill plaintiffs, the statute is silent on the issue of punitive damages[46]—leaving both the *South Port* and the *Deepwater Horizon* interpretations well within the bounds of reason when applying the bare canons of statutory analysis. However, as referenced above, the Supreme Court has issued two decisions since the First Circuit decided *South Port* all but foreclosing the possibility the OPA should be interpreted to preclude, *sub silentio,* the recovery of punitive damages[47]

1. The Shortcomings of Miles

Before turning to the more recent Supreme Court decisions, it is worth briefly reviewing *Miles v. Apex Marine,*[48] the case upon which the First Circuit principally relied in *South Port* and treated as dispositive on the issue.[49] The *Miles* decision is particularly weak authority to resolve the question of punitive damages in maritime law, and recent courts have been wise to look to other sources.

First, *Miles* does not actually address *punitive* damages: the question before the Court was the availability of *loss-of-society* damages in a wrongful death suit, and punitive damages were only mentioned in the opinion with reference to the lower court's decision to deny such damages on the specific facts of the case.[50] Thus, in order to reach its decision in *South Port,* the First Circuit broadened *Miles* into a much more general and expansive framework than the Supreme Court intended.

Second, the reasoning in *Miles* was poor. The *Miles* court declined to extend damages beyond those enumerated in DOHSA because the death of a seaman was an "area covered by statute."[51] But Congress had never actually said to deprive DOHSA claimants of their common law recourse to loss-of-society damages.[52] Rather, the Court followed an attenuated string of inferences to arrive at its

46. 33 U.S.C. § 2701 (2012) (lacking language regarding punitive damages for oil spill plaintiffs).

47. *Id.* (interpreting statute silence as punitive damage preclusion).

48. *See generally* 498 U.S. 19, 19 (1990) (establishing cornerstone for punitive damage recovery).

49. 234 F.3d 58, 65-66 (1st Cir. 2000) "This question has largely been decided for us by the Supreme Court in *Miles v. Apex Marine.*" *Id.*

50. *Miles,* 498 U.S. at 22-23 (denying effectiveness of Miles precedent for punitive damage issue).

51. *Id.* at 31 (highlighting limiting language of statute).

52. David W. Robertson, *Punitive Damages in American Maritime Law,* 28 J. MAR. L. & COM. 73, 143 (Jan. 1997) (lacking Congressional authority to deny recovery).

result. First, DOHSA incorporated by reference the Federal Employer's Liability Act (FELA), which fails to address damages.[53] Next, the Supreme Court had interpreted FELA to preclude loss-of-society damages in *Michigan Central Railroad v. Vreeland*[54] in 1913.[55] In turn, the *Miles* court concluded:

> [w]hen Congress passed [DOHSA], the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation.[56]

Thus, *Miles* is based on the premise that when Congress passes a law, it is aware not only of all provisions of related incorporated statutes, but any common law gloss that has been subsequently added.

Remember where this inquiry started: does the OPA preclude the recovery of punitive damages? Consider the nesting dolls that the *South Port* court had to open, one after another, to arrive at their result: *Miles* was hidden in the OPA, DOHSA was tucked within *Miles,* FELA was concealed in DOHSA, and *Vreeland* was secreted away inside FELA. Is *Vreeland*, a 1913 case deciding the compensation to the family of a deceased railway worker, the ultimate authority that denies punitive damages for oil spills? This result strains credulity.

2. *Dispensing with South Port: The Baker-Townsend One-Two Punch*

As exemplified by *South Port,* the *Miles* framework had metastasized into a tradition that had all but extinguished punitive damages in maritime law.[57] *Exxon v. Baker,* the 2008 Supreme Court

53. *Id.* at 142 (applying inappropriate act to issue).

54. *See generally* 227 U.S. 59 (1913) (analyzing FELA).

55. *Id.* at 69-71 (interpreting FELA to preclude loss-of-society damages).

56. *Miles,* 498 U.S. at 32 (quoting rule on pecuniary damages).

57. As the *Miles* framework gained momentum, a wide-range of courts used it to justify the denial of punitive damages. *See, e.g.*, Clausen v. M/V New Carissa, 339 F.3d 1049 (9th Cir. 2003); Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1510 (5th Cir. 1995); Glynn v. Roya Al Boat Mgmt. Corp., 57 F.3d 1495, 1503 (9th Cir. 1995); Horsley v. Mobil Oil Corp., 15 F.3d 200, 202 (1st Cir. 1994); Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993); *see also* Brittan J. Bush, *The Answer Lies in Admiralty: Justifying Oil Spill Punitive Damages Recovery Through Admiralty Law,* 41 ENVTL. L. 1255, 1269 (Fall 2011) "Scholars proclaimed, in light of *Miles*'s expansion, that maritime punitive damages were on the brink of death." *Id.*

case arising from the Exxon Valdez oil spill, broke the trend and reaffirmed the viability of punitive damages in admiralty.[58] The Court in *Baker* addressed whether punitive damages were preempted by the Clean Water Act (CWA),[59] the federal statute governing oil-spill liabilities before the OPA was passed in 1990.[60] The Court found there was "no clear indication of congressional intent to occupy the entire field of pollution remedies,"[61] and "[i]n order to abrogate a common-law principle, [the viability of punitive damages], the statute *must speak directly* to the question addressed by the common law."[62]

The following year in *Atlantic Sounding Co., Inc. v. Townsend*,[63] the Court revisited its decision in *Miles* under a narrower scope.[64] *Townsend* involved a suit in admiralty for maintenance and cure where the Supreme Court upheld the punitive damages award.[65] The Court distinguished *Miles*, because the underlying claim (wrongful death on the high seas), was *only* available because of statute, and "there was no general common-law doctrine providing for such an action."[66] Thus, *Townsend* clarified that *Miles* did not stand for the proposition that punitive damages were unavailable where a statute created an underlying claim; rather, it provided punitive damages were only unavailable where the underlying claim existed *solely* because of statute. As maintenance and cure claims developed under common law long before the passage of DOHSA, the statute was not the exclusive basis for remedies.[67]

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58. Exxon Shipping Co. v. Baker, 554 U.S. 471, 484-89 (2008).

59. 33 U.S.C. § 1251 (2012). Congress passed the OPA in response to the Exxon Valdez disaster; however, because the statute did not apply retroactively, the CWA still governed all claims against Exxon in *Baker*.

60. *Baker,* 554 U.S. at 484 (questioning CWA preemption).

61. *Id.* at 488-89. Strangely, the Court failed to address *Miles* and its progeny in its sparse, two-paragraph explanation, where it dismissed the merits of the preemption argument.

62. *Id.* at 489 (quoting United States v. Texas, 507 U.S. 529, 534 (1993)) (emphasis added) (internal quotation marks omitted).

63. Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 407 (2009).

64. *Id.* at 407, 418-24 (providing Supreme Court discussion of *Miles* in *Townsend*). "*Miles* does not require [the Court] to eliminate the general maritime remedy of punitive damages for the willful or wanton failure to comply with the duty to pay maintenance and cure." *Id.* at 422. "The fact that seamen commonly seek to recover under the Jones Act for maintenance and cure claims, does not mean that the Jones Act provides the only remedy." *Id.*

65. *Id.* at 417-26. Maintenance and cure is a claim in admiralty that provides injured seamen with day-to-day living expenses (maintenance) and medical costs (cure). Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938).

66. *Townsend*, 577 U.S. at 419-22.

67. *Id.* at 414, 422.

Baker and *Townsend* both squarely support the Eastern District of Louisiana's proposition that the OPA does not preempt punitive damages as a remedy.[68] *Baker,* on its own, may seem dispositive on the question through a simple syllogism: the Court found that the CWA did not preempt punitive damages, the OPA is the successor to the CWA, and thus the OPA should not preempt punitive damages. As tempting as it may be to rely on such reasoning, *Baker* requires more than a facial substantive connection, and calls for fairly thorough statutory analysis.[69] In other words, *Baker* did not say the CWA allows for punitive damages because punitive damages are intrinsically available in all oil spill claims, but because the text of CWA does not preclude remedies it does not list.[70]

Baker included two discrete prongs: Does the OPA directly abrogate the common law principle of punitive damages, and did Congress, through the OPA, intend to occupy the entire field of remedies?[71] To the first prong, the answer is clearly "no." The OPA makes no mention of punitive damages, and thus falls short of the Court's requirement that a statute "must speak directly to the question" to dispose of a common law remedy.[72] In contrast to *South Port,* the Court in *Baker* makes a fairly clear assertion that statutory silence on the question of punitive damages likely allows for them.[73]

The second prong also results in a fairly definitive "no." The OPA contains two clauses that explicitly preserve a plaintiff's rights to recover beyond the OPA. First, the OPA allows for plaintiffs to concurrently recover under any state oil-spill-liability statutory

68. *See generally Townsend*, 577 U.S. at 407; Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008); *see also* In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 808 F. Supp. 2d 943, 960-62 (E.D. La. 2011); Bush, *supra* note 55, at 1258; Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 1 (2011).

69. *See Baker*, 554 U.S. at 489 (declining to assume Congressional intent with respect to all pollution remedies).

70. *See id.* at 488-90 (noting lack of CWA language regarding punitive or other categories of damages does not preempt those damages in actions arising under CWA).

71. *Id.* (providing *Baker* analysis of damages available under CWA).

72. *See* Oil Pollution Act of 1990, 33 U.S.C. §§ 2718, 2751 (2012) (making no mention of punitive damages); *see also Baker*, 554 U.S. at 489. (quoting United States v. Texas, 507 U.S. 529, 534 (1993)) (internal quotation marks omitted).

73. *Baker*, 554 U.S. at 488-89. "[W]e find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties. *Id.*

scheme.[74] Second, the OPA has a savings clause, which states the OPA does not affect "civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[75] These two clauses serve as plain evidence that Congress never intended the OPA to be exhaustive.[76]

Townsend further solidifies the availability of punitive damages. Most importantly, *Townsend* substantially pared back misinterpretations of *Miles*, limiting its application to claims that arise solely from federal statute and had no prior common-law tradition.[77] The question thus becomes: were punitive damages available in contamination and maritime suits before the passage of the OPA? *Townsend* clearly affirms "the common-law tradition of punitive damages extends to maritime claims," and several cases support the proposition that punitive damages have long been available in contamination suits.[78]

While *South Port* ostensibly remains good law, the decision receives distinct skepticism in the *Deepwater Horizon ruling*, which stands in direct contradiction. It seems evident in light of *Baker* and *Townsend,* if the issue reached the Supreme Court, the Eastern District of Louisiana's interpretation falls in line with the Supreme Court's logic, and the reasoning in favor of punitive damages under the OPA would carry the day.

III. VICARIOUS PUNITIVE LIABILITY

Although no one should interpret the OPA as preempting the recovery of punitive damages, further disagreement arises between lower courts over which actions should trigger the award of punitive damages.[79] Though many courts have broadly held punitive damages as recoverable under general maritime law for a variety of actions,[80] courts sharply divide over extending punitive damages to an

74. 33 U.S.C. § 2718(a)(1) (2012) "Nothing in this Act . . . shall affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability." *Id.*

75. 33 U.S.C. § 2751(e)(2) (2012).

76. Congress knows how to preempt punitive damages in clear terms when it so intends. *See, e.g.*, 46 U.S.C. § 30307(b) (2012) (explicitly preempting punitive damages in commercial aviation accidents).

77. *See* Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 420-24 (2009).

78. *Id.* at 414 (2009). *See also, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S 238, 238 (1984).

79. For discussion on the existence of punitive damages under the OPA, see Part I, *supra* notes 25-78, and accompanying text.

80. *See, e.g.,* Muratore v. M/S Scotia Prince, Etc., 845 F.2d 347, 354 (1st Cir. 1988) (awarding punitive damages in maritime for intentional infliction of emotional distress); In re Marine Sulphur Queen, 460 F.2d 89, 105 (2d Cir. 1972)

employer for the acts of an employee under the theory of *respondeat superior*.[81]

A. Early Rulings

The Supreme Court first addressed the question of vicarious liability for punitive damages in admiralty in *The Amiable Nancy*.[82] In the case, sailors aboard the (aptly-named) *Scourge* illegally boarded and subsequently plundered The Amiable Nancy under direction of the *Scourge*'s captain and first lieutenant.[83] Various parties from The Amiable Nancy brought suit against the owner of the *Scourge* and received compensatory damages for personal injuries and loss of property.[84] The Court, however, declined to extend the liability of the ship-owners any further:

> [I]f this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary [punitive] damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can *scarcely ever* be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive [punitive] damages.[85]

(awarding punitive damages in maritime for wrongful death); The Seven Brothers, 170 F. 126, 127 (D.R.I. 1909) (awarding punitive damages in maritime for property damage).

81. *Compare* In re P&E Boat Rentals, Inc., 872 F.2d 642 (5th Cir. 1989) (holding that Supreme Court precedent sets proper standard for punitive damages), *with* CEH, Inc. v. F/V Seafarer, (ON 675048), 70 F.3d 694 (1st Cir. 1995) (rejecting Supreme Court precedent and finding Second Restatement of Torts provides correct standard for punitive damages).

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

83. *Id.* at 550.

84. *Id.* at 553.

85. *Id.* at 558-59 (emphasis in original).

Thus, *The Amiable Nancy* stands for the proposition that while vicarious liability extends to the employer for any losses actually sustained by the plaintiffs, the availability of punitive damages requires the employer directs, supports, or participates in the tortious acts of the employee.

The Supreme Court affirmed the holding of *The Amiable Nancy* decades later in the non-admiralty case of *Lake Shore*,[86] wherein a passenger sued a railway for the tortious acts of one of the railway's conductors.[87] Citing to *The Amiable Nancy*, Justice Gray noted that:

> Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent.[88]

Although not an admiralty case, *Lake Shore* nonetheless influenced the construction of early rules for vicarious punitive damages in admiralty law.[89] *The Amiable Nancy*'s fault-based rule for punitive damages arguably qualifies as mere *dicta* because the case did not actually involve an issue of punitive damages.[90] The *Lake Shore* Court, however, interpreted *The Amiable Nancy* as constituting a rule in the courts of admiralty.[91]

B. Examining the Circuit Split

Despite early Supreme Court rulings on the issue, four circuit courts sitting in admiralty split evenly on the question of vicarious punitive damages: In cases of first impression, the Fifth and Sixth

86. Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107-08 (1893) (affirming *The Amiable Nancy* decision).

87. *Id.* at 102-03 (describing facts of case).

88. *Id.* at 107 (applying *The Amiable Nancy* decision regarding exemplary and punitive damages).

89. *See, e.g.*, *infra* notes 93-123 and accompanying text (discussing circuit split regarding application of *Lake Shore* to punitive damages).

90. *See* The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 552-56 (1818) (addressing damages at issue).

91. *See Lake Shore,* 147 U.S. at 109 (noting rule not solely applicable to admiralty case). "The rule thus laid down is not peculiar to courts of admiralty . . . ." *Id.*

Circuits adopted *The Amiable Nancy/Lake Shore* standard, while the First and Ninth Circuits opted for a more lenient standard.[92]

1. Sixth Circuit

In *U.S. Steel v. Fuhrman*, the Sixth Circuit became the first federal appellate court to interpret *The Amiable Nancy* and *Lake Shore*.[93] At trial, the district court found U.S. Steel liable for punitive damages for the acts of its employee in ordering a steamship to proceed at full speed across a river despite heavy fog and limited visibility, leading to a deadly collision with another ship.[94] The district court awarded punitive damages against U.S. Steel in large part because the corporation failed to countermand the captain's order.[95] The Sixth Circuit determined, however, that "the isolated action of [a single ship captain] does not support a finding that United States Steel knew of this deviation, much less ordered it."[96] In assessing the district court's holding, the Sixth Circuit stated, "punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident."[97] Because U.S. Steel neither authorized nor ratified the actions of the employee in ordering the steamship to continue in the fog, the Sixth Circuit court found the district court's award of punitive damages erroneous.[98]

2. Fifth Circuit

The Fifth Circuit first addressed the issue in *Matter of P&E Boat Rentals, Inc.*, when the company-owner of a boat was sued for the

92. *Compare* Matter of P&E Boat Rentals, Inc., 872 F.2d 642, 651-52 (5th Circ. 1989) (adopting rule from *The Amiable Nancy/Lake Shore*), *and* U.S. Steel Corp. v. Fuhrman, 407 F.2d 1143, 1148 (6th Cir. 1969) (applying punitive damages rule from *The Amiable Nancy/Lake Shore*), *with* CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (imposing vicarious liability standard from RESTATEMENT (SECOND) OF TORTS § 909), *and* Prospectus Alpha Navigation Co. v. North Pac. Grain Growers, 767 F.2d 1379, 1386-87 (9th Cir. 1985) (rejecting *Lake Shore* standard).

93. *See Fuhrman*, 407 F.2d at 1143, 1148 (interpreting *The Amiable Nancy/Lake Shore* 6th Cir. 1969).

94. *Id.* at 1147-48 (finding facts did not support imposition of punitive damages).

95. *Id.* at 1145-46 (applying clearly erroneous standard to district court finding).

96. *Id.* at 1146 (finding insufficient evidence to support managerial discretion approach).

97. *Id.* at 1148 (discussing applicability of punitive damages).

98. *Fuhrman*, 407 F.2d at 1148 (summarizing Sixth Circuit finding).

acts of its employee.[99] The facts of the case are quite similar to *Fuhrman*: two employees unilaterally piloted a ship across a fog-laden terrain, leading to a tragic and fatal collision.[100] Citing *Fuhrman*, the Fifth Circuit held that "punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct."[101] Because there was no evidence that the specific decision to pilot the ships through the fog was approved by P&E management, or that P&E policymaking officials were aware of the practice of operating ships in heavy fog, the company was not liable for punitive damages.[102]

The court defended the *Fuhrman* rule as being more consistent with the overall goals of punitive damages than a rule that held employers strictly liable for the acts of their employees.[103] The court argued the proper reason for awarding punitive damages was to punish the offending party and deter others from taking such actions in the future.[104] When the corporation is found to have taken no part in the wrongdoing, punitive damages would not serve this purpose, but merely increase the amount of damages.[105]

3. Ninth Circuit

In *Prospectus Alpha Navigation Co. v. North Pacific Grain Growers*, the Ninth Circuit declined to follow the path of its sister courts.[106] Recognizing a split in authority on the issue of vicarious punitive damages, the Ninth Circuit adopted the Second Restatement of Torts standard, which states that vicarious punitive damages are appropriate where: 1) the principal authorized the agent to commit the act; 2) the principal recklessly employed or retained an unfit agent; 3) the agent was employed in a managerial capacity and acting in the scope of employment; or 4) the principal or managerial agent later approved the act in question.[107]

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99. Matter of P&E Boat Rentals, Inc., 872 F.2d 642, 645 (5th Cir. 1989) (describing *P&E Boat Rentals*).

100. *Id.* at 644-45 (providing facts of *P&E Boat Rentals*).

101. *Id.* at 652.

102. *Id.* at 652-53.

103. *Id.* at 652 (providing reasoning of Fifth Circuit).

104. *P&E Boat Rentals*, 872 F.2d at 652 (finding purpose of punitive damages undercut by imposing liability on P&E).

105. *Id.* (underscoring proper purpose of punitive damages).

106. Prospectus Alpha Navigation Co. v. North Pac. Grain Growers, 767 F.2d 1379, 1386 (9th Cir. 1985).

107. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 909).

The Ninth Circuit explained that the Restatement standard mirrored the standard in *Lake Shore* with one difference: the Restatement imposes liability pursuant to a third prong, which allows for punitive damages where the tortious act was committed by an agent acting in a managerial capacity within the scope of employment, irrespective of the fault of the employer.[108] The court found the Restatement standard "better reflects the reality of modern corporate America . . . [because] a corporation can act only through its agents and employees, and [ ] no reasonable distinction can be made between the guilt of the employee in a managerial capacity acting within the scope of his employment and the guilt of the corporation."[109]

The Ninth Circuit upheld the district court's award of punitive damages because the company's dock foreman—an employee that the court deemed a manager because he performed a supervisory role and managed several employees—committed the tortious act.[110] The court, however, left open whether vicarious punitive liability would extend to acts of menial employees, declining to address that issue because it was not necessary to resolve the case at bar.[111]

4. First Circuit

Interestingly, the Ninth Circuit in *Prospectus Alpha* did not once address the looming precedent of *The Amiable Nancy*, seemingly the touchstone for punitive-damages adjudication in maritime law. In *CEH, INC. v. F/V Seafarer*, the First Circuit adopted the Ninth Circuit's Restatement standard, but in doing so met *The Amiable Nancy*'s conflicting standard head on.[112] The court stated, "we do not believe the early nineteenth century decision in *The Amiable Nancy* and the late nineteenth, nonadmiralty decision in *Lake Shore* dictate the result here."[113] In rejecting those two precedential cases, the First Circuit argued, "[n]either [*The Amiable Nancy* nor *Lake Shore*] considered the more modern concerns reflected in the contrary case law . . . ."[114]

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108. *Id.* (underscoring additional liability imposed under Restatement).

109. *Id.*

110. *Prospectus Alpha*, 767 F.2d at 1387.

111. *Id.*

112. CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 704 (1st Cir. 1995) (illustrating conflict between Ninth Circuit Restatement and *The Amiable Nancy* standard).

113. *Id.* (quoting court language regarding conflicting standards).

114. *Id.* (lamenting failure of both cases to address modern concerns).

Instead, the First Circuit applied a newly adopted rule and held that punitive damages stemmed from defendant-employer's conduct because an agent in a managerial capacity committed the act.[115] The employee in question acted as a ship's mate with the authority to hire and fire crew, determine the location and duration of the fishing expeditions, and sell the catch at his discretion.[116] Justifying the decision, the First Circuit explained that the imposition of punitive damages "encourages shipowners to hire qualified and responsible captains and to exercise supervisory power over them."[117] Like the Ninth Circuit, the First Circuit left the question open as to how far "managerial capacity" could extend and whether mere menial employees might incur liability for company or owner through their decision-making.[118]

C. Recent Supreme Court Litigation

In perhaps the most visible environmental trial of the 20th century, *Exxon v. Baker*, the Supreme Court received the opportunity to resolve the circuit split over the standard for vicarious punitive damages in maritime law.[119] *Baker* arose out of the 1989 Exxon Valdez oil spill in Prince William Sound, in which the court held Exxon as acting negligent for employing Captain Joseph Hazelwood, a known alcoholic.[120] Immediately before the Exxon Valdez disaster, Hazelwood "downed at least five double vodkas" and consumed enough alcohol that "a non-alcoholic would have passed out."[121] Given the facts of the case, the Supreme Court granted certiorari "to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents . . . ."[122] This issue wholly embodied the precise point of disagreement between the circuit courts.

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115. *Id.* at 705 (explaining rationale for adopting new punitive damage standard).

116. *Id.* (describing role of employer agent who committed act).

117. *CEH, Inc.*, 70 F.3d at 705 (quoting district court regarding incentive for increased competence) (internal quotation marks omitted).

118. *Id.* at 703, 705 (providing no limiting definition for "managerial capacity").

119. Exxon Shipping Co. v. Baker, 554 U.S. 471, 482-84 (2008) (delineating definition and application of 'agent' in maritime law).

120. *Id.* at 476 (describing alcoholic conduct of ship captain).

121. *Id.* at 477 (recounting captain's dangerous drinking activities on night of oil spill) (internal quotation marks omitted).

122. *Id.* at 481 (granting certiorari to discuss applicable merits of maritime law).

The Ninth Circuit Court of Appeals decided *Baker* according to the Restatement standard and held Exxon liable for five billion dollars' of punitive damages.[123] Upon reaching the Supreme Court, an eight-justice panel considered the case, with Justice Alito taking no part in the decision because of his ownership of Exxon stock.[124] After discussion, the Court split evenly over whether maritime law imposes corporate liability based on the actions of managerial agents, and chose to leave the Ninth Circuit's opinion undisturbed while explicitly noting that "it should go without saying that the disposition here is not precedential . . . ."[125]

D. Resolution: The Court should adopt the Restatement Standard

If (and likely when) the *Deepwater Horizon* litigation reaches the Supreme Court, this question is sure to be resolved.[126] The district court in *Deepwater Horizon* took the rare step of resolving the issue under each of the circuit's standards, making separate findings that the case would come out differently in the First and Ninth Circuits.[127] In deciding this issue, the Supreme Court should 1) not feel bound by any of the prior precedent and, thus free to decide the question *de novo*, and 2) consider normative and policy arguments.[128]

1. Legal Arguments for Punitive Damages

The threshold question the Court will confront is: does *stare decisis* bind the Court?[129] If either *The Amiable Nancy* or *Lake Shore* speaks directly to the question, then the Court, at least in theory,

123. *Id.* at 484 (recounting procedural history).

124. *See Baker*, 554 U.S. at 515 (explaining recusal of Justice Alito); *see also* Linda Greenhouse, *Justices to Hear Exxon's Challenge to Punitive Damages*, NEW YORK TIMES (Oct. 30, 2007), *available at* http://www.nytimes.com/2007/10/30/business/30bizcourt.html?pagewanted=print&_r=0 ("[Justice Alito's] ownership of Exxon stock caused him to recuse himself from the case").

125. *Baker*, 554 U.S. at 484 (stating unprecedented nature of issue).

126. *See Eaton*, *supra* note 5 (questioning settlement of punitive damage issue).

127. In re Oil Spill, 21 F. Supp. 3d 657, 751 (E.D. La., by the *Deepwater Horizon* in the Gulf of Mexico, on April 20, 2010, 2014 U.S. Dist. LEXIS 123245, at *568-71 (E.D. La., Oct. 12, 2014) ("The State of Alabama urges the Court to make separate findings, as not all Circuits follow the same rule as the Fifth Circuit and some cases may ultimately be resolved under the law of other Circuits. The Court will briefly indulge this request.") (quoting pleading).

128. *Id.* (suggesting Supreme Court action for deciding *Deep Water Horizon*).

129. *See generally* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (pondering role of prior precedent applied to issue at question).

should be compelled to follow its own precedent.[130] To do otherwise, the Court would have to find the standard unworkable, poorly reasoned, or inconsistent with subsequent developments of law or societal mores.[131]

As noted above, both *The Amiable Nancy* and *Lake Shore* are imperfect precedent.[132] *The Amiable Nancy*, while superficially setting forth a clear standard for vicarious punitive liability, does not directly speak to the issue.[133] In that case, the district court did not award punitive damages, and the Supreme Court stated, "the only inquiry will be, whether any of the items allowed by the district court were improperly rejected by the circuit court."[134] The *Amiable Nancy* standard, therefore, is mere dictum, and while the case is often cited as a *persuasive* authority, it is not *binding*.[135]

Next, does *Lake Shore* bind a court sitting in admiralty?[136] The Supreme Court did not revisit the issue between 1893 (*Lake Shore*) and 2008 (*Exxon*),[137] so *Lake Shore,* if binding, is the final and definitive word on the issue.[138] *Lake Shore,* however, suffers from several problems.[139] First, and most glaringly, *Lake Shore* is not a maritime case.[140] Even though *Lake Shore* purported to interpret *Amiable Nancy*, a proper maritime case, this does not give it proper authority over maritime courts, which have a fully distinct body of precedent.[141]

130. *Id.* at 827 (emphasizing importance of following established precedence). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.*

131. *Id.* at 849 (Marshall, J., dissenting) (discussing rationale for abandoning precedent).

132. See *supra* notes 80-88, Part III (1) (discussing impact of *The Amiable Nancy* and *Lake Shore*). See *supra* notes 112-18, Part III (2)(d) (examining Ninth and First Circuit rejection of legal precedent).

133. *See generally* The Amiable Nancy, 16 U.S. 546 (1818) (lacking specific standard for vicarious punitive liability).

134. Michael F. Sturley, *Vicarious Liability for Punitive Damages,* 70 LA. L. REV. 507, n.225 (quoting *The Amiable Nancy* at (3 Wheat.) 559).

135. *See, e.g.*, Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 411 (2009) (citing *The Amiable Nancy* as persuasive authority); Kolstad v. Am. Dental 527 US 526, 541 (1999) (distinguishing *The Amiable Nancy* from binding authority).

136. *See generally* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893) (debating application to admiralty law).

137. *See* Exxon Shipping Co. v. Baker, 554 U.S. at 471, 482-83 (2008) (failing to address legal effect on admiralty law regarding punitive damages).

138. *Lake Shore*, 147 U.S. 101 (debating potential binding effect).

139. *Id.* (highlighting negative elements of case as effective precedent for admiral law).

140. *See id.* (hearing claim for unlawful arrest made by railway conductor).

141. *See* CORNELL LEGAL INFORMATION INSTITUTE, *supra* note 14.

Second, *Lake Shore* does not speak to the main point of contention between the circuits: whether a *managerial* employee's acts will be imputed to his employer even absent authorization or ratification. As the Court in *Baker* noted, "*Lake Shore* merely rejected company liability for the acts of railroad conductors, while saying nothing about the liability for agents higher up the ladder, like ship captains."[142]

Lastly, *Lake Shore* is seen as a particularly poor authority, even to courts sitting *outside* of admiralty. The Supreme Court later called its own decision into question and noted it may have been improperly restrictive, even for its own time.[143] Indeed, most courts sitting outside of admiralty do not follow the *Lake Shore* standard.[144] Putting it all together, admiralty courts should not follow a standard that was developed *outside* of maritime law, and further, has been rejected by the very courts it might have the authority to bind.

2. Normative Justifications for Allowing Punitive Damages

Freed from the constraints of binding precedent, this issue would reach the Supreme Court as a case of first impression.[145] With the lower courts evenly split and the statutory texts silent, the Supreme Court would likely consider normative-based policy arguments to resolve the issue. The general advantages and disadvantages of punitive damages (such as deterrence/over-deterrence, retributive justice, the multiple punishments problem, Due Process implications, making the victim truly "whole," etc.) have been debated *ad nauseam* and won't be given further treatment.[146] More interesting to the present inquiry, is how the policy arguments apply specifically to oil drilling.

Furthermore, given that twenty-two percent of the world's undiscovered, technically recoverable resources lie north of the Arctic

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

143. American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 n. 14 (1982) ("[T]he Court may have departed from the trend of late 19th–century decisions when it issued *Lake Shore* . . . .").

144. *See* W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 13 (5th ed. 1984).

145. BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "first impression" as "A case that presents the court with an issue of law that has not previously been decided by a controlling legal authority in that jurisdiction.").

146. The debate has raged since Simon Greenleaf and Theodore Sedgwick crossed swords in the mid-1800s. *Compare* SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (1859) (arguing in support of punitive damages), *with* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (1858) (arguing against punitive damages).

Circle,[147] the Court would be prudent to consider Arctic-specific arguments in formulating any prospective standard. The operational risks in oil and gas development in the Arctic are severe and amplify one another: remoteness, extreme cold, darkness, and powerful sea ice.[148] Most important to the Arctic, the Court should consider the role that a fully functioning tort system, particularly punitive damages,[149] plays in: 1) filling the gaps in preexisting regulatory schemes; and 2) encouraging self-regulation.[150]

Filling the gaps in the preexisting regulatory scheme is crucial in the extreme Arctic climate. As outlined by the Brookings Institute, the current regulatory framework is not tailored to the conditions of the Arctic marine environment.[151] This is, of course, problematic when coupled with the fact that the Arctic outer continental shelf (OCS) is dramatically different from any other U.S. OCS area.[152] The differences, climate, remoteness, ice, etc., all exacerbate the chances of an oil spill and worsen their effects.[153] In their report, the Brookings Institute recommends the U.S. government rewrite the regulatory framework to encompass these concerns and create Arctic-specific standards.[154]

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147. *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, UNITED STATES GEOLOGICAL SURVEY (2008), *available at* http://www.usgs.gov/newsroom/article.asp?ID=1980#.VJQ53MABA (summarizing assessment of Arctic resources).

148. *Arctic Opening: Opportunity and Risk in the High North*, LLOYD'S OF LONDON 35 (2012), *available at* http://www.lloyds.com/~/media/files/news%20and%20insight/360%20risk%20insight/arctic_risk_report_webview.pdf; *Oil Spill Prevention and Response in the U.S. Arctic Ocean: Unexamined Risk, Unacceptable Consequences*, PEW ENVIRONMENT GROUP 10-23 (2010), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/peg/publications/report/Oil20Spill20Preventionpdf.pdf (discussing general risks of Arctic exploration).

149. *Cf.* David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359 (Nov. 1998) (demonstrating serious flaws in methodology and reasoning in prior article calling for discontinuance of punitive damages in environmental cases).

150. Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making*, 86 TEX. L. REV. 1837, 1838 (June 2008) (outlining impact of tort law on production of regulation).

151. Charles Ebinger et al., *Offshore Oil and Gas Governance in the Arctic: A Leadership Role for the U.S.* 34 (Mar. 2014), *available at* http://www.brookings.edu/~/media/research/files/reports/2014/03/offshore%20oil%20gas%20 governance%20arctic/offshore%20oil%20and%20gas%20governance%20web.pdf (stating Arctic environment not fully considered by regulations governing production).

152. PEW ENV'T GRP., *supra* note 157, at 5 (discussing unique marine environment extant in Arctic).

153. *Id.* (discussing increased risk of spill and increased damage that would result).

154. Ebinger et al., *supra* note 161, at 52 (recommending strengthening of diplomatic efforts).

In the absence of government movement, the tort system has the ability fill this void and create common-law standards. For example, given the concerns particular to the region, a court could define a certain action as reckless in the Arctic which would not necessarily be considered reckless in other regions. With extra liability through civil suits looming, Arctic operators will surely take additional precautions.

Achieving a high level of self-regulation is also an important objective in achieving an optimally safe Arctic-drilling environment. Indeed, one of Brookings' main recommendations to achieve safer Arctic drilling was to better integrate the private sector into the regulatory efforts.[155] While perhaps an imperfect analogy, a brief comparison of prescriptive and performance-based regulations is illustrative. A prescriptive approach (such as what is used in the United States) sets forth explicit requirements operators must meet to be in compliance.[156] A performance-based approach (such as that used in Norway), on the other hand, is designed to shift the responsibility for how to meet certain quantifiable goals to the operator.[157] While both regimes have advantages and disadvantages, performance-based systems have the advantage of encouraging innovation instead of mere compliance,[158] and thus may be more effective.[159]

The threat of additional civil liability has proven an effective impetus to spark self-regulation in other already highly regulated sectors, such as the gun industry.[160] After additional possible civil penalties, the gun industry innovated to improve safety, taking such measures as including trigger locks in gun sales and distributing educational materials to children about gun safety.[161] If a robust

155. Ebinger et al., *supra* note 161, at 50 (recommending expansion of legal framework through treaties and Arctic specific regulation).

156. Ebinger et al., *supra* note 161, at 22 (discussing prescriptive approach).

157. *Id.* at 23 (using Norway as example to discuss meaningful ways performance-based approach has been successful).

158. *See generally* Gaia J. Larsen, *Skewed Incentives: How Offshore Drilling Policies Fail to Induce Innovation to Reduce Social and Environmental Costs*, 31 STAN. ENVTL. L.J. 139 (June 2012) (discussing advantages of performance based systems).

159. *See* Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection* 20 (2002), *available at* http://www.hks.harvard.edu/m-rcbg/Events/Papers/RPPREPORT3.pdf. "Expanding the use of performance-based regulation holds promise for achieving health, safety, and environmental goals at lower cost and for doing so in a way that accommodates if not encourages technological innovation." *Id.*

160. Lytton, *supra* note 159, at 1847 (comparing use of civil liability as form of regulation).

161. *Id.* (discussing regulation through civil liability in terms of firearms manufacturers).

tort system can similarly encourage Arctic operators to self regulate and innovate, then the United States may reap the benefits of a performance-based system, even with the prescriptive framework in place.

3. Corporate Recklessness—A Novel Approach

Perhaps a court could award punitive damages regardless of whether *The Amiable Nancy* standard or Restatement standard prevails. Looking to even the most restrictive, *The Amiable Nancy* standard (as adopted by the Fifth and Sixth Circuits), a corporation is liable for punitive damages if it "authorized or ratified the (tortious) acts."[162] Punitive damages, of course, are not available in every civil suit, but are limited to cases where the defendant's conduct is "owing to gross negligence, willful, wanton and reckless indifference to the rights of others, or behavior even more deplorable."[163] Thus, if a corporation authorizes or ratifies an action that meets this level of conduct, it can be found liable for punitive damages.

Gross negligence and willful, wanton, and reckless indifference (hereinafter, collectively referred to as "recklessness") are different from intentional misconduct.[164] While a reckless act is volitional, it is not intended to cause the resulting harm.[165] Rather, it is sufficient that the actor realizes, or should realize, there is a *strong probability* harm may result, even though he intends, or even expects, his conduct will prove harmless.[166] 'Strong probability' is a lesser standard than 'substantial certainty,' the standard required to show intentionality, and a more stringent standard than negligence requires.[167]

It is rare to thoroughly understand, *ex ante*, the probable outcomes of certain actions. An individual does not know when switching lanes on the highway or affixing a ladder to a roof the precise odds of causing an accident. As such, case law defining and comparing recklessness to negligence and intentionality is qualitative,

162. U.S. Steel Corp. v. Fuhrman, 407 F.2d 1143, 1148 (6th Cir. 1969) (holding punitive damages were given in error).

163. Exxon Shipping Co. v. Baker, 554 U.S. 471, 493 (2008) (internal citations omitted) (holding lower court properly vacated punitive damages).

164. RESTATEMENT (SECOND) OF TORTS § 500(f) (1965) (discussing distinction between misfeasance and malfeasance).

165. *Id.* (discussing recklessness).

166. *Id.* (discussing likelihood of harm necessary to create recklessness).

167. *Id.* at § 500(f)-(g) (discussing grades).

not quantitative. For example, a reckless action is strongly probable, rather than, for example, sixty-to-eighty percent probable.

Shell and other actors preparing to drill in the arctic, however, are in the rare position of being able to understand the odds of incident prior to acting—and those odds have been pegged at seventy-five percent by the BOEM Environmental Impact Statement.[168] Is seventy-five percent substantially certain, thus meeting the bar for intentionality? Likely not.

But is seventy-five percent strongly probable, and thus reckless? Channeling a textualist ethos, the Merriam Webster dictionary defines 'strongly probable' as an event with a well-established chance of occurring.[169] Under this inquiry, a seventy-five-percent likelihood seems to meet the definition of strongly probable. However, this exercise is not particularly instructive (query whether 'well-established chance of occurring' is in any way inherently more meaningful than 'strongly probable') and would quickly lead to a spell of circular reasoning.

Perhaps most illuminating, would be comparing these odds to familiar, everyday events. For example, an almost-two-touchdown favorite in college football has about a seventy-five percent chance of winning the game outright.[170] As an avid college football fan, I can certainly say that when my team is favored by two touchdowns, I am confident that there is a 'strong probability' of victory.[171] Different analogies may prove more meaningful to different people based on life experience, but whatever that analog may be, I believe most individuals would equate seventy-five percent with a strong probability of occurrence. This leaves us with a fairly simple and uncontroversial string of premises to connect:

—Drilling in the Arctic will produce a major oil spill seventy-five percent of the time.

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168. BUREAU OF OCEAN ENERGY MGMT., *supra* note 3.

169. *See Strong Definition,* Merriam Webster, http://www.merriam-webster.com/dictionary/strong (last visited Feb. 17, 2015); *see also Probability Definition*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/probability (last visited Feb. 17, 2015).

170. Jeff Zimmerman, *Chances of a Football Team Winning Knowing the Vegas Spread,* SB NATION (Aug. 29, 2009), *available at* http://www.beyondthebox score.com/2009/8/29/1003957/chance-of-a-football-team-winning (describing calculation of odds in college football).

171. *But see, e.g., Notre Dame v. Northwestern* (NBC television broadcast Nov. 15, 2014) (demonstrating my unwarranted confidence in a futile football program losing as 17.5 favorites); *Notre Dame v. Navy* (NBC television broadcast Nov. 7, 2009) (crushing my spirit losing when favored by 13 points); *Notre Dame v. Syracuse* (NBC television broadcast Nov. 22, 2008). "We can't even win when we're favored by 18 points—at home—against a 2-8 team?"

—An event with a seventy-five percent chance of occurring is strongly probable.

—Engaging in an activity that is strongly probable to cause significant harm to others is reckless.

—Reckless behavior can be punished by punitive damages.

Quod erat demonstrandum? Unless there are latent, convoluting subpremises, it seems fairly straightforward an oil spill in the Arctic may lead to the award of punitive damages, even under the strictest standard for vicarious punitive liability.

IV. CONCLUSION

Shell looks poised to finally roll that four-sided dice during the summer of 2015 with, if the BOEM study is correct, a three-out-of-four chance that an oil spill will occur. In that seventy-five percent likelihood, the above analysis demonstrates that Shell and other Arctic operators can and should be found liable for punitive damages under maritime law.