

NOTES

ARE WE SAILING IN OCCUPIED WATERS?: RETHINKING THE AVAILABILITY OF PUNITIVE DAMAGES UNDER THE OIL POLLUTION ACT OF 1990

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Litigants' briefs in the myriad cases arising from the Deepwater Horizon explosion raise questions about the extent to which the Oil Pollution Act's two savings clauses preserve additional remedies, such as punitive damages. A large number of comprehensive federal frameworks include savings clauses that anticipate supplementing the statute with additional federal or state law. When these clauses are ambiguous, the statute and precedent may not suffice to resolve the ambiguity. This Note explores how economic policy, specifically optimal deterrence theory, may be used to resolve whether the Oil Pollution Act's ambiguous maritime savings clause preserves or precludes maritime punitive damages. Optimal deterrence theory bolsters the Supreme Court's recent repeated affirmances of using maritime punitive damages to supplement federal statutes, providing a firmer justification for the argument that two lower courts wrongly held that the Act precludes the maritime damages for oil spill injuries. Having resolved the ambiguity caused by the interaction between maritime punitive damages and the Oil Pollution Act with optimal deterrence theory, I conclude by proposing a framework that courts could use to determine when and how to award maritime punitive damages for oil spill injuries in particular cases, integrating the common law remedy with the statutory scheme.

INTRODUCTION

On April 20, 2010, the explosion on the Deepwater Horizon drilling rig in the Gulf of Mexico produced the largest accidental marine oil spill in United States history.¹ Although the immediate casualty toll included the lives of eleven oil rig workers and serious injuries to many others,² three months elapsed before the gushing oil could be contained, creating a much larger group of victims that includes people whose livelihoods depend on the Gulf ecosystem and

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¹ NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 173 (2011) [hereinafter NAT'L COMM'N, DEEP WATER].

² *Id.* at 127.

others further from the Gulf whose businesses suffered as a result of the spill.³ Given the National Commission on the BP Deepwater Horizon Oil Spill & Offshore Drilling's conclusion that the rig's owner (Transocean), operator (BP), and well contractor (Halliburton) could have prevented the disaster,⁴ questions concerning the scope of these actors' liability and the amount of recoverable damages for injured parties already have emerged.⁵ Although the Oil Pollution Act of 1990⁶ (OPA) is the primary damages-recovery mechanism for oil spill injuries, its maritime savings clause may allow additional recovery through general maritime law causes of action.⁷ General maritime law is a concept "incapable of precise definition by the courts," but which primarily encompasses actions related to "events occurring on certain types of waters . . . and particular classes of disputes historically belonging to the admiralty courts, such as actions arising out of maritime contracts."⁸ Punitive damages are available for some maritime causes of action, including negligence.⁹ Since OPA does not provide for punitive damages in its remedial scheme,¹⁰ the question of whether such damages are available for oil spill injuries will be of particular

³ See *id.* at 171–95 (describing the consequences and victims of the spill); see also David Segal, *Should the Money Go Where the Oil Didn't?*, N.Y. TIMES, Oct. 24, 2010, at BU1 (describing those in neighboring states who lost profits without suffering physical damage).

⁴ NAT'L COMM'N, DEEP WATER, *supra* note 1, at 89.

⁵ See, e.g., First Amended Complaint at 6–7, *Abbasi v. Transocean Ltd.*, No. 3:11-cv-00189-MCR-CJK (N.D. Fla. May 14, 2011) (seeking maritime punitive damages based on unseaworthiness and asserting a cause of action under a Florida statute); Complaint at 2–8, *Coco v. BP Prods. N. Am., Inc.*, No. 2:11-cv-00946-CJB-SS (E.D. La. Apr. 20, 2011) (asserting causes of action for damages under the Jones Act and for unseaworthiness and maintenance and cure, and seeking attorney's fees); Complaint at 6, 8, *Boullion v. Anadarko Petroleum Corp.*, No. 2:11-cv-00923-CJB-SS (E.D. La. Apr. 19, 2011) (bringing Jones Act and general maritime negligence actions and seeking compensatory and punitive damages).

⁶ Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2006).

⁷ The general maritime law is an area of federal common law established by the Constitution. U.S. CONST. art. III, § 2. Although much federal common law was overturned by the Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), maritime law remains an area of federal common law. See *Erie R.R. Co.*, 304 U.S. at 78 (preserving those areas of federal common law set forth by the Constitution). The two major policies underlying the general maritime law are a special solicitude for seafarers' welfare and uniformity. Ugo Colella, Comment, *The Proper Role of Special Solicitude in the General Maritime Law*, 70 TUL. L. REV. 227, 230–31 (1995) ("Two policy objectives have shaped the contours of general maritime law – special solicitude and uniformity.").

⁸ 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3671, at 242, 257 (3d ed. 1998).

⁹ Plaintiffs may recover maritime punitive damages through a general maritime action for negligence. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 475–76 (2008) (awarding maritime punitive damages for reckless oil pollution).

¹⁰ See 33 U.S.C. § 2702(a)–(b) (listing available damages).

interest to litigants who allege harm from the Deepwater Horizon spill.

Congress passed OPA to address oil spill liability in the wake of the Exxon Valdez grounding in 1989.¹¹ The two decades since OPA's enactment have not clarified the extent to which other related state and federal laws allow for damages beyond the remedies provided by OPA. In OPA, Congress explicitly preserved some level of state and general maritime law in two savings clauses.¹² However, two factors may limit the availability of other sources of law. First, in considering other federal regulatory frameworks that include savings clauses, the Supreme Court has held that implied preemption nonetheless may occur within the preserved field.¹³ Second, the Supreme Court held in *Miles v. Apex Marine Corp.*¹⁴ that in some circumstances, the general maritime law should be interpreted to conform to maritime statutes, suggesting that ambiguity in the application of general maritime law may be better resolved in favor of preemption. Ambiguity in OPA's maritime savings clause combines with the possibility of implied preemption to leave open whether OPA preempts other relevant federal and state law in a way that limits recoverable damages. This Note focuses on the interaction between OPA and federal maritime—as opposed to state—law.

The text of a savings clause provides some clues as to how narrowly or broadly Congress intended it to displace existing laws,¹⁵ but when such clauses are ambiguous, the Supreme Court repeatedly has

¹¹ Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C. §§ 2701–2762). Previous attempts to pass similar legislation were unsuccessful. See Letter from John C. P. Goldberg, Professor, Harvard Law Sch., to Kenneth R. Feinberg, Esq., Feinberg Rozen, LLP 6–7 (Nov. 22, 2010) (on file with the New York University Law Review) (noting that prior to 1990, Congress tried for fifteen years to fashion a law for oil spills).

¹² See 33 U.S.C. § 2718(c) (“Nothing in this Act . . . shall in any way affect . . . the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil.”); 33 U.S.C. § 2751(e) (“Except as otherwise provided in this Act, this Act does not affect admiralty and maritime law . . .”). A savings clause is “[a] statutory provision exempting from coverage something that would otherwise be included.” BLACK’S LAW DICTIONARY 1461 (9th ed. 2009).

¹³ See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (“[A] pre-emption provision, by itself, does not foreclose (through negative implication) ‘any possibility of implied [conflict] pre-emption . . .’” (second alteration in original) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995))).

¹⁴ 498 U.S. 19, 36 (1990).

¹⁵ Compare *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–87 (1992) (broadly interpreting the prepositional phrase “relating to” in an express preemption clause to preempt state law), with *Altria Grp., Inc. v. Good*, 555 U.S. 70, 85–86 (2008) (distinguishing *Morales* on the grounds that “based on” is narrower than “relating to”).

looked to the statute's purpose to resolve the ambiguity.¹⁶ When courts rely on purpose to resolve ambiguous savings clauses, there is an opportunity for policy rationales to inform judicial decision-making processes. OPA provides a useful example of how economic policy, specifically the theories of optimal deterrence that underlie the punitive damages literature, may help in interpreting ambiguous savings clauses, particularly given Deepwater Horizon litigants' ongoing attempts to assert the availability of state and maritime causes of action that provide remedies not included in OPA's remedial scheme.¹⁷

This Note proposes using economic policy, specifically optimal deterrence theory, to resolve the ambiguity in OPA's maritime savings clause and to determine whether the clause allows for [punitive damages under the general maritime law.¹⁸ Only two lower courts have addressed this issue since OPA's passage,¹⁹ and it has been raised again in the Deepwater Horizon litigation.²⁰ This Note argues that these two lower courts erred in ignoring the text of the maritime savings clause and relying on what is, at best, ambiguous precedent in *Miles v. Apex Marine Corp.*²¹ Recent Supreme Court precedent on the availability of maritime punitive damages casts doubt on the lower courts' interpretation, but it does not clearly resolve the textual ambiguity.

Part I of this Note lays out the relevant factual background. It discusses the relevant portions of OPA, the *Miles* decision, and the two lower court decisions that relied on *Miles* to hold that OPA pre-

¹⁶ See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 (2009) (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

¹⁷ See *supra* note 5 (discussing some causes of action asserted in Deepwater Horizon litigants' briefs); *infra* notes 33–35 and accompanying text (laying out OPA's two savings clauses).

¹⁸ I utilize a subset of economic policy, as opposed to other policy considerations, because one of the major debates about the theoretical justifications for the punitive damages remedy concerns how best to award punitive damages to achieve optimal deterrence. See *infra* Part II.C.1. Likewise, the Supreme Court's evolving punitive damages jurisprudence increasingly focuses on the use of a single-digit multiplier to avoid overdeterrence. See Alison F. Del Rossi & W. Kip Vicusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 AM. L. & ECON. REV. 116, 118–19 (2010) (detailing the progression of Supreme Court precedent toward a 1:1 ratio between compensatory and punitive damages).

¹⁹ *S. Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000); *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127 (D. Or. 2001).

²⁰ See, e.g., Plaintiffs' Response and Memorandum in Opposition to Defendants' Motions to Dismiss at 7–11, *Deupree Outdoor Guide Servs., Inc. v. BP, plc*, No. 1:10-cv-00252-KD-M (S.D. Ala. Aug. 11, 2010) (seeking punitive damages).

²¹ 498 U.S. 19 (1990).

cludes maritime punitive damages. Part II examines the text of OPA, explains the difficulties posed by applying competing Supreme Court precedents, and provides an overview of the main theoretical justifications for punitive damages. Part II concludes by suggesting that optimal deterrence theory should be used to resolve the textual ambiguity. Finally, Part III lays out a framework for analyzing whether maritime punitive damages are appropriate in particular oil spill injury cases. I conclude by discussing some boundaries for my framework's application.

I

AMBIGUITY IN OIL POLLUTION LIABILITY: THE STATUTE, THE PRECEDENT, AND THE POLICY

Section A lays out the relevant provisions of OPA. Section B details the interpretive methodology developed by the Supreme Court in *Miles* and the way in which two lower courts applied *Miles* to prohibit supplementing OPA with maritime punitive damages.

A. The Basics of the Oil Pollution Act

OPA is the primary federal source of oil spill liability. It establishes a private cause of action to recover a range of damages caused by oil pollution. In general, OPA makes "each responsible party for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters [of the United States] or adjoining shorelines . . . liable for the removal costs and damages . . . that result from such incident."²² Damages recoverable by private parties²³ include: (1) "[d]amages for injury to, or economic losses resulting from destruction of, real or personal property";²⁴ (2) "[d]amages for loss of subsistence use of natural resources";²⁵ and (3) "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources."²⁶ Although not mentioned explicitly in OPA's remedial

²² 33 U.S.C. § 2702(a) (2006). For an explanation of the meaning of the phrase "result from" in § 2702(a), see Letter from John C. P. Goldberg to Kenneth R. Feinberg, *supra* note 11, at 17 n.36.

²³ Government actors, however, may recover additional damages. 33 U.S.C. § 2702(b)(1), (2)(A), (2)(D), (2)(F).

²⁴ *Id.* § 2702(b)(2)(B).

²⁵ *Id.* § 2702(b)(2)(C).

²⁶ *Id.* § 2702(b)(2)(E). Maritime and land-based tort law traditionally bar the recovery of lost profits under the Economic Loss Rule. The Economic Loss Rule requires some injury to persons or property for a plaintiff to recover for purely financial losses. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) ("[A] tort to the person or property of one man does not make the tortfeasor liable to another merely because the

scheme, damages for personal injury or death caused by oil pollution are available under either maritime common law or a variety of statutes, depending on the location of the oil spill.²⁷

OPA limits the liability of responsible parties by listing possible defenses to liability and imposing a cap on recoverable damages, but it also increases liability by lifting the damages cap under certain circumstances. A responsible party may defend completely against OPA liability by establishing that an oil spill was caused by:

(1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party [who is not an agent of or in privity with the responsible party] . . . [as long as the responsible party] exercised due care . . . [and] took precautions against foreseeable acts or omissions of any such third party.²⁸

In the Deepwater Horizon context, BP will likely assert the third defense and attempt to establish that a third party—either Transocean or Halliburton—caused the spill. However, BP’s contractual relations to such parties may preclude this defense.²⁹ Even if an absolute defense cannot be proven in a particular case, OPA sets a liability cap of \$75 million (in addition to removal costs) for oil spills at offshore facilities, such as the Deepwater Horizon rig on the Outer Continental Shelf.³⁰ The cap is lifted when, among other things, a spill results from a responsible party’s “gross negligence or willful misconduct.”³¹ Thus, if a court rules that BP or another responsible party acted with gross negligence and caused the Deepwater Horizon explosion and the

injured person was under a contract with that other unknown to the doer of the wrong.”); David Gruning, *Pure Economic Loss in American Tort Law: An Unstable Consensus*, 54 AM. J. COMP. L. 187, 189–90 (2006) (noting that *Robins Dry Dock* has been interpreted broadly and expanded beyond the reference to a contract in the original case). However, the general maritime law excepts commercial fishermen from the Economic Loss Rule. *Union Oil Co. v. Oppen*, 501 F.2d 558, 568 (9th Cir. 1974) (reasoning that a fisherman’s ability to catch is key to his livelihood and therefore actual damage to *his* property is not required because damage to his livelihood is clear). OPA may broaden the commercial fishermen’s exception. See, e.g., Letter from John C. P. Goldberg to Kenneth R. Feinberg, *supra* note 11, at 32 (“OPA’s economic loss provisions are best understood as expanding liability for economic loss . . . to any person whose business’s profitability depends on his or her ability to exercise a right physically to obtain or use property or resources that are damaged or lost because of an oil spill.”).

²⁷ For the specifics of jurisdiction over maritime torts and the substantive law that applies to them, see generally ROBERT FORCE & MARTIN J. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* (5th ed. 2010).

²⁸ 33 U.S.C. § 2703(a).

²⁹ See Matt Daily, *BP, Other Oil Spill Companies Start the Blame Game*, REUTERS (May 6, 2010), <http://www.reuters.com/article/2010/05/06/oil-rig-blame-idUSN0610788520100506> (explaining that BP’s contractual relationships with other potentially responsible parties may prevent BP from shifting blame under OPA).

³⁰ 33 U.S.C. § 2704(a)(3).

³¹ *Id.* § 2704(c)(1)(A).

resulting spill, that party would be responsible for the full amount of covered damages and removal costs.³²

Although its basic liability provisions are relatively clear, OPA explicitly preserves additional liability through two savings clauses. These clauses create uncertainty about the availability of remedies not provided in OPA for oil spill injuries. First, in the state law savings clause,³³ OPA states that “[n]othing in this Act . . . shall in any way affect . . . the authority of . . . any State . . . to impose additional liability or requirements . . . relating to the discharge, or substantial threat of a discharge, of oil.”³⁴ Second, the maritime savings clause states that, “[e]xcept as otherwise provided in this Act, [OPA] does not affect admiralty or maritime law.”³⁵ This Note examines whether the latter provision preserves the maritime punitive damages remedy.

*B. A Narrow View of Congressional Intent in Admiralty Law:
Miles v. Apex Marine Corp. and Its Extension to Maritime
Punitive Damages and the Oil Pollution Act*

The key to the two lower courts’ holdings that OPA preempts maritime punitive damages lies in *Miles v. Apex Marine Corp.*, which articulated uniformity as the principal policy concern to be used in interpreting the interaction between statutes and the general maritime law.³⁶ This section describes first the decision in *Miles* and then the lower court OPA punitive damages decisions.

³² See generally NAT’L COMM’N, DEEP WATER, *supra* note 1, at 89–127 (discussing the causes of the Deepwater Horizon explosion and arguing that improved management by multiple companies could have prevented the disaster).

³³ This Note does not consider the issues raised by the state law savings clause. For example, the state law savings clause, which differs textually from the maritime clause, may more broadly preserve other causes of action. Although courts, such as that in *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127, 1134 n.5 (D. Or. 2001), assume that OPA preserves state law punitive damages, I will not address whether state or maritime law is the normatively better source of punitive damages. *But see* Letter from John C. P. Goldberg to Kenneth R. Feinberg, *supra* note 11, at 47 n.117 (suggesting OPA might impliedly preempt a state law providing punitive damages).

³⁴ 33 U.S.C. § 2718(c). Multiple states accepted this congressional invitation and enacted their own oil pollution statute. See, e.g., FLA. STAT. § 376.123 (2003); LA. REV. STAT. ANN. § 30:2478 (2000); TEX. NAT. RES. CODE ANN. § 40.159 (West 1991); see also Stanley A. Millan, *Escaping the “Black Hole” in the Gulf*, 24 TUL. ENVTL. L.J. 41, 66–67 (2010) (providing a brief description of the Florida, Louisiana, and Texas oil pollution acts).

³⁵ 33 U.S.C. § 2751(e)(1).

³⁶ 498 U.S. 19, 33 (1990).

1. *Miles v. Apex Marine Corp.: Uniformity as the Superseding Policy Concern*

The relationship between maritime common law causes of action and statutory causes of action was at issue in *Miles*, which addressed the relationship between the Jones Act³⁷ and the general maritime law. The Jones Act provides a seaman³⁸ (or a deceased seaman's representative) with a negligence action against the seaman's employer for injuries or death sustained in the course of the seaman's employment.³⁹ The Act does not contain an explicit limit on recoverable damages, and the burden on a seaman to prove causation is light.⁴⁰ Maritime plaintiffs other than seamen—like harborworkers or vessel passengers—may not recover under the Jones Act.

In *Miles*, Ludwick Torregano, a steward's assistant aboard the M/V Archon, died after being repeatedly stabbed by a fellow crewmember while the vessel was docked in the port of Vancouver, Washington.⁴¹ Torregano's mother and the administratrix of his estate, Mercedel Miles, sued on his behalf. Miles alleged claims under both the Jones Act and the general maritime law. Her general maritime claim alleged that the vessel was unseaworthy—that is, not reasonably fit for its intended use⁴²—because of the presence of a dangerous crewmember.⁴³ A shipowner is strictly liable for injuries or death

³⁷ 46 U.S.C. §§ 30104–30105 (2006).

³⁸ A seaman is an employee whose duties “contribute to the function of [a] vessel [to which he is assigned] or to the accomplishment of its mission.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). To be a seaman, an employee should spend at least thirty percent of his time aboard a vessel in navigation. *Id.* at 371. Seaman status is litigated heavily in individual cases because courts consider seamen wards of the court who receive additional protections. *See* 14AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3677 (4th ed. 2011) (discussing jurisdiction under the Jones Act and some advantages of seaman status); *see also Chandris*, 515 U.S. at 354–55 (“[S]eamen ‘are emphatically the wards of the admiralty’ because they ‘are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.’” (quoting *Harden v. Gordon*, 11 F. Cas. 480, 485, 483 (C.C. Me. 1823))).

³⁹ *See Larue v. Joann M.*, 73 F.3d 325, 327 (11th Cir. 1996) (noting that the Jones Act creates a cause of action not available at general maritime law).

⁴⁰ *See, e.g., Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 907–08 (6th Cir. 2006) (“[T]he plaintiff need not establish proximate causation but only show that the defendant’s actions, however slight, contributed in some way toward causing the plaintiff’s injuries.” (internal quotation marks and citations omitted)).

⁴¹ *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21 (1990).

⁴² *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) (“The duty [to provide a seaworthy ship] is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.”).

⁴³ *See Boudoin v. Lykes Bros. S.S.*, 348 U.S. 336, 339–40 (1955) (“A seaman with a proclivity for assaulting people may . . . be a more deadly risk than a rope with a weak strand or a hull with a latent defect.”).

resulting from an unseaworthy ship, even if the unseaworthy condition did not arise from the ship owner's fault.⁴⁴ Miles sought multiple types of damages under both theories of liability, but the key portion of the Supreme Court's opinion focused on the general maritime law question of whether a deceased seaman's nondependent parent could recover loss of society damages based on unseaworthiness.⁴⁵

To arrive at its holding, the Court waded into modern admiralty law, an area of federal common law made increasingly complex by the enactment of numerous statutes. The Court stressed the importance of uniformity in areas of purely federal law and noted that the recent increase in statutes in the area of maritime law required "an admiralty court . . . [to] look primarily to these legislative enactments for policy guidance."⁴⁶ Given that Torregano was a "true seaman" who died in the course of his employment,⁴⁷ the Jones Act provided his representative an action for negligence against his employer.⁴⁸ Although the Jones Act itself does not explicitly limit available damages,⁴⁹ the Federal Employers Liability Act (FELA),⁵⁰ which Congress incorporated wholesale into the Jones Act,⁵¹ has been interpreted to disallow loss of society damages.⁵² The *Miles* Court refused to allow the plaintiff to avoid the Jones Act's remedial limits, even though she also raised independent claims under maritime common law.⁵³ The Court barred common law remedies precluded by FELA, thereby denying

⁴⁴ However, it is more difficult to establish causation based on unseaworthiness than it is under the Jones Act. See 1B BENEDICT ON ADMIRALTY § 28 (Steven F. Friedell ed., 2009) (describing and contrasting the two causes of action).

⁴⁵ Loss of society, or consortium, damages compensate close family members for emotional injury due to the diminishment of their relationship with the victim caused by the victim's injury. RICHARD A. EPSTEIN, TORTS § 17.10 (1999).

⁴⁶ *Miles*, 498 U.S. at 27.

⁴⁷ *Id.* at 28.

⁴⁸ See *supra* notes 37–40 and accompanying text (describing the Jones Act and the benefits of Jones Act seaman status).

⁴⁹ See *Miles*, 498 U.S. at 32 ("[T]he Jones Act does not explicitly limit damages to any particular form."). By contrast, some maritime statutes explicitly restrict available damages. For example, the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30303–30308 (2006), which creates a private cause of action for damages arising from the wrongful death of any person that occurs more than three nautical miles from shore, "by its terms, limits recoverable damages . . . to 'pecuniary loss . . .'" *Miles*, 498 U.S. at 31 (quoting 46 U.S.C. § 30303).

⁵⁰ FELA, 45 U.S.C. §§ 51–60 (2006), provides compensation for injured railroad employees.

⁵¹ 46 U.S.C. § 30104.

⁵² See *Mich. Cent. R.R. v. Vreeland*, 227 U.S. 59, 70–71 (1913) (holding that loss of society damages may not be recovered under FELA).

⁵³ *Miles*, 498 U.S. at 32–33 ("It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.").

fuller compensation for seamen's relatives. The *Miles* uniformity principle requires maritime common law remedies to be limited to those provided by applicable federal statutes, unless a statute preserves additional remedies.

District and appellate courts faced with the difficult task of defining the proper role of the general maritime law in relation to statutes and common law remedies have repeatedly invoked *Miles*.⁵⁴ By reading *Miles* broadly, lower courts avoided lengthy considerations of the competing policies underlying both common law and statutory causes of action and remedies. David Robertson describes the analytical process used by several courts of appeals to expand *Miles* beyond its original holding as "an impressive three-step *tour de force*."⁵⁵ First, the courts interpreted loss of society damages in *Miles* as "nonpecuniary," implying that Jones Act seamen cannot recover any nonpecuniary damages.⁵⁶ Second, because Jones Act seamen are the most favored class of plaintiffs in maritime law,⁵⁷ any category of damages unavailable to them likewise must be unavailable to other plaintiffs bringing general maritime law claims.⁵⁸ Third, the courts characterized punitive damages as nonpecuniary and thus unavailable to all maritime plaintiffs because *Miles* made them unavailable to Jones Act seamen.⁵⁹ Although the First Circuit and the District Court of Oregon did not use the same process observed by Robertson, they read *Miles* broadly to hold that maritime punitive damages are unavailable for injuries that fall within OPA's remedial scheme.⁶⁰

2. Expanding Miles to the Oil Pollution Act

The two courts to analyze OPA's relation to maritime punitive damages barred the remedy based on *Miles*. However, the courts'

⁵⁴ One of the most expansive cases was *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), which held that maritime punitive damages were unavailable for the breach of a maritime common law duty. *Id.* at 1498. The Supreme Court abrogated *Guevara* in *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009) (holding that the respondent was entitled to pursue punitive damages unless Congress enacted contrary legislation).

⁵⁵ David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 LA. L. REV. 463, 468 (2010).

⁵⁶ *Id.*

⁵⁷ See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527, 531–32 (1962) (noting that seamen are wards of admiralty courts and ambiguities in law are resolved in their favor); see also *supra* notes 38–40 and accompanying text (describing the benefits of seaman status).

⁵⁸ Robertson, *supra* note 55, at 468.

⁵⁹ *Id.*

⁶⁰ *S. Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58, 65–66 (1st Cir. 2000); *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127, 1133–34 (D. Or. 2001) (relying on the reasoning in *South Port*).

heavy reliance on the *Miles* uniformity principle ignored OPA's maritime savings clause and the important distinction from *Miles* the clause creates.

The First Circuit's decision in *South Port Marine, LLC v. Gulf Oil Ltd.* arose from the release of between twenty-three and thirty thousand gallons of gasoline into Portland Harbor, Maine, on February 5, 1997.⁶¹ The spill occurred as the result of a leak during a transfer of oil from Gulf Oil's onshore facility to a barge located in the navigable waters of the harbor.⁶² South Port alleged that the spill damaged the docks in its marina and brought suit under both OPA and Maine common law, seeking compensatory and punitive damages.⁶³ The district court dismissed South Port's claim for maritime punitive damages in one sentence: "[U]nder *Miles v. Apex Marine Corp.* . . . [OPA] preempts any federal common-law (i.e., general maritime law) claims and [thus] punitive damages are not available"⁶⁴

South Port strongly objected to the district court's failure to consider the maritime savings clause. South Port viewed the limiting principle developed in *Miles* as "only ha[ving] effect in the event that there is an overlap between statutory and general maritime law."⁶⁵ Because OPA does not prohibit punitive damages explicitly, and its savings clauses anticipate being supplemented, "[n]othing in OPA regulates or limits punitive damages for . . . reckless damage caused . . . [to] property."⁶⁶ On this point, South Port quoted a First Circuit opinion in which the court held:

Miles may be applicable in those areas of maritime law where, at the very least, there is an overlap between statutory and decisional law. . . . [When], however, there is no legislation whatever that touches upon circumstances involv[ed in the case] . . . Congress has not spoken, and we consequently see no basis under *Miles* for barring nonpecuniary relief here.⁶⁷

⁶¹ 234 F.3d at 61.

⁶² *Id.* at 60–61.

⁶³ *S. Port Marine, LLC v. Gulf Oil Ltd.*, 56 F. Supp. 2d 104, 106 (D. Me. 1999). South Port sought state and maritime punitive damages. However, as explained *supra* note 7, maritime punitive damages are recoverable only through a maritime negligence action, which South Port did not plead. Thus, South Port essentially argued that punitive damages should be available under OPA, which is not the argument made by this Note. Instead, I argue that maritime punitive damages could be available in an appropriate case through an action for maritime negligence notwithstanding the remedy's absence from OPA's remedial scheme.

⁶⁴ *Id.* at 106.

⁶⁵ Brief for Appellant, *S. Port*, 234 F.3d 58 (Nos. 99-2369, 99-2370), 2000 WL 35571227.

⁶⁶ *Id.* Similarly, South Port argued that "the implications of *Miles* are not so direct as to require this Court to depart from its traditional role in admiralty or from established legal principles that allow punitive damages under general maritime or common law." *Id.*

⁶⁷ *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 701 (1st Cir. 1995).

As the Supreme Court recognized in *Exxon Shipping Co. v. Baker* with regard to the Clean Water Act (CWA)—OPA’s civil liability predecessor—the failure to specifically preserve actions alleging personal or vessel injuries does not preclude them.⁶⁸ Likewise, South Port’s argument goes, “because OPA is silent as to punitive damages, such claims are not thereby precluded.”⁶⁹

The defendants in *South Port* construed OPA’s maritime savings clause much more narrowly to preclude maritime punitive damages. They argued that the provision should be “interpreted as preserving only ‘admiralty claims which are not addressed in OPA,’ such as a claim for collision damages . . . [or] ‘maritime tort actions for harms to persons or vessels.’”⁷⁰ Because OPA provides a private right of action to recover purely economic damages caused by negligent oil spills, oil spill victims who suffer purely economic damages arguably should not recover additional remedies through a maritime negligence action. The defendants viewed the issue as a simple conflict between statutory and common law that could be resolved by applying *Miles* to preclude supplementing OPA’s remedial scheme with general maritime law. They also analogized to jurisprudence applying the *Miles* uniformity principle to the Jones Act and the Death on the High Seas Act (DOHSA):⁷¹ “[U]nder *Miles* and *Horsley* [*v. Mobil Oil Corp.*,⁷²] the remedies available for such general maritime claims [for example, a claim for unseaworthiness appended to a Jones Act or DOHSA claim] are limited to those allowed by the statute.”⁷³

On appeal, the First Circuit provided a more in-depth analysis of the issue than did the district court. Before analyzing the problem, the court noted: “In 1990, in the wake of the Exxon Valdez [spill] . . . Congress established a comprehensive federal scheme for oil pollution liability in the OPA.”⁷⁴ The court also acknowledged OPA’s two sav-

⁶⁸ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488–89 (2008) (“[W]e find it too hard to conclude that a statute geared toward protecting water, shorelines and natural resources was intended to eliminate *sub silentio* oil companies’ common law duties to refrain from injuring the bodies and livelihoods of private individuals.” (internal citations omitted)); see also *infra* Part II.B.2 (arguing that courts should analogize to *Baker* and interpret OPA’s maritime savings clause as weighing against the preemption of all other damages).

⁶⁹ Reply Brief of Plaintiff/Appellant, *S. Port*, 234 F.3d 58 (Nos. 99-2369, 99-2370), 2000 WL 35571228.

⁷⁰ Brief of the Defendants/Appellees/Cross-Appellants, *S. Port*, 234 F.3d 58 (Nos. 99-2369, 99-2370), 2000 WL 35571229 (quoting *Nat’l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp.*, 924 F. Supp. 2d 1436, 1447 (E.D. Va. 1996) and *Metlife Capital Corp. v. M/V Emily S.*, 132 F.3d 818, 822 (1st Cir. 1997)).

⁷¹ 46 U.S.C. §§ 30301–30308 (2006); see also *supra* note 49 (discussing DOHSA).

⁷² 15 F.3d 200, 202 (1st Cir. 1994) (holding that neither punitive damages nor spousal or parental loss of society damages are available for a nonfatal injury to a seaman).

⁷³ Brief of the Defendants/Appellees/Cross-Appellants, *supra* note 70.

⁷⁴ *S. Port*, 234 F.3d at 64.

ings clauses in describing South Port's argument,⁷⁵ but it exclusively focused its analysis of maritime punitive damages on the state law savings clause.⁷⁶ Instead of addressing the meaning of the maritime savings clause, the court proceeded to consider *Miles*'s impact.⁷⁷ After finding that *Miles* disposed of the issue, the court flatly rejected South Port's argument for a broad construction of the savings clause. The court saw the contrast between strict liability and the ability to lift the damages cap as a congressional attempt to "balance the various concerns at issue."⁷⁸

While the First Circuit opinion was more thorough, it still limited its analysis to characterizing the statute as comprehensive and applying *Miles* without recourse to the maritime savings clause. The court stated that the absence of punitive damages in the "comprehensive" remedial scheme did not decide the issue because it needed to determine whether the statute was intended to supplement or supplant general maritime law.⁷⁹ However, the court's failure to address the savings clause elided the real question: To what extent was OPA (including its maritime savings clause) intended to preserve general maritime law? A heavy reliance on *Miles* would make sense in the absence of contrary congressional intent to preserve other federal law, but the existence of the maritime savings clause suggests that *Miles* does not answer the question.

*Clausen v. M/V New Carissa*⁸⁰ was the second case that raised the OPA maritime punitive damages question. *Clausen* involved a group of oyster bed owners who sued after an oil spill killed several million of their oysters. The United States District Court for the District of Oregon relied on *South Port* to hold that OPA precluded maritime

⁷⁵ *Id.* at 65 ("Plaintiff also points to [the maritime savings clause] . . .").

⁷⁶ In addressing the savings clauses, the court cited a prior First Circuit decision that held that OPA did not preempt state law claims. *See id.* (citing *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630–31 (1st Cir. 1994)). It did not otherwise address the maritime savings clause.

⁷⁷ *See S. Port*, 234 F.3d at 65 ("This question has largely been decided for us by the Supreme Court in *Miles* . . .").

⁷⁸ *Id.* at 66. South Port challenged this interpretation of the congressional balancing act, noting that "[a]lthough the terms punitive damages or exemplary damages are not explicitly used in section 2704(c), the fact that Congress was willing to allow unchecked liability for gross negligence or willful misconduct is a powerful indicator that such damages are not precluded by OPA." Reply Brief of Plaintiff/Appellant, *supra* note 69.

⁷⁹ *S. Port*, 234 F.3d at 64–65 ("The question before us, therefore, is whether, by leaving punitive damages out of the OPA, Congress intended to supplant the general admiralty and maritime law that existed prior to the enactment of the statute, which permitted the award of punitive damages for reckless behavior.").

⁸⁰ 171 F. Supp. 2d 1127 (D. Or. 2001).

punitive damages.⁸¹ The court, echoing the First Circuit's rationale, barred punitive damages by focusing on OPA's liability cap, noting:

It is unreasonable to read the statute as authorizing punitive damages when Congress considered the additional "gross negligence" standard as a means for making the responsible party liable for all actual damages, and allowing a merely negligent responsible party to limit its liability and, for all practical purposes, receive the unbar-gained-for benefit of excess insurance from the government.⁸²

One critique of this reasoning is that the congressional decision to distinguish between negligent and grossly negligent conduct leading to oil spills need not preclude additional liability through another cause of action on a showing of a higher level of fault, whether that level is reckless or intentional conduct.⁸³

South Port and *Clausen* highlight a tension between judicial deference to an apparent congressional intent to limit damages and enforcement of the entire statute. On one hand, OPA's remedial scheme does not provide for all damages available from other sources of law, perhaps indicating that Congress intended to exclude all other damages not mentioned in the statute. On the other hand, the maritime savings clause evinces a congressional intent to preserve some other remedies. Although OPA's remedial scheme is quite detailed with respect to recoverable compensatory damages, both the First Circuit and the District of Oregon ignored the maritime savings clause. The *Clausen* court went even further, saying it was irrelevant if it answered the question incorrectly because state punitive damages could supplement the federal statutory scheme.⁸⁴ However, the possibility of a state law punitive damages remedy does not address whether OPA preserves or precludes maritime punitive damages, which is important to oil spill victims in states that do not provide punitive damages.⁸⁵

⁸¹ Indeed, the court originally denied the defendants' motion to dismiss the plaintiffs' general maritime claims but reconsidered and granted the motion based on the *South Port* decision. *Id.* at 1133.

⁸² *Id.* at 1134 n.4.

⁸³ See *supra* note 79 (explaining *South Port*'s argument to this effect).

⁸⁴ See *Clausen*, 171 F. Supp. 2d at 1134 n.5 ("Even if *South Port* is incorrect in its analysis of [the OPA punitive damages] issue, I fail to see any prejudice to plaintiffs in this case because their evidence for punitive damages in their general maritime claim would be the same as the proof offered on the state law claim.").

⁸⁵ There will not always be a state law alternative for oil spill victims. For example, punitive damages are available only in very limited circumstances under Louisiana state law: when an intoxicated driver injures a person or when a defendant engages in criminal sexual activity with a victim less than seventeen years of age. See LA. CIV. CODE ANN. arts. 2315.4, 2315.7 (2010); John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. 579, 586–87 (2010).

With an understanding of the relevant statutory provisions and precedent in mind, I turn in the next Part to my analysis of the proper interpretation of OPA's maritime savings clause.

II

RESOLVING THE AMBIGUITY IN THE MARITIME SAVINGS CLAUSE

Prior to the Supreme Court's recent maritime punitive damages decisions, lower courts consistently interpreted *Miles* as holding that any congressional action in the traditionally common law area of admiralty preempts maritime remedies not explicitly provided by the statute.⁸⁶ However, the Court's recent maritime punitive damages decisions⁸⁷ cast doubt on lower court opinions that interpret statutory silence as prohibiting maritime punitive damages. While OPA's text and Supreme Court precedent alone do not satisfactorily resolve the maritime savings clause's ambiguity, economic policy considerations demonstrate that maritime punitive damages should be available notwithstanding their absence from OPA.

A. *The Oil Pollution Act: Clues from the Text and Legislative History*

The analysis of whether maritime punitive damages may supplement OPA's remedial scheme should begin with the plain text of the statute, not an application of *Miles*.⁸⁸ The *South Port* and *Clausen* courts' invocation of *Miles* as decisive without first considering OPA's maritime savings clause thus appears erroneous. I analyze the scope of the maritime savings clause to determine whether maritime punitive damages remain available for oil spill injuries despite their absence from OPA's remedial scheme. Because this clause preserves "admiralty and maritime law," "[e]xcept as otherwise provided in this Act,"⁸⁹ the availability of maritime punitive damages depends on whether OPA's terms exclude a general maritime action for negligence that seeks punitive damages.⁹⁰

⁸⁶ See *supra* Part I.B (discussing *Miles* and lower courts' use of the opinion).

⁸⁷ *Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

⁸⁸ See *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.")

⁸⁹ 33 U.S.C. § 2751(e) (2006).

⁹⁰ The text of the state savings clause reads: "Nothing in this Act . . . shall in any way affect . . . the authority of . . . any State . . . to impose additional liability or requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C.

The extent to which OPA precludes other maritime causes of action is ambiguous. The maritime savings clause could mean that any maritime rights or remedies related to economic and property injuries sustained due to an oil spill that are not specifically addressed in OPA are unavailable. Under this interpretation, anyone who may bring a cause of action under OPA cannot utilize the general maritime law to attain remedies not provided by the statute. However, the clause could also mean that those aspects of admiralty law not specifically addressed by OPA are not thereby precluded unless other maritime actions duplicate damages. This understanding would permit those with economic damages claims under OPA to recover maritime punitive damages but not allow such plaintiffs to recover additional compensatory damages. Because both of these competing interpretations of the maritime savings clause are plausible, other sources are needed to resolve the provision's ambiguity.

OPA does not contain a statement of congressional purpose or a preamble, which, outside the text of the maritime savings clause itself, would be the best textual indicator of congressional intent.⁹¹ As mentioned by the First Circuit in *South Port*, the text's structure constitutes a congressional balancing act: limiting the liability of oil polluters in the absence of fault, but providing full liability when polluters' grossly negligent or intentional conduct causes a spill.⁹² As *South Port* mentioned in its brief with respect to this point, the balance is consistent with additional liability for conduct worse than gross negligence.⁹³ Given these two potential interpretations of the statute's structure, OPA's silence on punitive damages does not resolve whether fault above gross negligence could justify increased liability.

Legislative history is a controversial tool of statutory construction,⁹⁴ but, like OPA's text, it sheds little light on the proper interpretation of the maritime savings clause. There is nothing in OPA's legislative history that directly addresses the issue of punitive damages; rather, the available legislative history reinforces the ambiguities

§ 2718(c). The maritime savings clause states that "[e]xcept as otherwise provided in this Act, [OPA] does not affect admiralty or maritime law." 33 U.S.C. § 2751(e)(1).

⁹¹ See *Price v. Forrest*, 173 U.S. 410, 427 (1899) ("[T]he preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions.").

⁹² *S. Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58, 66 (1st Cir. 2000) (describing OPA as "Congress's attempt to balance the various concerns at issue" in the oil pollution context).

⁹³ See *supra* note 79.

⁹⁴ See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 421–26 (2005) (describing disagreement among intentionalists and textualists as to the propriety of using legislative history in statutory interpretation).

revealed in the above discussion of OPA's purpose. Multiple congresspersons commented to this effect—"[t]he polluter should pay and the victim[s] should receive *full compensation* for direct, proven damages"—but failed to specify whether the compensation that OPA provides would supplant other maritime actions and remedies completely.⁹⁵ Representative Shumway expressed his disappointment that the House "eliminated the gut of the liability section of the bill by removing the preemption provision" of an earlier House bill, thus "perpetuat[ing] much of the existing confusion in liability and compensation" because a patchwork of federal and state laws on oil spill liability was maintained.⁹⁶ Given that the plain text, purpose, and legislative history do not resolve the ambiguity over the availability of punitive damages for oil spills, I next consider whether policy, as it is reflected in OPA's text, does.

Policy concerns reflected in OPA's text provide another tool to guide the interpretation of the maritime savings clause. Multiple and conflicting purposes are reflected in OPA's text. Enacted in reaction to the Exxon Valdez spill, OPA embodies a concern that compensation should be available to both public and private victims of oil spills.⁹⁷ OPA also increases polluter liability—for example, by increasing certain liability caps.⁹⁸ However, the extent to which OPA was intended to provide a single applicable source of law is unclear. Its two savings clauses preserve additional state and maritime oil spill liability, and the statute lacks the preemption provision of an earlier

⁹⁵ 136 CONG. REC. 22,289 (1990) (statement of Rep. Stangeland) (emphasis added); *see also id.* at 22,292 (statement of Rep. Schneider) ("[This bill] clearly and completely provides for all injured parties to be compensated for the entire amount of their losses."); *id.* at 22,295 (statement of Rep. Anderson) ("[T]he bill addresses the issue of compensation of individuals injured by an oil spill by providing for an assured source of recovery and clearly delineated causes of action for *economic damages*." (emphasis added)).

⁹⁶ *Id.* at 22,293 (statement of Rep. Shumway).

⁹⁷ As noted *infra* Part II.B.2, it was unclear whether even compensatory damages were available to private actors under the CWA, the federal statute that provided civil liability for oil spills before the enactment of OPA.

⁹⁸ The Limitation of Liability Act (Limitation Act), 46 U.S.C. §§ 30501–30512 (2006), limits vessel owner liability after a tort to the value of the vessel, so long as the owner lacked knowledge of the condition that caused the tort. In the Deepwater Horizon context, Transocean is trying to invoke the Limitation Act to limit its liability to \$26.7 million, the value of debts owed to it on the rig at the time of the explosion. *See In re Complaint & Petition of Triton Asset Leasing GmbH*, 719 F. Supp. 2d 753, 756 (S.D. Tex. 2010). However, the Limitation Act no longer applies in the oil spill context because of the explicit conflict that would arise between the two limitations principles if both were to apply to a single responsible party. *See, e.g., Metlife Capital Corp. v. M/V Emily S.*, 132 F.3d 818, 822 (1st Cir. 1997) (noting that the Limitation Act was repealed by OPA to the extent that there was an explicit conflict between the two statutes).

House version that would have achieved full uniformity.⁹⁹ Because OPA's effect on the continued availability of maritime punitive damages is unclear, a nontextual tool is needed to resolve the ambiguity in the maritime savings clause.

In the next section, I reject the broad reading of *Miles* relied on by the *South Port* and *Clausen* courts to preclude maritime punitive damages by OPA. I also examine more recent Supreme Court jurisprudence and conclude that it too does not satisfactorily resolve the question. Therefore, I argue that optimal deterrence theory is an appropriate tool to resolve the question in Part II.C.

B. *Competing Lines of Supreme Court Precedent Do Not Resolve the Ambiguity*

I. *Miles v. Apex Marine Corp. Does Not Decide the Question*

Given the ambiguity within OPA's maritime savings clause, a nontextual source is required to define the extent to which OPA displaces preexisting maritime common law. After the Supreme Court issued its *Miles* opinion in 1990, lower courts faced with questions about the relationship between maritime common law remedies and federal statutes often seized on the opinion as an easy interpretive tool. The *South Port* and *Clausen* courts both adopted this methodology. In this section, however, I explain the deficiencies in *Miles* as an analytical framework for resolving the OPA punitive damages question.

The most fundamental objection to *Miles* concerns the Court's incorporation of *Michigan Central Railroad v. Vreeland*¹⁰⁰ into the Jones Act without any consideration of the policy issues underlying maritime law. In 1913, the *Vreeland* Court disallowed loss of society damages under FELA to the survivors of railroad workers killed on the job.¹⁰¹ The Court interpreted FELA's wrongful death provision as conforming to the wrongful death provision contained in Lord Campbell's Act, the first statutory wrongful death provision.¹⁰² Although *Miles* concerned a general maritime action alleging unseaworthiness, the *Miles* Court held that because the Jones Act incorpo-

⁹⁹ See 135 CONG. REC. 16,767 (1989) (statement of Rep. Stangeland) ("Some may argue that our bill . . . should not preempt State oil spill laws or certain uses of their trust funds. I certainly understand these concerns. But the benefits of preemption far outweigh the theoretical detriments . . .").

¹⁰⁰ 227 U.S. 59 (1913); see also *supra* note 52 and accompanying text (describing the holding of *Vreeland*).

¹⁰¹ See *supra* notes 49–52 and accompanying text (describing the *Vreeland* Court's interpretation of FELA).

¹⁰² *Vreeland*, 227 U.S. at 69.

rated FELA jurisprudence (including *Vreeland*)¹⁰³ and because policy suggested that the remedies for seamen's wrongful deaths should be uniform with those for other wrongful death suits, loss of society damages also were unavailable under general maritime law.¹⁰⁴ Therefore, whereas the general maritime law did not categorically bar any class from recovering loss of society damages, after *Miles*, only true seamen—traditionally the most protected class—were so barred.¹⁰⁵ In this way, the *Miles* Court's failure to consider broader policy concerns in the name of "uniformity" across types of law created a curious lack of uniformity across types of plaintiffs that should not be extended to the OPA context.

Even beyond this fundamental objection to the *Miles* decision, the expansion of *Miles* to maritime punitive damages is of questionable merit. The lower courts that precluded maritime punitive damages based on *Miles* both emphasized the pecuniary-nonpecuniary distinction drawn in *Vreeland* that the *Miles* Court found critical.¹⁰⁶ However, the distinction in *Miles* is not an absolute bar to the recovery of nonpecuniary damages, such as punitive damages. *Miles* did not hold that seamen could not recover nonpecuniary damages under the Jones Act or general maritime law, nor did *Miles* advise this outcome as a matter of policy. Instead, *Miles* disallowed one type of pecuniary damages: damages resulting from lost future income through a general maritime law action. At the same time, however, it failed to challenge the availability of a paradigmatic example of nonpecuniary damages: pain and suffering.¹⁰⁷

Lower courts' invocation of the *Miles* uniformity principle—that maritime common law remedies should conform strictly to applicable federal statutes—is inappropriate if they fail to recognize the nuance

¹⁰³ See *supra* note 51 and accompanying text (explaining that the Jones Act incorporates FELA).

¹⁰⁴ *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32–33 (1990).

¹⁰⁵ Robertson went so far as to describe the result in *Miles* as "perverse" and "mak[ing] [no] logical or policy sense." David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 141–42 (1997). For a discussion of the benefits of seaman status, see *supra* note 38.

¹⁰⁶ See, e.g., *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) (recognizing that "the *Miles* [C]ourt addressed the question of the availability of certain forms of nonpecuniary damages" and defining its task as following *Miles* to establish a uniform maritime punitive damages rule, given such remedy's absence from multiple statutes); *In re Mardoc Asbestos Case Clusters 1, 2, 5 & 6*, 768 F. Supp. 595, 597 (E.D. Mich. 1991) (denying punitive damages under the Jones Act because punitive damages are unavailable under FELA).

¹⁰⁷ *Miles*, 498 U.S. at 22 (noting that the Fifth Circuit affirmed an award of pain and suffering to the seaman's estate); see also Robertson, *supra* note 105, at 82 (arguing that the pecuniary-nonpecuniary distinction does not resolve the question of punitive damages because pain and suffering damages are nonpecuniary).

that accompanies uniformity. Specifically, lower courts should not ignore that uniformity can be created in multiple directions, not solely to the lowest common denominator. The maritime law is far from uniform: Significant disparities exist within admiralty law based on the status of the plaintiff—seaman, other maritime worker, or passenger—even with regard to “the basic rules of liability.”¹⁰⁸ A strict application of *Miles* in the OPA context would not achieve uniformity because maritime punitive damages would remain available for other maritime torts. Even within the oil spill context, some victims who suffer purely economic damages might be able to recover punitive damages under state law,¹⁰⁹ while victims of the same spill who reside in states without such a remedy could not.

Further, uniformity often provides at least two potential resolutions. For example, in *The Arizona v. Anelich*,¹¹⁰ the Supreme Court chose to render the Jones Act “in harmony with the established doctrine of maritime law of which it is an integral part” rather than to adhere strictly to the incorporation of FELA principles.¹¹¹ In *The Arizona*, the Court refused to extend FELA’s assumption of the risk defense to the Jones Act because “such a defense . . . [is] peculiarly inapplicable to suits by seamen.”¹¹² *The Arizona* shows that uniformity may be influenced by different policy considerations, such as a desire to protect vulnerable classes of plaintiffs. The Court’s recent maritime punitive damages jurisprudence, discussed *infra* Part II.B.2 and 3, confirms the aspect of *The Arizona* suggesting that policy concerns beyond rigid uniformity should inform admiralty courts’ interpretations.

¹⁰⁸ Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking “Uniformity” and “Legislative Intent” in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 766 (1995). Force further argues that “[w]e should not . . . slavishly pursue the goal of uniformity in a narrow context. There are other important policy implications . . . that should be given consideration.” *Id.* Although Force refers to the *Miles* Court’s extension of a lack of nonpecuniary damages in the context of a general maritime law survival action, this seems like a wise approach to adopt generally for maritime statutory interpretation, including in the OPA context.

¹⁰⁹ Theoretically, states could either provide for punitive damages in their oil spill liability statutes or through a common law negligence action. For a discussion of the interaction between OPA’s state law savings clause and state statutes, see *supra* note 33.

¹¹⁰ 298 U.S. 110 (1936).

¹¹¹ *Id.* at 123.

¹¹² *Id.* (internal citation omitted).

2. Exxon Shipping Co. v. Baker: *An Analogy to the Clean Water Act*

Exxon Shipping Co. v. Baker,¹¹³ which allowed maritime punitive damages to supplement the CWA without reference to the *Miles* uniformity principle, provides a strong but imperfect analogy to the OPA context. *Baker* arose from the Exxon Valdez spill and addressed three legal questions. Relevant to the analysis here is the second question presented: “whether punitive damages have been barred implicitly by federal statutory law making no provision for them.”¹¹⁴ This section demonstrates how lower courts should follow the *Baker* Court’s approach and interpret OPA’s maritime savings clause as an indication of congressional intent, taking an expansive view of the interaction between OPA and the maritime common law.

The Court affirmed the Ninth Circuit’s holding that the CWA did not preclude a private punitive damages remedy. The Ninth Circuit relied on the CWA’s savings clause to preserve maritime punitive damages awarded through a general maritime negligence action.¹¹⁵ Even though the Ninth Circuit characterized the CWA’s remedial scheme as “comprehensive,”¹¹⁶ it nonetheless allowed a private punitive damages remedy to complement the public remedies provided in the Act.¹¹⁷

Although no circuit court of appeals previously had addressed the precise question at issue in *Baker*, Exxon relied on precedent from other circuits to assert “that when Congress has spoken to an issue of federal tort law, the statute (not judge-made federal common law) determines the scope of the available remedies.”¹¹⁸ Exxon argued against the availability of maritime punitive damages by relying on what it saw as a circuit split. First, some circuits read the CWA to preempt common law causes of action from private parties for oil spill injuries.¹¹⁹ Second, several circuits interpreted other statutes gov-

¹¹³ 554 U.S. 471 (2008).

¹¹⁴ *Id.* at 476.

¹¹⁵ *In re Exxon Valdez*, 270 F.3d 1215, 1230 (9th Cir. 2001) (“[T]he Clean Water Act expressly provides that it does *not* preempt common law rights to other relief . . .”).

¹¹⁶ *Id.* at 1231.

¹¹⁷ *Id.*

¹¹⁸ Petition for Writ of Certiorari at 16, *Baker*, 554 U.S. 471 (No. 07-219). Exxon depended on several cases relied on by the First Circuit in *South Port*, including *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618 (1978), and *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995). *Id.* at 12, 16–19.

¹¹⁹ *Id.* at 18. The cases Exxon cited as representative of this line of jurisprudence include *Conner v. Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), and *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981). The *Conner* court specifically declined to answer the question facing the Ninth Circuit in *In re Exxon Valdez*, instead addressing damages that overlapped more completely with the CWA’s public remedies. See *Conner*, 730 F.2d at 838 n.6

erning maritime torts to preclude punitive damages.¹²⁰ Relying on these lines of cases, Exxon argued that prior precedent should be extended to the CWA context to preempt maritime punitive damages.

The *Baker* Court found two possible interpretations of Exxon's argument that the CWA precluded punitive damages. The Court quickly rejected the first interpretation: Congress's failure to explicitly preserve punitive damages via the savings clause reflected a deliberate intent to eliminate that remedy.¹²¹ The extreme breadth of that interpretation would have precluded a wide range of other remedies, including remedies for personal injuries caused by oil spills, that everyone agreed were available despite the lack of an explicit reference in the CWA. The Court found the alternative interpretation equally untenable: Despite no textual indication, Congress intended to preclude certain additional remedies, such as maritime punitive damages, but not others, such as compensatory damages for personal injuries. This interpretation would require the statutory scheme and its savings clause to be fragmented to preserve compensatory remedies but exclude punitive damages. However, both compensatory and punitive damages for personal injuries due to an oil spill, if available at all, would arise from a general maritime negligence action. The CWA does not reveal a congressional intent to entirely preempt that cause of action.¹²² Without more explicit statutory language—and given the broad savings clause, which suggested an intent to preserve additional causes of action—the Court “[saw] no clear indication of congressional intent to occupy the entire field of pollution remedies . . . nor for that matter [did the Court] perceive that punitive

(reserving the question of whether a maritime negligence tort would be available to plaintiffs). Exxon's attempted analogy to *In re Oswego Barge Corp.* also was inapt. There, the Second Circuit reasoned that the CWA's distinction between gross and ordinary negligence would be undermined by allowing recovery for ordinary negligence through a maritime negligence tort, ignoring the possibility of recovering damages based on a higher showing of fault. *In re Oswego Barge Corp.*, 664 F.2d at 343–44. *Baker* renders the continued validity of *In re Oswego Barge Corp.* questionable.

¹²⁰ Exxon cited four cases as representative of the second line of jurisprudence. See Petition for Writ of Certiorari, *supra* note 118, at 18 (citing the following four cases). One of these cases was inapposite because it did not involve a statute. See *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1087 (2d Cir. 1993) (describing the question as one of relief under federal maritime law). The other three cases, *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994), and *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993), are distinguishable because their relevant statute, the Jones Act, lacks a savings clause.

¹²¹ *Baker*, 554 U.S. at 488–89.

¹²² See *id.* at 489 (“[N]othing in the statutory text points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action.”).

damages for private harms [would] have any frustrating effect on the CWA remedial scheme, which would point to preemption.”¹²³

Robertson rightly observes: “*Miles* played no significant part in *Baker*. There was no suggestion by any member of the *Baker* Court that *Miles* impaired or questioned the general maritime punitive damages remedy.”¹²⁴ The difference between the statutory scheme at issue in *Miles*, the Jones Act, and the CWA explains the *Baker* Court’s distinct approach. The Jones Act lacks a savings clause, which makes it more difficult to find a congressional intent to preserve additional remedies. However, when a maritime statute contains a savings clause, it is reasonable to interpret the provision as an indication of intent to preserve additional remedies through other causes of action. Applying the *Baker* approach to the OPA context, lower courts should interpret OPA’s maritime savings clause as an indication of a congressional intent that takes an expansive view of the interaction between the statute and maritime common law.

However, the analogy between the CWA and OPA is imperfect. Most importantly, the CWA provides only a public right of action. Because the CWA did not authorize a private right of action, one may reasonably infer a congressional intent to preserve private causes of action under general maritime law.¹²⁵ By contrast, OPA authorizes private parties to recover, *inter alia*, economic damages. Nonetheless, OPA’s provision of some private remedies does not necessarily indicate that the statute impliedly preempts all other private remedies.

The analogy between the CWA and OPA should not fail solely because OPA authorizes a private right of action to collect certain damages for harms resulting from oil spills. The *Baker* Court focused on indications of a congressional intent to preserve additional remedies, rather than applying *Miles*. Applying *Miles*, which results in “[the] abrogat[ion of] a common-law principle,” is only appropriate if “the statute . . . speak[s] directly to the question addressed by the common law.”¹²⁶ Silence in the CWA with respect to punitive damages did not constitute a “clear indication of congressional intent to occupy the entire field of pollution remedies,”¹²⁷ however, so the

¹²³ *Id.* (internal citation omitted).

¹²⁴ Robertson, *supra* note 55, at 492–93 (internal footnotes omitted).

¹²⁵ See *In re Exxon Valdez*, 270 F.3d 1215, 1231 (9th Cir. 2001) (“It is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so. The absence of any private right of action in the Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them.”).

¹²⁶ *Baker*, 554 U.S. at 489 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

¹²⁷ *Id.* at 489.

statute did not speak directly to the maritime punitive damages question.

OPA's indicators of congressional intent are weaker than those in the CWA, but multiple indications suggest that Congress intended to preserve remedies not expressly provided in the statute. First, OPA does not prohibit all other laws from applying to the covered conduct. States expressly are permitted to maintain their own oil pollution acts.¹²⁸ A general maritime negligence action permits the recovery of damages for personal injuries or deaths caused by oil spills.¹²⁹ Second, Congress demonstrated its capacity to bar other maritime laws expressly by preempting the Limitation of Liability Act (Limitation Act)¹³⁰ with respect to oil spills¹³¹ and by limiting certain compensatory damages to recovery only by government or tribal actors.¹³² Third, the policies underlying maritime law and the enactment of OPA favor a broad reading of the savings clause.¹³³

Although OPA contains no explicit reference to punitive damages, *Baker* suggests that OPA should not be read to preclude maritime punitive damages. Maritime negligence actions should be available to a more limited extent for those who suffer only economic damages. Plaintiffs should not be permitted a double recovery of damages provided by OPA, but some litigants have argued that "the OPA is silent as to the potential extreme conduct of [polluters] . . . whereas state and maritime law specifically provide remedies to compensate [p]laintiffs and punish perpetrators for intentional, willful, wantonness."¹³⁴ Some courts interpreted OPA's maritime savings clause to preserve the pre-OPA maritime common law except when a specific provision of OPA provides otherwise.¹³⁵ This approach to the savings clause's ambiguity preserves important policy considerations. How-

¹²⁸ See 33 U.S.C. § 2718(c) (2006) (preserving states' ability to enact laws "relating to the discharge, or substantial threat of a discharge, of oil").

¹²⁹ See *Baker*, 554 U.S. at 488–89 (acknowledging that maritime negligence actions provide damages for personal injuries caused by oil spills).

¹³⁰ 46 U.S.C. § 30505 (2006) (limiting a vessel owner's liability for an accident caused by a condition unknown to the owner).

¹³¹ See *supra* note 98 (discussing OPA's preemption of the Limitation Act to the extent of a direct conflict between the statutes).

¹³² 33 U.S.C. § 2702(b)(2)(A), (D), (F).

¹³³ For an enunciation of some of these policies, see *supra* Part II.A.

¹³⁴ Plaintiffs' Response and Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 20, at 9. The *Deupree* plaintiffs also listed gross negligence, but that argument seems wrong because OPA's damages caps lift on a showing of gross negligence. See *id.* (listing gross negligence). However, in addition to intentional conduct, recklessness should suffice.

¹³⁵ See, e.g., *Tanguis v. M/V Westchester*, 153 F. Supp. 2d 859, 868 (E.D. La. 2001) (quoting H.R. REP. NO. 101-653 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 779, 838) (finding the legislative history silent on the issue of removal of maritime cases).

ever, as noted above,¹³⁶ the case for preserving maritime punitive damages pursuant to *Baker* is less persuasive under OPA than it was under the CWA.

3. Atlantic Sounding Co. v. Townsend: *Longstanding Historical Practice*

One year after deciding *Baker*, the Supreme Court, in *Atlantic Sounding Co. v. Townsend*,¹³⁷ considered whether the Jones Act,¹³⁸ the statute at issue in *Miles*, precluded an injured seaman from recovering punitive damages for his employer's alleged willful and wanton failure to pay maintenance and cure. The maintenance and cure obligation arises when a seaman is injured or falls ill during a voyage. It requires a shipowner to provide money for food and lodging (maintenance) and medical costs (cure) until the seaman reaches the point of maximum recovery.¹³⁹ As with the unseaworthiness doctrine,¹⁴⁰ a seaman need not show fault to recover maintenance and cure,¹⁴¹ and the Jones Act is silent about this feature of general maritime law. Edgar Townsend, a tugboat crewmember, injured his arm and shoulder. The shipowner, Atlantic Sounding, denied that it was obliged to pay Townsend maintenance and cure. Atlantic Sounding brought an action for declaratory relief to establish whether it needed to provide maintenance and cure, and Townsend counterclaimed, seeking maritime punitive damages for the shipowner's willful and wanton failure to pay.

Atlantic Sounding attempted to persuade the Supreme Court that *Miles* stands for the proposition that recovery in maritime personal injury and death cases is limited to the remedies expressly provided by the Jones Act and DOHSA.¹⁴² However, the Court viewed that interpretation of *Miles* as "far too broad."¹⁴³ Instead, the Court reaffirmed the uniformity principle, while clarifying that uniformity exists when a longstanding historical practice is continued if the practice predates

¹³⁶ See *supra* notes 128–33 and accompanying text (explaining OPA's weaker indications of a congressional intent to preserve additional private remedies as compared to the CWA).

¹³⁷ 129 S. Ct. 2561 (2009).

¹³⁸ See *supra* notes 37–40 and accompanying text (discussing the Jones Act and benefits of seaman status).

¹³⁹ NICHOLAS J. HEALY ET AL., *CASES AND MATERIALS ON ADMIRALTY* 504 (4th ed. 2006).

¹⁴⁰ See *supra* notes 42–45 and accompanying text (describing the unseaworthiness doctrine).

¹⁴¹ See, e.g., *De Zon v. Am. President Lines*, 318 U.S. 660, 667 (1943) ("This duty does not depend upon fault.").

¹⁴² *Townsend*, 129 S. Ct. at 2571.

¹⁴³ *Id.* at 2572.

the statute's enactment and the statute is silent on the issue. In this way, the *Townsend* Court distanced itself from the notion that uniformity must result in a reduction of available remedies:

The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action. Although "Congress . . . is free to say this much and no more," we will not attribute words to Congress that it has not written.¹⁴⁴

Because punitive damages were available under general maritime law long before the Jones Act and no principle suggested punitive damages could not be recovered for willful and wanton failures to pay maintenance and cure, the Court in *Townsend* preserved the common law remedy.¹⁴⁵

Applying *Townsend*'s reasoning to the OPA maritime punitive damages question, the desire to achieve uniformity does not require the preemption of punitive damages. The general maritime negligence action and the punitive damages remedy were well established before OPA's passage. The circumstances were similar in *Townsend*, in which "both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act."¹⁴⁶ Therefore, the reasoning in *Townsend* is more applicable to this question than that in *Miles*. Another such historical practice at issue in the oil spill context is the commercial fishermen's exception to the Economic Loss Rule, which allows commercial fishermen to receive economic damages, like lost profits, despite the lack of an injury to property.¹⁴⁷ Preserving the maritime punitive damages remedy for commercial fishermen injured by oil spills would reinforce this unique feature of maritime law. The Court's recent maritime punitive damages decisions can be explained by a presumption that long established common law principles should be retained unless a clear statutory purpose to the contrary can be divined. This suggests that maritime punitive damages should be available in the OPA context.¹⁴⁸

¹⁴⁴ *Id.* at 2574–75 (alteration in original) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990)).

¹⁴⁵ *Id.* at 2575.

¹⁴⁶ *Id.* at 2572.

¹⁴⁷ For an explanation of the Economic Loss Rule and the commercial fishermen's exception, see *supra* note 26.

¹⁴⁸ See *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); see also *Robertson*, *supra* note 55, at 494 ("[T]here is a presumption that where a [federal] common-law principle is well established . . . the courts may

C. *Policy Concerns Suggest Broad Interpretation of the Maritime Savings Clause*

Although recent Supreme Court precedent seems to suggest that lower courts should read OPA's maritime savings clause to preserve maritime punitive damages, that suggestion alone is not completely satisfactory. In this section, I examine the policies underlying the punitive damages remedy, followed by multiple rationales for the remedy that could reinforce either a broad or a narrow interpretation of the savings clause. Ultimately, I conclude that optimal-deterrence considerations favor broadly interpreting the maritime savings clause to preserve maritime punitive damages.

1. *Policies Underlying the Punitive Damages Remedy*

Although punitive damages are seldom awarded,¹⁴⁹ a significant body of scholarly literature explores the purposes that the remedy serves. Two economic rationales have been proposed to explain the purpose of punitive damages: loss internalization and enforcement of property rights. The Supreme Court seems to embrace a noneconomic rationale—retributive punishment—as the purpose of punitive awards. This section briefly describes these competing rationales and the different outcomes that each rationale might have produced in the *Exxon Valdez* litigation. This overview facilitates a discussion in the remainder of the section of the way in which policy may be used to resolve OPA's ambiguous maritime savings clause.

Loss internalization theory seeks optimal deterrence of tortfeasors by mitigating under-detection of tortious conduct. Under this theory, optimal deterrence occurs when tortfeasors must pay for all the harms their unreasonable risks cause, thereby encouraging tortfeasors to take cost-effective safety precautions.¹⁵⁰ When tortfeasors do not bear the full costs of their unreasonable risks, puni-

take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.” (second and third alterations in original) (internal quotation marks omitted)).

¹⁴⁹ See, e.g., LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 6 tbl.7 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf> (reporting that only 700 out of 1823 plaintiffs seeking punitive damages in state courts in 2005 were awarded them); Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325, 330, 331 tbl.1 (2011) (finding that punitive damages are awarded in less than five percent of cases that go to trial).

¹⁵⁰ Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1148 (1989) (“Punitive damages should be set for the sake of deterrence at a level that eliminates the advantage of noncompliance and forces potential injurers to internalize the expected social costs of their actions.”).

tive damages may increase a tortfeasor's liability to ensure that the actor pays the full amount of the harm.¹⁵¹ A. Mitchell Polinsky and Steven Shavell argue that "if a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability."¹⁵² That is, punitive damages should equal total harm multiplied by the reciprocal of the probability of detection, minus compensatory damages. Catherine Sharkey proposes adding other factors into the Polinsky-Shavell multiplier to better internalize costs.¹⁵³ However, Mark Grady criticizes Polinsky and Shavell because their model "requires that punitives be awarded even for inadvertent errors if the ex ante probability of detection was sufficiently low."¹⁵⁴

Gain elimination is an alternative to loss internalization, as exemplified by the idea of property rule protection. David Haddock et al. explain: "Some activities . . . have *no* social value at any level: their optimal level is zero. To eradicate such activities, efficient law . . . would reduce to zero the expected gain available to the defendant from the injurious activity, leaving no incentive for him to attempt the activity in the first place."¹⁵⁵ Gain elimination comports with the Calabresi-Melamed distinction between property rules and liability rules:¹⁵⁶ When an entitlement is protected by a property rule, it can only be taken through voluntary exchange. Gain elimination removes tortfeasors' incentive to violate the entitlement.¹⁵⁷

¹⁵¹ A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873-74 (1998) ("[I]njurers should be made to pay for the harm their conduct generates [P]unitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes." (emphasis omitted)).

¹⁵² *Id.* at 887 (emphasis omitted).

¹⁵³ Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 368-69 (2003) (observing that the Polinsky-Shavell model ignores potential underliability for societal harms and the possibility of shaming or constitutional torts); *see also id.* at 369-70 (noting that the Supreme Court rejected underdetection as a basis for awarding punitive damages to an individual plaintiff in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003)).

¹⁵⁴ Mark F. Grady, *Efficient Negligence*, 87 GEO. L.J. 397, 398 (1998).

¹⁵⁵ David D. Haddock, Fred S. McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CALIF. L. REV. 1, 13 (1990).

¹⁵⁶ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105-06 (1972).

¹⁵⁷ An exemplary case is *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997), in which the Wisconsin Supreme Court approved a \$100,000 punitive award to protect a landowner's right to exclude people from his property, despite nominal compensatory damages.

In contrast to the Polinsky-Shavell model, which uses punitive damages to make the tortfeasor pay for the total harm his actions cause, gain elimination aims to stop the tortious conduct entirely because the optimal level of the conduct is zero. Keith Hylton proposes a framework to implement the rationale: “[I]f each offender’s gain is less than or equal to the social loss, then the award should be set a level greater than or equal to the minimum necessary to eliminate the prospect of gain to the offender.”¹⁵⁸ Overdeterrence concerns do not arise when punitive damages are used to eliminate gains because “[t]he central implication is that in a setting in which offender gains are less than social losses, overdeterrence costs should not be a concern to punishment authorities.”¹⁵⁹

The Supreme Court, although acknowledging that deterrence plays some role in punitive damages,¹⁶⁰ appears more accepting of the noneconomic rationale of retributive punishment. The Court rejected the loss internalization rationale in *State Farm Mutual Automobile Insurance Co. v. Campbell*: “[T]he argument that [the defendant] will be punished in only the rare case . . . [has] little to do with the actual harm sustained by the [plaintiffs].”¹⁶¹ The *Baker* Court suggested that loss internalization could increase a punitive award in some cases,¹⁶² but found that the rationale did not apply to the Exxon Valdez spill because the “staggering damage” caused by the spill sufficed to induce private actors to sue.¹⁶³ Rather than employ loss internalization, the *Baker* Court “set [] out its task as defining ‘the place of punishment in modern civil law.’”¹⁶⁴

Each of these three rationales might have produced different punitive awards in the *Exxon Valdez* litigation. Polinsky and Shavell argued that “no punitive damages are needed, or appropriate, in the circumstances of this case because the injurer could not have escaped liability for compensatory damages.”¹⁶⁵ By contrast, Hylton believed that punitive damages were justified because the relevant tortious

¹⁵⁸ Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 *GEO. L.J.* 421, 439 (1998).

¹⁵⁹ *Id.* at 439–40.

¹⁶⁰ *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” (emphasis added)).

¹⁶¹ 538 U.S. 408, 427 (2003); see also *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (limiting punitive damages to harms suffered by the plaintiffs).

¹⁶² See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494 (2008) (“[H]eavier punitive damages have been thought to be justifiable when wrongdoing is hard to detect . . .”).

¹⁶³ *Id.* at 511.

¹⁶⁴ Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 *U. ST. THOMAS L.J.* 25, 52 (2009) (quoting *Baker*, 554 U.S. at 490).

¹⁶⁵ Polinsky & Shavell, *supra* note 151, at 904.

conduct was “the knowing retention of an obviously incompetent supertanker captain[, which] is not economically desirable at any level, [and thus] should be deterred completely.”¹⁶⁶ Based on this understanding of the Exxon Valdez grounding, Hylton did not believe the \$5 billion jury verdict to be excessive.¹⁶⁷ Although scholars criticize the Supreme Court’s misuse of empirical data in *Baker*,¹⁶⁸ its approach might be understood as defining the amount of retributive punishment needed as equal to the amount of compensatory damages.¹⁶⁹

2. *Optimal Deterrence Theory Resolves the Maritime Savings Clause*

Competing deterrence considerations in the OPA context point in different directions with regard to whether punitive damages should be able to supplement OPA’s remedial scheme. Limits on compensable harm may allow polluters to internalize less than the total amount of social harm,¹⁷⁰ in which case punitive damages could serve a loss internalization rationale. Yet, polluters that cause major oil spills will be subject to penalties and fines that increase deterrence, and so punitive damages may not be necessary to achieve deterrence as defined by Polinsky-Shavell.¹⁷¹ To understand how economic policy, specifically optimal deterrence theory, may resolve OPA’s ambiguous maritime savings clause, I first need to define the relevant tortious conduct.

¹⁶⁶ Hylton, *supra* note 158, at 453.

¹⁶⁷ *Id.* at 454.

¹⁶⁸ See, e.g., Theodore Eisenberg et al., *Variability in Punitive Damages: Empirically Assessing Exxon Shipping Co. v. Baker*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 5, 20–22 (2010) (criticizing the Court for ignoring the compensatory component of awards); Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers: Exxon Shipping Co. v. Baker*, 18 SUP. CT. ECON. REV. 259, 272 (2010) (observing that the Court’s inclusion of all punitive damages awards when setting the compensatory-to-punitive ratio lowered the median ratio); Sharkey, *supra* note 164, at 41 (“What is fairly astounding . . . is the fact that, with [its] statistical analysis, the Court managed to provoke vehement criticisms from both camps in the punitive damages empirical debate.” (emphasis omitted)).

¹⁶⁹ The Court established a 1:1 ratio between compensatory and punitive damages as the maximum amount of punitive damages recoverable under maritime law for recklessness. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008). This resulted in limiting the punitive award to \$507.5 million. *Id.* at 515.

¹⁷⁰ John C. P. Goldberg has argued that “OPA’s economic loss provisions are best understood as expanding liability . . . to any person whose business’s profitability depends on his or her ability to exercise a right physically to obtain or use property or [natural] resources that are damaged or lost because of an oil spill.” Letter from John C. P. Goldberg to Kenneth R. Feinberg, *supra* note 11, at 32. However, Goldberg also acknowledges that OPA does not broadly expand the Economic Loss Rule. See *id.* at 41–42.

¹⁷¹ See *supra* notes 151–54 and accompanying text (discussing the Polinsky-Shavell conception of punitive damages).

The type of conscious cost-benefit analyses and tradeoffs between safety and profit that corporations engage in on a daily basis is at issue in cases within OPA's framework. For example, in the Deepwater Horizon context, there have been intimations that BP and other potentially responsible parties may have taken more risk than was reasonable in order to avoid delays in drilling that would have caused reductions in profit.¹⁷² Conscious tradeoffs, however, are a necessary part of corporate decision making because even the exercise of reasonable care will sometimes result in accidents. If the relevant conduct under OPA is defined as the conscious tradeoffs made by actors exercising reasonable care that accidentally cause oil spills, then punitive damages should not be allowed. Although this definition would suggest that the maritime savings clause be narrowly interpreted, it does not conform to the elevated fault level required for enhanced damages.

Maritime punitive damages require a plaintiff to prove that a defendant acted recklessly or intentionally, causing injury. Thus, a better definition of the relevant conduct is reckless (or worse) decision making that causes oil spills. This narrower frame better comports with OPA's remedial scheme, which does not even impose full liability for compensatory damages on negligent responsible parties (let alone non-negligent responsible parties that accidentally caused harm). The property rule rationale explains the reason that the maritime savings clause should be interpreted to preserve maritime punitive damages: Reckless decision making that causes oil pollution has no social value and should be completely deterred. Because there is no concern that overdeterrence of reckless decision making will occur, the maritime savings clause should be interpreted broadly, allowing additional liability through maritime punitive damages.¹⁷³

This Part aimed to show how policy may be used to resolve ambiguous savings clauses in comprehensive federal regulatory regimes. However, such a use of policy may raise concerns about what limitations bar additional liability. With respect to OPA's maritime savings clause, the text itself provides a limit by stating "[e]xcept as otherwise provided in this Act."¹⁷⁴ Any maritime law that clearly conflicts with OPA is preempted. Congress showed that it could "otherwise provide" in the statute when it explicitly prohibited several other

¹⁷² See generally NAT'L COMM'N, DEEP WATER, *supra* note 1, at 89–127 (arguing that improved management by multiple companies could have prevented the Deepwater Horizon spill).

¹⁷³ See *supra* notes 150–59 and accompanying text (discussing optimal deterrence through punitive damages).

¹⁷⁴ 33 U.S.C. § 2751(e) (2006).

statutes.¹⁷⁵ Expansiveness concerns should be further allayed by the high-profile nature of such an interpretation; entities likely to be responsible parties under OPA undoubtedly would seek to have Congress more clearly define the scope of OPA's savings clauses.

3. *Distributive Justice Is Not an Adequate Tool of Resolution*

To date, no other scholar has specifically addressed the proper interpretation of OPA's ambiguous maritime savings clause with respect to punitive damages. However, Dr. Ronen Perry relies on the distributive justice rationale to propose a theory for analyzing the interaction between the Economic Loss Rule and punitive damages that could be extended to that question.¹⁷⁶ According to Perry, the Economic Loss Rule and punitive damages serve irreconcilable policy goals: The Economic Loss Rule decreases liability, whereas punitive damages increase it. Rather than allow punitive damages to increase liability and deterrence in an area of law in which the Economic Loss Rule operates, Perry proposes that courts follow a procedure similar to that utilized in the Exxon Valdez case. He suggests that liability for punitive damages—that is, the need to increase deterrence beyond a combination of fines and compensatory damages for oil pollution—be determined at the outset.¹⁷⁷ After determining the appropriate level of deterrence in a particular case, the trial court would then lift the Economic Loss Rule to the extent necessary to achieve that level of deterrence. If the complete removal of the Economic Loss Rule failed to achieve “the normatively desirable scope of liability” in a particular case, only then would a defendant become liable for punitive damages in addition to compensatory damages.¹⁷⁸

Although Perry's proposal is appealing from a distributive justice perspective,¹⁷⁹ for the vast majority of cases—particularly oil spill

¹⁷⁵ See *supra* notes 130–32 and accompanying text (listing express preemption of other maritime laws).

¹⁷⁶ Dr. Ronen Perry, *Economic Loss, Punitive Damages, and the Exxon Valdez Litigation*, 45 GA. L. REV. 409, 472–73 (2011).

¹⁷⁷ *Id.* at 480 (“[T]o apply the new model it is necessary to determine at a relatively early stage if and to what extent expansion of liability is warranted. . . . [A] preliminary decision of this sort was made in the *Exxon Valdez* litigation.”).

¹⁷⁸ *Id.* at 472.

¹⁷⁹ Perry notes that “[i]ncreasing and decreasing liability simultaneously . . . [creates distributive injustice]: numerous plaintiffs are denied recovery for actual losses caused by the defendants' wrongdoing, while others obtain damages that significantly exceed their actual loss.” Dr. Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 5 (2011). His approach avoids that distributive injustice by “prioritiz[ing] compensation to more victims over enrichment of the already-compensated few,” only allowing punitive damages “in [the] very rare cases in which removing liability caps is insufficient” to achieve the ideal level of deterrence. *Id.* at 48, 64.

cases, which involve many types of plaintiffs in multiple states subject to a variety of laws—its application would be administratively unfeasible. Both scholars and judges recognize that courts “lack the institutional competence and factual basis to decide whether or not particular instances of economic loss raise the specter of indeterminate or extensive liability, given the highly complex and speculative factual determinations and competing, frequently incompatible, policy considerations which this assessment often requires.”¹⁸⁰ Furthermore, distributive justice, as embodied in Perry’s proposal, would require a clear departure from OPA’s statutory text. Although Perry makes no attempt to reconcile his proposal with the text, his approach seems to suggest that if an application of OPA would result in damages that do not achieve the normative level of liability, the classes of victims allowed to recover would need to be increased or *decreased* notwithstanding the statutory text.¹⁸¹ Courts deciding cases in traditionally federal common law areas, such as admiralty, are not completely free to act as they think best when Congress already has spoken. Congress clearly limited the damages that may be recovered under OPA based on negligence and gross negligence—limits that the courts may not ignore. Distributive justice thus is inapplicable as a policy rationale.

This Part has demonstrated that considerations of text, legislative history, and precedent fail to resolve the ambiguity of OPA’s maritime savings clause. Economic policy provides the superior tool for the resolution of this ambiguity. I propose, therefore, that it be used to resolve the savings clause broadly so as to preserve the maritime punitive damages remedy.

¹⁸⁰ Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. REV. 823, 834–35 (2009) (internal footnotes omitted).

¹⁸¹ Perry’s approach also risks the creation of enormous inconsistency that would undermine the distributive justice rationale. For example, in the Deepwater Horizon context, litigation is proceeding in multiple district courts across the Gulf Coast states. Application of Perry’s approach would mean that Deepwater Horizon victims’ ability to maintain suit would depend on judges’ determinations of the “right” amount of deterrence of responsible parties and the extent to which the Economic Loss Rule should be lifted. Uneven determinations of the extent to which normally excluded claims should be allowed could permit certain categories of plaintiffs—for example, beachfront hotel proprietors who lost profits from cancellations based on fears of oil pollution spreading, even though oil never washed ashore on their property—to recover in one jurisdiction but not others. See Segal, *supra* note 3, at BU1 (describing those who suffered such lost profits).

III

BLUEPRINT FOR FUTURE COURTS: WHEN AND HOW TO AWARD MARITIME PUNITIVE DAMAGES FOR OIL SPILL INJURIES

Having concluded in the previous Part that economic policy should resolve OPA's maritime savings clause broadly to preserve the maritime punitive damages remedy, I now propose a framework that trial courts could apply to determine when to award maritime punitive damages in individual cases. In articulating this framework, I intend to integrate the remedy—both in terms of whether punitive damages should be awarded and, if so, in what amount—with OPA's remedial scheme, attempting to avoid the deficiencies that would result from applying Ronen Perry's approach to the OPA context.¹⁸²

A. *Proposed Framework for Maritime Punitive Damages in the Oil Spill Context*

I propose that courts considering the question of when to award maritime punitive damages in addition to the damages OPA expressly provides should integrate the maritime punitive damages remedy with the OPA framework. This approach will ensure that OPA is not undermined. First, on a showing by an OPA plaintiff of negligence by a responsible party, that party would be liable for the compensatory damages listed in OPA, subject to the statute's liability caps. Second, a showing of gross negligence would trigger the provision in OPA that lifts the liability caps on compensatory damages.¹⁸³ A responsible party that acted in a grossly negligent manner would be fully liable for compensatory damages, but lack liability for punitive damages. Third, if an OPA plaintiff showed recklessness by a responsible party, then the party would be liable for the full amount of compensatory damages plus punitive damages subject to the 1:1 compensatory to punitive damages ratio outlined in *Baker*.¹⁸⁴ As mentioned *supra* Part II.C.1, the *Baker* Court limited the maximum amount of maritime punitive damages recoverable for reckless conduct to the total amount of compensatory damages. Fourth, a showing of intentional unauthorized oil pollution in violation of OPA would subject a responsible party to liability for the full amount of compensatory damages and punitive damages not limited by *Baker*'s 1:1 ratio.¹⁸⁵ This approach

¹⁸² See *supra* Part II.C.3 (describing Perry's approach).

¹⁸³ 33 U.S.C. § 2704(c)(1)(A) (2006).

¹⁸⁴ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (“[W]e consider that a 1:1 ratio . . . is a fair upper limit in such maritime cases.”).

¹⁸⁵ Language in *Baker* suggests that a factual scenario involving more egregious conduct might merit a larger ratio. See *Baker*, 554 U.S. at 510–11 (noting that state-law 3:1 ratios

should not interfere with OPA¹⁸⁶ because OPA's remedial scheme is based on only two possible levels of fault—negligence and gross negligence¹⁸⁷—neither of which suffices for the recovery of maritime punitive damages.¹⁸⁸

Although there is the potential for inconsistent applications of my framework in some cases, this is easily avoided. If a spill like the Exxon Valdez were to occur today, it would fit my proposed framework well because of the geographically restricted nature of the spill and the possibility of employing a mandatory punitive damages class action to consolidate the actions for punitive damages purposes.¹⁸⁹ A single district court faced with the need to apply this approach would begin with an assessment of the responsible party's level of fault, as did the district court and jury in the *Exxon Valdez* litigation. A finding that the party acted with less than recklessness would bar punitive damages and allow the litigation to focus on liability for compensatory damages. If the party were found to have acted intentionally or recklessly, then the court would determine both the amount of compensatory damages and the appropriate level of punitive damages.

While the risk of inconsistent application may increase in a more complicated situation like the Deepwater Horizon incident, my proposed approach nonetheless would apply. The risk of inconsistent application arises from the fact that eventual trials will proceed in multiple courtrooms, and different judges or juries might assign varying levels of fault to the same underlying conduct. Most of the cases will be consolidated for the discovery phase of litigation before

apply across many contexts and deciding they were inapplicable only on the facts of the case).

¹⁸⁶ It is important that additional remedies not frustrate the statutory scheme created by OPA. One reason the *Baker* Court allowed punitive damages was that it did not “perceive that punitive damages . . . [would] have any frustrating effect on the CWA remedial scheme, which would point to preemption.” *Id.* at 489.

¹⁸⁷ 33 U.S.C. § 2704(c)(1)(A) (lifting the liability cap for “gross negligence or willful misconduct”).

¹⁸⁸ Recklessness is the minimum level of fault necessary for the imposition of maritime punitive damages. *See, e.g.,* CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 702 (1st Cir. 1995) (imposing punitive damages in light of the defendants' reckless conduct).

¹⁸⁹ In his analysis of the mandatory punitive damages class action procedure used in the *Exxon Valdez* litigation, Francis E. McGovern highlights several characteristics of the Exxon Valdez spill that made the spill particularly appropriate for that type of procedural mechanism. *See* Francis E. McGovern, *Punitive Damages and Class Actions*, 70 LA. L. REV. 435, 445 (2010) (including the occurrence of injuries within a single state and the restriction of injuries to those for non-personal injury losses as important factors for a punitive damages class action). The Deepwater Horizon oil spill possesses fewer of these characteristics because of the length of time that the spill continued, the distance and multiple states over which the oil spread, and the occurrence of physical injuries. However, the lack of a consolidation procedure is not fatal to maintaining individual maritime negligence claims seeking punitive damages.

the Judicial Panel on Multidistrict Litigation (JPML).¹⁹⁰ Although they will be returned to their originating districts for trial,¹⁹¹ the proof of fault likely will be quite similar across economic damages cases. District courts should decide the level of fault of each responsible party consistently and only award punitive damages when appropriate. Each district court to award punitive damages should also account for punitive damages awarded by other courts for the same conduct. The reviewing court should then employ that award as a factor in setting punitive damages.

B. Boundaries on Applicability of the Framework

Although OPA itself should not preclude recovery of maritime punitive damages through a maritime negligence action, other principles of maritime law will preclude such recovery in many cases. This recognition does not diminish the argument that OPA fails to bar maritime punitive damages in appropriate cases, but instead narrows the range of cases in which such recovery would be appropriate.

First, for maritime punitive damages to be available, the underlying factual situation giving rise to the litigation must constitute a maritime tort. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* sets out the current test for maritime tort jurisdiction.¹⁹² Maritime tort jurisdiction exists if the tort occurs on navigable waters and is connected with maritime activity.¹⁹³ The maritime-activity prong requires both “a potentially disruptive impact on maritime commerce” and a “substantial relationship to traditional maritime activity.”¹⁹⁴ Although it seems self-evident that maritime tort jurisdiction would be required, OPA may apply to some situations that fail to meet the Supreme Court’s current test for maritime tort jurisdiction, despite being a “maritime” statute. For example, OPA applies to a spill from any “facility,” which includes “any structure . . . [with the purpose of] storing, handling, transferring, processing, or transporting

¹⁹⁰ See *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 731 F. Supp. 2d 1352 (J.P.M.L. 2010) (consolidating actions arising out of the Deepwater Horizon explosion and spill).

¹⁹¹ See 28 U.S.C. § 1407(a) (2006) (explaining that JPML determines whether actions pending in different districts should be “transferred . . . for coordinated and consolidated pretrial proceedings” (emphasis added)).

¹⁹² 513 U.S. 527, 534 (1995) (“[A] party seeking to invoke federal admiralty jurisdiction . . . over a tort claim must satisfy conditions both of location and of connection with maritime activity.”).

¹⁹³ See *id.* at 534 (describing the location test requirement).

¹⁹⁴ *Id.* (quoting *Sisson v. Ruby*, 497 U.S. 358, 364 & n.2 (1990)) (internal quotation marks omitted).

oil.”¹⁹⁵ This concern is not raised by the Deepwater Horizon spill because the rig was located on navigable waters when the explosion and spill occurred. The spill also seems to meet the maritime-activity prong because containment and cleanup of the spill could have disrupted maritime commerce¹⁹⁶ and the operation of a vessel, like a rig, on navigable waters is a traditional maritime activity.¹⁹⁷ A plaintiff unable to satisfy maritime jurisdictional requirements could not recover maritime punitive damages.

Second, any action for maritime negligence that seeks to recover damages for purely economic losses is subject to the Economic Loss Rule.¹⁹⁸ That is, victims of an oil spill who suffer only economic losses, but also seek punitive damages through a maritime negligence action, must satisfy the commercial fishermen’s exception to maintain the negligence action. This limitation could bar many claimants (for example, plaintiffs such as hotels, guide services, or chartering companies that make up the tourism industry) from being able to recover maritime punitive damages, even if egregious conduct caused the spill. OPA lifts the Economic Loss Rule for the recovery of certain damages,¹⁹⁹ but it may be broader than the commercial fishermen’s exception,²⁰⁰ which would mean that not everyone who recovered under OPA could also successfully maintain a maritime negligence action.

Third, any plaintiffs who suffered harm from a maritime tort and fall within the commercial fishermen’s exception also would need to prove that reckless or intentional conduct caused the spill.²⁰¹ As discussed *supra* Part III.A, proof of gross negligence—the standard required to lift the liability cap on compensatory damages imposed by OPA—would not suffice to show punitive damages were warranted. These three limitations would greatly restrict the number of economic loss plaintiffs able to recover maritime punitive damages for an oil spill.

¹⁹⁵ 33 U.S.C. §§ 2702(a), 2701(9) (2006).

¹⁹⁶ See News Release, Dep’t of the Interior, Salazar Calls for New Safety Measures for Offshore Oil and Gas Operations; Orders Six Month Moratorium on Deepwater Drilling (May 27, 2010) (on file with the New York University Law Review) (announcing moratorium on deepwater drilling).

¹⁹⁷ Halliburton Energy Services, Inc.’s Reply in Support of Its Motion to Dismiss and, Alternatively, for a More Definite Statement at 4–5, *Bon Secour Fisheries, Inc. v. BP, plc*, No. 1:10-cv-00206-KD-N (S.D. Ala. Aug. 10, 2010).

¹⁹⁸ See *supra* note 26 (describing the Economic Loss Rule).

¹⁹⁹ See, e.g., 33 U.S.C. § 2702(b)(2)(E) (allowing recovery of damages for lost profits and diminished earning capacity).

²⁰⁰ See Letter from John C. P. Goldberg to Kenneth R. Feinberg, *supra* note 11, at 32 (noting that it would also include beachfront property owners).

²⁰¹ See *supra* note 188 (noting that recklessness is the minimum fault level for an award of punitive damages).

CONCLUSION

By proposing an alternate analytical framework for courts to use in interpreting OPA's maritime savings clause, this Note sought to accomplish two goals. First, I demonstrated that the formulaic application of the *Miles* uniformity principle employed by many lower courts to restrict the availability of general maritime remedies may be inappropriate. This is particularly true when it requires lower federal courts to abdicate their traditional common law roles and neglect important policy concerns in favor of a simple solution to legal questions. Under the framework I proposed in Part III, those Deepwater Horizon litigants who are able to maintain a maritime negligence action and prove that BP or other responsible parties acted with at least recklessness should be able to receive a punitive damages award. Second, I proposed a method that courts could use outside of the admiralty context to resolve ambiguous savings clauses in comprehensive federal regulatory schemes based on policy, such as optimal deterrence theory. This approach is consistent with Supreme Court preemption jurisprudence that examines purpose in addition to the text of a savings clause, and it may clarify savings clauses that more traditional tools of statutory construction fail to resolve.