COMMENTS

THE ANSWER LIES IN ADMIRALTY: JUSTIFYING OIL SPILL PUNITIVE DAMAGES RECOVERY THROUGH ADMIRALTY LAW

BY

BRITTAN J. BUSH*

Oil spills, unlike other environmental disasters, often cue a certain immediacy among society for not only increased regulation but also punishment exerted against the parties responsible for a spill. Within the American tort system, society's call for punishment is most clearly embodied within the realm of punitive damages recovery. Although society may desire punitive damages in causes of action arising out of an oil spill, the current federal oil spill liability regime, the Oil Pollution Act of 1990 (OPA), and its accompanying jurisprudence stifle the possibility of oil spill punitive damages recovery.

This Article posits legal and normative justifications in favor of punitive damages recovery for OPA as well as general maritime law causes of action arising out of an oil spill. The Article first refutes the reliability of the prior jurisprudence regarding the OPA's effect on punitive damages recovery. It then argues that the Clean Water Act preemption analysis from Exxon Shipping Co. v. Baker *as well as the Court's criticism of* Miles v. Apex *in* Atlantic Sounding Co. v. Townsend *form a complementary argument supporting oil spill punitive damages recovery. The Article then applies these arguments to causes of action under general maritime law as well as the OPA. The conclusion argues that punitive damages' goals of punishment and deterrence require an extension of punitive damages recovery to post OPA oil spills.*

I. INTRODUCTION

On April 20, 2010, the *Deepwater Horizon* oil spill struck the Gulf of Mexico and not only took the ecology and citizens of the Gulf Coast hostage, but courts along the Gulf as well.[1] The *Deepwater Horizon* oil spill is the largest marine pollution disaster in history and may result in the most complex and drawn out litigation in United States history.[2] While the spill's grasp on the Gulf Coast's ecology and citizens lasted only eighty-seven days,

* B.A., University of Georgia, 2009. J.D./D.C.L. Candidate, 2012, Paul M. Hebert Law Center, Louisiana State University. The author would like to thank President Thomas C. Galligan, Jr. of Colby-Sawyer College and Professor Frank Maraist, whose constant support and guidance made this Article possible. The author would also like to thank Kevin Blanchard and Michael Mims for their helpful comments.

[1] *See* Steven Mufson & Juliet Eilperin, *Lawyers Lining Up for Class-Action Suits over Oil Spill*, WASH. POST, May 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/16/AR2010051603254.html?hpid=topnews; *see also* 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 vi (2011), *available at* http://permanent.access.gpo.gov/gpo2978/DEEPWATER_ReporttothePresident_FINAL.pdf [hereinafter DEEP WATER: THE GULF OIL DISASTER].

[2] *See* Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14, *available at* http://www.nytimes.com/2010/08/03/us/03spill.html?_r=2&fta=y (noting that the *Deepwater Horizon* release of 4.9 million barrels eclipsed the Ixtoc I disaster which spilled 3.3 million barrels into the Bay of Campeche in 1979); Rick Jervis & Alan Levin, *Obama, in Gulf, Pledges to Push on Stopping Leak*, USA TODAY, May 28, 2010, *available at* http://www.usatoday.com/news/nation/2010-05-27-oil-spill-news_N.htm?csp=34news (noting *Deepwater Horizon* is the largest offshore environmental disaster in United States history, far exceeding the *Exxon Valdez* spill).

when the well was eventually sealed,[3] *Deepwater Horizon*'s grasp on the judicial system remains until the final *Deepwater Horizon* case is adjudicated.

Deepwater Horizon likely poses the most complex questions of liability ever presented to the United States judicial system. The ongoing litigation will likely involve numerous responsible parties and independent oil exploration contractors, thousands of plaintiffs, and state and local governments across the Gulf Coast. If history serves as any indicator, the *Deepwater Horizon* litigation could easily result in decades of litigation over the spill's liability similar to the twenty-year litigation involving the *Exxon Valdez* spill.[4] At the heart of the litigation lies a web of comprehensive statutes and liability regimes that muddy the already oil-soiled waters of the *Deepwater Horizon* controversy. Included in this web are the liability provisions of the Oil Pollution Act of 1990 (OPA),[5] the Federal Water Pollution Control Act (Clean Water Act or CWA),[6] Resource Conservation and Recovery Act of 1976 (RCRA),[7] Merchant Marine Act of 1920 (Jones Act),[8] Death on the High Seas Act (DOHSA),[9] as well as general maritime

3 Joel Achenbach, *Oil Leak Is Stopped for First Time Since April 20 Blowout*, WASH. POST, July 16, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071500642.html (last visited Nov. 12, 2011).

4 The *Exxon Valdez* spill occurred in 1989 and prompted nearly two decades worth of litigation that ultimately reached the Supreme Court in 2008. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008).

5 Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2006 & Supp. III 2009). The OPA will likely be the primary avenue for claimants asserting causes of action for economic damages, property damage, and natural resource damage.

6 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006 & Supp. III 2009). The CWA imposes civil penalties up to $4300 per barrel for oil discharged into navigable waters. *Id.* § 1321(b)(7)(D) (2006); 40 C.F.R. § 19.4 tbl.1 (2010).

7 42 U.S.C. §§ 6901–6992k (2006 & Supp. III 2009) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)). At the *Deepwater Horizon* rig, employees pumped excess drilling mud into the wellbore in order to classify the drilling mud as exploration and production wastes and avoid excess hazardous waste removal costs under RCRA. The excess mud pumped down the wellbore is believed to have possibly contributed to the *Deepwater Horizon*'s blowout. *See* Bill Lodge, *Engineers Testify About Rig Procedures*, BATON ROUGE ADVOC., July 20, 2010, at A1, *available at* 2010 WLNR 14484356.

8 Pub. L. No. 66-261, 41 Stat. 988 (codified as amended in scattered sections of 46 U.S.C. (2006)). The workers injured at the *Deepwater Horizon* likely fit within the classification of a seaman. Therefore, their injury claims, because the *Deepwater Horizon* spill occurred on a vessel in the high seas, likely fall under the Jones Act which provides:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104(a) (2006).

9 Death on the High Seas Act, 46 U.S.C. §§ 30301–30308 (2006). DOHSA allows recovery for the survivors of a seaman who died in international waters because of negligence or a wrongful act. *Id.* § 30302.

law.[10] This Article, however, turns its focus away from the specific compensatory remedies available under these statutory regimes and maritime law. Instead, this Article examines admiralty law's role in formulating an oil spill punitive damages regime for causes of action asserted under the OPA and maritime law.

Until recently, many regarded the recovery of punitive damages in oil spill causes of action as a closed question. In the wake of the *Exxon Valdez* spill, Congress enacted the OPA in order to establish a comprehensive liability scheme for oil spills.[11] Congress, however, did not include any language regarding punitive damages within the OPA's provisions. The OPA's silence on punitive damages recovery required the judiciary to determine if the OPA's provisions barred punitive damages recovery for OPA claims and general maritime causes of action. While the Supreme Court has not directly addressed this question, the United States First Circuit Court of Appeals, in *South Port Marine, L.L.C. v. Gulf Oil Ltd. Partnership* (*South Port*),[12] held that punitive damages were not recoverable under the OPA and in dicta extended the exclusion of punitive damages recovery to general maritime claims as well.[13] The First Circuit's decision relied heavily on the Supreme Court's decision in *Miles v. Apex Marine Corp.*[14] Now, the First Circuit's decision in *South Port* must be reconsidered in light of the Supreme Court's recent holdings in *Exxon Shipping Co. v. Baker* (*Exxon*)[15] and *Atlantic Sounding Co. v. Townsend*,[16] which criticize *Miles*.[17]

This Article argues that *South Port*'s reliance on *Miles* as well as congressional silence on punitive damages under the OPA leaves the question of punitive damages recovery open for future interpretation.[18] In addition, it argues that the Supreme Court's holdings in *Exxon* and *Townsend* provide arguments that justify punitive damages recovery for OPA claims and general maritime law causes of action arising from oil spills. It also provides normative justifications arguing that punitive damages are a necessary punishment and deterrence mechanism that may prevent future oil spills.

This Article proceeds in five parts. Part II sheds greater light on the history of punitive damages recovery for oil spills. First, it provides a brief sketch of oil spill liability prior to the OPA's enactment in 1990.[19] It proceeds

10 Throughout this Article, I use the terms "maritime law" and "general maritime law." For the purposes of this Article, "maritime law" is used to signal the entirety of maritime law including United States statutory maritime law and maritime common law. "General maritime law" is used to signal a subset of maritime law that includes maritime common law.

11 *See* Steven R. Swanson, *OPA 90 + 10: The Oil Pollution Act of 1990 After 10 Years*, 32 J. MAR. L. & COM. 135, 137 (2001).

12 234 F.3d 58 (1st Cir. 2000).

13 *Id.* at 64–65.

14 *See id.* at 65; Miles v. Apex Marine Corp., 498 U.S. 19 (1990).

15 554 U.S. 471 (2008).

16 129B S. Ct. 2561 (2009).

17 *See* discussion *infra* Part II.D.

18 *See* discussion *infra* Part III.B.1–3 (arguing that *South Port* should no longer serve as a barrier to punitive damages recovery under the OPA).

19 *See* discussion *infra* Part II.A.

by applying the OPA's liability provisions specifically to the *Deepwater Horizon* oil spill.[20] Part II then examines the lower court decisions holding that punitive damages are not recoverable in OPA and general maritime law causes of action.[21] Part II concludes by presenting the Supreme Court's decisions in *Miles*, *Exxon*, and *Townsend* and ultimately questions the reliability of the lower court decisions barring punitive damages under the OPA and general maritime law.[22]

Part III discusses the potential for maritime law to play a role in causes of action that may result in punitive damages. Part III begins by noting that oil spills resulting from offshore oil exploration on semi-submersible movable drilling rigs, like the *Deepwater Horizon*, come under federal maritime jurisdiction due to the status of these rigs as vessels.[23] Part III then argues that the First Circuit's decision in *South Port* must be reevaluated in light of the Court's commentary on *Miles* in *Townsend* and *Exxon*.[24] After re-opening the punitive damages debate through a refutation of *South Port*, Part III presents the Supreme Court's punitive damages preemption analysis of the CWA from *Exxon*.[25] Part III concludes that *Exxon* and *Townsend* form a complementary argument justifying punitive damages under the OPA and general maritime law causes of action.[26]

Part IV applies the arguments from *Exxon* and *Townsend* to three types of claims that may be asserted in the wake of an oil spill.[27] It first argues that *Exxon* and *Townsend* mandate punitive damages recovery for general maritime claims outside of the OPA, including claims against non-responsible parties.[28] It next argues that *Exxon* and *Townsend* present a strong normative justification for punitive damages recovery in OPA claims that overlap with a general maritime law cause of action in which a preexisting punitive damages remedy exists.[29] It also argues that the goal of uniformity within the OPA's remedial scheme mandates that punitive damages recovery be extended to OPA claims without an overlapping general maritime law cause of action.[30] Part IV concludes by arguing that punitive damages' goals of punishment and deterrence require a punitive damages remedy for wrongful death and personal injury claims arising out of an oil spill.[31]

Part V presents normative arguments in favor of oil spill punitive damages recovery.[32] It first argues that oil spill punitive damages recovery

20 *See* discussion *infra* Part II.B.
21 *See* discussion *infra* Part II.C.
22 *See* discussion *infra* Part II.D.
23 *See* discussion *infra* Part III.A.
24 *See* discussion *infra* Part III.B.1.
25 *See* discussion *infra* Part III.B.1–2.
26 *See* discussion *infra* Part III.B.3.
27 *See* discussion *infra* Part IV.
28 *See* discussion *infra* Part IV.A.
29 *See* discussion *infra* Part IV.B.
30 *See* discussion *infra* Part IV.B.
31 *See* discussion *infra* Part IV.C.
32 *See* discussion *infra* Part V.

aligns with the punishment and retributive justice functions of punitive damages.[33] Part V also argues that oil spill punitive damages awards would function as a deterrence mechanism.[34] It ultimately advocates that punitive damages, because of their deterring effect, are necessary to prevent future marine oil spill disasters.

Part VI concludes by urging the judiciary to allow punitive damages recovery for causes of action asserted under the OPA as well as general maritime law.[35]

II. *DEEPWATER HORIZON*, THE OIL POLLUTION ACT, AND MARITIME LAW PUNITIVE DAMAGES

A. The Oil Pollution Act of 1990

Prior to Congress's enactment of the OPA, liability for oil spills went through several phases. Until 1970, state law governed liability for damages and cleanup costs resulting from oil spills.[36] The rise of international transportation of petroleum and offshore oil exploration in the 1960s, however, limited the strength of state-enacted oil spill liability regimes.[37] In 1970, the federal government responded to the changes in the oil industry and established the first federal liability scheme for oil spills under the Water Quality Improvement Act of 1970.[38] In 1972, Congress incorporated the oil spill provisions from the Water Quality Improvement Act into the CWA.[39] Finally, Congress enacted the OPA, the current federal liability regime for oil spills, in response to the *Exxon Valdez* spill.[40] Congress's goal in enacting the OPA was to "streamline federal law to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry."[41]

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33 *See* discussion *infra* Part V.A.

34 *See* discussion *infra* Part V.B.

35 *See* discussion *infra* Part VI.

36 Kenneth M. Murchison, *Liability Under the Oil Pollution Act: Current Law and Needed Revisions*, 71 LA. L. REV. 917, 918 (2011).

37 *Id.*

38 *Id.* at 918–19; Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (codified at 33 U.S.C. §§ 1151–1174 (1970), *amended by* Federal Water PollutionControl Act Amendments of 1972, Pub. Law. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251–1274)).

39 Murchison, *supra* note 36, at 921.

40 *Id.* at 926. On March 24, 1989, the *Exxon Valdez* released 11 million gallons of oil into the Prince William Sound in Alaska. The cost of removing the oil greatly exceeded the liability cap for cleanup costs under the CWA. In addition, the release caused substantial damages to natural resources and resulted in large economic losses for individuals living near the Prince William Sound. *Id.* at 925. The dire effects from the spill exposed the inadequacies under the CWA and prompted Congress to pass the OPA, which expanded the scope of liability for removal costs and damages resulting from oil spills. *Id.* at 926.

41 Sye J. Broussard, *The Oil Pollution Act of 1990: An Oil Slick over* Robins Dry Dock, LOY. MAR. L. J., 2010, at 153, 165–66.

The OPA provides an extensive liability scheme for oil spills from vessels, offshore oil facilities, and land-based oil production facilities.[42] When oil is discharged into navigable waters of the United States, adjacent shorelines, or exclusive economic zones, the OPA states that each "responsible party" is liable for "removal costs" and "damages."[43] Removal costs are defined as the costs associated with removal measures that are "necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches."[44] Damages under the OPA are provided for 1) injury to, destruction of, loss of, or loss of use of natural resources, 2) injury to, or economic losses from, destruction of property, 3) loss of subsistence of natural resources, 4) net loss of taxes and other revenue from injury or loss of property, 5) loss of profits from damage to property or natural resources, and 6) net costs of governments providing increased or additional public services.[45]

The OPA establishes a strict liability regime, and responsible parties are deemed to be jointly and severally liable for removal costs and damages.[46] Under the OPA, damages for an offshore facility, like the *Deepwater Horizon* rig, are capped at $75 million exclusive of removal costs.[47] The damages cap, however, does not apply in two instances. First, when the spill was "proximately caused by" the "gross negligence or willful misconduct of" or "violation of an applicable Federal safety, construction, or operating regulation by" a responsible party, a responsible party's agent, or a responsible party's contractor.[48] Second, the damages cap does not apply when the responsible party fails or refuses to report the incident, provide reasonable cooperation or assistance, or without sufficient cause fails to comply with a cleanup order.[49]

The OPA also preserves a plaintiff's right to file suit under applicable state-enacted oil spill liability statutes.[50] Section 2718 does not preempt the

42 *See* Oil Pollution Act of 1990, 33 U.S.C. § 2702 (2006) (outlining elements of liability).

43 *Id.* § 2702(a). Responsible parties are grouped into four different entities under the OPA. Responsible parties for spills resulting from vessels are defined as "any person owning, operating, or demise chartering the vessel." The responsible parties for an onshore facility or pipeline are "any person owning or operating the facility" or "any person owning or operating the pipeline." For offshore facilities, like the *Deepwater Horizon*, the responsible party is "the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement." Finally, the responsible party for discharges in deepwater ports is the licensee of the port. *Id.* § 2701(32)(A)–(E).

44 *Id.* § 2701(30).

45 *Id.* § 2702(b)(2); *see also The Big Oil Bailout Prevention Liability Act of 2010: Hearing on S. 3305 Before the S. Comm. on Env't & Pub. Works*, 111th Cong. 2 (2010) [hereinafter *Hearing*] (statement of Kenneth M. Murchison, Professor, Louisiana State University), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b7e2604e-05dd-4518-9068-a69ebe533ff4 (describing the damages available under the OPA).

46 33 U.S.C. § 2702(a) (2006); Murchison, *supra* note 36, at 922–23, 927.

47 33 U.S.C. § 2704(a)(3) (2006) (stating that the liability limit is "the total of all removal costs plus $75,000,000").

48 *Id.* § 2704(c)(1).

49 *Id.* § 2704(c)(2).

50 *Id.* § 2718(a)(1).

authority of states and local governments to impose additional liability for "discharge of oil or other pollution by oil within such State" or "any removal activities in connection with such a discharge."[51] In response to the OPA's preservation of state law claims, many states adopted comprehensive oil spill compensation legislation.[52] Numerous state statutes also provide unlimited damages for spills in state navigable waters.[53] In addition to its preservation of state law claims, the OPA also included a maritime law savings clause within the Act's provisions, which states:

> Except as otherwise provided in this Act, [the OPA] does not affect—(1) admiralty and maritime law; or (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.[54]

Although the OPA does provide for extensive compensatory recovery, the recovery of punitive damages is not addressed within the language of the OPA's general liability provisions. The Act's provisions preserving additional liability under state and maritime law causes of action also do not expressly address punitive damages recovery. In light of the extreme devastation and public outcry after *Deepwater Horizon*, it is necessary to articulate and formulate a theoretical justification for punitive damages recovery in oil spill causes of action in order to adequately exact justice against those responsible for *Deepwater Horizon* and future oil spills. Although several lower court decisions address the issue of punitive damages and their preemption by the OPA, one must look at each court's decision in light of the Supreme Court's recent affirmation of punitive damages in *Exxon* and *Townsend*.

B. The Deepwater Horizon *Spill*

The *Deepwater Horizon* oil spill occurred forty-nine miles off the Louisiana Coast in the Gulf of Mexico.[55] The spill resulted from a blowout on

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51 *Id.*

52 Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 CASE. W. RES. L. REV. 1, 15 (1997).

53 *Id.* Numerous Gulf Coast states have enacted oil liability regimes that provide unlimited liability for oil spills. *See, e.g.*, ALA. CODE §§ 22-22-1 to -14 (LexisNexis 2006); FLA. STAT. ANN. §§ 376.011–376.21 (West 2010) (limiting unlimited liability to those incidents where the responsible party was negligent or engaged in willful misconduct); LA. REV. STAT. ANN. §§ 30:2451–30:2496 (2000) (same). Texas does not impose unlimited liability and has liability caps similar to the OPA. *See* TEX. NAT. RES. CODE ANN. § 40.202 (West 2011) (outlining liability caps and exceptions).

54 33 U.S.C. § 2751(e) (2006).

55 DEEP WATER: THE GULF OIL DISASTER, *supra* note 1, at viii. For a discussion of the regulatory and oil industry decisions that ultimately led to the *Deepwater Horizon* spill, see *id.* at 2–15 (discussing the production and capability of the *Deepwater Horizon* as well as unexpected drilling obstacles that caused explosions on the ship). *See also* Brittan J. Bush,

the *Deepwater Horizon* rig after a methane gas kick caused a marine riser to collide with the rig's platform.[56] Although policymakers blamed federal regulators as well as the oil industry as a whole for the spill and its dire consequences,[57] the effects of the spill and the recovery for those affected by it ultimately rests on the corporate parties responsible for the *Deepwater Horizon* disaster. Therefore, it is necessary to ascertain the damage caused by *Deepwater Horizon* as well as the potential claims that may arise under the OPA and maritime law. This Part proceeds by examining the potential claims under the OPA as well as maritime law causes of action.

The *Deepwater Horizon* spill leaked more than 4.9 million barrels of oil into the Gulf Coast and caused unprecedented environmental and economic damage to the Gulf of Mexico and its adjacent states.[58] The discharged oil from *Deepwater Horizon* damaged the Barataria-Terrebonne estuary, on which 98% of Louisiana's fish, crab, shrimp, and oyster habitats rely.[59] Shortly after the spill, residents reported dead fish and oil-filled oysters in the Gulf.[60] The damage to the Gulf negatively impacted not only its flora and fauna, but also numerous residents who depended on the estuary for their own economic livelihood.[61] *Deepwater Horizon*'s effects, however, did not stop at the Louisiana wetlands. The spill's harm soon reached the beaches of Alabama, Mississippi, and Florida causing a drop in tourism revenue throughout the summer of 2010.[62] Finally, *Deepwater Horizon*'s damage also

Addressing the Regulatory Collapse Behind the Deepwater Horizon *Oil Spill: Implementing a "Best Available Technology" Regulatory Regime for Deepwater Oil Exploration Safety and Cleanup Technology*, 26 J. ENVTL. L. & LITIG. (forthcoming 2011) (manuscript at 1–7) (on file with author).

56 DEEP WATER: THE GULF OIL DISASTER, *supra* note 1, at 113–14; *see also* Cain Burdeau et al., *Bubble of Methane Triggered Gulf Oil Rig Blast*, HUFFINGTON POST, May 9, 2010, http://www.huffingtonpost.com/2010/05/08/bubble-of-methane-trigger_n_568842.html (last visited Nov. 12, 2011) ("[M]ethane gas that escaped from the well and shot up the drill column . . . burst through several seals and barriers before exploding . . . .").

57 *See, e.g.*, DEEP WATER: THE GULF OIL DISASTER, *supra* note 1, at vii.

58 Joel Achenbach & David A. Fahrenthold, *Oil Spill Dumped 4.9 Million Barrels into Gulf of Mexico, Latest Measure Shows*, WASH. POST, Aug. 3, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html; *see also* Terry Tempest Williams, *The Gulf Between Us*, ORION, Nov./Dec. 2010, at 34, 35.

59 Bruce Barcott, *In the Battle Against Oil, the Wetlands Aren't Giving Up*, NAT'L GEOGRAPHIC, Oct. 2010, at 62, 62. The Barataria-Terrebonne, which lies southwest of New Orleans, spans more than four million acres. *Id.*

60 *See* Terry Tempest Williams, *supra* note 58, at 40, 50.

61 The spill's effect on commercial fishermen was substantial because roughly a third of the United States' oyster and shrimp crop comes from the waters along the Louisiana Coast. *See* Barcott, *supra* note 59, at 62, 64.

62 Southern Mississippi alone is estimated to have lost more than $119 million in revenue from the tourism and service industries from May to August 2010 because of the *Deepwater Horizon* spill. DAVID L. BUTLER & EDWARD SAYRE, ECONOMIC IMPACT OF THE DEEPWATER HORIZON OIL SPILL ON SOUTH MISSISSIPPI: INITIAL FINDINGS ON REVENUE 1 (2010), *available at* http://www.usm.edu/oilspill/files/white-papers/Oil-Spill-Economic-Impact-Butler-Sayre.pdf. For information on a drop in revenue in both Alabama and Florida, see SUBCOMM. ON COMMERCE, TRADE, & CONSUMER PROT., 111TH CONG., MEMORANDUM FOR HEARING ON THE "BP OIL SPILL AND GULF COAST TOURISM: ASSESSING THE IMPACT" 2 (2010), *available at* http://democrats.energycommerce.house.gov/documents/20100723/Briefing.Memo.ctcp.2010.7.23.pdf.

affected state and local governments along the Gulf that exhausted valuable manpower and monetary resources in response to the spill.[63]

Many of *Deepwater Horizon*'s harms to the Gulf Coast community likely fall within one of the six causes of action enumerated in the OPA.[64] For example, commercial fishermen or harvesters of fish or shrimp along the Gulf Coast may assert claims under the OPA's provision providing damages for loss of profits from damage to property or natural resources.[65] These same claimants may also seek recovery for the loss of use of natural resources.[66] In addition, businesses that rely on the tourism industry along Gulf Coast beaches may also file claims under these same remedies.[67]

The potential list of claimants asserting causes of action related to *Deepwater Horizon*, however, does not end with private parties. State and local governments often depend on the viability of private parties' enjoyment of the Gulf's natural resources to provide revenue from recreation areas as well as tax revenue from business ventures.[68] Government entities will also likely seek recovery for their public service expenditures following *Deepwater Horizon*.[69] Finally, governments may also seek damages for destruction to the aesthetic features of the Gulf Coast under the OPA's provision granting recovery for injury to, destruction of, or loss of natural resources.[70]

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63 Notably, the Attorney General of Louisiana recently filed suit against the parties responsible for the *Deepwater Horizon* spill seeking $1 million per day of the oil spill violation for damages to the state as well as removal and cleanup costs. Laurel Brubaker Calkins, *Louisiana Sues BP, Partners for $1 Million a Day over Spill*, BLOOMBERG.COM, Mar. 8, 2011, http://www.bloomberg.com/news/2011-03-08/louisiana-sues-bp-partners-for-1-million-a-day-over-spill.html (last visited Nov. 12, 2011).

64 Causes of action under the OPA include 1) injury to, destruction of, loss of, or loss of use of natural resources, 2) injury to, or economic losses from, destruction of property, 3) loss of subsistence use of natural resources, 4) net loss of taxes and other revenue from injury or loss of property, 5) loss of profits from damage to property or natural resources, and 6) net costs to governments providing increased or additional public services. Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(2) (2006); *see also Hearing*, *supra* note 45, at 2 (statement of Kenneth Murchison, Professor, Louisiana State University) (describing the damages available under the OPA).

65 33 U.S.C. § 2702(b)(2)(E) (2006).

66 *Id.* § 2702(b)(2)(C).

67 *Id.* § 2702(b)(2)(C), (E).

68 *See* DEEP WATER: THE GULF OIL DISASTER, *supra* note 1, at 185–87 (stating that Gulf Coast tourism and commercial fisheries generate more than $40 billion in annual revenue, but that these industries suffered enormous indirect economic impacts from a loss of consumer confidence associated with the perceived condition of natural resources).

69 *See, e.g.*, Calkins, *supra* note 62 (detailing Louisiana's suit against BP and its partners, seeking cleanup and reimbursement costs in addition to penalties of $1 million per day); *U.S. Joins Gulf Oil Spill Lawsuits, Seeks Unlimited Damages*, CNN.COM, Dec. 15, 2010, http://articles.cnn.com/2010-12-15/us/gulf.oil.lawsuits_1_transocean-oil-spill-deepwater-horizon?_s=PM:US (last visited Nov. 12, 2011) (describing the United States' suit against BP and its partners, Transocean and its partners and its insurers, seeking removal costs and damages caused by the oil spill, including damages to natural resources in addition to penalties under the CWA).

70 33 U.S.C. § 2702(b)(2)(A) (2006).

While the OPA provides widespread recovery for most of the parties affected by *Deepwater Horizon*, it is not the sole liability avenue for *Deepwater Horizon*'s affected plaintiffs. State law regimes provide an additional recovery mechanism for claimants. In addition, the OPA's lack of a recovery scheme for personal injury and wrongful death damages necessitates the use of maritime law for certain claimants. *Deepwater Horizon* demonstrated that oil spills not only can injure but also can claim the lives of offshore oil employees.[71] Therefore, injured seamen as well as the families of deceased seamen may assert causes of action based in maritime law for personal injury and wrongful death under the Jones Act and DOHSA.[72] In addition, the OPA does not grant a right of action against entities that do not constitute a responsible party under the OPA. Therefore, plaintiffs will likely rely on maritime law to assert causes of action against non-responsible parties.

Although the OPA has been characterized as a comprehensive liability regime for oil spills,[73] *Deepwater Horizon* shows that the OPA presents a complex web of different liability concerns inside and outside of its provisions. Because the OPA only addresses compensatory remedies, the question of punitive damages recovery further hinders the OPA's ability to adequately resolve oil spill causes of action. Therefore, it is essential to understand punitive damages recovery's place within not only oil spill causes of action asserted under the OPA but also maritime law. Most importantly, it is vital to determine if maritime law may serve as a mechanism to break the silence on oil spill punitive damages recovery.

C. The Case Against Punitive Damages Under the Oil Pollution Act

The issue of the OPA's effect on punitive damages recovery, until recently, has not garnered a great deal of discussion among academics and the judiciary. In the wake of *Deepwater Horizon*, however, punitive damages recovery is a subject of vast importance to all parties involved in the *Deepwater Horizon* and future oil spill litigation.[74] Thus, it is necessary to examine courts' previous treatment of oil spill punitive damages recovery with a critical eye towards their rulings' legal and policy justifications.

In *South Port*, the United States First Circuit Court of Appeals specifically addressed punitive damages recovery under the OPA.[75] In *South*

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71 As of May 4, 2010, survivors of perished *Deepwater Horizon* employees had already asserted wrongful death causes of action under the Jones Act. *See* Plaintiffs' Second Amended Petition at 2–4, 7–8, Kritzer v. Transocean, Ltd., No. 62,738 (Galveston Cnty. Ct. May 4, 2010).

72 Merchant Marine Act of 1920, 46 U.S.C. § 30104 (Supp. II 2008); Death on the High Seas Act, 46 U.S.C. § 30302 (2006).

73 *E.g.*, Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 1 (1990).

74 *See, e.g.*, Moira Herbst, *Analysis: Damages Ruling May Be Pivotal in BP Case*, REUTERS, Sept. 2, 2011, http://www.reuters.com/article/2011/09/02/us-bp-lawsuit-idUSTRE7814N920110902 (last visited Nov. 12, 2011) (discussing a key court ruling that recognized the possible award of punitive damages).

75 *South Port*, 234 F.3d 58, 65–66 (1st Cir. 2000).

Port, a marina owner filed suit against a petroleum distributor and barge owner for damages arising from a gasoline spill.[76] In addition to claims for compensatory damages, the marina owner also sought punitive damages under the OPA and Maine common law.[77] The marina owner, however, did not assert any causes of action under general maritime law.[78] The petroleum distributor and barge owner conceded liability for the spill under the OPA.[79] The trial court, however, refused to award punitive damages under the OPA and dismissed the marina owner's claims under Maine common law.[80]

The First Circuit affirmed the trial court's rulings and held that Congress intended the OPA to prohibit the recovery of punitive damages and supplanted general maritime law, which allowed the recovery of punitive damages in causes of action arising out of oil spills.[81] In its decision, the court relied heavily on the Supreme Court's decision in *Miles* to justify its refusal to award punitive damages under the OPA.[82] The court reasoned that Congress intended for the OPA to be the sole federal law in cases involving oil spills and that the OPA provided a comprehensive liability scheme under its statutory language.[83]

The court also rejected the marina owner's argument that the OPA's marine savings clause allowed for additional claims and damages not enumerated within the OPA.[84] Finally, the court rejected the marina owner's policy arguments and noted that the OPA "imposes strict liability for oil discharges, provides both civil and criminal penalties for violations of the statute, and even removes the traditional limitation of liability in cases of gross negligence or willful conduct."[85] Relying on this justification, the court ultimately reasoned that the policy concern of punishing defendants in oil spill cases was properly taken into account under the provisions of the OPA.[86]

Two months later, the District Court of Oregon, in *Clausen v. M/V New Carissa*,[87] followed the *South Port* decision.[88] In *Clausen*, oyster bed owners filed suit against a vessel owner, the vessel, its captain, and others to recover compensatory and punitive damages resulting from the death of several million oysters following an oil spill.[89] Although the court initially held that

76 *Id.* at 60–61.

77 *Id.* at 61.

78 *Id.* at 61. Although the marina owner did not assert any general maritime law causes of action in *South Port*, the court in dicta held that punitive damages were not available in general maritime law causes of action arising out of an oil spill. *See id.* at 65.

79 *Id.* at 61.

80 *Id.*

81 *Id.* at 65–66.

82 *Id.* (stating that the question of punitive damages "ha[d] largely been decided . . . by the Supreme Court in *Miles*").

83 *Id.* at 64–65.

84 *Id.* at 65–66.

85 *Id.* at 66.

86 *Id.*

87 171 F. Supp. 2d 1127 (D. Or. 2001), *aff'd*, 339 F.3d 1049 (9th Cir. 2003).

88 *Id.* at 1133–34.

89 339 F.3d at 1051–52.

the oyster bed owners could seek punitive damages under the OPA, the court, on reconsideration, held that punitive damages were not recoverable under the OPA.[90] The court reasoned that the OPA's strict liability regime along with the plaintiff's ability to overcome liability caps by showing a defendant's gross negligence formed a statutory interplay that prohibited the recovery of punitive damages.[91] In addition, the court stated that the oyster bed owners presented no evidence showing reckless and outrageous indifference by the defendants that would allow for punitive damages recovery.[92]

The *South Port* and *Clausen* decisions show the judiciary's hesitancy towards allowing punitive damages recovery under the OPA and general maritime law. It is important to note, however, that each case is limited in its reach, and other circuits and the Supreme Court have yet to rule on the issue of punitive damages recovery in oil spill causes of action. The remainder of this Article will formulate judicial as well as normative justifications for the rejection of the *South Port* and *Clausen* decisions. It will also provide judges and practitioners with persuasive and justifiable arguments in favor of punitive damages recovery in OPA and general maritime law causes of action.

D. Maritime Law and Punitive Damages

Although the court in *South Port* examined the OPA's effect on punitive damages recovery for OPA claims and general maritime law causes of action, the Supreme Court's recent admiralty jurisprudence reinvigorates the debate over oil spill punitive damages recovery. This Part will examine the modern history of maritime law punitive damages as well as present the current status of punitive damages under maritime law. It will first examine the Supreme Court's decision in *Miles*, which did not address punitive damages recovery, and its progenies' dismantling of maritime punitive damages. This Part then examines the Supreme Court's reaffirmation of punitive damages in *Exxon* and *Townsend*.

The modern story of punitive damages' relationship with maritime law begins with the Supreme Court's decision in *Miles* and its progenies' holdings regarding punitive damages under maritime law. Prior to *Miles*, the majority of courts recognized punitive damages among the remedies afforded under maritime law to plaintiffs suffering from property damage, personal injury, or mistreatment as seamen or vessel passengers because of a defendant's reckless or intentional conduct.[93] *Miles* featured a suit by a seaman's mother for the death of her son, who had been stabbed to death by

90 *See* 171 F. Supp. 2d at 1133.

91 *Id.* at 1133–34.

92 *Id.* at 1131.

93 David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 466 & n.18 (2010) (noting that although some courts refused to recognize punitive damages for seamen under the Jones Act, the preclusion of punitive damages did not gain widespread acceptance until after the Supreme Court's decision in *Miles*).

a crewmember, against a vessel's operators, charterer, and owner both for negligence under the Jones Act and for unseaworthiness under general maritime law.[94] Although the Court held that a general maritime cause of action for the wrongful death of a seaman existed, the Court also held that wrongful death damages in a general maritime law wrongful death action for the death of seamen as a result of an unseaworthy condition did not include loss of society.[95] In denying Miles's loss of society claim, the Court held that the Jones Act's preclusion of loss of society damages also precluded loss of society damages for the judicially created claim of wrongful death as a result of unseaworthiness.[96] The Court reasoned that it would be inconsistent with the Court's place in the constitutional scheme to grant more expansive remedies in a general maritime law cause of action than Congress allowed in cases of death resulting from negligence under the Jones Act.[97]

This begs the question: How did *Miles*, which addressed compensatory damages for loss of society, affect maritime punitive damages recovery? The answer lies in the Court's reasoning behind its denial of loss of society damages and its interpretation by lower courts in future cases. Although the Court's opinion in *Miles* only mentioned the subject of punitive damages recovery twice, lower courts found a justification within the Court's reasoning for the denial of punitive damages recovery in other maritime causes of action.[98] In *Guevara v. Maritime Overseas Corp.*,[99] the Fifth Circuit interpreted the *Miles* decision to preclude punitive damages for the failure to pay maintenance and cure.[100] The Ninth Circuit, in *Glynn v. Roy Al Boat Management Corp.*,[101] also utilized the *Miles* rationale to deny punitive damages for the failure of an employer to investigate or pay a claim for maintenance and cure.[102] The First Circuit, using the *Miles* decision, extended the preclusion of punitive damages to unseaworthiness causes of action for non-fatal injuries in *Horsley v. Mobil Oil Corp.*[103] The Sixth Circuit also denied punitive damages in wrongful death unseaworthiness claims.[104]

94 *Miles*, 498 U.S. 19, 21 (1990).

95 *Id.* at 30, 32–33.

96 *Id.* at 32–33.

97 *Id.*

98 *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1510, 1513 (5th Cir. 1995), *abrogated by Townsend*, 129B S. Ct. 2561 (2009); Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495, 1503–05 (9th Cir. 1995), *abrogated by Townsend*, 129B S. Ct. 2561 (2009); Horsley v. Mobil Oil Corp., 15 F.3d 200, 202 (1st Cir. 1994); Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1455, 1468 (6th Cir. 1993); Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1094 (2d Cir. 1993).

99 59 F.3d 1496 (5th Cir. 1995).

100 *Id.* at 1512 & n.15.

101 57 F.3d 1495 (9th Cir. 1995).

102 *Id.* at 1501–05.

103 15 F.3d 200, 202–03 (1st Cir. 1994).

104 Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1454–59 (6th Cir. 1993). The Sixth Circuit utilized the uniformity doctrine from *Miles* to conclude that wrongful death unseaworthiness causes of action were precluded because punitive damages for wrongful death were unavailable under the Jones Act, DOHSA, and Longshoreman and Harbor's Worker's Compensation Act. *Id.* at 1457.

Using the Supreme Court's rationale in *Miles*, the Second Circuit held that "plaintiffs who are not allowed by general maritime law to seek nonpecuniary damages for loss of society should also be barred from seeking nonpecuniary punitive damages."[105]

The lower courts' widespread extension of *Miles* significantly limited the availability of punitive damages under maritime law. Scholars proclaimed, in light of *Miles*'s expansion, that maritime punitive damages were on the brink of death.[106] The Court, however, revived maritime punitive damages recovery with its decisions in *Exxon* and *Townsend*.[107] Therefore, to truly ascertain the applicability of punitive damages to oil spill liability under maritime law and the OPA, it is necessary to understand the interplay between the judiciary's prior and current jurisprudence regarding punitive damages in maritime law.

Exxon is the Supreme Court's seminal decision regarding oil spill punitive damages under maritime law. *Exxon* was the culmination of nearly twenty years of litigation that arose out of the *Exxon Valdez* oil spill. In *Exxon*, the Court vacated a $2.5 billion punitive damages award against Exxon and remanded the case to the lower courts with instructions that punitive damages should not exceed $507.5 million.[108] In doing so, the Court held that maritime punitive damages could not exceed a ratio of 1:1 to the total compensatory damages awarded in a particular case.[109]

In *Exxon*, the Court addressed whether punitive damages awards in *Exxon Valdez* causes of action were preempted by the CWA, the statute that governed liability for oil spills prior to the OPA.[110] The Court held that the CWA did not preempt the recovery of punitive damages arising out of an oil spill.[111] The Court reasoned that because the CWA was silent on the issue of punitive damages, the Court could not assume that Congress intended to preempt punitive damages recovery under general maritime law.[112]

After concluding that the CWA did not preempt the recovery of punitive damages under general maritime law, the Court addressed the reasonableness of the Ninth Circuit's punitive damages calculation.[113] The Court determined that punitive damages have historically served as a method of deterrence and retribution, unlike compensatory damages awards.[114] The Court also found that, although American juries grant punitive damages more frequently than juries in other nations, American juries did

105 Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1094 (2d Cir. 1993).

106 *See, e.g.*, David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 163 (1997).

107 *See Exxon*, 554 U.S. 471, 486–89 (2008); *Townsend*, 129B S. Ct. 2561, 2570 (2009).

108 *Exxon*, 554 U.S. at 481, 515.

109 *Id.* at 515. The Court did, however, indicate that there could be cases where a defendant's culpability may result in a punitive damages award not in accordance with the 1:1 ratio. *Id.* at 495–96.

110 *Exxon*, 554 U.S. at 486–89.

111 *Id.* at 489.

112 *Id.* at 488–89.

113 *Id.* at 489–515.

114 *Id.* at 492–93.

not mass-produce runaway punitive damages awards.[115] In response to concerns regarding deference to Congress on the issue of punitive damages, the Court noted that the judiciary has traditionally taken the lead in formulating flexible and fair remedies in maritime law.[116] Although the Court recognized that the authority of Congress gave it superior power over the Court in establishing statutory guidance, the Court also stated that the absence of legislation constraining punitive damages does not imply a congressional intention that there should be no rule or remedy.[117] Thus, the Court reasoned that when there was a need for a maritime remedy, past precedent argued in favor of the Court's ability to promulgate a judicially derived standard.[118]

Justices Stevens, Ginsburg, and Breyer each dissented from the majority's opinion regarding punitive damages recovery.[119] Justice Stevens argued that a judicially created limit on maritime punitive damages overstepped the boundaries imposed by federal legislation.[120] In addition, he argued that the absence of a limitation provision regarding punitive damages suggested that Congress did not wish for the Court to restrict punitive damages awards.[121] Justice Stevens also noted that maritime punitive damages may serve as a compensatory measure for intangible admiralty injuries considering that general maritime law often limits compensatory damages and precludes recovery for certain causes of action, including negligent infliction of emotional distress and pure economic loss.[122] Because these damages, normally excluded under general maritime law, are compensable in general tort law, Justice Stevens concluded that general maritime law should not further limit recovery in maritime law cases with a bright line 1:1 ratio.[123] Justice Ginsburg and Justice Breyer argued that the 1:1 ratio imposed by the majority did not properly punish Exxon.[124] Justice Ginsburg also specifically echoed Justice Stevens's view that Congress was better equipped to make the necessary determinations for imposing maritime punitive damages recovery limits.[125]

The most recent Supreme Court pronouncement involving maritime punitive damages came in *Townsend*. In *Townsend*, the Court held that a seaman may recover punitive damages from his or her employer for a failure to maintenance and cure.[126] More importantly, *Townsend* abrogated lower court decisions that extended the Court's *Miles* decision to the realm of

115 *Id.* at 496–97.
116 *Id.* at 508 & n.21.
117 *Id.* at 508–09 n.21.
118 *Id.*
119 *Id.* at 516, 523, 525.
120 *Id.* at 516 (Stevens, J., dissenting in part).
121 *Id.* at 516–17.
122 *Id.* at 519–20.
123 *See id.* at 520.
124 *Id.* at 524 (Ginsburg, J., dissenting in part); *id.* at 525–26 (Breyer, J., dissenting in part).
125 *Id.* at 523 (Ginsburg, J., dissenting in part).
126 *Townsend*, 129B S. Ct. 2561, 2565 (2009).

maritime punitive damages.[127] The Court justified its affirmation of punitive damages on several grounds. First, the Court reasoned that punitive damages recovery has long been a part of general maritime law.[128] Second, the Court stated that although the Jones Act created a statutory cause of action for negligence, it did not eliminate preexisting remedies available to seamen for separate causes of action under the common law.[129]

Most importantly, the Court clarified its decision in *Miles* on the issue of punitive damages recovery.[130] The Court noted that *Miles* did not address the subject of punitive damages.[131] The Court further argued that allowing punitive damages in maintenance and cure actions was acceptable, considering that Congress had not directly spoken on the issue.[132] In addition, the Court reasoned that the Jones Act evinced no general hostility toward general maritime law recovery.[133] Finally, the Court reasoned that Congress was aware of the general maritime law when passing the Jones Act and that the Court would not impute congressional intent to exclude punitive damages recovery where congressional intent to do so is absent.[134]

The Court's decisions in *Exxon* and *Townsend* require a reexamination of the status of punitive damages recovery for OPA claims and general maritime causes of action arising out of an oil spill. Primarily, the court in *South Port* relied heavily on the *Miles* decision to determine that punitive damages awards were not an available remedy for OPA claims and general maritime causes of action.[135] The Court's clarification in *Townsend* of the *Miles* decision as a justification for limiting punitive damages recovery indicates an apprehension by the Court of the use of *Miles* in the debate over punitive damages recovery. The Court's apprehension is reinforced by its specific abrogation of *Guevara*, which used *Miles* as a basis for excluding maritime punitive damages recovery. When one views the Court's unwillingness to apply *Miles* on the issue of punitive damages recovery along with the *Exxon* decision, which establishes punitive damages recovery as a preexisting remedy for oil spill causes of action arising prior to the OPA, the question of punitive damages recovery under the OPA and general maritime law claims remains open due to the First Circuit's reliance on *Miles* in *South Port*. Part III discusses this issue further and presents jurisprudential and

127 *See id.* at 2566.

128 *Id.* at 2569.

129 *Id.* at 2570.

130 *Id.* at 2571–75.

131 *Id.* at 2572.

132 *Id.* at 2572–73.

133 *Id.* at 2573.

134 *Id.* It is important to note that Justice Thomas authored the Townsend opinion because the opinion itself maintains an originalist and historical perspective in tone.

135 The plaintiffs in *South Port* did not assert any claims under general maritime law. The court, in addition to barring punitive damages recovery for OPA claims, stated in dicta that the OPA precluded punitive damages recovery for general maritime law causes of action. *South Port*, 234 F.3d 58, 65–66 (1st Cir. 2000).

normative arguments that advocate the recovery of punitive damages under the OPA and general maritime law.[136]

III. REINVIGORATING OIL SPILL PUNITIVE DAMAGES

A. Offshore Oil Exploration and Maritime Jurisdiction

Before general maritime law can serve as a mechanism justifying punitive damages recovery under the OPA and general maritime law, it is necessary to determine if oil spills from offshore rigs come under maritime jurisdiction. This determination, however, is difficult given that certain offshore oil exploration facilities come under admiralty jurisdiction while some do not. Semi-submersible movable drilling rigs, like the *Deepwater Horizon*, are considered vessels because they are "capable of being used[] as a means of transportation on water."[137] Because the *Deepwater Horizon* rig and other semi-submersibles fit within the definition of a vessel, certain causes of action arising from their activities come under admiralty jurisdiction.[138] Therefore, federal admiralty law may serve as a mechanism that justifies punitive damages recovery under the OPA and general maritime law.

B. The Supreme Court's Affirmation of Punitive Damages in Maritime Law

The Supreme Court's recent punitive damages jurisprudence ultimately serves as a legal basis for allowing punitive damages recovery for OPA claims as well as general maritime causes of action. This Part proceeds by examining the Court's jurisprudence and extracting from it a theory that justifies oil spill punitive damages. This Part argues that *South Port*'s refusal to allow punitive damages recovery rests on unsound ground because it relies on *Miles* and therefore requires a reexamination of the question of oil spill punitive damages recovery. After showing the need for this reexamination, this Part argues that punitive damages recovery for OPA and general maritime causes of action is justified by two primary arguments. First, the Court's holding, in *Exxon*, that the CWA's oil spill liability provisions do not preempt maritime punitive damages recovery should also apply to the OPA. Second, the Court's holdings in *Townsend*, when combined with the Court's affirmation of oil spill punitive damages recovery in *Exxon*, present a viable argument in favor of punitive damages in light of the OPA's silence on punitive damages recovery. Although courts may

136 *See* discussion *infra* Part III.B.

137 1 U.S.C. § 3 (2006); Stewart v. Dutra Constr. Co., 543 U.S. 481, 489 (2005).

138 Semi-submersible, movable, drilling rigs are not the only types of platforms used for oil exploration on the high seas. Fixed platforms are also used in many oil exploration ventures. Fixed platforms, however, are not considered vessels, and causes of action arising out of their activities come under state law regimes as opposed to federal admiralty jurisdiction. *See* Hufnagel v. Omega Serv. Indus., Inc., 182 F.3d 340, 352 (5th Cir. 1999) ("Hufnagel was struck by equipment attached to the platform, which is not a navigable vessel.").

examine these arguments independently of one another, if viewed together both arguments formulate a comprehensive and workable legal framework that justifies punitive damages recovery under the OPA and general maritime law.

1. South Port*: A Modern Reexamination*

The First Circuit's decision in *South Port* made some commentators proclaim that punitive damages were not recoverable for OPA and general maritime law claims arising from an oil spill.[139] Their pronouncements, however, must be reexamined and scrutinized in light of *South Port*'s reliance on *Miles* after the Supreme Court's decision in *Townsend*. In *South Port*, the First Circuit stated that the question of punitive damages "ha[d] largely been decided . . . by the Supreme Court in *Miles*."[140] Relying on *Miles*, the First Circuit proceeded to apply it in the same manner as the court in *Guevara* and held that *Miles* justified the preclusion of punitive damages recovery under the OPA.[141]

For *South Port* to remain as a sound justification for not allowing oil spill punitive damages, its reliance on *Miles* must be reconciled with the Supreme Court's clarification of *Miles* in *Townsend*. In *Townsend*, the Court stated that "[h]istorically, punitive damages have been available and awarded in general maritime actions . . . [and] nothing in *Miles* . . . eliminates that availability."[142] The Court also found that *Miles* did not even address the availability of punitive damages recovery.[143] In addition, the Court criticized *Guevara*'s extension of *Miles* into the punitive damages arena and abrogated its holdings.[144] With such clear and strong statements by the Court on *Miles*'s applicability to punitive damages, how can *South Port*'s reliance on *Miles* allow it to close the door on punitive damages recovery for oil spill claims under the OPA as well as general maritime law? The simplest answer to this question is that *South Port* can no longer serve as controlling jurisprudence for OPA and general maritime punitive damages recovery given *Townsend*'s admonishment of *Guevara*'s extension of *Miles*.

Although *Guevara* addressed punitive damages recovery in maintenance and cure actions, the rationale in *South Port* nonetheless tracks the Fifth Circuit's reasoning in *Guevara*. The First Circuit, in *South Port*,

139 *See* Browne Lewis, *It's Been 4380 Days and Counting Since EXXON VALDEZ: Is It Time to Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 114 (2001) (citing *South Port* for the proposition that punitive damages are not available under the OPA, which was intended to supplant general maritime law); *see also* Aaron T. Duff, *Punitive Damages in Maritime Torts: Examining Shipowners' Punitive Damage Liability in the Wake of the* Exxon Valdez *Decision*, 39 SETON HALL L. REV. 955, 976 (2009) (citing *South Port* as evidence that "courts have interpreted the OPA to preclude an award of punitive damages").

140 *South Port*, 234 F.3d at 65.

141 *Id.* at 66.

142 *Townsend*, 129B S. Ct. 2561, 2565 (2009).

143 *Id.* at 2572.

144 The Court noted that the Eleventh Circuit's holding that a seaman could seek punitive damages for maintenance and cure conflicted with the decisions in *Guevara* and *Glynn*. *See id.* at 2566.

argued that the interplay between maritime law and the OPA, like the DOHSA in *Miles*, created "an overlap between statutory and decisional law."[145] Because of this overlap, the court found that *Miles* dictated deference to congressional judgment regarding punitive damages recovery under the OPA.[146] The First Circuit specifically utilized the language in *Miles* stating that "in an 'area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.'"[147] This rationale led to the First Circuit's ultimate conclusion that the OPA supplanted general maritime law and precluded punitive damages recovery.[148]

The *South Port* line of reasoning does track the Fifth Circuit's reasoning in *Guevara*. Like *South Port*'s finding of a statutory overlap between maritime law and the OPA, the court in *Guevara* found an overlap between the traditional general maritime maintenance and cure cause of action and the Jones Act.[149] Based on this statutory overlap, the Fifth Circuit opined that the *Miles* uniformity principle, also used in *South Port*, could be used to bar punitive damages recovery.[150] The Fifth Circuit reasoned that awarding punitive damages would upset the harmony between general maritime law and statutory law and would fragment the damages regime within admiralty law for maintenance and cure actions.[151] The Fifth Circuit's concern of harmonization between general maritime law and statutory law echoes the First Circuit's concern regarding the use of general maritime law to justify punitive damages under the OPA[152] given *South Port*'s pronouncement that the OPA is a comprehensive liability scheme for oil spills.[153]

Although *South Port* and *Guevara* addressed different causes of action, both decisions affected the status of a preexisting punitive damages remedy under general maritime law.[154] Prior to *Guevara*, admiralty courts recognized the remedy of punitive damages for a failure to pay maintenance and cure.[155]

145 *South Port*, 234 F.3d at 66 (quoting CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 701 (1st Cir. 1995)).

146 *See id.*

147 *Id.* (quoting *Miles*, 498 U.S. 19, 31 (1990)).

148 *Id.* at 65.

149 *Guevara*, 59 F.3d 1496, 1512 (5th Cir. 1995).

150 *Id.* (holding that should such a statutory overlap exist, the court would invoke the uniformity principle to bar punitive damages, and further, that *Miles* was persuasive in the present contract-like case to bar punitive damages as well).

151 *Id.* at 1513.

152 *See id.*; *South Port*, 243 F.3d at 65–66.

153 *South Port*, 243 F.3d at 64.

154 *South Port* and *Guevara* each addressed the effect of the OPA and Jones Act, respectively, on the preexisting general maritime punitive damages remedy. *South Port*, 234 F.3d at 64–65; *Guevara*, 59 F.3d at 1512–13.

155 *See* Manuel v. United States, 50 F.3d 1253, 1259–60 (4th Cir. 1995); Hines v. J.A. LaPorte, Inc., 820 F.2d 1187, 1188–89 (11th Cir. 1987); Holmes v. J. Ray McDermott & Co., 734 F.2d 1110, 1118 (5th Cir. 1984), *overruled by Guevara*, 59 F.3d 1496 (5th Cir. 1995), *abrogated by Townsend*, 129B S. Ct. 2561 (2009); Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051–52 (1st Cir. 1973).

In addition, prior to the OPA's enactment and the *South Port* ruling, courts recognized punitive damages recovery for oil spills under maritime law.[156] The Court continued to recognize the pre-OPA right to oil spill punitive damages in cases arising prior to the OPA in the years following the *South Port* decision as well.[157] This similarity is of vital importance primarily because the courts in *South Port* and *Guevara* each found that statutes, which contained no specific provisions on punitive damages, justified the preclusion of a preexisting maritime punitive damages remedy. Given the similarities between the courts' respective questions and reasoning in *South Port* and *Guevara*, the Court's abrogation of *Guevara* in *Townsend* must call into question *South Port*'s rationale as well.

Finally, it must be noted that *South Port* only represents the interpretation of the OPA's effect on punitive damages recovery in one federal circuit court. Since the enactment of the OPA in 1990, no other federal court of appeals has issued a ruling regarding the OPA's effect on punitive damages recovery. Within the context of the *Deepwater Horizon* and future oil spill litigation, this fact is important for two reasons. First, general maritime law is only binding on all circuits when pronounced by the United States Supreme Court. Second, the First Circuit's holding in *South Port* is not binding on the United States Fifth Circuit, the court in which the majority of *Deepwater Horizon* claims will likely be heard. Since *South Port* is not binding on the courts adjudicating *Deepwater Horizon* claims, its preclusion of OPA punitive damages recovery is only persuasive jurisprudence at best.

Because *South Port* rests on an outmoded interpretation of *Miles* and is only persuasive jurisprudence in the vast majority of federal courts, including the Fifth Circuit, the question of the OPA's effect on punitive damages in claims asserted under it and general maritime law should not follow the *South Port* reasoning. The Supreme Court's jurisprudence in the years following *South Port* indicates the Court's willingness to allow oil spill punitive damages recovery. Therefore, judges must re-examine the rationale of *South Port* in conjunction with the Court's recent punitive damages jurisprudence as well as the language of the OPA. The next two Parts present two plausible arguments using the Court's recent jurisprudence and the OPA's provisions that justify punitive damages recovery in causes of action arising out of the *Deepwater Horizon* spill and future oil pollution disasters.

2. The Clean Water Act Preemption Argument

In *Exxon*, the Supreme Court addressed oil spill punitive damages recovery under the liability provisions of the OPA's predecessor, the CWA.[158] The Court found that the CWA's liability provisions for oil spills did not

156 *Cf.* Doralee Estates, Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 721–22 (2d Cir. 1977) (allowing for punitive damages recovery for causes of action arising out of an oil spill).

157 *See Exxon*, 554 U.S. 471, 488–89 (2008).

158 *See id.* at 484–89.

preempt punitive damages awards.[159] The Court reasoned that the CWA did not preempt punitive damages recovery because the CWA's liability provisions did not speak directly to the question of punitive damages.[160] The Court also noted that punitive damages recovery would not have a frustrating effect on the CWA's remedial scheme.[161] Finally, the Court noted that nothing in the CWA advocated for a fragmentation of compensatory and punitive damages remedies from the same cause of action or indicated congressional intent to occupy the entire field of pollution remedies.[162]

The Court's analysis of the CWA's liability scheme in *Exxon* presents a rationale that is useful for determining the OPA's effect on punitive damages. The OPA, like the CWA, does not contain any provisions specifically addressing punitive damages recovery.[163] Both statutes, however, do lay out liability regimes for compensating individuals affected by oil spills. Although the CWA, similar to the current version of the OPA, was the preeminent federal oil spill legislation during its enactment, differences do exist within their liability regimes. The OPA prescribes distinct causes of action for oil spills exclusive of removal costs.[164] The CWA, however, lacks specified causes of action and instead includes a savings provision preserving the right of private parties to file suit for damage to property arising from an oil spill.[165]

Although some differences exist between the OPA's and the CWA's provisions regarding oil spill liability, this does not undermine the significance that each statute is silent on punitive damages recovery. Given the strength of this contention in the Court's analysis of the CWA liability provisions in *Exxon*, it seems that statutory silence on the issue of punitive damages by the OPA could result in punitive damages recovery in causes of action under general maritime law and possibly OPA claims. In addition, admiralty courts have long held that Congress is aware of the state of the law when passing new legislation.[166] When Congress enacted the OPA in 1990, courts had already recognized punitive damages recovery for oil spill causes of action under general maritime law.[167] Although Congress was aware of this practice, it did not include any language that discouraged punitive damages recovery for causes of action arising from oil spills after the OPA's enactment. In addition, Congress did not respond to the Court's

159 *Id.* at 488–89.

160 *See id.*

161 *Id.* at 489.

162 *Id.*; *cf.* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255–56 (1984) (noting that punitive damages have long been part of traditional state tort law, and thus the burden is on the defendant to show congressional intent to preclude punitive damages awards, and that preemption should be judged by whether a state standard conflicts with or frustrates federal law).

163 *See* Federal Water Pollution Control Act, 33 U.S.C. § 1321 (2006 & Supp. III 2009); Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2006 & Supp. III 2009).

164 33 U.S.C. § 2702(a)–(b) (2006).

165 33 U.S.C. § 1321(o) (2006 & Supp. III 2009).

166 *See, e.g.*, *Townsend*, 129B S. Ct. 2561, 2573 (2009).

167 *See, e.g.*, Doralee Estates, Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 718, 722 (2d Cir. 1977) (allowing for the recovery of punitive damages for causes of action arising out of an oil spill).

affirmation of punitive damages recovery in *Exxon* by amending the OPA's liability provisions. With this in mind, one can only assume that Congress did not see the practice of punitive damages recovery as a remedy worthy of exclusion under its new oil spill liability regime.

The Court also noted that punitive damages for private harms would not have a disruptive effect on the remedial scheme of the CWA.[168] The same is likely true under the OPA. The OPA was enacted in response to the call for greater liability for damages caused by oil spills in the wake of *Exxon Valdez*.[169] Although the OPA does establish liability caps for private causes of action arising under the Act,[170] the statute also removes the compensatory damages caps in cases where a spill was proximately caused by gross negligence or willful misconduct.[171] When one considers that punitive damages are normally reserved only for culpability rising to a level of gross negligence or willful misconduct, the abrogation of liability caps in such situations seems to indicate that the remedial role of the OPA favors greater liability for reckless parties. With this in mind, punitive damages recovery may not disrupt the remedial scheme of the OPA.

Although the OPA does not expressly provide the right to recover punitive damages, it contains no language that gives any indication that Congress intended to sever punitive damages from the remedies available to claimants asserting causes of action under the OPA or general maritime law. Congress's failure to include such language further suggests no such intent when one considers that the OPA's liability caps do not apply for spills caused by responsible parties' reckless actions. Because punitive damages are meant to punish reckless and intentional actions,[172] Congress's affirmation of unlimited liability seems to endorse punitive damages recovery instead of prohibiting such recovery. In addition, Congress did not likely intend to control the entire field of oil spill remedies through the OPA. Although the OPA does establish greater liability for specific causes of action arising from oil spills, the statute also contains savings provisions that specifically recognize causes of action arising out of state liability regimes[173] as well as general maritime law.[174] While the savings clauses preserve causes of action under state and maritime law, there is nothing within those provisions showing an intent to exclude punitive damages recovery from such causes of action. Therefore, the savings provisions show a lack of

168 *Exxon*, 554 U.S. 471, 489 (2008).

169 Swanson, *supra* note 11, at 137.

170 The OPA contains a $75 million cap on damages for offshore oil facilities, exclusive of removal costs, arising out of one of its six prescribed causes of action in section 2702. Oil Pollution Act of 1990, 33 U.S.C. § 2704(a) (2006).

171 The liability caps under section 2704 of the OPA do not apply if a spill is proximately caused by "gross negligence or willful misconduct," or "the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party." *Id.* § 2704(c)(1).

172 *Exxon*, 554 U.S. at 492–93.

173 33 U.S.C. § 2718 (2006).

174 *Id.* § 2751(e).

congressional intent to occupy the entire field of oil spill causes of action as well as that of remedies.

The similarities among the liability provisions of the CWA and the OPA make the Court's CWA preemption analysis from *Exxon* a viable evaluation tool for determining the OPA's effect on oil spill punitive damages recovery. It is likely that, under the Court's CWA preemption analysis, the OPA does not "preempt" punitive damages recovery for causes of action arising from an oil spill that results from a responsible party's reckless or intentional conduct. Oil spills, similar to *Deepwater Horizon*, present the prime circumstances where punitive damages recovery is not only allowed but also needed. Courts must, therefore, utilize the Supreme Court's preemption analysis from *Exxon* and allow it to serve as a justifiable argument allowing punitive damages recovery for OPA and general maritime law causes of action.

3. The Exxon *and* Townsend *Argument*

In addition to the CWA preemption argument, oil spill punitive damages recovery is justifiable under the argument that *Exxon* establishes oil spill punitive damages recovery as a preexisting maritime remedy, which under *Townsend* cannot be denied in the absence of statutory or congressional intent. The Supreme Court's decision in *Exxon* recognized punitive damages as a legitimate remedy for causes of action arising out of oil spills.[175] The Court's recognition of this remedy is fundamental to establishing a post-OPA punitive damages regime after *Townsend*. In *Townsend*, the Court affirmed punitive damages recovery for an employer's failure to pay maintenance and cure.[176] The Court reasoned that punitive damages were a preexisting remedy in maintenance and cure actions that could not be restricted absent congressional intent to the contrary.[177] With this fact in mind, it is crucial to determine whether the Court's jurisprudence in *Townsend* and *Exxon* can justify oil spill punitive damages recovery in light of the OPA's silence regarding punitive damages recovery.

The oil spill punitive damages remedy is similar to the punitive damages remedy that the Court in *Townsend* recognized as being a preexisting maritime remedy in maintenance and cure actions. Several courts have recognized that punitive damages were available prior to the Jones Act amendments at issue in *Townsend*.[178] Similarly, the Court in *Exxon* recognized that punitive damages were available in oil spill causes of action arising prior to the passage of the OPA.[179] Thus, the punitive damages remedy

175 *See Exxon*, 554 U.S. at 475–76.

176 *Townsend*, 129B S. Ct. 2561, 2575 (2009).

177 *Id.* at 2569.

178 *See id.* at 2571; *see also* Manuel v. United States, 50 F.3d 1253, 1259–60 (4th Cir. 1995); Hines v. J.A. LaPorte, Inc., 820 F.2d 1187, 1188–89 (11th Cir. 1987); Holmes v. J. Ray McDermott & Co., 734 F.2d 1110, 1118 (5th Cir. 1984), *overruled by Guevara*, 59 F.3d 1496 (5th Cir. 1995), *abrogated by Townsend*, 129B S. Ct. 2561 (2009); Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051–52 (1st Cir. 1973).

179 *See Exxon*, 554 U.S. at 488–89.

available for oil spill causes of action is likely also preexisting as with maintenance and cure punitive damages.

In *Townsend*, the Court reasoned that the Jones Act's silence on punitive damages as well as other factors indicated that Congress did not intend to prohibit punitive damages recovery for a failure to pay maintenance and cure under general maritime law.[180] The OPA's language regarding damages also tracks with the language of the Jones Act's amendments in that each statute contains *no* language regarding punitive damages.[181] Thus, the *Townsend* rationale, which held that punitive damages are available when Congress has not directly spoken on the issue,[182] is likely applicable to the OPA as well. In addition, the Jones Act amendments from *Townsend* showed no hostility towards general maritime law recovery.[183] The same is likely true for the OPA considering that the only language within the statute that addresses maritime law is the maritime savings provision, which contains no language that could be construed as hostile to maritime punitive damages recovery.[184]

The only prong of the *Townsend* analysis that may serve as a barrier to OPA punitive damages recovery is the Court's statement regarding Congress's knowledge of punitive damages recovery at the time of the Jones Act's amendments' enactment.[185] Courts had already affirmed the institution of punitive damages recovery for a failure to pay maintenance and cure at the time of the amendments' enactment.[186] The Court's affirmation of oil spill punitive damages recovery in *Exxon*, however, occurred nearly twenty years after the passage of the OPA on causes of action arising prior to the OPA's passage.[187] Therefore, some may argue that Congress did not, in fact, know that oil spill punitive damages were recoverable at the time of the OPA's passage. Although there is some merit in this argument, one must ponder why Congress did not choose to respond to *Exxon*'s affirmation of oil spill punitive damages recovery by amending the OPA. If oil spill punitive damages recovery posed concern for future oil spill liability, Congress could have certainly chosen to amend the OPA to preclude punitive damages recovery. Congress's failure to respond to *Exxon*, therefore, suggests that Congress accepted maritime law's punitive damages stance whole hog, as it

180 *See Townsend*, 129B S. Ct. at 2570–75.

181 The OPA does not once reference punitive damages within its liability provisions. *See* Oil Pollution Act of 1990, 33 U.S.C. § 2702 (2006). In addition, the court in *Townsend* found that nothing in the Jones Act precludes the preexisting right to punitive damages for a failure to pay maintenance and cure. *Townsend*, 129B S. Ct. at 2570–72.

182 *Townsend*, 129B S. Ct. at 2572–73.

183 *Id.* at 2573.

184 *See* 33 U.S.C. § 2751(e) (2006).

185 *See Townsend*, 129B S. Ct. at 2573.

186 *See* Manuel v. United States, 50 F.3d 1253, 1259–60 (4th Cir. 1995); Hines v. J.A. LaPorte, Inc., 820 F.2d 1187, 1188–89 (11th Cir. 1987); Holmes v. J. Ray McDermott & Co., 734 F.2d 1110, 1118 (5th Cir. 1984), *overruled by Guevara*, 59 F.3d 1496 (5th Cir. 1995), *abrogated by Townsend*, 129B S. Ct. 2561 (2009); Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051–52 (1st Cir. 1973).

187 *See Exxon*, 554 U.S. 471, 476, 515 (2008).

existed and as it would develop, in addition to *Exxon*'s recognition of a preexisting general right to recover punitive damages in maritime law.

The Court in *Townsend* also stated that they would not impute congressional intent to exclude punitive damages recovery where congressional intent to do so is absent.[188] Congressional silence on punitive damages recovery in the wake of *Exxon* shows an absence of this intent. Therefore, the OPA, like the Jones Act amendments from *Townsend*, does not preclude oil spill punitive damages recovery.

Because oil spill punitive damages are a preexisting general maritime remedy after *Exxon*, the lack of congressional intent to preclude such damages paves an avenue for punitive damages recovery in causes of action arising from an oil spill. Therefore, courts must use the maintenance and cure punitive damages analysis from *Townsend* to justify punitive damages recovery in oil spill causes of action under general maritime law and the OPA. If courts are willing to utilize this argument in conjunction with the CWA preemption analysis in *Exxon*, oil spill punitive damages recovery may soon become reality. With this in mind, Part IV examines the applicability of these arguments to causes of action under the OPA and general maritime law.

IV. APPLYING THE ARGUMENTS

Oil spills, like *Deepwater Horizon*, present complex liability questions that go far beyond the parameters of the OPA.[189] Therefore, the applicability of the arguments in favor of punitive damages recovery from *Exxon* and *Townsend* must be analyzed for causes of action arising within and outside of the OPA's provisions. This Part proceeds by arguing that punitive damages recovery for general maritime causes of action, outside of the OPA's provisions, for which a preexisting punitive damages remedy exists should not be affected by the OPA's liability provisions. Next, this Part argues that a compelling normative justification exists for punitive damages recovery in OPA claims that overlap with a general maritime cause of action with a preexisting punitive damages remedy. Finally, this Part argues that punitive damages' functions of punishment and deterrence mandate punitive damages recovery for maritime personal injury and wrongful death actions.

A. General Maritime Causes of Action

The potential for suits, outside of the OPA's liability provisions, does exist for oil spills. While the OPA grants widespread recovery, the Act is limited to suits against responsible parties.[190] Responsible parties for

188 *See Townsend*, 129B S. Ct. at 2573.

189 *See supra* notes 4–9 and accompanying text (addressing the possible causes of action that may be asserted under the OPA, CWA, RCRA, Jones Act, and DOHSA in the aftermath of an oil spill similar to *Deepwater Horizon*); *see also* discussion *supra* Part II.B (discussing the possible OPA, Jones Act, and DOHSA claims arising out of the *Deepwater Horizon* spill).

190 Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (2006).

offshore facilities, like *Deepwater Horizon*, are limited to "the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement."[191] This raises a potential problem when one considers that the work of a deepwater oil exploration facility is not limited to actions by "responsible parties." For example, British Petroleum (BP) employed numerous independent contractors to perform specific tasks at the *Deepwater Horizon* rig.[192] Many independent oil contractors, however, possess no ownership status or general operating power over a rig's day-to-day work. Thus, a potential problem arises when one considers a scenario where an independent contractor's reckless or intentional actions cause an oil spill.

In such a situation, what is a plaintiff to do? The independent contractor is not likely a responsible party under the OPA, but this fact does not mean that independent contractors are not subject to liability for their reckless or intentional actions. Because the OPA does not grant a right of action against these parties, it is likely that plaintiffs will be left to assert general maritime law causes of action, similar to the claims asserted in *Exxon*, to garner recovery from such entities.[193]

The arguments from *Exxon* and *Townsend* likely support a finding of punitive damages recovery in causes of action against non-responsible parties. After *Exxon*, punitive damages recovery in oil spill causes of action under general maritime law is likely a preexisting remedy, which under *Townsend* cannot be denied without congressional intent to do so. The OPA, however, does not contain any language that restricts punitive damages recovery in general maritime causes of action. In addition, the OPA's maritime savings clause specifically saves "all other remedies" for plaintiffs asserting causes of action under general maritime law.[194]

The combination of the OPA's silence and the OPA's maritime savings clause's preservation of maritime remedies likely allows for punitive damages recovery in certain general maritime causes of action. Therefore, it is likely that punitive damages are available in causes of action under general maritime law asserted against non-responsible parties. In addition, punitive damages recovery is also likely available in general maritime causes of action that do not fall within the OPA's enumerated causes of action.

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191 *Id.* at § 2701(32)(C). The OPA recognizes additional categories of responsible parties. Responsible parties for spills resulting from vessels are defined as "any person owning, operating, or demise chartering the vessel." The responsible parties for an onshore facility or pipeline are "any person owning or operating" the facility or the pipeline. Finally, the responsible party for discharges in deepwater ports is the licensee of the port. *Id.* § 2701(32)(A)–(E).

192 Independent contractors on the *Deepwater Horizon* included Halliburton workers for cementing jobs, drilling mud loggers from Sperry Sun (a Halliburton subsidiary), and drilling mud engineers from M-I SWACO, a subsidiary of the international oilfield services provider, Schlumberger. *See* DEEP WATER: THE GULF OIL DISASTER, *supra* note 1, at 3.

193 The availability of general maritime law claims against non-responsible parties has been recognized by other scholars. *See, e.g.*, Robert Force et al., Deepwater Horizon*: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 975 (2011).

194 33 U.S.C. § 2751(e) (2006).

B. Claims Under the Oil Pollution Act

Although punitive damages recovery is likely available for certain general maritime causes of action, it is necessary to examine how the *Exxon* and *Townsend* arguments may apply to causes of action under the OPA. The OPA enumerates six specific causes of action within its liability provisions.[195] Because the OPA creates its causes of action outside of admiralty law, numerous courts have held that the OPA's liability provisions preempt general maritime law's applicability to causes of action against responsible parties.[196] Although courts have ruled that the OPA preempts general maritime law, general maritime law still may serve a normative function by showing how courts should treat punitive damages recovery for OPA claims. Because the Court in *Exxon* recognized punitive damages recovery for general maritime causes of action arising from an oil spill, there is likely a strong normative justification for allowing OPA punitive damages recovery when an OPA claim overlaps with a general maritime law cause of action in which punitive damages recovery is available. Keeping this in mind, it is necessary to determine which OPA claims overlap with a general maritime law cause of action and with a preexisting punitive damages remedy.

Exxon recognized that punitive damages were available in certain general maritime causes of action arising out of an oil spill. In *Exxon*, the Court upheld punitive damages recovery under general maritime law for commercial and subsistence fishermen for their lost income and lower harvests resulting from the *Exxon Valdez* spill.[197] The claims asserted by the fisherman in the *Exxon* case likely parallel certain OPA claims as well. The OPA grants a cause of action for the loss of use of natural resources as well as loss of profits due to the injury, destruction, or loss of property or natural resources.[198] These claims mirror the same general maritime cause of action that allowed commercial fisherman to recover punitive damages after *Exxon*. In addition, *Exxon*'s approval of punitive damages recovery for subsistence fisherman also likely mirrors the OPA provision that recognizes a cause of action for loss of subsistence of natural resources. Therefore, courts should allow punitive damages recovery for such claims given the Court's acceptance of punitive damages in their general maritime law counterparts and the OPA silence on punitive damages.

Two potential problems arise, however, when one examines the overlap of general maritime causes of action and the remaining OPA causes of action. First, government-asserted claims, which are available under the OPA, have not been recognized under general maritime law since the

195 *See supra* note 64 and accompanying test..

196 *See, e.g.*, Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 750 (E.D. La. 2009); *In re* Settoon Towing L.L.C., No. 07-1263, 2009 WL 4730969, at *3 (E.D. La. Dec. 4, 2009).

197 *See Exxon*, 554 U.S. 471, 488–89 (2008); *see also In re* Exxon Valdez, 270 F.3d 1215, 1225–27 (9th Cir. 2001) (discussing availability of punitive damages in maritime law in spill caused by an oil tanker that ran aground in Alaska resulting in environmental damage in Prince William Sound).

198 33 U.S.C § 2702(b)(2)(C), (E) (2006).

passage of the CWA's oil spill liability provisions.[199] Prior to the enactment of the CWA's liability provisions, the Oil Pollution Act of 1924[200] provided the federal government's statutory remedy to recover its cleanup costs.[201] Government entities could still assert claims to recover their cleanup costs under general maritime law.[202] These government-asserted causes of action arising from oil spills, however, were soon preempted after the passage of the CWA's oil spill liability provisions in 1970.

Because the predecessor to the OPA liability provisions regarding government asserted causes of action comes from the CWA as opposed to general maritime law, it is unlikely that an overlap between such claims and general maritime law causes of action exists. Therefore, the normative justification provided by *Exxon* and *Townsend* in favor of punitive damages recovery is weaker for OPA claims asserted by government entities.

Second, the *Exxon* and *Townsend* arguments rest on the availability of a preexisting maritime remedy. This fact raises a problem when one considers that the OPA breaks from the traditional rule from *Robins Dry Dock & Repair Co. v. Flint* (*Robins Dry Dock*)[203] barring pure economic loss recovery in maritime suits.[204] In *Robins Dry Dock*, the Supreme Court held that plaintiffs cannot recover damages for economic harm, such as loss of income or profits, unless there has been an injury to the claimant or his property.[205] The OPA breaks from this bright line rule and allows damages by permitting claimants to recover "[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, which shall be recoverable by any claimant."[206] Several lower courts addressed the OPA's preemption of the *Robins Dry Dock* rule, and the majority of their opinions held that the OPA allows claimants to recover economic damages that result from damage to another's property.[207]

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199 Federal Water Pollution Control Act, 33 U.S.C. §1321 (2006 & Supp. III 2009); *In re* Exxon Valdez, 270 F.3d at 1231; *see* United States v. Oswego Barge Corp., 664 F.2d 327, 332–33 (2d Cir. 1981) (stating that the Oil Pollution Act of 1924 allowed the government to recover cleanup costs, but that the remedy was inadequate).

200 Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 108, 84 Stat. 91, 113 (1970) (repealing Oil Pollution Act of 1924, Pub. L. No. 68-238, ch. 316, 43 Stat. 604, *amended by* Clean Water Restoration Act of 1966, Pub. L. No. 89-753, § 211(a), 80 Stat. 1246, 1252).

201 *Oswego Barge*, 664 F.2d at 332.

202 *Id.* at 332–33; *see* Burgess v. M/V Tamano, 370 F. Supp. 247, 249 (D. Me. 1973) (stating that an oil spill in a state's waters constitutes a maritime tort).

203 275 U.S. 303 (1927).

204 *Compare* Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(2) (2006) (outlining the damages available under the OPA, including lost profits), *with Robins Dry Dock*, 275 U.S. at 308–09 (holding that there is no recovery for economic harm unless there is also injury to a claimant or his property).

205 *Robins Dry Dock*, 275 U.S. at 308–09.

206 33 U.S.C. § 2702(b)(2)(E) (2006).

207 The Fifth and First Circuits, as well as the Eastern District Court of Louisiana, held that the *Robins Dry Dock* rule is preempted by the OPA. *See* Taira Lynn Marine Ltd. No. 5, L.L.C. v. Jays Seafood, Inc., 444 F.3d 371, 382 (5th Cir. 2006); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630 & n.6 (1st Cir. 1994); Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1014 (E.D. La. 1993). The Eastern District of Michigan is the lone court to uphold the

The OPA's break from *Robins Dry Dock* and the lack of an overlap between government asserted OPA claims and a general maritime law cause of action present a particular problem when one considers that the *Exxon* and *Townsend* arguments rely on the proposition that a preexisting maritime law remedy exists. Because compensatory damages for economic loss for damages to another's property were not available for causes of action arising prior to the OPA, it likely follows that punitive damages for such claims are not a preexisting maritime remedy. In addition, the lack of an overlap between OPA claims asserted by government entities and general maritime law likely defeats the argument of a preexisting punitive damages remedy's existence for such claims. Thus, if courts choose to allow punitive damages recovery for the OPA's other causes of action, they are left in a precarious situation. Do the courts exclude punitive damages recovery for government-asserted claims and causes of action for pure economic loss and risk creating a fragmented punitive damages scheme under the OPA, or do they allow punitive damages recovery for such claims in order to unify an OPA punitive damages regime although a preexisting remedy does not exist?

The lack of a maritime overlap with certain OPA claims weakens the justification for punitive damages recovery in OPA claims. Although courts could simply only allow punitive damages recovery for OPA claims with a maritime overlap, this would cause a fragmentation of the remedies available for OPA claims and risk fracturing the OPA's remedial scheme. Although a maritime overlap does not exist for certain claims, punitive damages recovery is still needed for such claims for several reasons.

First, the Supreme Court has never faced the question of punitive damages recovery for the OPA claims that lack a general maritime law counterpart. In addition, neither Congress nor the Court has given any guidance regarding the availability of punitive damages recovery for such claims. Thus, courts, when presented with the question of OPA punitive damages recovery, are left without any guidance for OPA claims without a maritime overlap. Although some may argue that *South Port* could serve as a guide, its reliance on *Miles* hinders its reliability as controlling jurisprudence.[208] Therefore, courts must look at the guidance and reasoning provided in the cases that allow punitive damages recovery in general maritime causes of action that overlap with OPA claims. Although the applicability of these cases is weaker for OPA claims without a maritime overlap, the cases still speak to the general principle that oil spills proximately caused by reckless or intentional conduct should result in punitive damages recovery.

Second, the need for uniformity within the OPA's remedial scheme mandates an extension of punitive damages recovery for OPA claims without a maritime overlap. While there is an argument that the OPA's

Robins Dry Dock rule for OPA economic damages claims arising from damage to another's property. *See In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 679 (E.D. Mich. 1992).

[208] *See* discussion *supra* Part III.B.1 (discussing *South Port*'s inability to serve as controlling jurisprudence in causes of action seeking punitive damages recovery under the OPA and general maritime law).

liability regime should continue to exclude punitive damages for all OPA claims to achieve this uniformity, this assertion fails to recognize that the Court has affirmed punitive damages recovery for the general maritime causes of action that mirror certain OPA claims. Therefore, following such a rationale results in a situation where remedial uniformity takes precedence over existing law and limits recovery for claims that previously allowed punitive damages. In addition, it places greater emphasis on remedial uniformity for the sake of maintaining an exclusion of punitive damages in OPA claims for which the question of punitive damages recovery has never been asserted under their statutory and common law predecessors.

Therefore, courts should utilize the normative justification provided by *Exxon* and *Townsend* to not only allow punitive damages recovery for OPA claims with a maritime overlap but also extend punitive damages recovery to OPA claims lacking a maritime overlap. By extending punitive damages recovery to all OPA causes of action, courts can ensure that the OPA maintains a uniform remedial scheme that also recognizes the Court's affirmation of punitive damages recovery for general maritime causes of action that mirror OPA claims.

C. Maritime Wrongful Death and Personal Injury Causes of Action

Wrongful death and personal injury claims under maritime law also present a unique problem in the wake of *Deepwater Horizon*. Although it is not far-fetched to imagine that an oil spill could result in personal injury or death, the OPA does not establish causes of action for these injuries. Plaintiffs affected by wrongful death and personal injury must assert their claims under general maritime law and its accompanying statutory regimes. Therefore, it is necessary to determine if punitive damages may apply to wrongful death and personal injury claims under the justifications from *Exxon* and *Townsend*.

Thomas Galligan, Jr., in a recent article, noted the risks that plaintiffs may encounter from inadequate recovery for wrongful death and personal injury claims stemming from oil spills and how those problems affect punitive damages regimes' goals of punishment and deterrence.[209] Because semi-submersible rigs, like the *Deepwater Horizon*, are considered vessels under maritime law, the survivors of seamen killed on the high seas due to employer negligence or unseaworthiness must assert their claims under the Jones Act and DOHSA respectively.[210] The Jones Act and DOHSA only provide recovery for pecuniary losses stemming from the personal injury or wrongful death of a seaman.[211] In addition, punitive damages recovery is not generally available for Jones Act personal injury and DOHSA wrongful death claims.[212]

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209 *See* Thomas C. Galligan, Jr., *Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk*, 71 LA. L. REV. 787, 791–92 (2011).

210 *Id.* at 794–95, 798.

211 *Id.* at 798.

212 *See id.* at 798, 814.

The lack of punitive damages recovery in maritime wrongful death claims is of grave concern in the wake of *Deepwater Horizon*. The OPA, whose liability provisions do not address wrongful death actions, will likely not play a role in determining if punitive damages are awarded in such cases in the future. While the OPA's provisions may not be determinative, if courts are willing to allow punitive damages for OPA claims and other general maritime law causes of action, a startling policy concern arises when one considers the functions of punitive damages.

As this Article will further argue, oil spill punitive damages are rooted within the functions of all punitive damages awards—punishment and deterrence. If courts accept the justifications provided in this Article and allow punitive damages recovery for OPA claims and other general maritime law causes of action, they will be impliedly communicating messages of punishment and deterrence in regard to tortfeasors' damage to economic and environmental resources. Because the OPA, however, does not address or affect wrongful death and personal injury claims, there is a risk that the same messages of punishment and deterrence will not be communicated for such causes of action because their punitive damages prohibition falls outside the OPA's confines. One cannot honestly argue, however, that there is a greater moral justification to emphasize punishment and deterrence for causes of action arising out of economic and environmental damages and not personal injury and human life.

Thus, the justification for wrongful death and personal injury punitive damages recovery does not lie within the current legal environment for such injuries. Instead, it lies in the possible acceptance of punitive damages for OPA and other general maritime law claims and the negative policy ramifications that may arise from oil spill punitive damages recovery. The current recovery scheme for wrongful death and personal injury actions may inadequately deter and punish those who engage in conduct that leads to such claims.[213] This fact "can result in an undervaluing of human life and tragic ramifications when it is lost" or affected by injury.[214] The risk of this inadequacy is not only real, but also imminent if punitive damages recovery is extended to OPA claims. Therefore, legislators and the judicial system must preemptively recognize this possibility and institute judicial as well as statutory measures that recognize punitive damages for wrongful death and personal injury claims arising out of oil spills.

V. OIL SPILL PUNITIVE DAMAGES: A NORMATIVE AND MORAL JUSTIFICATION

The ultimate question of whether maritime law may serve as a mechanism instituting punitive damages under the OPA exists not only in a legal dimension but also in a moral dimension. Because punitive damages are intended to serve as a punishment and deterrence mechanism, an oil spill punitive damages regime should reflect these goals as well. This Part

213 *Id.* at 814.
214 *Id.*

proceeds by presenting a brief sketch of specific normative justifications that supplement the judicial arguments in favor of oil spill punitive damages. It continues by arguing that punitive damages recovery is necessary to punish and deter parties responsible for marine oil spills. Ultimately, it advocates that punitive damages recovery is essential to the prevention of future oil spills through retributive justice and deterrence.

A. Punitive Damages as a Mechanism of Retributive Justice

In *Exxon*, the Supreme Court noted that punitive damages, historically, served as a punishment mechanism against tortfeasors engaging in reckless or intentional tortious conduct.[215] The function of punitive damages as a retributive mechanism cannot be understated within the context of oil spills. Unlike other environmental disasters, oil spills generate a larger amount of scrutiny among legislators, regulators, and society at large.[216] In their wake, spills prompt a response of increased regulation and compensation, as well as punishment.[217] To respond to calls for punishment by government and society, punitive damages should serve as a mechanism instituting increased damages and retribution. Scholars have characterized modern retributive justice as a communicative experience between society and the wrongdoer with a focus on three specific ideals: 1) responsibility for choices of unlawful actions, 2) equality under the law, and 3) a mode of democratic self-defense.[218] Therefore, a brief sketch of these goals is needed.

The goal of communicating responsibility for unlawful actions rests on the foundation that without communication to the unlawful actor, the actor may continue unlawful conduct with only a burden of compensatory liability.[219] By only instituting compensatory damages, society sends a message to wrongdoers that communicates "do whatever you want, just make sure you pay those who you hurt." Such a message fails to communicate any sense of moral reprehensibility which in turn does not trigger the needed recognition from the wrongdoer that his acts were not only unlawful, but also morally repugnant to society at large. Thus, punitive

215 *See Exxon*, 554 U.S. 471, 492–93 (2008).

216 One need only look to the large amount of media coverage in the wake of the *Deepwater Horizon* oil spill. In the months following the spill, politicians, government officials, and private citizens criticized the spill's responsible party in print, television, and internet media. *See, e.g.*, Ryan Owens et al., *President Obama to Create a Presidential Commission to Probe Oil Spill*, ABC NEWS, May 17, 2010, http://abcnews.go.com/WN/obama-creates-presidential-commision-probe-oil-spill/story?id=10669383 (last visited Nov. 12, 2011) (describing increased scrutiny of the oil industry's safety practices and government response to the BP oil spill). Although environmental disasters happen on a fairly regular basis, rarely do they receive the amount of public outcry and media coverage dedicated to large-scale disasters similar to the *Deepwater Horizon* spill.

217 *See, e.g.*, United States v. Locke, 529 U.S. 89, 94 (2000) (describing the legislative actions taken by Congress after the *Torrey Canyon* spill in 1967 and *Exxon Valdez* spill in 1989). The *Exxon Valdez* spill spurred enactment of the OPA. *Id.* at 101.

218 *E.g.*, Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 260 (2009).

219 *See id.* at 260–62.

damages must accomplish their communicative effect through the implementation of damages that exceed compensatory limits.

Retributive justice must also foster equality among actors within a legal regime.[220] When a wrongdoer undertakes actions in derogation of the law, he places himself in a position above the rest of society that conforms to the norms and rules established through statutory and tort law.[221] It is important to note, however, that such actions do not show an unwillingness to conform to the particular laws broken, but a rejection of a society's entire legal regime that requires uniform compliance by all of its members. Compensatory damages focus on remedying the status of the victim, and thus fail to properly address the wrongdoer's choice to place himself above the rest of society.[222] Punitive damages, however, shift their focus away from this remedial measure and instead focus on punishing the wrongdoer for his own repugnancy as opposed to his effect on victims.[223] Thus, punitive damages, as a method of punishing repugnancy, must serve the purpose of correcting the wrongdoer's belief that he is above the law. If the state and society establish no institution to punish wrongdoers, a tortfeasor's implicit or explicit claim to superiority goes unchecked and could be deemed nearly acceptable by society. Therefore, society must use punitive damages to continue an equal and uniform system of justice.

Finally, punitive damages carried out in a judicial setting reinforce our societal notion of democratic self-defense.[224] At the heart of our justice system lies a social contract where society is ensured protection from wrongdoers by vesting its own power to punish within a formal judicial system.[225] Through this contract, it is imperative that the state and its judicial enforcers institute mechanisms illuminating society's desire for punishment. By deemphasizing the enforcement of our legal regime by private citizens, the judicial system ensures that punitive damages awards can serve their retributive effect without the prejudices and violence that can arise through uncontrolled justice administered outside of a structured regime.[226] Because of the need for an impartial entity to adjudicate disputes requiring punishment in addition to compensatory damages, the state must recognize its role within our democratic society and institute a system of retributive justice through punitive damages that recognizes the need for equality under the law for all actors and communication of moral repugnancy.

To serve as a retributive mechanism, oil spill punitive damages awards should embody the three aforementioned goals of retributive justice. Oil spills, like *Deepwater Horizon*, present a prime example of a situation where there is a need to communicate the reprehensibility of the tortfeasor's conduct. Unlike spills resulting from mere negligence, *Deepwater Horizon*

220 *Id.* at 262–63.
221 *See id.* at 263.
222 *See id.* at 323.
223 *See id.* at 262.
224 *Id.* at 263–65.
225 *Id.* at 264–65.
226 *See id.* at 265.

presents a situation where an entity engaged in willful and wanton disregard in order to increase its own financial viability.[227] To hold actors, such as BP, to the same damages standards as entities causing oil spills by mere negligence, fails to communicate the reprehensibility of reckless conduct one performs in pursuit of financial gain. Therefore, courts must institute punitive damages in oil spills where reckless conduct is undertaken under the guise of financial benefit. By instituting such a scheme, society and the state can properly communicate the repugnancy of financially driven recklessness to tortfeasors.

Second, punitive damages can reinforce the state of equality among actors in society. Through their actions, *Deepwater Horizon*'s responsible parties communicated to society that their drive for profit trumped their responsibility to conduct their operations in a reasonable and legally compliant manner. By doing so, BP and its partners placed themselves in a position above their oil industry competitors and would have likely garnered greater financial gain if the blowout never occurred. More disturbing than BP's heightened status among its oil industry competitors is its lack of recognition over its place in the grand interplay between the environment and its individual and corporate inhabitants. Although such an assertion trends towards an environmental ethics perspective, it is nonetheless vital to not only recognize but also promote a homeostatic balance with respect to corporate endeavors that affect the environment.[228]

The responsible parties' actions before and after the *Deepwater Horizon* spill require a response that reestablishes equality among oil industry actors as well as society as a whole. Thus, the puzzling question is: Does a system of only compensatory actions properly achieve this end? Compensatory damages, at their root, are meant to remedy the suffering of a victim who has been displaced of their equal status among unaffected members of society.[229] Such an approach, however, fails to equalize a tortfeasor's elevated status among the rest of society. Therefore, punitive damages, within their goal of punishment, serve as a mechanism that places the tortfeasor into its equal status among these entities.[230] In order to reestablish an equilibrium among all of society, courts must institute a punitive damages regime that adequately places tortfeasors on equal footing with entities affected and unaffected by their wrongful actions.

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227 At the time of the *Deepwater Horizon* spill, BP was six weeks behind schedule and $58 million over budget. In the days leading up to the spill, statements made by BP officials, prior to the rig's blowout, showed the influence of time and financial pressures on their decision making. For a discussion of how these financial difficulties influenced the decision making of *Deepwater Horizon* officials, see generally DEEP WATER: THE GULF OIL DISASTER, *supra* note 1.

228 Environmental ethics centers on the notion that mankind is part of a greater environmental community and that man's interactions with the environment should not be motivated purely by utilitarian purpose but by a broader ethical perspective of his place in the entire environmental scheme along with plants, animals, and resources. For further discussion on this topic, see ALDO LEOPOLD, *The Land Ethic*, *in* A SAND COUNTY ALMANAC 237, 239 (1949).

229 *See* RESTATEMENT (SECOND) OF TORTS § 901 & cmt. a (1979).

230 *See* Markel, *supra* note 218, at 262.

Finally, the state, as the extension of society, must utilize its judicial system to institute punitive damages recovery for oil spills. In a perfect world, society could adequately punish parties whose reckless conduct resulted in an oil spill through peaceful and effective mechanisms such as boycotting. Oil spills, however, generate intense antagonism among society,[231] which could result in violent and unwarranted punishment at the hands of society. In addition, society's mindset can be fickle, which can erode the long-term viability of punishment inflicted by society. Unlike society, however, the state can efficiently institute society's desire for punishment through its judicial power. The state's judicial power provides a method for administering punitive damages that ensures constitutional safeguards that society may not respect. In addition, the state can ensure that punishment is fully carried out through judicial enforcement. Given the state's ability to efficiently and peacefully execute punitive damages recovery, retributive justice commands that the state accept this role and implement a regime allowing punitive damages recovery for oil spill causes of action under the OPA and general maritime law.

Oil spill punitive damages recovery can achieve the goals of retributive justice. *Deepwater Horizon* provides a prime example of a situation where a punitive damages regime, administered through the state, is needed to communicate moral repugnancy and restore societal equilibrium. Because retributive justice is based on the concept of punishment, the fulfillment of retributive justice's goals under a punitive damages regime makes their recovery an acceptable avenue for punishment in the wake of oil spills.

B. Punitive Damages as a Deterrence Mechanism

Another normative justification for punitive damages lies within the concept of deterrence. In *Exxon*, the Supreme Court affirmed this position by stating that punitive damages historically served a deterrence function.[232] In order to grasp the concept of deterrence within an oil spill punitive damages regime, it is necessary to evaluate deterrence within the confines of oil exploration and transport. While scholars have offered numerous theoretical arguments for punitive damages as a deterrence mechanism,[233] this Part adopts a theory of punitive damages deterrence that focuses on compensating societal harm and removing the benefits tortfeasors acquire through reckless and intentional conduct.[234] This Part proceeds by applying

231 *See* David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1418–19, 1448–50 (2011).

232 *Exxon*, 554 U.S. 471, 492–93 (2008).

233 *See, e.g.*, Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 40 (1990) (arguing that punitive damages are efficient deterrents wherever compensatory damages are inadequate to take account of societal costs); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 366–67 (2003) (explaining that by making wrongdoers internalize the costs of their actions, punitive damages result in appropriate deterrence).

234 This theory focuses largely on deterrence as a mechanism to implement efficiency in actors' decision making process. The primary focus is to force actors to consider the possibility

this theory to the *Deepwater Horizon* spill and discussing how its adoption may possibly prevent future spills. It ultimately concludes that an oil spill punitive damages regime effectively advances the concept of deterrence in maritime oil exploration and shipping.

Deterrence cannot properly serve as a normative justification unless viewed within a mindset that is somewhat irrespective of the goals of retributive justice. Punitive damages, as a deterrence mechanism, do not focus on the goals of communicating moral repugnancy or necessarily punishment. Instead, deterrence should focus on the advancement of efficiency among the various actors within a society.[235] Punitive damages, within the deterrence context, must function in a manner that makes actors consider the costs of their actions prior to undertaking them.[236] With this goal in mind, this Article advocates that oil spill punitive damages, as a deterrence mechanism, must complement the goals of retributive justice by serving as an instrument that influences behavior through the institution of damages eliminating the benefits gained through reckless behavior.

In order to achieve this end, oil spill punitive damages regimes must rid oil industry actors of the benefits of reckless behavior. To remove such benefits, however, courts must recognize that these benefits are two-fold. First, reckless behavior may allow actors to derive increased revenue in a shorter period of time.[237] Second, actors derive benefit, by refusing to implement best practices and safety technology, in order to widen profit margins.[238] Thus, actors not only can derive greater benefits but also can lessen the cost of obtaining those benefits through reckless behavior. Courts must, therefore, recognize this fact and institute oil spill punitive damages awards that eliminate the incentive to pursue such benefits.

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of punitive damages when undertaking actions which may in turn influence them to act in a non-reckless fashion. *See generally* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1989) (discussing how in the absence of punitive damages, injurers can externalize a portion of the social costs they cause); Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1989) (explaining that deterrence rather than retribution justifies extracompensatory damages that provide economic disincentives); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) (arguing deterrence objectives justify punitive damages when compensatory damages produce less than optimal deterrent value); Sharkey, *supra* note 233 (arguing that optimal deterrence is achieved by threatening defendants with damages equal to the aggregate tortious loss, forcing them to internalize potential societal costs). For a further discussion of deterrence as an efficiency mechanism see Galligan, *supra* note 233.

235 "[T]aking account of accident costs is the crux of Judge Learned Hand's" risk-utility theory, which rests in a justification within the context of strict liability that if the cost is greater than the benefit then a rational actor will not engage in tortious activity. *See* Galligan, *supra* note 209, at 809.

236 *See id.* at 813–15.

237 *Cf. id.* at 810 (noting that actors who ignore accident costs when making decisions will underinvest in safety).

238 *Cf.* Galligan, *supra* note 233, at 12, 17–18 (noting that actors who do not account for accident costs will not consider true costs of their activities and will therefore engage in certain activities more than they should).

Punitive damages can remove the benefits of reckless conduct through a modified theory of risk-utility. Risk-utility is based on the assumption that rational actors will not engage in tortious behavior if the costs outweigh the derived benefit.[239] Mathematically, risk-utility is represented by PL > B with P, representing the likelihood for loss, L, the loss, and B, the burden of avoiding the loss.[240] Although risk-utility is normally used to determine if a defendant owes a duty to a potential plaintiff,[241] it is also useful within the deterrence function of punitive damages, albeit with some modifications. In the punitive damages context, the mathematical risk-utility formula would function as follows: PL + PP > B. Within this context, PL would continue to represent the total compensatory damages multiplied by the potential for those damages. PP would represent the total amount of a potential punitive damages award multiplied by the chance of such an award being implemented. B, as opposed to representing the burden of undertaking nonreckless action, would represent the benefits derived from reckless behavior. Under this modified risk-utility theory, rational actors would not engage in reckless activity if the benefit derived from such activity would be outweighed by the potential of mass punitive damages awards combined with compensatory liability.

The deterrence function of punitive damages is especially significant within the context of marine oil pollution, with *Deepwater Horizon* providing a unique example of the need for a deterrence function. When the *Deepwater Horizon* spill occurred, BP and the other financiers were six weeks behind schedule and $58 million over budget.[242] The time and financial difficulties eventually led to numerous decisions and shortcuts that led to the rig's eventual blowout.[243] In the wake of the blowout, further reckless behavior on the part of BP was exposed as regulators learned that the company's spill response plan did not even address the potential for spills similar to *Deepwater Horizon*.[244] If the oil spill had not occurred, it is likely that BP and the other rig financiers would have reaped extensive benefits from their reckless actions. Sadly, the current state of oil spill liability does

239 *See, e.g.*, Galligan, *supra* note 209, at 810 (explaining the cost calculations an economic actor considers when making decisions about engaging in tortious activity).

240 *E.g.*, Galligan, *supra* note 233, at 20.

241 RESTATEMENT (SECOND) OF TORTS § 291 cmt. f (1965).

242 DEEP WATER: THE GULF OIL DISASTER, *supra* note 1, at 2.

243 Several financially influenced decisions led to the reckless behavior causing the *Deepwater Horizon* blowout. For example, BP officials refused to install 15 additional centralizers needed to properly seal the well. In addition, rig officials chose to displace drilling fluid, used to prevent gas kicks that result in blowouts, with seawater in order to hasten the well's production. Most costly, rig officials failed to properly maintain the rig's blowout preventer, the last line of defense for wells experiencing a possible blowout. For a further discussion of these and other decisions that led to the *Deepwater Horizon* oil spill, *see id.* at 93–115.

244 BP's spill response plan was vastly inadequate and addressed concerns completely irrelevant to oil exploration in the Gulf Coast, while failing to address the response needed to a spill of *Deepwater Horizon*'s caliber. In addition, BP had failed to test its mechanisms for containing the well's leak. For a further discussion of the inadequacy of the *Deepwater Horizon* oil spill response, see *id.* at 133–60.

not properly deter such behavior with its limited liability caps and admonition of punitive damages in *South Port*. If a punitive damages regime were to recognize and implement awards that removed the benefits of such behavior, future spills, like *Deepwater Horizon*, might be prevented because rig officials would recognize that the costs of reckless actions outweigh any benefits that are derivable from reckless conduct.[245]

The need for deterrence is clear in the wake of *Deepwater Horizon*. Punitive damages recovery provides an avenue that could remove the incentives that actors garner from reckless behavior. Although the potential for punitive damages awards may not prevent all future oil spills, they certainly can impact oil industry decision making and possibly push industry actors to adopt less reckless courses of action in the future. Thus, juries and judges must institute punitive damages awards that not only punish but also deter reckless conduct.

VI. CONCLUSION

Oil spills will always prompt mass public outcry from legislators, regulators, and society. Large-scale environmental disasters often cue a call for greater punishment enacted against those who are their cause. The *Deepwater Horizon* disaster must, therefore, stimulate response by society. Ideally, this response should not come in the form of lackluster policy statements by politicians and interest groups. Instead, the executive, legislative, and judicial branches must communicate society's outcry by imposing more stringent regulatory requirements and larger damages awards on actors responsible for oil spill disasters.

Although the recommended calls to action from the legislative and executive branches remain outside of this Article, the needed judicial response is clear in the wake of *Exxon* and *Townsend*. Currently, our judicial system fails to recognize the need for greater punishment for oil spills, and in doing so does not communicate the concepts of deterrence and retribution to reckless members of the oil industry. The judiciary's failure to institute punitive damages recovery, thus far, stems from misconceived notions regarding oil spill punitive damages beginning with *Miles* and culminating in *South Port*. *Exxon* and *Townsend*, however, provide an avenue that remedies the problems created by *Miles* and *South Port*. Therefore, the judiciary must proceed down this avenue and institute punitive damages recovery for causes of action under the OPA and general

245 It would be remiss to not assess the possible effect that the Supreme Court's 1:1 punitive damages ratio from *Exxon* may have on the deterrence function of oil spill punitive damages. The strength within the deterrence argument is that punitive damages, when combined with compensatory damages, can force rational actors to engage in nonreckless conduct. The 1:1 *Exxon* ratio, however, poses a potential problem for deterrence if punitive damages are limited to a level, that when combined with compensatory damages, does not outweigh the benefits gained from reckless behavior. If such instances do occur, it is likely that the deterrent effect of a punitive damages award may not only be mitigated but also eliminated.

maritime law. The judiciary's role, however, does not end with allowing punitive damages in OPA and general maritime law causes of action. They must also recognize the policy implications that may arise from punitive damages recovery and reform their view of punitive damages recovery in wrongful death and personal injury causes of action under maritime law.

In conclusion, *Deepwater Horizon* presents an opportunity to remedy the judicial inequities that have arisen in the punitive damages arena. With this in mind, the judiciary must recognize and adopt the arguments outlined within this Article and implement a liability regime that adequately punishes and deters reckless conduct. Hopefully, courts will recognize this necessity and begin the arduous task of reforming punitive damages recovery in OPA and maritime law causes of action arising out of offshore oil spills.