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LAW REVIEW

The Great Spill in the Gulf . . . and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability

Vernon Valentine Palmer[1]

I. INTRODUCTION

A. *Event and Aftermath*

What has been called the greatest oil spill in history, and certainly the largest in United States history, began with an explosion on April 20, 2010, some 41 miles off the Louisiana coast. The accident occurred during the drilling of an exploratory well by the Deepwater Horizon, a mobile offshore drilling unit (MODU) under lease to BP (formerly British Petroleum) and owned by Transocean.[2] The well-head blowout resulted in 11 dead, 17 injured, and oil spewing from the seabed 5,000 ft. below at an estimated rate of 25,000-30,000 barrels per day.[3]

The Deepwater Horizon is technically described as "a massive floating, dynamically positioned drilling rig" capable of operating in waters 8,000 ft. deep.[4] In maritime law, such a rig qualifies as a vessel; yet, as a MODU, the rig also qualifies as an offshore facility that may attract higher liability limits under the Oil Pollution Act of 1990 (OPA).[5] Under these provisions the double designation as vessel and/or MODU

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1. Thomas Pickles Professor of Law and Co-Director of the Eason Weinmann Center for Comparative Law, Tulane University. This paper was presented in October 2010 in Hong Kong at a conference convened under the auspices of the Centre for Chinese and Comparative Law of the City University of Hong Kong. The conference theme was "Towards a Chinese Civil Code: Historical and Comparative Perspectives." The conference papers will be published in a forthcoming volume edited by Professors Chen Lei and Remco van Rhee.

2. Paul Barrett, *Transocean: No Apologies Over Gulf Oil Spill*, BLOOMBERG BUSINESS WEEK, June 30, 2011, http://www.businessweek.com/magazine/transocean-no-apologies-over-gulf-oil-spill-07012011.html.

3. Justin Gillis & Henry Fountain, *New Estimates Double Rate of Oil Flowing Into Gulf*, N.Y. TIMES, June 10, 2010, http://www.nytimes.com/2010/06/11/us/11spill.html.

4. *Deepwater Horizon Oil Spill*, WIKIPEDIA, http://en.Wikipedia.org/wiki/Gulf_of_Mexico_oil_rig_disaster#Deepwater_Horizon_drilling_rig (last visited June 25, 2011).

5. *See* Oil Pollution Act of 1990, 33 U.S.C. §§ 2701(18)-(32), 2704 (a)-(b) (2006).

potentially raises the liability limits to as much as $75 million. The operator and principal developer of this well is BP, which owns a 65% interest.[6] Various attempts at stemming the initial flow of oil failed. The oil spread on the surface and in the depths over a very wide area, killing marine life and water birds, entering estuaries, and polluting shores. The National Oceanic and Atmospheric Administration closed commercial and recreational fishing in a very wide area of the Gulf, and the federal government declared a moratorium on exploratory drilling for six months, thus idling about 33 drilling operations in progress.[7] Meantime, BP, after meeting with President Obama, agreed to establish a $20 billion compensation fund, which would be independently administered by a nongovernmental agency led by Kenneth Feinberg.[8] BP carried very little or no third party liability insurance and reportedly operated on a self-insured basis.[9] Given the minimal insurance, questions arise as to whether BP's pockets are deep enough to meet its overall liabilities which, in addition to the compensation fund already discussed, may include $21 billion further in civil fines under the Clean Water Act (CWA).[10] The compensation fund, after an initial $5 billion deposit in 2010, would receive quarterly installments of $1.25 billion until the full

6. *See Deepwater Horizon Accident Investigation Report*, BP, 15 (Sept. 8, 2010), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf. Anadarko Petroleum Co (25% share), and MOEX Offshore (10% share) are BP's partners in the project, and each is regarded as a "responsible party" under the Oil Pollution Act. *See id.*; 33 U.S.C. § 2701(32) (2006) (defining "responsible party" under the OPA). Transocean also qualifies as a responsible party under this provision. *See id.* Concerning the legal effect of this designation, *see infra* Part III.A.

7. Bill Sasser, *Despite BP Oil Spill, Louisiana Still Loves Big Oil*, CHRISTIAN SCIENCE MONITOR, May 24, 2010, http://www.csmonitor.com/USA/2010/0524/Despite-BP-oil-spill-Louisiana-still-loves-Big-Oil.

8. *See* Deepwater Horizon Oil Spill Trust (Execution Copy) (Aug. 6, 2010), http://media.nola.com/2010_gulf_oil_spill/other/Trust%20Agreement.pdf. This fund operates independently of the statutory compensation scheme set up under OPA (the Oil Spill Liability Trust Fund), which is funded by taxes on oil exports and imports into the US. *See id.* The OPA fund clearly has inadequate reserves to deal with the BP spill.

9. OPA requires the responsible party operating an offshore facility like Deepwater Horizon to produce proof of "financial responsibility" up to $150 million either by insurance, surety bond, letter of credit, and/or qualification as a self-insurer. *See* 33 U.S.C. § 2716(c)(C) (2006); 33 U.S.C. § 2716(e) (2006). Transocean reportedly carried $500 million in physical damage insurance and $900 million in third party liability insurance. *See* Howard Epstein and Theodore Keyes, *BP Oil Spill: An Insurance Perspective*, N.Y.L.J., Aug. 18, 2010, *available at* http://www.srz.com/Epstein_Keyes_NYLJ_BP_Oil_Spill/. Halliburton carried more than $1 billion in insurance. *See id.*

10. The Justice Department sued BP in late 2010 to recover the fines and penalties owing under the Act. *See* Jerry Markon, *BP, 8 other firms sued by Justice Dept. over gulf oil spill*, WASH. POST, Dec. 15, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/15/AR2010121503894.html.

amount is reached in mid-2013.[11] The fund would pay for damage to natural resources, state and local response costs, and individual economic losses (whether in the form of civil judgments or settlements with the fund), but it will not be used to cover any fines and penalties incurred by BP. The right of individuals to seek compensation through the courts instead of the Fund remains open.

The flow of oil was finally arrested on July 15, 2010, 87 days after the blowout.[12] By then more than 200 million gallons of oil had poured into the Gulf, which was nearly 20 times more than the *Exxon Valdez* emptied into Prince William Sound (11 million gallons) and 60 million gallons more than the *Ixtoc I* disaster in the Bay of Campeche (140 million gallons).[13] The environmental, economic, and social impacts of the spill are staggering, and long-term effects will be unknown for much time to come.[14]

B. Some Perspective on the Continuing Risk

Deepwater Horizon is by no means the first disaster of its kind. There have been similar accidents at home and abroad, many more than commonly realized, and it seems exaggerated to regard them as freakish, random events.[15] For instance, while the BP spill was in progress, two

11. For details on the financing of the BP claims fund, *see BP Claims: About the $20 Billion Dollar BP Claims Fund*, www.thebpclaimsfund.com (last visited July 21, 2011).

12. *See* John M. Broder, *Report Slams Administration for Underestimating Gulf Spill*, N.Y. TIMES, Oct. 6, 2010, http://www.nytimes.com/2010/10/07/science/earth/07spill.html.

13. *See* Linda Rosenthal & Carol Raper, *Amoco Cadiz and Limitation of Liability for Oil Spill Pollution: Domestic and International Solutions*, 5 VA. J. NATURAL RES. LAW 259 (1985); Victor Goldberg, *Recovery For Endonnmic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1 (1994); Shiela Toomey, *Spills: A Matter of Liability*, ANCHORAGE DAILY NEWS, May 7, 1989, http://www.adn.com/evos/stories/EV332.html.

14. For the estimated impact on shrimp, crabs, oysters, and finfish in the Gulf, see John W. Tunnell, Jr., *An Expert Opinion of When the Gulf of Mexico Will Return to Pre-Spill Harvest Status Following the BP Deepwater Horizon MC 252 Oil Spill*, GULF COAST CLAIMS FACILITY (Jan. 31, 2011), *available at* http://graphics8.nytimes.com/packages/pdf/national/20110131-GCCF-Final-Report.pdf.

15. *See, e.g.*, Will Wright, *The Worst Major Oil Spills in History*, ASSOCIATED CONTENT, Nov. 25, 2007, http://www.associatedcontent.com/article/454782/the_worst_major_oil_spills_in_history.html; *List of Oil Spills*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_oil_spills (last visited June 30, 2011) (providing a reverse chronological list of over 100 worldwide oil spills); Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1 (1994) (citing 189 "significant" oil tanker spills between 1970 and 1987 based upon research by the firm of Temple, Barker & Sloane). At the time of the Deepwater Horizon blowout, five major spills had already occurred during the calendar year. *See id.* (including Utah, Texas, Singapore, Nigeria, and Australia Great Keppel Island). Moreover, spills appear common in Louisiana given that thirteen occurred between 2004 and 2006, due to the

more major spills occurred in distant parts of the world—one in the Red Sea and another off the coast of China.[16] According to the Maritime Accident Casebook, there have been, not counting Deepwater Horizon, 44 notable blowout events world-wide since 1955.[17] The mean interval between the blowouts was about 15 months.[18] Furthermore, over the past 46 years in the Gulf of Mexico, there have been 11 blowouts (counting Deepwater Horizon), or one every 4.2 years.[19] According to a report by the U.S. Minerals Management Service, the rate may be significantly higher.[20] Compiled in 2000, the report listed 151 well blowouts for the previous 25 years, a rate of about one every two months.[21] One quarter of these led to oil spills.[22] Whichever failure rate is nearer to the truth, the figures clearly show that blowouts and spills are not rare events.[23] The assertion that such events are so remote and unlikely that they can be discounted from the decision to drill does not sufficiently take into account the proven history of the risk.[24] The presidential commission

effects of Hurricanes Katrina and Ivan, and one occurred in 2008 in the Mississippi river at New Orleans. *See id.*

16. *See* Cara Anna, *China Oil Spill Doubles in Size, Called "Severe Threat,"* ASSOCIATED PRESS, July 21, 2010, *available at* http://www.msnbc.msn.com/id/38337393/ns/world_news-world_environment; *Egypt Oil Spill Threatens Red Sea Marine Life*, AFP, June 20, 2010, *available at* http://news.discovery.com/earth/egypt-oil-spill.html. Since 1969, oil operations in Nigeria's Niger Delta have annually "spilled as much oil as the 1989 Exxon Valdez." Amy Westervelt, *Oil Spills Around the World: An Exxon Valdez Every Year*, THE FASTER TIMES, May 17, 2010, http://thefastertimes.com/earthmatters/2010/05/17/yes-men-draw-attention-to-the-rest-of-the-worlds-oil-spills/.

17. *See Delving Into Deepwater—Before The Blow-Out*, MARITIME ACCIDENT CASEBOOK (July 9, 2010), http://maritimeaccident.org/2010/07/delving-into-deepwater-before-the-blow-out.

18. *See id.*

19. *See id.*

20. *See* Jason DeParle, *Leading the Way into Deep Water*, N.Y. TIMES, Aug. 8, 2010, at A1.

21. *See id.*

22. *See id.*

23. For example, in September 2008 BP reportedly suffered a blowout that caused a large gas leak in Azerbaijan. *See* Andy Rowell, *Another $20 Billion Bill for BP*, THE PRICE OF OIL (Dec. 16, 2010), http://priceofoil.org/2010/12/16/another-20-billion-bill-for-bp/. Only a few months before the Deepwater Horizon incident, Transocean had a similar emergency in the North Sea in which the blowout preventer was successfully activated and averted a disaster. *See* Robbie Brown, *Another Rig's Close Call Altered Rules, Papers Say*, N.Y. TIMES, Aug. 17, 2010, at A19.

24. According to newspaper reports, the Director of the Minerals Management Service informed "associates that modern engineering made spills all but impossible and harmless if they did occur." DeParle, *supra* note 20. For a perspective on attitudes towards risk management, it is useful to compare standards in the UK. According to The Maritime Advocate Online, UK offshore installations should demonstrate by design that their "integrity is not threatened by credible events on the installation less than once per 1000 years." William Campbell, *Blowouts Not Such Rare Events*, THE MARITIME ADVOCATE ONLINE, Issue 444, July 12, 2010. A "rare event" under this analysis

investigating the causes of the Gulf spill recently concluded that without major changes another accident is likely to occur. In the words of the commission:

> The blowout was not the product of a series of aberrational decisions made by rogue industry or government officials that could not have been anticipated or expected to occur again. . . . Rather, the root causes are systemic and, absent significant reform in both industry practices and government policies, might well recur.[25]

C. The Purposes and Plan of this Paper

This paper is a series of reflections inspired by a devastating event and the worldwide problem it represents. Oil spills have occurred virtually everywhere around the globe, and they pose challenges to the environmental, administrative, regulatory, maritime, and tort laws of legal systems. In this paper, I narrowly focus upon only one of those challenges: whether the extensive economic losses suffered by those in the general population and surrounding economy can be recovered against the polluter. This question will be explored and answered primarily in terms of American law, together with the insights afforded by comparative law.

Oil spills afford a critical vantage point from which to observe the evolution of liability rules and a shift of attitude toward the recoverability of economic loss. Spills are excellent engines of pure economic loss. They cause relatively little damage to private property or to human life. Instead, they devastate something *un-owned*—natural resources, wildlife, the shores, the environment—and that devastation causes severe disruption to the surrounding co-dependent economy. The resulting loss to individuals and businesses is a massive economic ricochet. Consequently, it is no surprise to learn, for example, that 99% of the claims filed with the Trust Administrator in the BP spill thus far are for lost earnings and profits while only 1% are for property damage.[26] There is no scarier example of the dreaded floodgates which inspired and informed the common law's economic loss rule.[27] Instrumentally and historically, the effect of this rule is to protect the oil and shipping industry from the secondary and tertiary costs of oil spills. The rule

considers risks between 1 in 100 and 1 in 1000 years to be tolerable, "depending upon the event and its potential consequences." *Id.*

25. John M. Broder, *Panel Points to Errors in Gulf Spill*, N.Y. TIMES, Jan. 6, 2011, at A14 (quoting the commission).

26. *See infra* note 42 (discussing eligibility criteria for claims); *see also infra* note 49 (examining classification of claims).

27. For discussion of the concept, *see infra* Part I.

shielded the industry from nearly all of the ricochet losses that arose.[28] These losses were not unrecoverable because they were unforeseeable. Rather, they were unrecoverable because the scope of liability appeared to be overwhelming and limitless: the ultimate example of the nightmare scenario. The fear was also of disproportionate liability arising from minor blameworthiness.

The career of the exclusionary rule in this sector raises an important issue about the relation between liability rules and prevention. Legal theory suggests that when liability rules are narrow in scope, categorically exclude certain forms of loss, and permit the spiller to perfect various defenses, the spiller may not have sufficient incentives to invest in prevention and safety.[29] As a result, society may then suffer a net economic loss. On the other hand, if liability rules are overly broad and expose firms to excessive costs from third parties, firms may over-invest in prevention and pass on the costs to consumers, or firms may simply leave the industry. Achieving the correct balance between liability and safety becomes even more important for dangerous activities involving extraordinary risks. The stringent provisions of the Oil Pollution Act of 1990 (OPA)[30]—strict liability, channeled responsibility, narrowed defenses, and recoverability of economic loss—clearly testify that exploration and transportation of oil are high risk activities that should pay their own way irrespective of fault.[31] The OPA, in my view, recognizes a new "abnormally dangerous activity" and imposes liability far more onerous than that applied to other ultra-hazardous activities in the United States.[32] The new liability expressly covers the costs of

28. Fishermen, crabbers, oystermen and shrimpers were treated as exceptions under the *Robins* and *Oppen* jurisprudence. *See infra* notes 50-56 and accompanying text; *infra* Part II.1. With that exception aside, the losses of riggers and roustabouts, companies idled by the moratorium, tour operators, boat charterers, marina operators, tackle shops, hotels and resorts, homeowners, real estate developers, seafood processors and restaurants, and the employees in all these businesses were all unrecoverable. *See id.* Of course, all further financial repercussions were unrecoverable as well. *See id*.

29. *See* Bobbie Lively-Diebold et al., *Liability Incentives for Reducing the Costs of Oil Spills*, INT'L OIL SPILL CONFERENCE, at 2, *available at* http://www.iosc.org/papers_posters/01139.pdf.

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

31. Commentators have observed that "OPA embodies the principle that the 'polluter pays' irrespective of fault." Robert Force, Martin Davies & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 899 (2011).

32. *See* RESTATEMENT (SECOND) OF TORTS § 519 (1977) (discussing general principle); RESTATEMENT (SECOND) OF TORTS § 520 (1977) (determining whether an activity is abnormally dangerous); RESTATEMENT (THIRD) OF TORTS § 20(b) (2010) (defining an activity to be abnormally dangerous if it is foreseeable, involves a high risk of harm even when reasonable care is exercised, and is an uncommon activity). China's Tort Liability Law contains detailed strict liability provisions for environmental pollution and for ultra-hazardous activities. *See* Qinquan Zeren Fa **[**Tort Liability Law]

diverted governmental services, diminished governmental revenues, and the lost earnings and profits of private individuals and businesses.[33] In a major departure from past practice, the OPA opens private remedies to an unrestricted number of individuals and governmental entities.[34] This shift of paradigm suggests that in Congress's view the exclusionary rule did not provide the deterrence and safety that were needed.[35]

This is far from saying, however, that the relation between risk and liability rules under the OPA is actually well-balanced and consistent with the risks. Congress set a cap on civil liability at $75 million, a figure so paltry in relation to the potential costs of oil spills that, arguably, it would produce less safety than the old exclusionary rule.[36] A cap that low might even be considered an overt subsidy in favor of the oil

(promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. VIII, arts. 65-68, *translated at* http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html; *id.* at ch. IX, arts. 69-77. The technique of bringing this liability directly into the law is a notable step. Rather than drafting a *lex specialis* like OPA focused only on oil pollution, the Chinese legislature took a broader, more inclusive approach. For example, the introductory article to the chapter on liability for ultra-hazardous activity sets forth the principle of liability in a general clause. *See id.* at ch. IX, art. 69 (stating "[o]ne who causes any harm to another person while engaging in any ultrahazardous operation shall assume the tort liability"). The implication is clear that the list of ultra-hazardous activities is not closed and that the judge is authorized to recognize others by analogy. This provision is followed by particular rules for four areas—nuclear facilities; civil aircraft; inflammable, toxic and radioactive materials; and aerial, high pressure, or underground excavation activities. The deepwater drilling, which gave rise to the BP spill, would thus appear to qualify as an ultra-hazardous activity. *See id.* at ch. IX, art. 69; *id.* at ch. IX, art. 73 (providing that an operator assumes liability if underground excavation or high pressure activity harms another). At the same time, the spill itself would arguably qualify as environmental pollution. *See id.* at ch. VIII, art. 65 ("Where any harm is caused by environmental pollution, the polluter shall assume tort liability.").

33. Under the Second Restatement of Torts, liability for abnormally dangerous activities was restricted to "harm to the person, land or chattels of others" and did not cover purely financial harm. RESTATEMENT (SECOND) OF TORTS § 520(a) (1977).

34. *See* 1 JOSHUA FORCE & ROBERT FORCE, MARINE POLLUTION 12 (Tulane Maritime Law Center 2009) (on file with author). The OPA provides that damages to profits and earnings "shall be recoverable by any claimant." 33 U.S.C. § 2702(b)(E) (2006). Prior legislation, such as the federal Water Pollution Control Act, provided for government cleanup and restoration costs but did not grant private actions to victims. *See* 33 U.S.C. §§ 1251-1387 (2006).

35. *See supra* note 30. As to the oil pollution laws of the twenty-four coastal states, *see* 3 ERASTUS CORNELIUS BENEDICT, ET AL., BENEDICT ON ADMIRALTY chap. IX, ¶ 113 (7th ed. 1985). There is also an international convention, but the U.S. is not a signatory. *See* International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 23 I.L.M. 177 [hereinafter the CLC].

36. *See* 33 U.S.C. § 2704(a)(3) (2006). Even under the fishermen exception to *Robins*, Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), the amount of recoverable loss would likely be greater than $75 million.

industry.[37] A striking problem arises, however, when the liability cap is removed entirely, for then economic liability may seem to go too far in the other direction. To paraphrase Cardozo, it may then be feared that liability has been opened "in an indeterminate amount for an indeterminate time [and] to an indeterminate" number of claimants.[38] Whether the OPA actually moves this far when liability is uncapped, or is restrained by some other principle or internal check, is perhaps the most vital issue in this paper. In my view, the answer depends greatly upon the scope and meaning attributed to the OPA, particularly the principle of causation it has adopted. Because this will be of great concern in the courts, this paper devotes considerable attention to the reading and explication of the OPA.

As just mentioned, the economic loss rule is technically inapplicable to the BP oil spill. The rule was decisively preempted by the OPA so that in principle purely financial loss may be recovered. In my view, however, preemption itself is neither the end of the story nor any indication of the complexity of the future. I would suggest there are a number of difficult and challenging problems ahead. On the one hand, whether a doctrine of this nature can be so easily suppressed in a judicial culture so accustomed to its presence is not clear. It may easily reappear in a different guise. As an old proverb on human nature declares *chassez le naturel, il revient au galop*![39] In my view, there is already evidence that this is occurring in the emerging jurisprudence under the OPA. On the other hand, whether there exist any internal limits to this liability or what, if anything, replaces the bright-line that the exclusionary rule once provided remains unclear. Liability cannot be extended indefinitely. There is a legitimate need to find a reasonable stopping point, but the basis for drawing the line is far from self-evident.

This paper considers the merits of two contrasting readings of the statute. One reading is based on proximate cause, while the other reading is based on a pure cause-in-fact approach. The first reading would authorize judges to reach restrictive causal outcomes through recourse to an *implied* proximate cause limitation, or through the introduction of some other exigent causal requirements which may exclude ricochet and relational economic losses to some degree. Such causation control may be qualified as one of the recognized methods of

37. *See* Gerhard Wagner, *Tort Liability and Insurance: German Report*, *in* TORT LAW AND LIABILITY INSURANCE 99 (Gerhard Wagner ed., 2005).

38. Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931).

39. Sometimes loosely translated as "What is bred in the bone will come out in the flesh," but it also suggests that whenever you suppress a natural instinct, it returns at first opportunity.

containing pure economic loss in comparative law.[40] The second reading (cause-in-fact) rests upon the literal provisions and schematic arguments, and it finds the terminus of liability in the fixed monetary caps of the statute (where applicable) and policy judgments as to the intended scope of protection offered by the statute. The latter approach, in my view, is more defensible in terms of the literal language and schematic plan of the statute. Of course, neither approach limits recoverability with a bright line, nor, given the malleability of concepts, is one necessarily more restrictive than the other. Whichever is adopted, the reach of the OPA is untested and still unpredictable.

At the same time, we should watch closely the actions of the Trust Fund administrator, who is thought to be free to devise and develop his own eligibility criteria for the compensation of victims. His actions and interpretations of the law are in direct competition with the courts and should ultimately depend upon the same statutory analysis of the OPA.[41] Thus far, however, the administrator has not acknowledged that the OPA is his guide and has not revealed his methodology or his formulas.[42]

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40. The method is characteristically used by courts in Austria, Finland, and Sweden. *See The Case Studies*, *in* PURE ECONOMIC LOSS IN EUROPE 171, 206-07 (Mauro Bussani & Vernon Valentine Palmer eds., 2003). Also, strict liability statutes are vulnerable to dogmatic causal cutoffs, and the limiting effect may rival the exclusionary rule. A classic illustration of this technique is the case of *Taira Lynn Marine Ltd. No. 5, LLC v. Jay Seafoods, Inc.*, 444 F.3d 371 (5th Cir. 2006) (discussed *infra* notes 138-143 and accompanying text).

41. Will he use OPA liability as his "floor"? How will he construe the statute's language on causation and what will he consider the cut-off point? Will he be guided by the traditional exclusionary rule found in the law of the neighboring states and in general maritime law?

42. The Gulf Coast Claims Facility published certain "eligibility criteria" on its website that seem to rely on concepts of proximity and remoteness:

> Claimants with losses that are closely tied to injury to real or personal property, or natural resources, resulting from the Spill-such as fishermen whose fishing grounds are closed and hotels located on oiled beaches-will receive an emergency payment for the full amount of the claimant's losses for either one month or up to six months where the claimant can establish that six months of loss will be incurred. Claimants have the choice to file for a one-month (or multiple up to six months) payment.
>
> Economic losses which are more remote, or occurred at a location more distant from the Spill, are less likely to be fully compensated. In determining eligibility, and how much compensation is appropriate for such eligible claims, the GCCF will take into account geographic proximity to the Spill, the nature of the claimant's job or business, and the extent to which the claimant's job or business is dependent upon injured property or natural resources. Each of these factors will be weighed in the initial assessment of a claim.
>
> Geographic proximity will primarily be based on whether the claimant's loss occurred in a community or municipality adjacent to a beach, shoreline, marsh, bay or tributary of the Gulf where oil or oil residues came ashore or appeared in the waters. Determinations regarding proximity focus on where the claimant's

In reflecting on all of these matters, I divide the discussion into five parts. The first considers the origins of the exclusionary rule in American tort law, its different manifestations in the cases, and its current place and standing. The second part reviews some leading cases from the oil spill jurisprudence and focuses upon the role the exclusionary rule has played, the internal debate over granting exceptions, and the problems of administration. The third part looks closely at the revolutionary OPA and presents a statutory reading or explanation of the key provisions relevant to the recovery of pure economic loss. The fourth analyzes in greater depth the operation of causal responsibility under the OPA's strict liability standard, and presents alternative interpretations of the proper cut-off point. Finally, the fifth part considers the relevance of these interpretations to the administration of the Trust Fund.

I first turn to the origin and development of the economic loss rule in the United States.

II. THE ECONOMIC LOSS RULE IN AMERICAN TORT LAW

The economic loss rule is neither a universally recognized nor ancient doctrine in the comparative law of tort. It found a firm footing in the German and German-influenced civilian systems on the Continent only in the late 19th century. By great coincidence (if not by covert borrowing), the economic loss rule arose about the same time in the English and later the English-influenced systems of the common law.[43] It is to this day not generally recognized in the French and French-inspired systems of private law, and this difference was apparently of some significance in the *Amoco-Cadiz* litigation where French plaintiffs enjoyed generally wider recoveries of pure economic loss.[44]

> work or business activity takes place (or normally takes place)—not an individual's or business's mailing address.
>
> The nature of the claimant's business will be evaluated based on the information provided by the claimant, such as whether the claimant is in the seafood processing industry, a supplier of commercial fishermen, a supplier of recreational users of the waters of the Gulf, or a tourist-oriented business such as a motel.

Understanding the GCCF's Eligibility Criteria for Emergency Advance Payments August 23, 2010, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/proto_2 (last visited June 28, 2011).

43. *See* James Gordley, *The Rule Against Recovery in Negligence for Pure Economic Loss: An Historical Accident?*, *in* PURE ECONOMIC LOSS IN EUROPE 25, 51 n.106 (Mauro Bussani & Vernon Valentine Palmer eds., 2003).

44. *See In re* Oil Spill by The Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992). In addition, a Paris appeals court recently upheld liability against the oil company Total for environmental damage related to the 1999 Erika tanker spill. *See* Matthew Saltmarsh,

In the common law world, this concept is identified by the phrase "pure economic loss" (with accent upon the word *pure*), but it has other names as well. It may be called "stand-alone economic loss" or sometimes the "general economic loss no liability doctrine."[45] In this paper, the concept will be freely referred to as the economic loss rule or the exclusionary rule. Whatever the label, it refers to pecuniary loss without antecedent harm to the claimant's person or property. It is the kind of loss that strikes the wallet and nothing else. When economic loss results after physical injury to person or property, however, it is then not considered "pure" or stand-alone, but may be recovered as consequential or parasitic damage.[46] The formal difference between *pure* and *parasitic* loss produces a bright line, which shields the tortfeasor in case of pure loss. A study of the approaches in Europe shows that courts and legislatures have used four principal means of keeping this sort of damage under control: "flexible causal determinations" (characteristic of liberal regimes); "preliminary judicial screening using a 'duty of care' analysis" (characteristic of English law); exclusionary and dogmatic causation requirements which bar "third party" loss (characteristic of some conservative regimes); and, enactment of "a scheme of absolute rights that, by deliberate omission, leaves this interest unprotected" (characteristic of German law).[47] The economic loss rule embraced by

French Court Upholds Verdict in Oil Spill, N.Y. TIMES, Mar. 30, 2010, http://www.nytimes.com/2010/03/31/business/energy-environment/31total.html.

45. *See* Mauro Bussani & Vernon Valentine Palmer, *The Notion of Pure Economic Loss and Its Setting*, *in* PURE ECONOMIC LOSS IN EUROPE 3, 3-24 (Mauro Bussani & Vernon Valentine Palmer eds., 2003); Gary T. Schwartz, *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, *in* CIVIL LIABILITY FOR PURE ECONOMIC LOSS 103, 103-130 (Efstathios K. Banakas ed., 1996); Spartan Steel and Alloys Ltd. v. Martin and Co. Ltd., [1973] Q.B. 27 at 39 (Eng.) (wherein Lord Denning noted "it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage").

46. This is at least the theory, but in fact there may be extreme hesitancy to recognize trivial physical losses as a pathway to recover predominantly economic loss. A number of the decisions studied in this paper reflect this difficulty.

47. Mauro Bussani & Vernon Valentine Palmer, *General Conclusions of the Study*, *in* PURE ECONOMIC LOSS IN EUROPE 530-31 (Mauro Bussani & Vernon Valentine Palmer eds., 2003). Whether China's recently adopted Tort Law actually treats pure economic loss as a protected interest is a vital question. It is not mentioned as one of the protected "civil rights and interests" explicitly catalogued by Article 2 of the Law. Qinquan Zeren Fa [Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. I, art. 2, *translated at* http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html. Article 2 provides that "[t]hose who infringe upon civil rights and interests shall be subject to the tort liability according to this Law." *Id.* The term "civil rights and interests" includes "the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right of discovery, equities, right of succession, and other personal and property rights and interests." *Id.* Obviously,

American admiralty courts is recognizable in terms of the conservative approaches. It leaves the interest just as effectively unprotected as under German legislation, while rationalizing the result as a necessary limitation upon proximate causation.

The shield provided by the rule is strikingly effective in connection with oil spills. There the overwhelming harm is not to human lives and private property as such but to "unowned resources," viz. the high seas, territorial waters, wildlife, and marine and coastal environment, all of which lie in the public domain.[48] Since these resources are publicly owned, a private claimant is typically unable to recover on the basis of direct property loss, or even able to attach his economic losses to any physical loss, even parasitically speaking.[49] The public resources are exogenous to the private property law system and therefore the repercussion consists mostly of pure economic loss. For example, marina owners and seafood processors who depend directly upon these public resources for their livelihood are in theory barred from recovery. Their equipment or vessels would not be damaged by the contamination of the water, or, if so, only slightly. Nor were they in a position to enter a contract with the "owner" of the resources and to protect against their economic loss. Basically, no remedy is available other than a tort or statutory action.

A related reason for the shield's effectiveness is that the oil spill will have occurred within the federal admiralty jurisdiction where the *Robins* doctrine has long dominated the stage. *Robins Dry Dock v. Flint*[50] was decided by the Supreme Court in 1927. The owner of a boat

this list of 18 protected interests is not phrased as a closed list because it ends with a catchall; yet, the fact that pure economic loss was not specifically left off the list may prove to be important. For example, the liability provisions on environmental pollution and ultra-hazardous activities repeatedly use the phrase "[w]here any harm is caused." *Id.* at ch. VIII, arts. 65 and 68; *id.* at ch. IX, arts. 73-76. However, we cannot be sure that "any harm" includes "pure economic loss" as not an explicitly protected right and interest. *See id.* at ch. I, art. 2.

48. The Louisiana Civil Code declares that running waters, water bottoms of natural navigable water bodies, the territorial sea, and the seashore are public things. *See* LA. CIV. CODE art. 450 (2010). All public things are owned by the state or its political subdivisions. *See id.* In contrast, the high seas are considered "common things" that "may not be owned by anyone." LA. CIV. CODE art. 449 (2010).

49. This is borne out by the five-state claims experience of the BP oil spill fund. For example, of the nearly $1.5 billion in funds thus far distributed to claimants in Louisiana, 99% was for lost earnings and profits ($1,459,493,030.39). *See Louisiana Program Statistics*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/GCCF_Louisiana_Status_Report.pdf (last visited July 5, 2011). All property loss, removal and clean-up costs, physical injury, and loss of subsistence use of natural resources accounted for less than 1% of the total payments. *See id*. The statistics for Texas, Mississippi, Alabama and Florida reflect a comparable experience.

50. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

under time charter put it into dry dock for inspection and repair, and while there the defendant, Dry Dock, negligently damaged the boat's propeller causing delay until a new propeller could be installed. On account of the delay, the plaintiff, who was the time charterer of the boat, lost productive use of the boat and claimed his losses from the Dry Dock. The plaintiffs' pleadings and cause of action were framed as a "cause of contract and damage," and the plaintiffs contended they were intended third party beneficiaries of the repair contract with the defendant.[51] The Court rejected the assertion that the plaintiffs were an intended beneficiary.[52] Subsequently, the Court proceeded beyond the pleadings to examine whether plaintiffs had any action in tort against defendant, but the Court found none.[53] Justice Holmes asked "whether the [plaintiffs] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter."[54] He held that the plaintiffs, as a time charterer, had no protected property interest in the boat, and suffered no property damage. As a result, the plaintiffs' only loss was due to delay, and that loss arose solely because of a contractual violation between others:

> [T]hat delay would be a wrong to no one except for the [defendant's] contract with the owners. . . . [N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.[55]

In short, Holmes rejected the plaintiffs' claim as a third party beneficiary, and the claim of interference with contractual rights because the defendant had not done so intentionally.

Robins is a venerable doctrine, but it was not an original and characteristic feature of admiralty law. Historically, it seems that Justice Holmes absorbed the rule from a preexisting principle of the common

51. *Id.* at 307.
52. *Id.*
53. *See id.* at 308-09.
54. *Id.* at 308.
55. *Id.* at 308-09. Holmes mentioned the case in a letter to Pollock:

> I have just finished a fairly interesting case in which a time charterer of a vessel tries to get damages from a dry dock company for negligent delay in repairs per quod the charterer lost a fortnight of valuable time. I have no doubt that he can't recover, but I have not yet heard from my brethren. Perhaps I should explain that there was no demise of the ship, that the owner remained in possession and put the vessel into dry dock without reference to the charter, having a right to do so by the terms of the instrument.

David Gruning, *The United States*, *in* PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW 134, 138 (Mauro Bussani & Vernon Valentine Palmer eds., 2008).

law.[56] After becoming a landmark of admiralty, however, *Robins* exerted its own influence on the common law of torts. The prestige of Holmes and the Supreme Court gave it broad influence, as witnessed by its incorporation in the Restatement (Second) of Torts. The Restaters read *Robins* narrowly as a principle that excluded the recovery of economic loss for unintentional interference with contract.[57] The reason was Holmes's emphasis upon the fact that the defendant, Dry Dock, "knew nothing" of the existence of the time charter and therefore any interference with plaintiff's contract was unintentional. The original "contractual interference" rationale should not be lost sight of because, subsequently, that rationale was too confining. Neither *Robins* nor the economic loss rule it supposedly embodies has ever been restricted to narrow claims of contractual interference. Rather, the decision has been used to block recoveries in diverse situations where there is not necessarily a contractual link between the parties, as when defendant's negligence cut off the electrical power to a printing plant, shutting it down. The plant owner failed to recover the profits lost during the interruption of power.[58] The rationale of such rulings is not unintentional interference with contract rights, but in reality the fear of unduly open-ended liability, together with the concern that the defendant's liability may be disproportionately large in relation to his negligence.[59] In a

56. Some of the decisions Holmes cited, such as *Savings Bank v. Ward*, 100 U.S. 195 (1879), revealed the older American and English common law authorities barring recovery. Interestingly, Holmes did not cite the famous case of *Cattle v. Stockton Waterworks Co*., [1875] 10 L.R.Q.B. 453 (Eng.), which James Shephard considers the origin of the pure economic loss rule and identical to the fact pattern of *Robins*. *See* James W. Shephard, Comment, *The Murky Waters of Robins Dry Dock: A Comparative Analysis of Economic Loss in Maritime Law*, 60 TUL. L. REV. 995, 997-999 (1986). Holmes specifically approved of a statement in *Elliott Steam Tug Co. v. Shipping Controller*, [1922] 1 K.B. 127 (Eng.), that "the common law rightly or wrongly does not recognize [the charterer in collision cases] as able to sue for such an injury to his merely contractual rights." *Id.* at 140.

57. RESTATEMENT (SECOND) OF TORTS § 766C (1979) stated:

> "One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently
>
> (a) causing a third person not to perform a contract with the other, or
>
> (b) interfering with the other's performance of his contract or making the performance more expensive or burdensome, or
>
> (c) interfering with the other's acquiring a contractual relation with a third party.

58. *E.g.,* Byrd v. English, 43 S.E. 419 (Ga. 1903); *cf.* Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, 929 N.E.2d 722 (Ind. 2010) (adopting the Economic Loss rule, the Indiana Supreme Court refused an action for economic loss in tort because plaintiff and all defendants were connected by a chain of contracts).

59. See *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct. App. 1946), in which defendant's negligence caused a fire that closed down businesses in the vicinity with the result that plaintiff lost wages. Plaintiff did not assert that the defendant's negligence interfered with his contract with his employer. *Id.* at 201. Rejecting the

recent study, David Gruning confirms that *Robins* has been relied upon in a rather wide variety of scenarios outside of the admiralty sphere. He concludes, "[t]he [*Robins*] opinion now stands for the proposition that pure economic loss is generally not recoverable in tort and the case has frequently been cited in that connection by numerous state and federal courts."[60] Indeed, *Robins* has been repeatedly applied to oil spill disasters in which claimants never based their claims upon contractual interference. As Judge Wisdom once noted, to apply *Robins* in such circumstances may have departed from the Restaters' intent.[61] Nevertheless, *Robins* has always had wider influence and scope than the "contractual interference" rule enshrined in the Restatement.

American tort commentators generally (perhaps the admiralty commentators are an exception) appear to be divided as to whether there actually exists a hard and fast economic loss rule or whether it is even a single rule.[62] They have disagreed whether it is a series of rules operating in specialized contexts, or perhaps only a general legal policy disfavoring this form of loss. Gary Schwartz, for example, surveyed a wide variety of contexts and spoke guardedly of a "supposed" economic loss rule in the United States.[63] He was reluctant to call it a "rule" for various reasons. He noted that some leading opinions reject the rule, while other cases deny recovery without even acknowledging its

claim, the court relied on *Robins Dry Dock* and expressed a fear of an unacceptably large number of claims against the defendant. *Id.* at 202-03.

60. David Gruning, *The United States*, *in* PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW 134, 138 (Vernon V. Palmer & Mauro Bussani eds., 2009). *See also* Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 11 (2011) (noting federal courts apply *Robins* to the great majority of relational loss cases, and most state courts have embraced the bright-line rule).

61. *See infra* notes 62-63 and accompanying text. Judging recent efforts to draft the modern rule for the Restatement (Third) of Torts, the doctrine would not be tied to the context of contractual interference. *See* RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS § 8(1) (Preliminary Draft No. 2, 2006) ("An actor is not subject to liability under the negligence, strict liability, and products liability actions . . . for solely pecuniary harm resulting from the actor's unreasonable conduct, abnormally dangerous activity, or defective product."). The work of this committee, however, now seems to be on hold, if not abandoned.

62. Commenting on preliminary efforts of the Restatement (Third) of Torts to codify a rule on economic loss, Oscar Gray remarks: "I had not previously thought that there was any such thing as a single 'economic loss rule.' Instead I had thought that there was a constellation of somewhat similar doctrines that tend to limit liability. . . ." Oscar S. Gray, *Some thoughts on "The Economic Loss rule" and Apportionment*, 48 ARIZ. L. REV. 897, 898 (2006).

63. Gary Schwartz, *American Tort Law and the (Supposed) Economic Loss Rule*, *in* PURE ECONOMIC LOSS IN EUROPE 94, 94-119 (Mauro Bussani & Vernon V. Palmer, eds., 2003). Schwartz's survey included, *inter alia*, cases of negligently caused gambling losses, health payments, hospital charges, loss of employment prospects, spoliation of evidence, and the expenses of adoptive parents.

existence.[64] Other cases seem to ignore the question altogether except when certain policy concerns are relevant.[65] Schwartz concluded that *if* the economic loss rule exists, there are really two distinct rules and each addresses a different concern. First, the rule emerged in the field of products liability where it prevented the extension of strict liability actions in tort to recover the consumer's pecuniary losses where a defective product caused injury only to itself. The consensus of the judges was that contract law would be the preferred framework for handling such claims. Second, the rule emerged in tort cases in which a claim based on negligence or strict-liability raised the prospect of an "unduly open-ended or disproportionate" liability.[66] Here, the prospect was of too numerous plaintiffs and vast pecuniary losses.

Thus, to Schwartz, the "rule" basically existed in two principal contexts. With great respect, however, he altogether neglected the context of maritime law and oil spill jurisprudence. Indeed, he made no direct mention of *Robins*, its progeny, or its iconic status in admiralty law. In admiralty law, it functions as a stern exclusionary rule—an exception to the general principle that one whose unreasonable conduct caused foreseeable harm to another is liable for that harm.[67]

III. A SHORT REVIEW OF THE OIL SPILL JURISPRUDENCE

In previous spills within American waters, the *Robins* doctrine played a dominant role in placing limits on liability. A cursory look at four leading cases may help us understand the resiliency of the doctrine, the creation of an exception for commercial fishermen, and the internal debate about foreseeability.

A. Oppen

In cases growing out of the Santa Barbara oil spill of 1969, the Ninth Circuit denied relief to various classes of claimants for pure economic loss but recognized a special exception for commercial fishermen.[68] The court granted the exception for "pecuniary loss of a particular and special nature, limited to the class of commercial fishermen."[69] The court apparently regarded fishermen as "favorites of admiralty," noting they had been allowed to recover in prior cases for

64. *Id.* at 118-19.
65. *Id.*
66. *Id*. at 108.
67. Perry, *supra* note 60, at 5 (citing Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006)).
68. Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).
69. *Id.* at 570.

their economic losses.[70] At the same time, however, the court strongly reaffirmed *Robins*, both by the general denial of all other claims and by the very narrowness of the fishermen exception. Importantly, the court did not really carve out this limited exception for fishermen on the ground that their losses were more foreseeable than anyone else's. It is true that defendants resisted the fishermen's claims with the argument that such losses were unforeseeable, and the court responded to the argument by stating that even schoolchildren understand the dangers of pollution. To suppose defendants were unable to foresee plaintiffs' harm is "to suppose a degree of general ignorance of the effects of oil pollution not in accord with good sense."[71] But this was a rhetorical riposte rather than a substantive point. The economic harm to the non-fishermen plaintiffs in the case was equally foreseeable, even to schoolchildren, but somewhat beside the point. As a factual matter, the likelihood and extent of economic loss have a degree of foreseeability that does not differ qualitatively from the ability to foresee physical losses in a typical tort situation.[72] The non-fishermen claims were simply barred by the bright line of the economic loss rule, not because the court seriously believed their losses were unforeseeable.[73]

B. Testbank

A few years later, two ships in the Mississippi River Gulf Outlet near New Orleans collided, and twelve tons of PCP (pentachlorophenol) aboard the *Testbank* spilled into the outlet.[74] The Coast Guard ordered the closure of the outlet to navigation and closed all fishing, shrimping, and related activity within the outlet and 400 square miles of surrounding marsh and waterways. Lawsuits were filed on behalf of shipping interests, marina and boat rental operators, wholesale and retail seafood enterprises and restaurants, tackle and bait shops, and recreational fishermen. The claims were consolidated before a judge in the Eastern District of Louisiana who granted defendant's motion for summary judgment against all claims unaccompanied by physical damage to property, except in the case of commercial oystermen, shrimpers,

70. Carbone v. Ursich, 209 F.2d 178, 182 (9th Cir. 1953).
71. *Oppen*, 501 F.2d at 569.
72. Francesco Parisi, *Liability for Pure Financial Loss: Revisiting the Economic Foundations of a Legal Doctrine, in* PURE ECONOMIC LOSS IN EUROPE 75, 90-91 (Mauro Bussani and Vernon V. Palmer, eds., 2003) .
73. The exclusionary rule is an exception to the general principle that one whose unreasonable conduct caused foreseeable harm to another is liable for that harm. *See* Perry, *supra* note 60, at 5.
74. La. *ex rel*. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985).

crabbers, and fishermen who made use of the embargoed waters and suffered economic losses.

Sitting *en banc*, the Fifth Circuit affirmed the lower court's decision with five dissents. Writing the majority opinion, Judge Higginbotham relied upon the 1927 *Robins* decision as the basis for denying recovery to all claimants with the exception of commercial fishermen. He called *Robins* a remarkably resilient decision which represented a "pragmatic limitation" upon the tort doctrine of foreseeability.[75] Its value was to establish a predictable, bright-line rule that avoids case-by-case foreseeability determinations. In answer to the dissenters' position, he stated: "Those who would delete the requirement of physical damage have no rule or principle to substitute."[76] Interestingly, he made no attempt to justify the rule by invoking the specter of a floodgate of claims, though this fear was subliminally present in his reference to a "pragmatic" limitation, viz. a practical limit upon the traditional tort principles of foreseeability and remoteness. He argued to the dissenters that *Robins* should not be confined to situations called "interference with contract rights"[77] because its literal holding was not so restricted, and so plaintiffs who suffered no physical property damage were barred even if they recharacterized their action in public nuisance. The precedents in the wake of *Robins* have always emphasized "the nature of the interest harmed rather than the theory of recovery."[78] In sum, there was every indication in this reasoning that pure economic loss was an unprotected legal interest or a category of unrecoverable loss, even though it might be foreseeable.

Judge Wisdom's dissent argued that fundamental fairness justifies the cost of individualized determinations of foreseeability and causation. *Robins* does not really apply since it was originally a doctrine directed against claims for negligent interference with contractual rights.[79] Extending it to plaintiffs who have no connection to the tort via a contract or any contractual relationship to protect interferes with the conventional tort principles of foreseeability and proximate cause. In conformity with traditional principles, the fishermen may recover, but other plaintiffs who were just as equally affected, or perhaps more affected, should recover on the same basis. These plaintiffs would

75. *Id.* at 1023.
76. *Id.* at 1028.
77. *Id.* at 1023 n.3 (quoting Kaiser Aluminum v. Marshland Dredging Co., 455 F.2d 957, 958 (5th Cir. 1972)).
78. *Id.* at 1030.
79. *Robins* has been a leading illustration of RESTATEMENT (SECOND) OF TORTS § 766C: NEGLIGENT INTERFERENCE WITH CONTRACT OR PROSPECTIVE CONTRACTUAL RELATION (1979).

include shipping interests whose vessels were trapped or delayed by the closure of the outlet, seafood processors and wholesalers, marinas and boat charterers, and bait and tackle shops that suffered economic losses. The general test should be "whether their business of supplying a vital commodity or service to those engaged in the maritime industry has been interrupted by the collision, the closure, or the embargo."[80] Judge Wisdom conceded that there was still a practical need to draw the line somewhere. All would agree, he wrote, that seafood restaurants in New Orleans should not recover because of consumer concerns over contaminated food.[81]

C. Alvenus

The *Alvenus* grounded near Cameron, Louisiana in 1984 spilling 65,500 barrels of oil into the Gulf. The oil finally washed ashore on Galveston Island, about 70 miles west of the initial spill.[82] The trial court divided the 375 claimants into distinct classes.[83] Plaintiffs who suffered economic loss exclusively received no recovery, but plaintiffs who suffered direct physical impact damages with resultant economic loss recovered. There was a third class of plaintiffs, however, who claimed "tracking damages" by tourists and beachgoers to the rugs and carpets of their condos and apartments. They alleged this physical damage in hopes of recovering their overwhelmingly greater financial losses sustained in owning empty units they could not rent. The district court concluded that the tracking damage was unforeseeable, which meant that the financial losses could not be recovered parasitically.[84] In a curiously strained opinion, a panel of the Fifth Circuit affirmed this conclusion.[85] It noted that the 340-mile coastline from Louisiana to the Mexican border has only about 60 miles that is developed. To produce the tracking damages the oil had to wash ashore on a developed area where there were people and places to track it. According to the Court,

80. Judge Wisdom said it was difficult to differentiate fishermen from others who make their living from the sea: "*Oppen* allowed the fishermen to recover . . . but the opinion fails to draw a very convincing line between the rights of fishermen and the rights of others who draw their living from the water. Certainly the injury from the oil spill to others . . . such as boat charterers who are unable to put to sea, is as foreseeable and as direct as the injury to the fishermen. . . . Yet if those who make use of a 'resource of the sea' are entitled to recovery, then it seems *a fortiori* that those who make use of the sea itself in their business—a boat charterer, for example—would be entitled to recovery." *Testbank*, 752 F.2d at 1044 n.23 (Wisdom, J., dissenting).

81. *Id.* at 1050.

82. Lloyd's Leasing Ltd. v. Conoco, 868 F.2d 1447, 1448 (5th Cir. 1989).

83. *Id.*

84. *See In re* Lloyd's Leasing, Ltd., 697 F. Supp. 289, 291 (S.D. Tex. 1988).

85. *Testbank*, 752 F.2d at 1019.

appellants' experts had testified that tracking damages are a probable consequence of oil spills, but they did not address the probability that the oil would wash ashore in a developed area. True, the appellee could reasonably anticipate that the oil would wash ashore "somewhere," but had no reason to anticipate it would do so in a heavily populated area like Galveston.[86] This casuistry was apparently necessary in order to avoid a disagreeable outcome. To have granted recovery to the apartment and condo owners on a thin technicality of nominal physical loss would have exposed a glaring inequity in the three classes of claimants. The difficulty with recognizing parasitic loss lies in its empty technicality: "the magnitude of the economic loss so far overshadows that of the physical injury as to warrant the assertion that the general rule, barring recovery absent a physical injury, is but a formalism."[87] Parasitic loss apparently poses an acute embarrassment for the *Robins* rule because it forces the courts to use the very foreseeability principles which *Robins* suppresses, but offers no convincing basis to allow the plaintiff to recover his losses. Thus the denial of recovery must be achieved by an anomalous declaration that the physical damage was not foreseeable.

D. Exxon Valdez

A sea change in the approach to pure economic loss was produced by the *Exxon Valdez* disaster of 1989. The pouring of millions of gallons of oil into Prince William Sound in Alaska shocked the national conscience and single-handedly produced a shift of paradigm. At both the federal and state levels, statutes introduced strict liability for the responsible party, stringent cleanup requirements, liability caps, the loosening of the objection to the recovery of pure economic loss, and the establishment of compensation funds.

The tanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound due to an inebriated captain and a corporate employer who knew or should have known of his unfitness for command. The vessel spilled 11 million gallons of oil into the Sound.[88] Exxon spent over $2 billion in cleanup, $300 million on voluntary settlements (mostly with fishermen), and paid $900 million to the State of Alaska and the

86. In a concurring opinion, Judge Higginbotham thought that the spill did create a foreseeable risk of tracking, similar to the risk created by a person firing a gun into the air in a populated area. *See id.* at 1450 (Higginbotham, J., concurring). He nevertheless agreed with the result because *Testbank* would limit *which* parties can recover for foreseeable injuries. Under *Testbank* these plaintiffs were beyond the ambit of permissible plaintiffs.

87. Union Oil Co. v. Oppen, 501 F.2d 558, 567 (9th Cir. 1974) (citing Christopher Harvey, *Economic Losses and Negligence*, 50 CAN. BAR REV. 580, 585, 594-595 (1972)).

88. *In re* the Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).

United States to restore damaged natural resources.[89] In addition, over 200 lawsuits were brought in state and federal courts. Approximately 10,000 commercial fishermen recovered over $286 million in compensation for the value of their lost catch and native Alaskans recovered for loss of fishing resources.[90] The courts denied the claims of all others who suffered mere economic loss. These included providers of goods; boat repairers; seafood wholesalers; seafood processors; fishing lodges; employees of such firms, such as cannery workers, boat charterers, guides for sport fishing; and so forth.[91] There was the possibility that Alaska's strict liability statute defined recoverable damages broadly enough to include the pure economic losses of these claimants, but according to the court these provisions were preempted by maritime law and the *Robins* doctrine.

The Ninth Circuit reversed the district court on the issue of preemption. It held that the *Robins* doctrine was not an original feature of maritime law.[92] The *Robins* doctrine was drawn from a traditional rule of tort law that had entered the common law well before 1927. The Alaska statute did not therefore interfere with a rule characteristic of admiralty or originating in admiralty. Nor did the statute interfere with the harmony and uniformity of maritime law. There were by then two recent federal laws on the books—the OPA and the Trans-Alaska Pipeline Authorization Act (TAPAA)—in which Congress expressly allowed for the recovery of such damages. The federal statutes offered "compelling evidence" that Congress did not regard the Alaska statute or comparable state enactments as an excessive burden on maritime commerce. Accordingly, the court concluded that Alaska's statute was not preempted by general maritime law, and it remanded for trial the claims of tenderboat operators and crews, seafood processors, dealers, wholesalers, and processor employees to establish damages allowable under the Alaska statute.[93]

89. *Id.* at 1223-1224. *See also Exxon Valdez Oil Spill*, WIKIPEDIA, http://en.wikipedia.org/wiki/Exxon_Valdez_oil_spill#Litigation_and_cleanup_costs (last visited July 22, 2011).

90. Civil claims brought in the federal courts were consolidated in the District Court for the District of Alaska, which recognized a Commercial Fishing Class, a Native Class, and a Landowner Class. *See* sources cited *supra* note 89.

91. *See* Perry, *supra* note 60, at 23.

92. *Exxon Valdez*, 270 F.3d at 1250-52.

93. The remand, however, excluded certain parties claiming pure economic loss. The damages of "area businesses," certain fishermen outside the closed area, the aquaculture association, and persons claiming "stigma damages" were considered too remote. The Ninth Circuit had not read the statute as abrogating entirely the requirement of proximate cause between defendant's act and plaintiff's damage. *See* Benefiel v. Exxon Corp., 959 F.2d 805, 807 (9th Cir. 1992).

In conclusion, these cases demonstrate that *Robins* is a limitation on causation that leaves purely patrimonial interests unprotected. It operates in a doctrinaire and inflexible manner. It applies irrespective of the numbers of plaintiffs and the size of their aggregate claims. It does not admit exceptions even where the liability and class of claimants is relatively closed or finite.

IV. A SHIFT OF PARADIGM: THE OIL POLLUTION ACT OF 1990

Congress enacted the Oil Pollution Act of 1990 in response to the *Exxon Valdez* oil spill. This act passed unanimously in the Senate by a vote of 99-0 and unanimously in the House by a vote of 360-0.[94] While prior "spill" statutes like the Federal Water Pollution Control Act and the CWA contained specific crimes for oil and hazardous substance pollution, this Act was the first to provide remedies for private persons. It went "further than any other statute in providing for both public and private remedies."[95]

The Act imposes strict liability upon the party responsible for a discharge of oil and clearly applies to the Deepwater Horizon spill, which began in the exclusive economic zone of the United States and spread to the territorial waters and shorelines. The OPA holds the responsible party strictly liable for cleanup and removal costs in an unlimited amount but restricts total civil liability damages to $75 million.[96] This liability cap can be lifted, however, when there is evidence of gross negligence, willful misconduct, or violation of a safety regulation by the responsible party or any party in contractual relationship with the responsible party.[97] As events of the BP spill unfolded, the protection provided by the cap was immediately attacked. Congress threatened to take steps to increase the amount significantly or to eliminate it altogether, even retroactively.[98] In any event the issue soon became moot, at least as to BP, when the company unilaterally announced that it waived the protection of the cap. The other responsible

94. *See* Perry, *supra* note 60, at 49.

95. Robert Force, Martin Davies, and Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 895 (2011).

96. 33 U.S.C. § 2704(a) (2011).

97. *Id.* § 2704(c).

98. For instance, the CLEAR Act of 2009, H.R. 3534, 111th Cong. (2009), and a Senate bill, Clean Energy Jobs and Oil Company Accountability Act of 2010, S. 3663, 111th Cong. (2010), would entirely eliminate all caps for offshore facilities, including MODUs, but would leave them in place for vessels. *See* Bryant Gardner, *Treading DEEPWATER*, 8 BENEDICT'S MAR. BULL. 186 (2010). The obvious problem with eliminating all caps is that no level of "financial responsibility" can be set which would seem adequate or could be met even by the deepest pockets.

parties did not make a similar declaration and may be still relying on it. For its part BP agreed to set up a $20 billion compensation fund and agreed not to assert any liability cap under the OPA to avoid liability.[99] Nor would it seek reimbursements from the Oil Spill Liability Trust Fund.[100] In light of these concessions, BP's liability under the OPA may therefore be preliminarily summarized as strict, uncapped, and covering pure economic loss. We turn first to understand the meaning of strict liability in this context.

A. *The OPA as a Strict Liability Regime*

The Oil Pollution Act displays many of the classic features found in strict liability tort regimes. With the exception of its novel provisions on pure economic loss, the OPA conforms to the mold of strict liability legislation generally found in comparative law.[101] It eliminates the need for fault determinations, simplifies causality and remoteness issues, and narrows exonerative opportunities by eliminating fault-based defenses.[102] The use of a liability cap (ineffective in retrospect) and the establishment of a compensation fund may also be regarded as rather typical features of strict liability regimes.[103] This paper will review only four aspects of the statute.

1. The Absence of Fault

We should first notice the absence of fault and the use of "channeling." The OPA abandons fault and simply connects responsibility to an activity or a status.[104] The "responsible party" for a

99. *See* Press Release, White House Office of Press Secretary, Fact Sheet: Claims and Escrow (June 16, 2010), *available at* http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow.

100. *See* Perry, *supra* note 60, at 58.

101. Brueggemeier lists six characteristic features of modern strict liability in Germany: focused applicability upon a specific risk, limited protections (pure economic loss excluded), liability exclusions, limited quantum of damage (liability caps), enterprise liability, and required insurance. GERT BRUEGGEMEIER, COMMON PRINCIPLES OF TORT LAW: A PRE-STATEMENT OF LAW 87 (2004). These traits relate to legislative models of strict liability, as opposed to judicial instances like *Rylands v. Fletcher*, [1868] UKHL 1 (appeal taken from Eng.), or liability under French Civil Code [C. CIV.] art. 1384 (Fr.).

102. *See* THE BOUNDARIES OF STRICT LIABILITY IN EUROPEAN TORT LAW 11-13 (Franz Werro & Vernon Valentine Palmer eds., 2004).

103. *See* Wagner, *supra* note 37, at 99 ("One of the principles of this branch of the law [strict liability] is that the liability of the tortfeasor is limited by caps. Time and again it is said that these caps are necessary in the interest of insurability of the underlying risk.").

104. Unlike fault liability, strict liability introduces a hard baseline tailored to a narrowly-focused risk, such as being the owner of an animal or being the custodian of a dangerous thing.

discharge of oil from a vessel or offshore facility is identified by asking who is the owner, operator, or lessee of the vessel or facility in question. Questions associated with that party's negligence and/or "negligence foreseeability" are off the table. The Act "channels" liability in this predetermined way, without asking whether that party was at fault, should have foreseen injury to another, or indeed whether any person's fault caused the spill.[105] Channeling means that responsibility is *automatically* imputed to the party who fits the description, and all claims are initially directed to that party.[106]

2. The Recoverability of Pure Economic Loss

The Act specifically creates responsibility for pure economic loss. The statute indeed preempts the economic loss rule found in common law and general maritime law. An expansion of liability of this kind is highly unusual, especially for a strict liability statute. Ordinarily, the tendency is to constrict the forms of recoverable damage as a trade-off for dispensing with the requirement of fault. The opposite combination in the OPA reflects a more radical design. The heads of damages covered under § 2702 include damages to natural resources, real or personal property, subsistence use of natural resources, decreased revenues from taxes and royalties, profits and earning capacity, and public services.[107] These last three categories of damage allow claimants without a proprietary stake to recover their economic losses. As seen below, this reading is amply supported by the legislative history.

First, the Conference Report to the Act stated that the provisions overcome any existing requirement of physical damage to a proprietary interest:

105. The value of the provision is already clear. According to reports, federal investigators have experienced difficulty determining which responsible party (BP, Transocean, or Halliburton) was operationally in charge of the rig at the time of the accident. Testimony before a federal panel has been characterized as "finger-pointing" and "mutual recriminations by BP, Transocean and Halliburton." Robbie Brown, *Missing Piece In Oil Rig Inquiry: Who Was in Charge?,* N.Y. TIMES, Aug. 26, 2010, at A18. That is the indeterminacy that statutory "channeling" helps to eliminate. For the notion of channeling, see Nathan Richardson, *Deepwater Horizon and the Patchwork of Oil Spill Liability Law*, RESOURCES FOR THE FUTURE, (rev. ed. June 2010), http://www.rff.org/RFF/Documents/RFF-BCK-Richardson-OilLiability_update.pdf.

106. 33 U.S.C. § 2702 (2011). One may note "channeling" technique under China's Civil Code, in that "the victim" may always claim against the polluter even when the latter is entitled to be reimbursed by a third party. Qinquan Zeren Fa [Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. VIII, arts. 68, *translated at* http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html.

107. 33 U.S.C. § 2702(A)-(F).

> Liability under this Act is established notwithstanding any other provision or rule of the law. This means that the liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitations under existing statutes . . . *or under existing requirements that physical damage to the proprietary interest of the claimant be shown*.[108]

Second, the Conference Report highlighted the claimants who might recover for economic loss. It included lessees of property, those whose subsistence depends upon natural resources, fishermen who lost income from damaged fisheries, and, concluding generally, "any claimant" who had lost profits or impaired earnings due to damaged property or natural resources:

> Six categories of damages are compensable. . . . Subsection (b)(2)(B) allows a person who owns or leases real or personal property to recover for injury to, or economic losses resulting from the destruction of that property. Subsection (b)(2)(C) provides *a right of recovery for loss of subsistence use of natural resources, without regard to the ownership or management of those resources.*
>
> Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. *For example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources*.[109]

On the basis of these provisions and legislative history, courts have had little difficulty concluding that Congress intended to preempt the economic loss rule.[110]

3. Narrowed Defenses

Typical of many strict liability statutes, the OPA narrows down the defenses available to a responsible party. The narrowing here, however, is exceptional by any standard.[111] The Act distinguishes between

108. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 101-653, § 1002 (1990) (Conf. Rep.).

109. *Id.*

110. *See* Benefiel v. Exxon Corp., 959 F.2d 805 (9th Cir. 1992); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994); Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp 1008 (E.D. La. 1993) (holding that *Robins* rule did not bar recovery under the OPA of oil platform owner's claim for loss resulting from shutdown of operations during pollution investigation).

111. The defenses have also been narrowly construed by the courts. *See, e.g.*, Apex Oil Co., Inc. v. United States, 208 F. Supp. 2d 642, 654 (E.D. La. 2002) ("These defenses

"complete" defenses which arise from irresistible and superseding causes, and partial defenses which may be asserted against "particular claimants" who played a highly culpable role in the discharge of the oil.[112] As to the opportunity to establish a complete defense, the responsible party must essentially prove the discharge was not really caused by him and that it occurred *solely* because of an act of God, an act of war, or the act or omission of a third party.[113] A complete defense in this last instance is deliberately restricted, both by the way "third party" is defined as well as a series of further conditions that serve as predicates.[114] No one having a contractual relation with the responsible party is deemed a third party. Thus it is no defense for BP to show that acts or omissions by co-contracting parties Transocean or Halliburton were the sole cause of the discharge (though such proof would be relevant to actions in contribution between them or as partial defenses),[115] nor could the defense be set up against a BP supplier or agent. Furthermore, even when the defense is established, the responsible party still remains initially obliged to pay removal costs and the damages of all those who direct their claims against him. The "defense" in such circumstances is rather illusory in that it actually amounts to subrogated rights of recoupment against the third party.[116]

are narrowly construed and only in the situation where the discharge was totally beyond the control of the discharging vessel would the responsible party be excused from liability.").

112. The responsible party is not liable to a particular claimant to the extent that *the incident* [resulting in the discharge] was caused by the claimant's own gross negligence or willful misconduct. *See* 33 U.S.C. § 2703(b). Therefore this defense is irrelevant to the economic losses of businesses and individuals who played no part in bringing about the discharge of the oil.

113. *See* 33 U.S.C. § 2703(a).

114. To qualify for complete release, the responsible party must prove he or she took due precautions against the foreseeable acts or omissions of third parties, reported the incident, and cooperated with authorities and complied with orders. *See* 33 U.S.C. § 2703(a), (c).

115. *See* 33 U.S.C. § 2709 (authorizing contribution actions); *see also, supra* note 112. Under China's Civil Code provisions on ultra-hazardous activities (Arts 70-72), the available defenses vary according to the type of activity involved: Thus, nuclear facilities (act of war, victim's own intentional act); civil aircraft (victim's intentional act only); use of ultra-hazardous materials (force majeure, victim's intentional act). Qinquan Zeren Fa [Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. IX, arts. 70-72, *translated at* http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html.

116. 1 JOSHUA FORCE AND ROBERT FORCE, MARINE POLLUTION 15 (Tulane Maritime Law Center 2009) (on file with author).

4. Liability Determined by Causation.

As with any strict liability statute, the causal mechanism is the critical element in its operation. It affects the degree of strictness and the scope of the liability. Since questions of fault and "negligence foreseeability" are in theory eliminated from the inquiry, the causal issue necessarily increases in importance. Unfortunately the OPA did not match the importance of the subject with a sufficiently clear and specific treatment. It laconically states that a responsible party is liable for damage "resulting from" or "due to" a discharge of oil.[117] This is tantamount to leaving the issue to the judges and the jurisprudence to spell out appropriate tests and supply workable limits on recoveries. To a large degree, Congress was silent in choosing a causal mechanism.

This is not so surprising since strict liability statutes are often silent or unclear as to how causation should be analyzed. The residual problem, however, is that judges and scholars born and bred upon negligence principles will not hesitate to read familiar proximate cause limitations into the text.[118] For example, as one court said, in the absence of an express statement in the statute, "the common law requirement of proximate cause is implicitly incorporated."[119] A Ninth Circuit decision interpreting the strict liability provisions of TAPAA stated that while Congress intended to override the *Robins* doctrine, it did not intend to abrogate entirely the principles of proximate cause. The court accordingly held that the higher gasoline prices paid by motorists in California as a result of the *Exxon Valdez* spill in Alaska were too remote to be recovered.[120] Similar reasoning could easily infer it was Congress's intention to retain the principles of proximate cause in the OPA.

Other interpolations of the OPA are to be expected. For example, a report on the OPA commissioned by the Trust Fund administrator argues that the words "due to" in § 2702(b)(2)(E) of the OPA should be read as

117. *See* 33 U.S.C. § 2703(a), (e).

118. On the "defanging" of the UK's Water Resources Act, see Jenny Steele, *Statutory Strict Liability and the Common Law Judge*, 52 CAMBRIDGE L.J. 202, 202-203 (1993) (noting "the general uneasiness of the common law judge when faced with strict liability offences"). This has also been the experience with New York's strict liability scaffold cases. *See*, *e.g.*, Mack v. Altmans Stage Lighting Co., 98 A.D.2d. 468, 471 (N.Y. App. Div. 1984) ("Foreseeability also plays a role in the proximate cause equation, albeit quite different from that in determining the scope of duty."); *see also* Julian Ehrlich, *Dropping in on the Causation Controversy in Strict Liability Scaffold Cases*, 2 J. DEF. ASS'N OF N.Y 18 (2001).

119. Slaven v. BP Am., Inc., 786 F. Supp 853, 858 (C.D. Cal. 1992).

120. *See* Benefiel v. Exxon Corp., 959 F.2d 805, 807-08 (9th Cir. 1992) (holding that claims of resulting higher gasoline prices in California caused by the Exxon Valdez spill were to remote to be recoverable).

a second-layer causal requirement for economic loss claims.[121] This second layer would allegedly exclude all claimants other than those directly denied use or access to the damaged natural resources. Under this reading, fishermen should recover their economic losses because the pollution denied them use of their fishing grounds, but those in the business of selling supplies to fishermen or a restaurant typically patronized by fishermen and now experiencing a downturn would not recover their losses.[122] With due respect, the words "due to" appearing in the provision do not bear the weight of this gloss. The words "due to" and "resulting from" are used interchangeably and synonymously in the statute and throughout the Conference Report.[123] The same words appear, for instance, in the similarly-structured preceding section on the recovery of lost governmental revenues (a form of pure economic loss as well) "due to" the spill,[124] and the notion of a second layer of causation in that context manifestly does not work.

V. FURTHER ANALYSIS OF CAUSATION UNDER THE OPA

A. Beginning with Cause in Fact

However spare the causal wording, any judge interpreting the OPA must begin with cause-in-fact analysis. All tests of causation, whether under negligence principles or strict liability statutes, require a cause-in-fact connection as a condition of liability. Accordingly, the first step is to determine whether "but for" the discharge of oil, the plaintiff would have suffered harm. The answer here would seem almost automatic, but not always. Even at this "factual" step in the analysis, it is possible to be influenced by customary biases against strict liability and pure economic loss. For example, a judge may inject his preference for negligence-based liability through disingenuous readings of the required causal nexus. This may be accomplished, for example, by defining the necessary harm-producing "incident" so narrowly that it cannot serve as a cause-in-fact predicate of plaintiff's ensuing damage. Thus in *Gatlin*

121. *See* JOHN C.P. GOLDBERG, LIABILITY FOR ECONOMIC LOSS IN CONNECTION WITH THE DEEPWATER HORIZON SPILL 16-17 (Nov. 22, 2010), *available at* http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438.

122. *Id.* at 7-12, 17.

123. In explaining this provision, the Conference Report merely used "resulting from" and "due to" as interchangeable phrases and did not acknowledge a second layer causation. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 101-653, § 1002 (1990) (Conf. Rep.). Thus, the Report stated: "Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity *resulting from* injury to property or natural resources." *Id.*

124. *See* 33 U.S.C. § 2703(b)(2)(E).

Oil Co., Inc. v. United States,[125] the Fourth Circuit found that plaintiff's fire damage, while resulting from the combustion of fumes created by a discharge of oil, did not materialize from a discharge of oil into *navigable waters.*[126] The phrase "in navigable waters," however, is a qualification not found in the statutory provision defining the meaning of an "incident"[127] nor, more importantly, is it found in the provision governing "recovery by responsible party" against the Fund, which was the primary issue in the case.[128] Nevertheless, the damage was held unrecoverable on this strained reading.[129] According to the court, the discharge was not a cause-in-fact of the fire damage and plaintiff's claim against the statutory fund was denied. *Gatlin's* narrow reading of "incident" has been borrowed and extended to third party claims of economic loss against the responsible party, with the same restrictive result.[130]

B. Where is the Stopping Point? Two Alternatives

Once the requirement of cause-in-fact is satisfied, a cutoff point is necessary to limit the extent of liability. As everyone would agree, liability cannot extend indefinitely in time and space. For example, few would argue that BP caused the death of a restaurant patron who died from eating contaminated fish which local restaurants imported from Asia because local species were unavailable after the spill. Accordingly, few would regard BP as responsible for the pure economic losses of the deceased diner's wife and children who lost his support and income.[131]

125. Gatlin Oil Co., Inc. v. United States, 169 F.3d 207 (4th Cir. 1999).

126. *Id.* at 212.

127. *See* 33 U.S.C. § 2701(14). "'Incident' means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil. . . ." *Gatlin Oil*'s cramped reading of "incident" is also contradicted by the Conference Report's statement that "'Incident' is defined to mean an occurrence or series of related occurrences because, as under other Federal law *it is the intent of the Conferees that the entire series of events resulting in the spill of oil comprise one 'incident.'*" JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 101-653, § 1001 (1990) (Conf. Rep.) (emphasis added).

128. *See* 33 U.S.C. § 2708(a) ("The responsible party for a vessel or facility from which oil is discharged, . . . may assert a claim for removal costs and damages . . . [upon fulfilling one of two conditions].").

129. *See Gatlin Oil*, 169 F.3d at 212. By choosing the narrower of two possible causal predicates, the court denied liability and protected the OPA Trust Fund.

130. *In re* Taira Lynn Marine Ltd. No. 5, LLC, 444 F.3d 371 (5th Cir. 2006).

131. For further illustrations, see 1 DAN B. DOBBS, THE LAW OF TORTS 180 (West Group 2001). *See also* A.M. Honoré, *Causation in the Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2001), *available at* www.plato.stanford.edu/entries/causation-law (noting that a doctor who failed to prescribe an effective contraceptive cannot be held responsible for the death of the victim of a murder

In all probability, this cutoff will be found either through a "proximate cause" limitation of one kind or another, or alternatively through a "scope and purpose" analysis of the statute. Both tools are instruments of policy more than questions of causation, but the former adopts the defendant's point of view as its guide while the latter looks to the overall purposes and design of the legislation. This article will first consider proximate cause.

1. Proximate Cause

Dobbs has pointed out that "[p]rofessional usage almost always reduces proximate cause issues to the question of foreseeability."[132] Strict liability actions based on common law are not necessarily an exception. The Restatement (Second) of Torts, for example, explicitly employs proximate cause analysis to limit strict liability for abnormally dangerous activities, and English courts have recently acknowledged that foreseeability is a component of strict liability under *Rylands v. Fletcher*.[133] Of course, if proximate cause analysis is used to place boundaries around cause-in-fact under the OPA, as some assume is proper,[134] one should at least base this determination upon the far-reaching foreseeability of professionals and experts in their field. It would hardly be *strict* liability if the foreseeability of an average person (or the Fifth Circuit's "reasonably thoughtful person") were to become the standard to delimit the liability of sophisticated companies and experts carrying on dangerous operations.[135] Furthermore, the use of proximate cause permits use of the very tools of tort law that *Robins* precluded: particularized "foreseeability," particularized showings of victim damage, and perhaps geographical considerations. This could

committed by the child conceived as a result of the doctor's negligence); Brueggemeier, *supra* note 101, at 82 (observing that pure causal or absolute liability would lead to social immobility).

132. *See* DAN B. DOBBS, 1 THE LAW OF TORTS 447 (West Group 2001).

133. *See* Rest. 2d Torts § 520; *see also* Foster v. Preston Mill Co., 268 P.2d 645 (Wash. 1954) (holding that there is no strict liability for minks devouring their young after being frightened by the defendant's blasting operations). For a discussion of *Rylands*, as explained in *Cambridge Water Co. v. Eastern Counties Leather*, [1994] 2 A.C. 264 (appeal taken from Eng.), see Elspeth Reid, *Liability for Dangerous Activities: A Comparative Analysis*, 48 INT' & COMP. L.Q. 731 (1999).

134. *See* Benefiel v. Exxon Corp., 959 F.2d 805 (9th Cir. 1992); Slaven v. BP Am. Inc., 786 F. Supp 853 (C.D. Cal. 1992); *see also* Perry, *supra* note 60 at 52.

135. The Fifth Circuit deploys this comparatively low standard of foreseeability in spill cases. *See Taira Lynn*, 444 F.3d at 380-381 ("We perceive a harm to be the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention.").

open the door for an approach similar to the one suggested by Judge Wisdom and his fellow dissenters in *Testbank*. Whatever its parameters and scope, however, it will operate as a control on the responsible party's liability (within the monetary cap fixed by statute), but it cannot operate in the doctrinaire, exclusionary fashion of the *Robins* rule.[136]

One should not automatically assume, however, that particularized foreseeability determinations inevitably lead to an enlargement of the class of recognized claimants. Some skepticism is in order because foreseeability is highly malleable and the OPA simultaneously presents judges with two sensitive questions: strict liability and pure economic loss. First, proximate cause rules under strict liability statutes may not be as broad as the proximate cause rules for negligence. As William Statsky correctly notes, "A court is more willing to find proximate cause in a negligence case than in a strict liability case involving abnormally dangerous activities. . . ."[137] In other words, if proximate cause is the basic guideline adopted under the OPA, one may anticipate the introduction of more exigent causal requirements (raised foreseeability thresholds and/or lowered remoteness thresholds) because it is a strict liability statute under consideration and the damage for which a defendant is strictly liable for is pure economic loss. The combination increases concerns about the limits of civil liability, and the sole means of acting on that concern is to adjust the rules of causation.

The opinion of the Fifth Circuit Court of Appeals in *In re Taira Lynn Marine Ltd No. 5, LLC* is a striking illustration.[138] In *Taira Lynn*, a barge carrying a gaseous cargo struck and damaged a bridge which was the sole means of ingress or egress for an island community. As a result of the collision a cloud of flammable gas spewed from the vessel's cargo, endangering the community. The State Police ordered the evacuation of nearby businesses and residences and ordered all electricity to be cut off in the area. Two of the affected businesses sought recovery against the barge owner for loss to their property (crabs spoiled in freezer for one; manufacturing materials were lost in interrupted runs for the other) as well as for ensuing economic losses in shutting down their businesses. Reversing the district court, the Fifth Circuit denied all claims.[139] The court denied that plaintiffs' physical losses were the result of the barge's collision with the bridge.[140] The loss of crabs and manufacturing

136. *See supra* section II, "A Short Review of the Oil Spill Jurisprudence."
137. WILLIAM P. STATSKY, ESSENTIALS OF TORTS 95 (Delmar 2d ed. 2001).
138. *See Taira Lynn,* 444 F.3d at 371.
139. *Id.*
140. In *Taira Lynn*, the court did not view the lost use of a business during a forced evacuation as an interference with the owner's property rights. *See id.*; *cf.* Sekco Energy,

materials, it reasoned, were caused by the cut-off of electricity, not the collision. To be recoverable, such physical losses needed to be "directly" inflicted by the barge/bridge collision, even though the court pointed to no intervening or superseding acts breaking the chain of events.[141] For good measure, the court added that the spoilage of the crabs and the materials were unforeseeable consequences of the collision. Of course, this assertion could not have been advanced if the damage in question had been personal injuries, for then the ambit of a defendant's foreseeability might well extend to the injury of a first responder attempting to save the crew, or to subsequent injuries received through negligent treatment at the hospital.[142] But the barge case was not really about legal foreseeability as deployed in physical injury cases. It concerned whether *trivial* physical damage could provide a pathway to the recovery of pure economic loss.

The final question in *Taira Lynn* dealt with whether these plaintiffs might recover their physical/economic losses under the OPA. Relying upon the highly-technical *Gatlin Oil* reading of the OPA, the court found no causal nexus and no liability.[143] The court asserted that neither the physical nor the economic loss had any causal connection to "the incident" (the discharge of gas). This apparently means the gas discharge was not a cause-in-fact of these losses, which, as the reader knows, is counterfactual and anomalous. The court surgically altered the causal mechanism of the OPA, which I find difficult to explain except in terms of apprehensions about extending the ambit of pure economic loss.

2. Cause-in-Fact and "Scope and Purpose"

In contrast to the above analysis, we will consider an alternative approach based on factual causation, coupled with the "scope and purpose" of the statute as its limiting principle. The question in every case would be whether the discharged oil was a "but for" reason for the plaintiff's economic loss and whether compensation for that loss falls within the intended scope and purpose of the statute.[144] As with the question of proximate cause, a scope and purpose inquiry must also be

Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008 (E.D. La. 1993); Vicksburg Towing v. Mississippi Marine Transp. Co., 609 F.2d 176 (5th Cir. 1980).

141. Of course, if personal injuries had been the gist of the action, it would have been clear that the electricity cutoff should not be regarded as a severable causal event. The cutoff would then appear as foreseeable as the physical damage to the bridge or the release of flammable gas in the air. The cutoff was hardly a superseding cause, given the dangers of gas inhalation or of electricity sparking an explosion.

142. For additional examples of this sort, see DOBBS, *supra* note 132, at 192. A *locus classicus* on this is Petition of Kinsman Transit Co., 338 F.2d 708 (2nd Cir. 1964).

143. *See Taira Lynn*, 444 F.3d 371.

144. See BRUEGGEMEIER, *supra* note 101, at 112.

regarded as a *non-causal* inquiry. Nevertheless, it determines the cutoff point for economic loss in an entirely different way. It places the focus upon statutory intent and the typical risks associated with oil spills.[145] It would permit the judge to consider not only the language and structure of the Act, but the aims and convictions of the legislators. This differs from asking what harm the responsible party could have expected or foreseen. For example, under a scope and purpose inquiry it should be irrelevant that oil washed ashore in a highly improbable place or was carried by capricious currents to distant places (*Alvenus*), or that the damage arose before or after the discharged oil reached navigable waters (*Gatlin Oil*). Arguably, these eventualities involve fairly typical risks of oil spills which Congress would have wanted and expected to cover.

My argument is that the language and structure of the OPA support a unitary cause-in-fact analysis, as delimited by the supposed scope of the statute, and that the language and structure logically exclude the use of proximate cause as a limiting device. There are four statutory features that seem to exclude the proximate cause hypothesis.

Firstly, it is clear that "unforeseen damage" plays no part among the permitted "complete" defenses of the responsible party. That party's only defenses are perfected when causation arises *solely* from an external cause that has no connection to the party's acts. The point is that if unforeseeability is not an element of defense, then foreseeability would hardly be an element of prima facie liability. The nature of the defenses logically suggests that Congress intended *prima facie* liability to be based on cause-in-fact alone.

Secondly, a stronger indication of Congress's intent to follow factual causation is shown by a *one-time only* reference to proximate cause which comes in an exceptional provision dealing with the removal of the liability cap.[146] This affirmative resort is in glaring contrast to the

145. *Normzweck* or "scope and purpose" interpretation is normally regarded as a normative and non-causal limitation. *See* A.M. Honoré, *Causation in the Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010) *available at* http://plato.stanford.edu/entries/causation-law/; *see also* WERRO and PALMER, *supra* note 102, at 12. Otherwise but-for causation would end up as the test for all physical harm caused by a discharge, but proximate cause and remoteness might be used to limit the extent of pure economic loss. Alaska's statute was apparently so interpreted in *Benefiel*. *See* Benefiel v. Exxon Corp., 959 F.2d 805 (9th Cir. 1992).

146. *See* 33 U.S.C. § 2704(c)(1). Under § 2704(c)(1), liability caps may be lifted due to the conduct of the responsible party. The caps may be lost "if the incident was *proximately caused* by (A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation. . . ." The shift to "proximate cause" terminology certainly indicates Congress's attentiveness to the distinctive levels of causation. Congress was likely of the view that proximate cause, which permits judicial weighing of competing considerations, would permit a more searching review of a question of such importance as the removal of the cap.

words "due to" and "resulting from" and strongly suggests that they were meant in the sense of factual causation. It shows Congress's attention to the difference between causal levels and certainly undermines the argument that proximate cause is implied throughout the OPA. This one-time appearance demonstrates that Congress specifically saved proximate cause for an isolated and important question. To go beyond the parameters of the exception and read in proximate cause generally would essentially rewrite the statute.

Thirdly, Congress did provide an explicit limit on cause-in-fact liability: monetary caps.[147] A proximate cause standard would effectively introduce a "second cap" on liability that Congress did not intend. Though not based on dollar limits, proximate cause reduces liability by determining the classes of plaintiffs who may recover. This type of cap is arguably at war with a fixed monetary cap. It is indeterminate in scope and runs in one direction only. It can reduce liability below the amounts set by Congress, but it cannot lead to recoveries higher than those caps. Should the fixed cap be removed for the reasons of culpability stated in the statute, the second cap could only reduce the broad liability which the removal of the fixed cap was intended to create.[148]

Fourthly, the statute uses the same formulas of causation ("resulting from," "due to") for each of the six heads of recoverable damages. To insert implied foreseeability limitations for one type of damage without reading it in for all the other damages governed by the same causal mechanism would be incoherent. The difficulty with an across-the-board approach, however, is that it quickly undermines important goals of the statute. For example, it would make it difficult, if not impossible, to charge the responsible party with full liability for damage to natural resources or full cleanup without limitation as to cost. A full cleanup cannot be accomplished if some of the damage is considered unforeseeable and thus held beyond the party's responsibility.[149] Yet responsibility for cleanup is governed by the same causal nexus as economic losses. To see the problem in a different light, a generalized inference of proximate cause would mean that decreased governmental revenues on account of the spill—for example, foregone taxes, fees,

147. Limits for oil tankers are determined by tonnage. For example a 100,000-ton oil tanker would be potentially liable for $120 million. Sturla Olsen, *Recovery for the Lost Use of Water Resources: M/V Testbank on the Rocks*?, 67 TUL. L. REV. 271, 288 (1992).

148. The removal of the fixed cap would have additional effects. The indeterminateness of the classes included or excluded complicates the question of determining insurance coverage ex ante, as well as the appropriate levels the enterprise should invest in safety and prevention.

149. There is no authorization to read in different causal levels for different purposes (e.g., ordinary "foreseeability" for liability determinations but not for cleanup).

investments, rents, royalties, and net profit shares—would be unrecoverable if certain types of revenue (particularly revenues derived from intricate and unpublicized instruments) were unforeseen by the responsible party.[150] Yet the difficulties with a generalized inference are perhaps less acute than an attempt to infer proximate cause selectively. Any attempt to infer proximate cause *solely* in the case of pure economic loss but not for the other loss categories has the least merit. The literal terms of the OPA do not support this approach:

> Profits and earning capacity. Damages 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*.[151]

The plain meaning of this provision is that damages for lost profits or earnings "due to" the destruction of natural resources "shall be recoverable by any claimant." There is no room in this language for superimposing "proximate cause." The effect would be to choose and limit the classes of claimants, whereas the provision expressly mandates recovery by "any claimant."

Finally, the approach to claims of pure economic loss under the Civil Liability Convention (CLC) is not without relevance to this interpretation of the OPA.[152] The CLC established a strict liability regime for oil spills somewhat similar to the scheme of the OPA, though it was never signed by the United States. In connection with a spill off the Shetland Islands, for example, claims for economic loss were paid out of the compensation fund to claimants whose damage was deemed to be "caused by contamination."[153] Compensation for *contamination* was taken to be the core purpose of the CLC and a substantial number of claims for pure economic loss were allowed even though the CLC did not expressly make that form of loss recoverable. In effect, the

150. For example, would the reduced revenues of a western state which had investments or profit shares in the Gulf South be unrecoverable because of the geographic distance from the scene of the spill, and/or because these investments were unpublished and unknown by BP or the general public?

151. 33 U.S.C. § 2702(b)(2)(E) (emphasis added).

152. International Convention on Civil Liability for Oil Pollution Damage, 1992, *available at* http://www.iopcfund.org/npdf/Conventions%20English.pdf. The "old" regime was the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC), together with the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The current regime is contained in the 1992 Civil Liability Convention, as amended in 2003, and the 1992 Fund Convention (and subsequent Protocols), both of which entered into force on May 30, 1996.

153. *See* Mans Jacobsson, *The Braer: Legal Aspects of a Major Oil Spill*, 2011 INT'L OIL SPILL CONF., *available at* http://www.iosc.org/papers_posters/00195.pdf.

compensation fund administrators used a "scope and purpose" inquiry rather than proximate cause as a means of defining the circle of claims entitled to compensation.[154] Reasoning by analogy, I would suggest that a core purpose of the OPA was to give private remedies for damages *caused to natural resources by oil pollution*. The OPA went further than the CLC by expressly making pure economic loss recoverable for oil pollution, placing it on an equal footing with the other heads of damage, and using the same causal nexus.

VI. THE RELEVANCE OF THE OPA'S SCOPE TO COMPENSATION QUESTIONS UNDER BP'S TRUST FUND

The provisions of the OPA are the law of the land, but whether this law serves as the principal guide of the Trust Fund administrator is not at all clear. As of this writing, the administrator's methodology remains opaque, and it may be that there is more than one methodology. In a preliminary statement soon after his appointment, Mr. Feinberg indicated he had not yet decided if businesses merely "affected" by the spill would qualify for compensation.[155] He indicated he would look to state courts for guidance, for example, by asking "What would the law in Mississippi say is the appropriate cut-off point."[156] While a deferential bow to state law might have seemed at first sight reasonable, it would essentially be a

154. *See id.* Under this approach, compensation was awarded to salmon farmers, fish processors, repairers of fishing boats, divers maintaining salmon cages, collectors of offal from fish processors, ice producers supplying salmon farmers, and manufacturers of boxes for processed fish. However, and perhaps somewhat illogically, the claims of employees in fish processing plants whose working hours were reduced were denied on the basis that their lost wages were not due to the "contamination." Of course, the scope of the CLC is narrower than the OPA in regard to pure economic loss. It did not expressly address or allow claims of pure economic loss and therefore any existing exclusionary rule in the background law would influence administrative and judicial determinations of its scope in that regard. In *Alegrete Shipping Co. v Int. Oil Pollution Comp. Fund ("The Sea Empress")*, the Court of Appeal ruled that a processor of whelks (200 miles from a spill in Devon) could not recover because his secondary economic loss lay *outside* the intended scope of the UK implementing statute. [2003] 1 Lloyd's Rep. 327 (U.K.). The Court did not regard UK adherence to the CLC's strict liability regime as a reason to weaken the traditional economic loss rule. *Id.* In *Landcatch Ltd v. Int. Oil Pollution Comp. Fund*, the Scottish Court of Session (Inner House) refused a salmon farmer's claim against the Fund for lost profits. [1999] 2 Lloyd's Rep 316, 1999 S.L.T. 1208 (U.K.). The court noted that if the farmer had sued for damages at common law his claim would have failed by application of the 'pragmatic' rule against secondary or relational claims for purely economic loss. It accordingly ruled that such loss was not caused directly and immediately by contamination within the meaning of the Convention or the implementing UK legislation. Followed by *Skerries Salmon Ltd. v. Braer Corp. and Int. Oil Pollution Comp. Fund*, 1999 S.L.T. 1196 (U.K.).

155. Kathleen Hennessey, *Overseer of BP fund 'a force of nature'*, L. A. TIMES, June 18, 2010, http://articles.latimes.com/2010/jun/18/nation/la-na-oil-feinberg-20100618.

156. *Id.*

regression to the *Robins* rule already rejected by the OPA, and thus an inappropriate starting point for analysis. As John Culhane saw clearly, "The state law Feinberg says he'll rely on offers nothing to many, even most, possible claimants. Unless he ignores clear rules of law, the promise of this fund won't—and can't—be fulfilled."[157] State law places the proper cut-off far short of the one envisioned by Congress or expected by the public. Deferring to state law also undermines efforts to convince claimants to submit claims to the Trust Fund rather than to sue for better and broader rights in federal court. Since courts must implement the provisions of the OPA if litigants invoke them, they would offer recoveries to a wider class and on more generous terms than the Fund. The existence of a double standard would direct protracted cases into the courts, which is neither in the interest of BP nor the public. In that event, the Fund would internalize a double standard, because the judgments rendered by the courts under federal law are to be satisfied out of the same fund as the settlements of the administrator. It is an important practical and legal question then whether the administrator should be guided by statutory federal rights under the OPA, or by state and maritime jurisprudence, or by his own informed judgment.

The Fund is a voluntary and informal entity and its administration is intended to be independent of both the U.S. government and BP. Assuming that to be true, it would nevertheless be strange to maintain that it operates in a legal vacuum or that the administrator might offer diluted or fewer rights than federal law expressly grants. The Fund operates in the shadow of rights offered by the OPA, which were the driving reason for the creation of the Fund.[158] The original pressure to create the Fund as an alternative to the judicial system stemmed from the stringency of OPA provisions, namely its strict liability, channeling, streamlined defenses, wider categories of loss recognition, and accompanying civil and criminal fines. The statute was designed to deal with oil spills, as opposed to judicial doctrines applicable to every kind of accident. Clearly, the administrator is justified in placing limits on the types of claims he can accept (his funds being finite), but the fund is the negotiated outgrowth of an oil-spill statute that sets the appropriate

157. *See* John Culhane, *Feinberg's Wizadry: How he'll help the down-and-out businesses of the Gulf states–despite the law*, SLATE, July 22, 2010, http://www.slate.com/id/2261461/. The state laws vary on defining limits for liability. *See* Curd v. Mosaic Fertilizer, LLC, 39 So.3d 1216 (Fla. 2010) (commercial fishermen recovered economic losses under Florida common law negligence claim for chemicals spilled into Tampa Bay). *See* also Howard B. Epstein and Theodore A. Keyes, *BP Oil Spill: An Insurance Perspective*, 244 N.Y. L.J., no. 34, August 18, 2010.

158. By the terms of the Trust Fund agreement, *supra* note 8, appeals from the administrator may be taken to a reviewing court, which suggests that there are legal criteria in the background which a court may enforce.

standard for treatment of claimants. As previously suggested, the appropriate cutoff can be found by consulting its scope and purpose. Arguably the baseline question to ask is what losses did Congress intend to cover.

VII. CONCLUDING THOUGHTS

We have seen an important legal evolution in the United States over the past few decades with respect to oil spills. That evolution began with the tragic *Exxon Valdez* spill in Prince William Sound, but the law's response continues today in dealing with a spill in the Gulf twenty times greater in size. The evolution must continue tomorrow as the risks of retrieving this ever scarcer commodity from increasingly inaccessible places continue to mount. We at least know that the risks of catastrophic spills are grave and recurrent.[159] The OPA responded by giving birth to a new form of ultra-hazardous liability that seems far more onerous and stringent than others of its kind. The OPA cast aside a paradigm based on negligence and the economic loss rule, and moved to a rigorous regime of liability without fault, channeled responsibility, narrowed defenses, liability caps, broader loss categories, and private actions to recover pure economic loss. The OPA recognized that oil spills are unique engines of pure economic loss. To shield the industry from that form of loss is to shield it from nearly all the harm sustained by people whose income and livelihoods depend upon the damaged resources. This categorical exclusion weakens the deterrent effect of liability rules and gives the polluter almost no incentive to invest in safety and prevention.

The questions for the future regarding pure economic loss relate primarily to the unrealistically low liability cap set by the OPA and the unclear causal mechanism found in its provisions. This paper presents two alternative readings of the statute, one based on proximate cause, the other based on cause-in-fact. The significant differences between these approaches make this a vital matter of interpretation. The current liability cap, which seems to be set at a level lower than the liability previously recoverable under *Robins*, functions as a subsidy to the

159. Indeed, even as I write these concluding paragraphs, word arrives that two new oil spills are taking place, one in the remote South Atlantic endangering penguins and their habitat, and another in the Gulf of Mexico only a few miles from the site of Deepwater Horizon. *See* John Collins Rudolf, *Oil Spill in South Atlantic Threatens Endangered Penguins*, N.Y. TIMES March 22, 2011, http://www.nytimes.com/2011/03/23/science/earth/23spill.html; David Hammer, *Shallow Gulf Well is Source of Mysterious Oil Sheen Near Grand Isle, State Official Says*, TIMES-PICAYUNE (New Orleans), March 22, 2011, http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/03/shallow_gulf_well_is_source_of.html.

industry and produces perverted incentives. The cap and the financial responsibility requirements must be greatly increased.