

**RESPONSIBLE FOR WHAT?
DOES THE OIL POLLUTION ACT OF 1990 PRECLUDE
RECOVERY OF PUNITIVE DAMAGES?**

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I. Introduction

Punitive damages have a long yet complicated history within general maritime law (GML). Decade-to-decade, court-to-court, GML punitive damages have seen eras of support and condemnation. Unfortunately, its relationship with marine pollution has only produced even murkier waters. Following four successive oil spills in 1989, initiated by the devastating Exxon Valdez oil spill, public and political outcry came to a head. Congress quickly realized that existing oil pollution laws were wholly inadequate. To help expedite clean-up responses and prevent future oil pollution, Congress enacted the Oil Pollution Act of 1990 (OPA).

OPA fulfilled many of its desired results; it expanded the scope of recoverable claimants, accelerated oil removal efforts, and in large part

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created a comprehensible liability scheme. However, some questions regarding the OPA liability provisions continue to loom. A provision that saves state law “*except as otherwise provided*” raises questions as to what exactly is saved?¹ A damages provision that is silent on punitive damages has left courts unsure of whether the provision is entirely exclusive.² These questions, compiled with an unclear punitive damage history, have created a hurricane of uncertainty.

In 2008, the tide again turned in favor of GML punitive damages in *Exxon Shipping Co. v. Baker*.³ Nearly twenty years after the Exxon Valdez spill that catalyzed the enactment of OPA, its resulting litigation concluded in the Supreme Court. The Court granted punitive damages to the claimants and revitalized its availability in GML.⁴ This holding seemed to be strengthened the following year when the Supreme Court concluded that punitive damages are available for maintenance and cure in *Atlantic Sounding Co. v. Townsend*.⁵ However, just as quickly as punitive damages seemed to return to GML, they were stripped from unseaworthiness claims in *Batterton v. Dutra Group*.⁶ With *Batterton* as the current precedent, what is left of punitive damage availability under OPA?

This comment will first examine the purpose of punitive damages and its complicated history within GML. It will follow with a review of the adoption, purpose, and substance of the Oil Pollution Act of 1990. The next section will analyze the OPA damages provision and the arguments for and against the supplementation of punitive damages. The punitive damages question is further analyzed in the following section by considering how a claimant’s status may transform the question of availability. The penultimate section will explore how this question may be similarly altered but by the defendant’s status. Finally, logical and illogical challenges are considered, and a prediction is made about the current availability of punitive damages under OPA.

II. Punitive Damages

¹ 33 U.S.C. § 2704(a).

² See 33 U.S.C. § 2702(b)(2).

³ *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

⁴ *Id.* at 515.

⁵ See *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424-45 (2009).

⁶ See *Batterton v. Dutra Grp*, 139 S. Ct. 2275, 2287 (2019).

Punitive damages, or exemplary damages, have been in existence “since the Code of Hammurabi in 2000 B.C.”⁷ These damages do not compensate, but instead punish an individual for outrageous conduct and deter wrongdoers from similar conduct in the future.⁸ Since the late eighteenth century, American courts have awarded punitive damages “for examples sake.”⁹ Due to its penal nature, punitive damages are awarded infrequently and are reserved for truly egregious behavior. The United States Supreme Court noted: “It should be presumed a plaintiff has been made whole for her or his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve retribution or deterrence.”¹⁰

A. Punitive Damages in Admiralty

Admiralty courts have recognized the punitive damage doctrine since the early nineteenth century.¹¹ “Although rarely imposed, punitive damages have long been recognized as available under GML where a defendant’s intentional or wanton and reckless conduct amount to a conscious disregard for the rights of others.”¹² In 1818, the crew of an American vessel named THE AMIABLE NANCY, boarded and plundered a Haitian schooner.¹³ While mindful of the crew’s lawless misconduct, the United States Supreme Court refused to hold the vessel’s owners liable for punitive damages.¹⁴ Since the owners neither participated in nor authorized the misconduct, Justice Story observed: “if deterrence is the goal of punitive damages, then the original wrongdoer shall pay the punitive damages award.”¹⁵ Although punitive damages were declined in its first instance, they have continued to be a highly debated subject in GML. However complex, it is helpful to reduce the history of exemplary damages in GML to four important ideological

⁷ Linda Schlueter & Kenneth R. Redden, *Punitive Damages*, 1 (4th ed. 2000).

⁸ See Restatement (Second) of Torts § 908(1) (1979).

⁹ *Coryell v. Colbough*, 1 N.J. 77, 77 (1791).

¹⁰ *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996)).

¹¹ *The Amiable Nancy*, 16 U.S. 546 (1818).

¹² *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995).

¹³ *The Amiable Nancy*, 16 U.S. 546 (1818).

¹⁴ *Id.*

¹⁵ *Id.* at 558.

periods: Pre-*Miles* Era, the *Miles* Era, the *Exxon* Era, and the current *Batteron* Era.

1. Pre-*Miles* Era

Following *The Amiable Nancy*, punitive damages did not again emerge under GML until 1969, more than 150 years later. In *United States Steel Corp. v. Fuhrman*, two vessels collided in heavy fog.¹⁶ The captain of the responsible vessel, which was owned by U.S. Steel, attempted to beach the vessel rather than abandon it, resulting in the death and injury of many of the crew when the vessel capsized.¹⁷ Claimants sought recovery for compensatory and punitive damages for injuries and deaths sustained.¹⁸ The trial court held that U.S. Steel was liable for punitive damages because it failed to countermand the captain's order to beach the vessel, and because it was common practice for U.S. Steel's ships to deviate from the U.S. Coast Guard's recommended courses and proceed full speed ahead in fog.¹⁹ The Sixth Circuit reversed and denied the punitive damage award.²⁰ Similar to the *Amiable Nancy* holding, the Sixth Circuit rejected punitive damage awards against the owner of a vessel unless it can be shown that the owner ratifies the acts of the captain.²¹ Although punitive damages were denied, the holding maintained that under certain circumstances punitive damages are available for gross negligence.²²

2. *Miles* Era

In 1990, the United States Supreme Court decided what would emerge to be a watershed decision. In *Miles v. Apex Marine*, the family of a deceased seaman brought damages against the employer for loss of society and future income.²³ In a unanimous decision, the Court denied recovery and emphasized principles of uniformity in light of applicable legislation.²⁴ The Court reasoned that "an admiralty court should look primarily to these legislative enactments for policy guidance...[and]

¹⁶ U.S. Steel Corp. v. Fuhrman, 407 F.2d 1143, 1144 (6th Cir. 1969).

¹⁷ *Id.* at 1145.

¹⁸ *Id.* at 1144.

¹⁹ *Id.* at 1145.

²⁰ *Id.* at 1146.

²¹ U.S. Steel Corp. v. Fuhrman, 407 F.2d at 1148.

²² *Id.*

²³ *Miles v. Apex Marine*, 498 U.S. 19, 19 (1990).

²⁴ *Id.*

must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.”²⁵ Although the case did not discuss punitive damages, subsequent courts used the legislative deference framework to broadly deny exemplary awards in other contexts.

The Fifth and Ninth Circuits held that the *Miles* framework barred punitive damage recovery for willful failure to pay maintenance and cure.²⁶ The First and Sixth Circuits used *Miles* to preclude punitive damage awards in unseaworthiness claims.²⁷ The Second Circuit held that *Miles* inhibited non-pecuniary damage recovery in loss of society claims.²⁸ Strangely, post-*Miles* decisions that allowed for punitive damage recovery were not related to any loss of life, but were instead for property damage. The court in *CEH v. F/V Seafarer* refused to extend *Miles* “to bar recovery of punitive damages in all general maritime cases,” reasoning that *Miles* does not “signify a call for universal uniformity of maritime tort remedy, but rather emphasizes the importance of uniformity in the face of applicable legislation.”²⁹ Importantly, the First Circuit noted, however, that *Miles* does not compel a uniform result for every maritime action.³⁰ Nonetheless, the watershed *Miles* decision struck a near fatal blow to punitive damage recovery under GML altogether. Until 2008, when faced with a claim or right based on a federal statute, courts refused to proscribe any different measure of damages than provided by statute.

3. *Exxon* Era

After nearly two decades of litigation resulting from the EXXON VALDEZ oil spill in 1989, *Exxon Shipping Co. v. Baker* thrust maritime punitive damages back into the spotlight.³¹ Although the case was litigated and decided long after the enactment of the OPA, Exxon Shipping disputed the availability of punitive damages under the Clean Water Act (CWA). In *Exxon*, fishermen sought compensatory and

²⁵ *Id.* at 27.

²⁶ See *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995).

²⁷ See *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993).

²⁸ See *Wahlstron v. Kawasaki Heavy Indus.*, 4 F.3d 1084 (2nd Cir. 1993).

²⁹ *F/V Seafarer*, 70 F.3d at 700.

³⁰ *Id.* at 702.

³¹ See 554 U.S. 471 (2008).

punitive claims in response to damaged property.³² Exxon Shipping argued that the CWA preempted the maritime law remedy of punitive damages.³³ The United States Supreme Court rejected the argument, finding that although CWA's savings clause does not explicitly mention punitive damages, there is no clear indication that Congress intended to occupy the entire field of available remedies.³⁴ Further, Justice Souter asserted that because the judicial branch traditionally formulates flexible and fair remedies in general maritime law, Congress cannot inhibit these remedies absent clear intention to do so.³⁵ Importantly however, it should be noted that the CWA is far less comprehensive than the OPA framework. Unlike OPA, the CWA includes a citizen suit provision stating "[n]othing in this section shall restrict any right which any person (or class of persons) under any statute or common law to seek enforcement of any effluent standard or limitation to seek any other relief."³⁶ Accordingly, although *Exxon* provided precedent for marine pollution punitive damages and sparked the revitalization of GML punitive damages as a whole, the holding is not conclusive in the face of a far more stringent OPA liability scheme.

The following year, the Supreme Court again faced the question whether punitive damages were preempted by statute in *Atlantic Sounding Co. v. Townsend*.³⁷ Following an injury on a tugboat, Edgar Townsend claimed that Atlantic Sounding, the owner of the tugboat, refused to provide maintenance and cure.³⁸ Townsend sought compensatory and punitive damages for this breach of duty under GML.³⁹ In response, Atlantic Sounding asserted that the Jones Act limits recovery to pecuniary damages, and applying the reasoning in *Miles*, punitive damages were also not recoverable for the asserted maintenance and cure claim.⁴⁰ Justice Thomas rejected this assertion and held that the availability of punitive damage recovery under GML was proper because Congress did not directly speak to the issue when it passed the Jones Act.⁴¹ Justice Thomas further reasoned that because Congress was presumptively aware of the recoverability of punitive

³² *Id.* at 479.

³³ *Id.* at 484.

³⁴ *Id.* at 488.

³⁵ *Id.* at 492-508.

³⁶ 33 U.S.C. § 1365(e).

³⁷ *Atlantic Sounding*, 557 U.S. at 404.

³⁸ *Id.* at 407.

³⁹ *Id.* at 408.

⁴⁰ *Id.* at 418.

⁴¹ *Id.* at 419-20.

damages in maintenance and cure actions when it passed the Jones Act, punitive damage awards are not displaced absent clear Congressional intent.⁴² Importantly however, he acknowledged the sound reasoning of *Miles* and the need for courts to look to legislative enactments and intent for policy guidance.⁴³ Nonetheless, in addition to clarifying that *Miles* did not address punitive damages, Justice Thomas abrogated lower court decisions that extended the *Miles* reasoning to the punitive damage context.⁴⁴

A growing circuit split became further evident in *McBride v. Estis Well Service, L.L.C.*⁴⁵ One employee was killed and three were injured on a barge in Bayou Sorrell, Louisiana.⁴⁶ All claimants sought compensatory and punitive damages under the Jones Act and GML for the alleged breach of warranty of seaworthiness.⁴⁷ Estis moved to dismiss on the grounds that punitive damages were unavailable under either the Jones Act or GML; the motion was granted.⁴⁸ On appeal, the Fifth Circuit initially held that punitive damages were available for unseaworthiness claims because punitive damages are established under GML and pre-exist the Jones Act.⁴⁹ However on rehearing, the Fifth Circuit concluded that *Miles* correctly provided the framework to bar punitive damages under the Jones Act and for claims of unseaworthiness.⁵⁰ A writ of certiorari was denied.⁵¹

4. *Batterton* Era

Three years after *Townsend* and *McBride*, a United States Court of Appeals encountered the applicability of the *Miles* and *Townsend* decisions to punitive damage claims for breach of the warranty of seaworthiness in *Batterton v. Dutra Group*.⁵² The plaintiff was a seaman that injured his hand while on a vessel owned by the defendant.⁵³ A

⁴² *Atlantic Sounding*, 557 U.S. at 422.

⁴³ *Id.* at 420.

⁴⁴ *See id.*

⁴⁵ 731 F.3d 505 (5th Cir. 2013).

⁴⁶ *Id.* at 507.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See id.* at 517-18.

⁵⁰ *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 391 (5th Cir. 2014).

⁵¹ 135 S. Ct. 2310 (2015).

⁵² 880 F.3d 1089 (9th Cir. 2017).

⁵³ *Id.* at 1090.

hatch cover blew open causing the injury because the vessel lacked a necessary pressure relief instrument.⁵⁴ This inadequacy allegedly rendered the vessel unseaworthy.⁵⁵ The Ninth Circuit confirmed what many courts before seemed to overlook, that *Miles* did not address “the permissibility of a punitive damages award...just loss of society and of future earnings.”⁵⁶ The appellate court recognized that “whatever room might be left to support broadening *Miles* to cover punitive damages was cut off by the Supreme Court’s decision [in *Townsend*].”⁵⁷ The Ninth Circuit ultimately concluded that “unless Congress legislates on [punitive damages], their availability is clearly established not only in *Townsend* but also in *Baker*.”⁵⁸ As a result, the plaintiff was entitled to claim punitive damages for unseaworthiness under GML.⁵⁹ The United States Supreme Court granted certiorari.⁶⁰

Justice Alito, writing for the majority, reversed the Ninth Circuit’s decision and stated “because there is no historical basis for allowing punitive damages in unseaworthiness actions, and in order to promote uniformity with the way courts have applied parallel statutory causes of action, we hold that punitive damages remain unavailable in unseaworthiness actions.”⁶¹ He further noted that the Court in *Townsend* was “explicit that our decision represented a gloss on *Miles* rather than a departure from it.”⁶² Justice Alito distinguished the two decisions to clear the confusion.⁶³ *Miles* established that courts “should look primarily to...legislative enactments for policy guidance,’ while recognizing that [courts] ‘may supplement these statutory remedies where doing so would achieve the uniform vindication’ of the policies served by the relevant statutes.”⁶⁴ *Townsend* however was an example of the justified departure from statutory remedial schemes “based on an established history of awarding punitive damages for certain maritime torts, including maintenance and cure.”⁶⁵ The majority opinion of Justice Alito’s decision stands primarily on three reasons: (1)

⁵⁴ *Id.*

⁵⁵ *Id.* at 1090-91.

⁵⁶ 880 F.3d at 1093.

⁵⁷ *Id.* at 1095.

⁵⁸ *Id.* at 1096.

⁵⁹ *Id.*

⁶⁰ *Dutra Grp. v. Batterton*, 139 S. Ct. 627 (2018).

⁶¹ *Dutra Grp. v. Batterton*, 139 S. Ct. 2275, 2278 (2019).

⁶² *Id.* at 2283.

⁶³ *Id.*

⁶⁴ *Id.* (citing *Miles*, 498 U.S. at 27 (1990)).

⁶⁵ *Id.* (citing *Townsend*, 557 U.S. at 411-14).

“unseaworthiness did not traditionally allow recovery of punitive damages,”⁶⁶ (2) awarding punitive damages would contradict the promotion of a “uniform rule applicable to all actions”⁶⁷ for the same injury, and (3) a punitive damages award “would exceed [the Court’s] current role to introduce novel remedies contradictory to those Congress has provided in similar areas.”⁶⁸

Batterton seems to strike a blow to GML punitive damages for seamen similar to that of *Miles*; however, none of Justice Alito’s considerations are necessarily ground-breaking. Historical analyses, preference for uniformity, and legislative deference have all been fairly common discussions in the punitive damage context.⁶⁹ Noteworthy however, is whether the *Miles* framework has again been utilized in punitive damage claims. What seemed to be an antiquated consideration has now been apparently resurrected. Whether it is through subsequent misinterpretations of *Townsend’s* seemingly straightforward abrogation of *Miles* or a compelling desire for uniformity, *Batterton* has again thrust the question of punitive damage availability spiraling back into confusion.

What then is the necessary showing for punitive damage availability under GML? What are the more important considerations? *Batterton* seems to require an unquestioned uniformity amongst claims, a detailed history of its availability or an explicit allowance by Congress.⁷⁰ Where does this leave the *Baker* and *Townsend* decisions, and GML punitive damages as a whole? With a general understanding of the complicated history of punitive damages in general maritime law, it is necessary to take a few steps back to address the adoption and enactment of the OPA, and its effect on the *Exxon* decision.

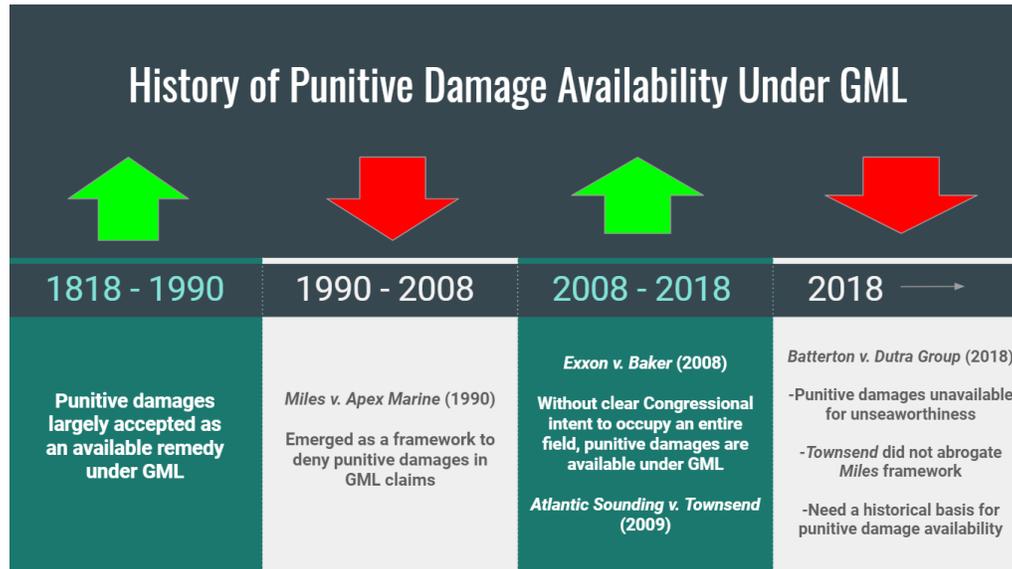
⁶⁶ 139 S. Ct. at 2284.

⁶⁷ *Id.* at 2285 (citing *Miles*, 498 U.S. at 33).

⁶⁸ *Id.* at 2286 (citing *Miles*, 498 U.S. at 36).

⁶⁹ Historical justifications for GML punitive damages are used in *Exxon*, 554 U.S. at 491. Legislative deference and preference for uniformity is stressed in *F/V Seafarer*, F.3d 694, 700 (1st Cir. 1995); *Horsley*, 15 F.3d 200 (1st Cir. 1994); *Miller*, 989 F.2d 1450 (6th Cir. 1993).

⁷⁰ *Batterton*, 139 S. Ct. at 2284.



III. EXXON VALDEZ Spill

On March 24, 1989, the tanker, EXXON VALDEZ, struck a reef near the port in Valdez, Alaska, and spilled nearly 11 million gallons of oil into Prince William Sound.⁷¹ Within two weeks, the oil spread more than 1,000 square miles in the Sound: blackening beaches, destroying plant and marine life, and endangering vital Alaskan industries.⁷² Although one judge likened the disaster to that of Hiroshima, a senator ironically described it as the Pearl Harbor of the United States environmental movement.⁷³ The comparisons do, however, jointly analogize the incident to those of a world-changing magnitude.

A. Resulting Concerns

Unsurprisingly, the oil industry faced immediate societal and political backlash. However, legislators and the general public alike

⁷¹ Exxon Valdez Oil Spill and its Environmental and Maritime Implications: Hearings before the Committee on Commerce, Science, and Transportation, 101 Cong. 1 (1989) (Statement of Ernest F. Hollings).

⁷² *Id.*

⁷³ *Id.* at 4 (Statement of Ted Stevens); A. H. E. Popp., 1993, A North American Perspective on Liability and Compensation for Oil Pollution Caused by Ships, 43 *International and Comparative Law Quarterly* 116 (1993).

quickly realized that America was “grossly unprepared for disasters of this scale.”⁷⁴ Specifically, Congress recognized the need to review the question of liability and to centralize authority to expedite response and cleanup efforts.⁷⁵ Further, in preventing oil spills altogether, the laws in place “[were] not an adequate deterrent to such disasters.”⁷⁶ To make matters worse, in just two days in June 1989, three different oil tankers accidentally discharged their cargo into United States coastal waters.⁷⁷ In a matter of forty-eight hours, more than 600,000 total gallons of oil discharged into the waters of Galveston Bay, Texas; Claymont, Delaware; and Narragansett Bay, Rhode Island.⁷⁸ With this backdrop, “the need for action on comprehensive oil spill legislation [had] never been as clear.”⁷⁹ Although the need was clear, the answers to looming questions, such as the degree to which such a regime should preempt other liability frameworks, were far from it.⁸⁰

B. OPA Adoption

The Oil Pollution Act of 1990 (“OPA”) was enacted as a response to the successive oil spills of 1989. The Act served as an acknowledgment that “existing authority for preventing and responding to oil spills from vessels and onshore facilities was inadequate.”⁸¹

IV. OPA Substance

⁷⁴ Exxon Valdez Oil Spill and its Environmental and Maritime Implications: Hearing Before the Committee on Commerce, Science, and Transportation, 101 Cong. 1 (1989) (Statement of Ernest F. Hollings).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ National Oceanic and Atmospheric Administration, *The Spills Behind the Oil Pollution Act*, March 22, 2019, <https://noaa.maps.arcgis.com/apps/Cascade/index.html?appid=2c67dae3fa12484487cdb827ccccf274>

⁷⁸ *Id.*

⁷⁹ Oil Spill Liability and Compensation: Hearing Before the Subcommittee on Water Resources of the Committee on Public Works and Transportation, 101 Cong. 2 (1989) (Statement of John Paul Hammerschmidt).

⁸⁰ *Id.*

⁸¹ Joel M. Gross & Lynn Dodge, CLEAN WATER ACT: BASIC PRACTICE SERIES, 12 (2005).

OPA provides an extensive liability scheme for oil spills. When oil is discharged, the Act provides that the responsible party (RP) is liable for removal costs and damages.⁸² An RP is one who is found to be accountable by the United States Coast Guard for the discharge of oil from a vessel or facility; the point source.⁸³ This strict liability regime, however, is not new. Since the passage of the Refuse Act in 1899, liability for damages arising from marine pollution is based entirely on causation, not fault.⁸⁴ For example, a non-negligent vessel that is damaged in a collision will still be deemed the RP if it discharges oil. These quick determinations of responsibility expedite response and cleanup efforts. Under this “blame first, ask questions later” framework, the RP is given only five days to deny its designation as the RP, fifteen days to advertise a claim procedure, and ninety days to pay or reject a claim made against it.⁸⁵ In fact, a claimant need not offer anything more than a written request for compensation to the RP.⁸⁶ This claim is a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident.⁸⁷ The RP is then faced with a daunting task, having been presented no information more than a written claim, to blindly decide in ninety days whether to pay or fight the claim.

In exchange for the mechanical determination of responsibility, OPA provides certain limitations of liability under limited circumstances.⁸⁸ This is a common tradeoff in environmental protection statutes.⁸⁹ These limitations are based almost exclusively on the size and weight of the vessel or type of facility.⁹⁰ However, depending on the amount of discharge, the scheme limits the liability depending on the greater of cost per gross ton and the general price cap affixed to different size vessels.⁹¹ Nevertheless, these liability caps are not assured. An owner or operator found guilty of gross negligence or willful misconduct,

⁸² 33 U.S.C. § 2704(a).

⁸³ 33 U.S.C. § 2714(a).

⁸⁴ A. H. E. Popp., 1993, A North American Perspective on Liability and Compensation for Oil Pollution Caused by Ships, 43 INT’L AND COMP. L.Q. 133 (1993).

⁸⁵ 33 U.S.C. § 2713(c)(2).

⁸⁶ 33 U.S.C. § 2701(3).

⁸⁷ *Id.*

⁸⁸ 33 U.S.C. § 2704.

⁸⁹ 112 BENEDICT ON ADMIRALTY § 112(4).

⁹⁰ 33 U.S.C. § 2704(1)-(4)

⁹¹ *Id.*

who violates safety regulations, or fails to report the discharge will be stripped of the liability cap.⁹²

The RP is liable for all resulting removal costs.⁹³ Removal costs are any and all costs of removal that are incurred after a discharge, or to prevent, minimize, or mitigate pollution if there exists a substantial threat of discharge.⁹⁴ For example, following the Deepwater Horizon oil spill in 2010, British Petroleum (“BP”) paid more than 4 billion dollars to contain and clean up the discharge.⁹⁵ To put it into perspective, offshore facilities of the same nature have a \$75 million liability limit on damages, though there exists no cap for the cost of cleanup.⁹⁶ Although exceptional circumstances left the Deepwater Horizon spill “the only incident to have resulted in damages known to exceed the statutory liability limit for an offshore facility,” the immense cleanup costs offer an idea as to the possible ceiling for limitless removal costs.⁹⁷ It should be again mentioned that these costs are borne by an RP that may not truly be responsible in fault.⁹⁸

A. Damages

The Oil Pollution Act significantly expanded the parameters for those seeking economic damages for oil pollution.⁹⁹ The damages provisions of OPA are significant because they overruled a “70 year-old doctrine denying recovery for purely economic loss resulting from tortious conduct in maritime cases.”¹⁰⁰ Since 1927, claimants of economic damages were constrained to those only with a proprietary

⁹² 33 U.S.C. § 2704(c)(1)(a).

⁹³ 33 U.S.C. § 2702(a).

⁹⁴ 33 U.S.C. § 2701(31)

⁹⁵ Kimberly Amadeo, BP Oil Spill Economic Impact: Costs of the Deepwater Horizon Spill, November 20, 2019, <https://www.thebalance.com/bp-gulf-oil-spill-facts-economic-impact-3306212>.

⁹⁶ Popp, *supra* note 84 at 139.

⁹⁷ United States Coast Guard, Oil Pollution Act Liability Limits in 2017, 3, August 21, 2018, https://www.uscg.mil/Portals/0/NPFC/docs/PDFs/Reports/Liability_Limits_Report_2017.pdf.

⁹⁸ An RP is designated as such by the point source of the discharge of oil, not by fault. 33 U.S.C. § 2701(a).

⁹⁹ See 33 U.S.C. § 2702.

¹⁰⁰ Popp, *supra* note 84 at 144.

interest in the property damaged under the Robins Dry Dock Rule.¹⁰¹ OPA threw aside this restrictive criteria to adopt a far more permissive scheme. For example, OPA provides that claimants may recover for loss of profits or earning capacity resulting from injury to or destruction of property or natural resources.¹⁰²

Although far more expansive, OPA lists recoverable damages in six categories: natural resources, real or personal property, subsistence use, revenue, profits and earning capacity, and public services.¹⁰³ Whether or not this list is exhaustive and precludes additional damages is contested. Specifically, because OPA “only addresses compensatory remedies, the question of punitive damage recovery further hinders the OPA’s ability adequately resolve oil spill causes of action.”¹⁰⁴

B. Savings Clauses

For purposes of this analysis, there are a few important savings clauses within the OPA. The first savings clause preserves a claimant’s right to sue under applicable state enacted oil spill liability statutes.¹⁰⁵ The Act specifically provides that it shall not be construed as “modifying, repealing, superseding, or *preempting* any...State or Federal law or regulation.”¹⁰⁶ Another provision goes further to state that “[n]othing in this Act...shall in any way affect, or be construed to affect, the authority of the United States *or any State*...to impose additional liability.”¹⁰⁷ This was a frequently contemplated aspect of OPA during its formulation. Congressman John Paul Hammerschmidt noted in a hearing before Congress that “the principal obstacle to a comprehensive Federal regime has been, and continues to be, the question of the degree to which such a regime should preempt State programs.”¹⁰⁸ It would appear that after

¹⁰¹ *Id.*

¹⁰² 33 U.S.C. § 2702(2)(e).

¹⁰³ 33 U.S.C. § 2701(2)(a)-(f).

¹⁰⁴ Brittan J. Bush, *The Answer Lies in Admiralty: Justifying Oil Spill Punitive Damages Recovery Through Admiralty Law*, 41 ENVTL L.REV. 1265 (2011).

¹⁰⁵ 33 U.S.C. § 2718(a)(1).

¹⁰⁶ 33 U.S.C. § 2732(n)(1).

¹⁰⁷ 33 U.S.C. § 2718(a)(1).

¹⁰⁸ *Oil Spill Liability and Compensation: Hearing Before the Subcommittee on Water Resources of the Committee on Public Works and Transportation*, 101 Cong. 1 (1989) (Statement of Honorable John Paul Hammerschmidt).

much consideration, “Congress intended OPA and general maritime law to coexist.”¹⁰⁹ However, this is not so black and white in its application.

Additionally, the Act specifies in a later savings clause that:

except as otherwise provided in this Act, this Act does not affect (1) admiralty and maritime law; or (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”¹¹⁰

Since OPA does not incorporate punitive damages, this clause poses the essential question as to whether or not the statute provides otherwise. Does OPA’s omission provide that punitive damages are unavailable? Does the omission provide nothing at all on the subject, leaving it to GML? Is the omission intentional? The answers often hinge on originalist and non-originalist interpretations.

These savings clauses and their application with general maritime law have been the center of debate; specifically in regard to punitive damage recovery. There are two most common opposing perspectives. First, similar to the *Miles* reasoning, the OPA damage provisions are fully comprehensive and in light of applicable legislation, courts should not provide for additional remedies. On the other hand, omission of punitive damages in OPA does not render it inapplicable without express Congressional intent to do so. Further, the state law savings provision provides courts the ability to apply additional State law liability despite applicable federal legislation; a potential window to allow state punitive damages.¹¹¹ An obvious yet important requirement for the state savings clause perspective to bear any weight is that the claim must be applicable under state jurisdiction. OPA’s jurisdiction requires a “[discharge], or ... substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone [of the United States].”¹¹² For example, an oil discharge that occurs outside of the reach of state jurisdiction, such as within the

¹⁰⁹ Brittan J. Bush, Thomas C. Galligan, Jr., Displacement and Preemption: The OPA’s Effect on General Maritime Law and State Tort Law Punitive Damages Claims, 42 CUMB. L.REV. 1, 84 (2012).

¹¹⁰ 33 U.S.C. § 2751(e)(1)-(2).

¹¹¹ 33 U.S.C. § 2718(a)(1).

¹¹² 33 U.S.C. § 2702(a).

exclusive economic zone of the United States, will similarly be out of the reach of state liabilities. However, the true debate lies regarding an incident that occurs within state jurisdiction and falls under the parameters of OPA.

Take, for example, this hypothetical situation: a vessel within state waters strikes a submerged boulder and discharges oil. Since the accident occurred within state boundaries, the vessel owner is liable under state law. However, OPA provides an extensive federal liability regime for marine oil pollution. In considering the applicability of both liability regimes, does the federal legislation preempt the state legislation? Does the state law savings clause allow state liability only where OPA is silent or also where they overlap?

OPA's silence is at the forefront of the savings clause confusion. Because OPA does not explicitly provide for punitive damages, can state punitive damages be sought while under an OPA claim, or are general maritime claims precluded?

V. Damage Availability

A. Marine Pollution Claims for "Covered Damages"¹¹³

Judge Lemelle addressed the effects of the savings clause in *Gabarick v. Laurin Maritime (America) Inc.*¹¹⁴ Here, a vessel collided with a towed barge on the Mississippi River, causing oil to spill into the river.¹¹⁵ The United States Coast Guard designated the barge as the source of the output and the barge owner as the responsible party.¹¹⁶ After extensive litigation, the vessel owner, barge owner, and tugboat operator moved to dismiss all claims for damages that are recoverable under OPA on the basis of preemption.¹¹⁷ The barge owner argued that the mandatory language of OPA requires that the damages recoverable under OPA, specifically those enumerated in the damages provision of OPA, are subject to and must be pursued according to OPA.¹¹⁸

Judge Lemelle first examined the language of the OPA damages provision and determined that "the text of OPA implies its mandatory

¹¹³ For the remainder of this article, "covered damages" refers to those explicitly listed in 33 U.S.C. § 2702(b)(2).

¹¹⁴ 623 F. Supp. 2d 741 (E.D. La. 2009).

¹¹⁵ *Id.* at 743.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

and exclusive nature.”¹¹⁹ The covered damages provision begins with “notwithstanding any other provision or rule of law, and subject to the provisions of this Act...;” of which Judge Lemelle specifically noted use of the word “notwithstanding.”¹²⁰ “Notwithstanding,” when used as a preposition, is defined as “in spite of.”¹²¹ When the definition is applied to the provision, it reads: Despite any other provision of law, and subject to the provisions of this Act...each responsible party for a vessel or a facility from which oil is discharged...is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident.¹²² This provision maintains that for any OPA cause of action, the RP is liable for, and only for, OPA covered damages, regardless of any other applicable law. Judge Lemelle concluded that OPA’s language “indicates its mandatory and exclusive nature with respect to its covered damages.”¹²³

Judge Lemelle further laid out four factors for consideration of statutory preemption of GML claims: (1) legislative history, (2) scope of legislation, (3) whether judge-made law would fill a gap left by Congress’s silence or rewrite rules that Congress enacted, and (4) the likeliness of Congress’s intent to preempt long established and familiar principles of the common law or GML.¹²⁴ Regarding the first factor, Judge Lemelle noted that the legislative intent of OPA was to encourage settlement and reduce litigation in oil spill cases.¹²⁵ The consummation of this intent was the creation a single federal law providing cleanup authority, penalties, and liability for oil pollution.¹²⁶ Further, concerning the third factor, he stated that there is no gap left for supplemental law regarding covered damages, however, OPA expressly leaves claims not addressed to GML.¹²⁷

Following an originalist interpretation of the damages provision, Judge Lemelle provided that because OPA explicitly states the damages to which it applies and the remedy to be pursued, “courts are to recognize this direct answer of Congress rather than seek to subvert it by allowing pursuit of the types of claims covered by OPA under the

¹¹⁹ 623 F. Supp. 2d at 745.

¹²⁰ *Id.* at 744.

¹²¹ *Notwithstanding*, BLACK’S LAW DICTIONARY, 1230 (10th ed. 2014).

¹²² 33 U.S.C. § 2702(a).

¹²³ *Gabarick*, 623 F. Supp. 2d at 745.

¹²⁴ *Id.* at 745 (*citing* U.S. v. Oswego Barge Corp., 664 F.2d 327 (2nd Cir. 1981)).

¹²⁵ *Id.* at 747-48.

¹²⁶ *Id.* at 748 (*citing* S. Rep. No. 101-94, 101 Cong. 2, 730 (1990)).

¹²⁷ *Id.* at 748.

general maritime law ...”¹²⁸ Ultimately, he followed a framework the Supreme Court set forth: “[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” What then is made of punitive damage claims and the like that are not listed in OPA?

The basic rule that Judge Lemelle sets forth is that if an individual has an OPA cause of action, he is confined to covered damages for that claim. However, he conceded that “preemption by OPA of the claims covered by OPA still allows the claimant to pursue claims not covered by OPA under [GML].” For example, bodily injury or collision damage claims do not give rise to an OPA cause of action, and thus a claimant may seek any GML claim. Adversely, if a lessee suffers destruction of property due to oil discharge, they may seek only covered damages because OPA is their only avenue for redress.¹²⁹ Consider only damage availability for now; questions and disagreements regarding different claims against responsible and non-responsible parties will be further analyzed later in this comment.

B. Marine Pollution Claims for “Un-Covered Damages”¹³⁰

Two years after *Gabarick*, Judge Barbier confronted a similar issue in *In re Oil Spill*.¹³¹ Following the Deepwater Horizon oil spill off the coast of Louisiana, Judge Barbier was assigned the litigation involving numerous claimants and defendants.¹³² This litigation has been considered some of “the most complex questions of liability ever presented to the United States judicial system.”¹³³ Among the claims were those for negligence and gross negligence under GML, of which punitive damages were sought.¹³⁴ Fourteen of the fifteen listed defendants, including BP, sought to dismiss all GML claims,

¹²⁸ *Gabarick*, 623 F. Supp. 2d at 747.

¹²⁹ The hypothetical individual has no claim under GML because the Robins Dry Dock Rule requires the individual have a proprietary interest in the property, whereas OPA allows lessees to recover for economic losses.

¹³⁰ For the remainder of this article, “un-covered damages” refers to those damages that are not expressly listed in 33 U.S.C. § 2702(b)(2).

¹³¹ *In Re Oil Spill*, 808 F Supp. 2d 943 (E.D. La. 2011).

¹³² *Id.* at 947.

¹³³ Brittan J. Bush, *The Answer Lies in Admiralty: Justifying Oil Spill Punitive Damages Recovery Through Admiralty Law*, 41 ENVTL L.REV. 1255, 1257 (2011).

¹³⁴ *In Re Oil Spill*, F. Supp. 2d at 948.

“contending that when Congress enacted OPA, it displaced...general maritime law, for claims covered by OPA.”¹³⁵ Further, they asserted that “when Congress enacts a comprehensive statute on a subject previously controlled by federal common law, the federal statute controls and displaces the federal common law.”¹³⁶

Judge Barbier first noted the history of GML punitive damages before the enactment of OPA.¹³⁷ Specifically in the case of gross negligence, GML “provided a claim for punitive or exemplary damages.”¹³⁸ Judge Barbier diverged from both *Gabarick* and *Miles*, and declined to concur with the proposition that OPA displaced GML.¹³⁹ He instead chose to form his opinion around the less stringent *Exxon* and *Townsend* holdings.¹⁴⁰ Judge Barbier contemplated three important considerations: (1) the history of GML punitive damages, (2) congressional intent regarding the field of oil spill liability, and (3) whether punitive damages would frustrate the OPA liability scheme.¹⁴¹ He declined to find that Congress intended to occupy the entire field of oil spill liability, and noted that he “does not read OPA’s silence as meaning that punitive damages are precluded under [GML].”¹⁴² Further, he recognized that “Congress knows how to proscribe punitive damages when it intends to.”¹⁴³ However, the third consideration is likely the most important for this analysis. Judge Barbier asserted that nothing indicates that a claim for punitive damages would frustrate the OPA liability scheme.¹⁴⁴ Critically, he stated that “the behavior that would give rise to punitive damages under general maritime law – gross negligence – would also break OPA’s limit of liability.”¹⁴⁵ In essence, because gross negligence simultaneously breaks the OPA liability limitation and gives rise to punitive damage availability, Judge Barbier argues that there exists no conflict in its application. Ultimately, Judge Barbier concluded that OPA does not preempt any GML claims.¹⁴⁶

¹³⁵ *Id.* at 958.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *In Re Oil Spill*, F. Supp. at 958-59.

¹³⁹ *Id.* at 960.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 961-62.

¹⁴² *Id.* at 962.

¹⁴³ *In Re Oil Spill*, F. Supp. at 962.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 963.

Judge Lemelle and Judge Barbier both contradict each other regarding GML's ability to supplement the explicitly provided damages in OPA. Although Judge Lemelle concluded that claims outside of OPA's scope are preserved under GML, he reasoned that claims within OPA's scope are exclusive and may not be supplemented. Judge Barbier, on the other hand, contended that claims even within OPA's scope may be supplemented by GML. However, eleven years before *In re Oil Spill*, the United States Court of Appeals for the First Circuit concluded the opposite.

South Port Marine, LLC v. Gulf Oil Limited Partnership is the only federal court of appeals case to have directly confronted whether OPA may be supplemented with punitive damages.¹⁴⁷ During a bad storm, a docked barge owned by the defendant discharged between 23,000 and 30,000 gallons of gasoline into the plaintiff's marina in Portland Harbor, Maine.¹⁴⁸ While filling the barge with gasoline, a crew member working for the defendant left the transfer unattended and boarded a tug boat.¹⁴⁹ The gasoline continued to overflow for a number of hours, and soon thereafter, two to three inches of gasoline floated on the surface of the water at the marina.¹⁵⁰ The gasoline dissolved the Styrofoam flotation of the plaintiff's dock segments and destroyed more than sixty floats and severely damaged forty-five dock segments.¹⁵¹

The plaintiff alleged economic damages and, among other things, asserted punitive damages.¹⁵² The complaints were filed under OPA and state tort actions.¹⁵³ The defendant conceded liability under OPA, and the court of appeals held that punitive damages were not available under OPA.¹⁵⁴ Judge Torruella found that Congress intended to supplant the general admiralty and maritime law that existed prior to the enactment of the statute, which permitted the award of punitive damages.¹⁵⁵ Although the court agreed that Congress did not intend OPA to bar imposition of additional liability by states, it asserted that "in an area covered by statute it would be no more appropriate to prescribe a different measure of damage than to prescribe a different

¹⁴⁷ *S. Port Marine, L.L.C. v. Gulf Oil Ltd. P'shp.*, 234 F.3d 58 (1st Cir. 2000).

¹⁴⁸ *Id.* at 60-61.

¹⁴⁹ *Id.* at 61.

¹⁵⁰ *Id.*

¹⁵¹ 234 F.3d at 60.

¹⁵² *Id.* at 61.

¹⁵³ *Id.* at 64-65.

¹⁵⁴ *Id.* at 61.

¹⁵⁵ *Id.* at 65-66.

statute of limitations, or a different class of beneficiaries.”¹⁵⁶ While applying the *Miles* framework, the court declined a punitive damage award and stressed “deference to Congressional judgment where at the very least, there is an overlap between statutory and decisional law.”¹⁵⁷

South Port offers a sturdy defense of the *Miles* and *Gabarick* statutory deference perspective. However, to better understand the context of the decisions by Judge Lemelle and Judge Barbier and the *South Port* decision, it should be noted the era with which each was decided. *South Port* was decided years before the *Exxon* decision, while *Miles* was still very much controlling with regard to GML punitive damages. This observation alone may clarify the reason for its condemnation of punitive damage availability in the face of OPA. Further, the court specifically stated that with regard to the question of punitive damages, it “has largely been decided for us by the Supreme Court in *Miles v. Apex Marine*.”¹⁵⁸ Would the *South Port* court have found differently had the controversy been decided after *Exxon*?

Sixteen years after *South Port*, the First Circuit clarified its holding.¹⁵⁹ The court stated that “[a]lthough we acknowledged in *South Port Marine* that the OPA supplants general admiralty and maritime law when OPA is triggered, we said nothing about the statute’s effect on general admiralty and maritime law outside the OPA context.”¹⁶⁰ Specifically, the court stated that it did not hold that negligence claims brought under general maritime law are displaced by OPA.¹⁶¹ Further, it re-affirmed that “when Congress supplanted admiralty and maritime law by passing the OPA – a statute that provides no punitive damages – it sought to eliminate punitive damages entirely in any case where OPA liability applied.”¹⁶² However, in this case, because public vessels lie outside the sweep of OPA liability, any preexisting GML that applied to public vessels survives its enactment.¹⁶³ The holding asserts that scenarios that lie outside the framework of OPA liability are thus not

¹⁵⁶ 234 F.3d at 65-66 (referencing *Miles v. Apex*, 498 U.S. at 31 (1990) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))).

¹⁵⁷ *Id.* at 66 (citing *CEH, Inc v. Seafarer*, 70 F.3d 694, 701 (1st Cir. 1995)).

¹⁵⁸ *Id.* at 65.

¹⁵⁹ See *Ironshore Specialty Ins. Co. v. American Overseas Marine Co., LLC*, 871 F.3d 131 (1st Cir. 2017).

¹⁶⁰ *Id.* at 139.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

displaced by OPA.¹⁶⁴ Just as Judges Lemelle and Barbier concluded with un-covered damages, the First Circuit's holding implies that parties excluded from the OPA may similarly evade the OPA framework. Importantly, this case was decided three months after the *Batterton* decision.¹⁶⁵ Does *South Port's* reliance on *Miles* render it inapplicable, or did *Batterton* open back up the door for the *Miles* reasoning?

Because *Batterton* is the most recent Supreme Court case to directly address the preemption of GML punitive damages by federal statute, it may be helpful to apply marine pollution punitive damages to the resulting test. The first, and what appears to be the most important factor in the *Batterton* decision, is the historical basis for allowing punitive damages for the claim.¹⁶⁶ Second, the *Batterton* court considered whether punitive damages would maintain uniformity with Congress's policies.¹⁶⁷ Finally, whether punitive damages would exceed the Court's objectives and introduce novel remedies contradictory to those provided by Congress in similar areas.¹⁶⁸

For purposes of this test, the historical basis consideration will be the most heavily weighted for a few reasons. First, in reference to *Townsend*, Justice Alito stated that the Supreme Court "may depart from the policies found in the statutory scheme in discrete instances based on long-established history."¹⁶⁹ This statement implies that in certain circumstances, satisfaction of this factor alone may allow for punitive damage recovery. Second, Justice Alito stated that "the lack of punitive damages in traditional [unseaworthiness] cases is practically dispositive."¹⁷⁰ This statement provides that the issue is essentially settled if there is a lack of historical evidence of punitive damages for the claim. Finally, historical evidence appears to influence the burden of proof for the subsequent factors. Justice Alito stated that when historical evidence is severely lacking, "we cannot sanction a novel remedy...unless it is required to maintain uniformity with Congress's clearly expressed policies."¹⁷¹ This is likely the strongest factor in favor of marine pollution punitive damages. *Exxon* provides clear support for marine pollution punitive damages. In fact, Justice Alito cited *Exxon* in

¹⁶⁴ See *Ironshore Specialty Ins. Co. v. American Overseas Marine Co., LLC*, 871 F.3d at 139.

¹⁶⁵ *Batterton*, 139 S. Ct. at 2275.

¹⁶⁶ *Id.* at 2283.

¹⁶⁷ *Id.* at 2284.

¹⁶⁸ *Id.* at 2285-86.

¹⁶⁹ *Id.* at 2278.

¹⁷⁰ *Batterton*, 139 S. Ct. at 2284.

¹⁷¹ *Id.*

Batterton when he stated that punitive damages are a well-established part of the common law.¹⁷²

The second *Batterton* consideration is whether punitive damages would maintain uniformity with Congress's policies. Application of this factor to marine pollution is likely a lower burden to satisfy than for unseaworthiness in *Batterton*. As noted above, Justice Alito employed a sort of balancing scale for the second factor in relation to the first. Justice Alito stated that because of a severe lack of historical evidence to support punitive damages for unseaworthiness, the Court would not sanction punitive damages "unless it is required to maintain uniformity with Congress's clearly expressed policies."¹⁷³ It appears that the less historical evidence, the more essential the remedy must be to maintain uniformity with Congressional policies. Does this similarly translate so that the more historical evidence, the less essential the remedy must be to maintain uniformity? For purposes of marine pollution, punitive damages have a strong historical basis, however even with a lower burden for this second factor, their availability may still fail. Justice Alito revived the *Miles* holding that commands that federal courts should seek to promote a uniform rule applicable to all actions for the same injury.¹⁷⁴ Although there is historical evidence to support punitive damages for marine pollution, there is an unquestioned lack of uniformity among federal courts.

The final factor considers whether sanctioning punitive damages would exceed the Court's role to pursue Congressional policies.¹⁷⁵ Importantly, Justice Alito acknowledged that unseaworthiness has a strict-liability form created from the Jones Act. Justice Alito stated that "we are particularly loath to impose more expansive liabilities on a claim governed by strict liability than Congress has imposed for comparable claims based in negligence."¹⁷⁶ This is clearly important because OPA, just as the Jones Act, employs a strict-liability regime.¹⁷⁷ Further, Justice Alito noted that punitive damages would create bizarre disparities, such as the fact that it would place the ship owner liable for punitive damages, whereas the master of the ship would escape this liability.¹⁷⁸ This is similar to the marine pollution disparity that could

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2283.

¹⁷⁵ *Batterton*, 139 S. Ct. at 2285-86.

¹⁷⁶ *Id.* at 2286.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2287.

potentially make RP's liable for punitive damages while non-RP third parties escape this liability.¹⁷⁹

Ultimately, although *Exxon* established a precedent for marine pollution punitive damages, it likely fails the *Batterton* considerations. Additionally, as noted earlier in this comment, *Exxon* established punitive damage availability under the far less stringent CWA framework that explicitly allows individuals to seek "any other relief."¹⁸⁰ Next, the *Miles* uniformity factor would alone likely shred punitive damage availability, despite requiring a lower bar than in *Batterton*. There is clear dispute regarding OPA punitive damage availability; a problem that would benefit from clarity. It appears that while *Batterton* controls, punitive damages are unavailable for marine pollution. This conclusion assuredly includes claims that fall within an OPA cause of action, though it is still unclear outside of the scope. For example, an individual that satisfies only a GML cause of action may still be able to assert punitive damages outside of OPA's constraints. Adversely, an individual that satisfies both a GML and OPA cause of action, or an individual that satisfies only an OPA cause of action, will be preempted from asserting punitive damage claims because they are constrained to the parameters of OPA. Specifically, an individual that is injured by an RP's discharge of oil is not able to assert punitive damages because they are compelled to assert only OPA damages. Whereas an individual that satisfies the Robins Dry Dock rule but fails to prove an OPA injury, albeit unlikely, may still be able to assert punitive damages because they are not constrained to OPA damages. These ideas are further explored below.

VI. Damage Availability by Claimant Status

Before one can assert a punitive damage claim, a prerequisite is always that the person be able to assert it. For purposes of this analysis, consider this hypothetical: a negligent vessel owner collides with a barge near a marina. Following the collision, the marina becomes polluted with oil. The barge is the source of the discharge, and the barge owner is determined to be the RP. An individual owns a fuel dock at the marina and loses all profits during the extensive clean-up period. Importantly however, the fuel dock was in no way physically damaged. Thus, the individual experienced only loss of profits.

¹⁷⁹ Non-responsible third parties fall outside of the scope of OPA's strict-liability scheme.

¹⁸⁰ 33 U.S.C. § 1365(e).

A. OPA Claimants¹⁸¹

First, may the individual bring covered damages against the barge owner? The simple answer is yes. In fact, this is the individual's only option. One major function of OPA is that it significantly broadened the scope of individuals, OPA claimants, who are allowed to recover for economic losses resulting from an oil spill. For economic damage claims, these OPA claimants must prove only that the losses "result[ed] from" or were "due to" the oil spill; they need not even own the damaged property.¹⁸² Further, OPA allows recovery for "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, or natural resources, which shall be recoverable by any claimant."¹⁸³ The individual in the hypothetical satisfies these requirements and is thus an OPA claimant. Therefore, this individual may file a claim against the barge owner as the designated RP for covered damages resulting from the oil spill. However, the individual may not assert any un-covered damages against the barge owner.

B. GML Claimants¹⁸⁴

Although OPA expanded the horizon for many claimants, the Robins Dry Dock rule still prevails under GML.¹⁸⁵ This rule requires that for purely economic losses, the individual experience physical damage to a proprietary interest. The individual in the hypothetical did not experience any physical damage to the fuel dock and therefore is not a "GML claimant" for purposes of marine pollution. As a result, the

¹⁸¹ For the remainder of this article, "OPA claimant" refers to a claimant that is able to prove any of the covered damages in 33 U.S.C. § 2702(b)(2)(A)-(F).

¹⁸² 33 U.S.C. § 2702(b)(2)(A)-(F).

¹⁸³ *Id.*

¹⁸⁴ For the remainder of this article, "GML claimant" refers to a claimant that is able to satisfy the Robins Dry Dock Rule; physical damage to a proprietary interest.

¹⁸⁵ The Fifth Circuit has frequently reaffirmed the application of the Robins Dry Dock rule. *See, e.g.,* Mathiesen v. M/V Obelix, 817 F.2d 345 (5th Cir. 1987); *See also* Louisiana v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985)); *See also* Wiltz v. Bayer Cropscience, Ltd. P'shp, 645 F.3d 690, 2011 WL 2535552 (5th Cir. 2011); *See also* Catalyst Old River Hydroelectric Ltd. v. Ingram Barge Co., 639 F.3d 207 (5th Cir. 2011).

individual is precluded from asserting any GML claims for his damages. Judge Barbier reasoned that prior to the adoption of OPA, these individuals would not have a viable cause of action and would be precluded from any recovery by virtue of the Robins Dry Dock rule.¹⁸⁶ He concluded that claims under GML asserted by claimants that do not satisfy the Robins Dry Dock rule are “not plausible and must be dismissed.”¹⁸⁷ As a result, the hypothetical individual is still only able to assert OPA damages.

However, what if the fuel dock were physically damaged by the oil in the hypothetical? In this scenario, the fuel dock owner would satisfy the Robins Dry Dock rule and would thus be a GML claimant. Importantly, this individual still maintains his OPA claimant status as well. Clearly the individual in this situation would have the same OPA damage availability as before, but it gets a little stickier regarding GML damage availability.

Judge Barbier concluded that plaintiffs that satisfy the Robins Dry Dock rule can assert GML claims against non-RP third parties because they are GML claimants.¹⁸⁸ This is true regardless of whether they satisfied the requirements as an OPA claimant also. As noted above, Judge Barbier found that GML claimants “may plausibly allege punitive damages under general maritime...”¹⁸⁹ Under this perspective, if an individual satisfies the Robins Dry Dock rule, they may assert punitive damages in any marine pollution scenario that it is warranted. These damages are available regardless of whether the individual is both a GML claimant and an OPA claimant. It is of critical importance to understand that Judge Barbier’s holding allows these individuals to simultaneously exist as OPA and GML claimants and assert OPA and GML claims — neither determination precludes the availability of the other.¹⁹⁰ Thus, “OPA does not displace general maritime law claims for those [GML claimants] who would have been able to bring such claims prior to OPA’s enactment.”¹⁹¹ Although this determination begins to clear up some of the confusion, there is one final component that must be examined: who these claims may be brought against.

¹⁸⁶ *In re Oil Spill*, 808 F. Supp. 2d 943, 961 (E.D. La. 2011).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 962.

¹⁹⁰ Judge Barbier asserts that claimants that satisfy both the Robins Dry Dock Rule and OPA requirements may assert any viable claims and are not precluded by either status. *Id.* at 961.

¹⁹¹ *In re Oil Spill*, 808 F. Supp. 2d at 963.

VII. Damage Availability by Defendant Status

The distinction between the responsible party and non-responsible party is critical to determine what claims may, and must, be brought against them. Judge Barbier asserts that if an individual is a GML claimant, they may assert any GML claim against the non-responsible party.¹⁹² He noted that “OPA does not directly address or speak to the liability of non-Responsible Parties to [OPA claimants].”¹⁹³ Just as he did with punitive damage availability, Judge Barbier concluded that the ability to seek redress directly from a non-responsible party would not frustrate Congressional intent when it enacted OPA.¹⁹⁴ In returning to the hypothetical in the preceding section, Judge Barbier asserts that the fuel dock owner that satisfied the Robins Dry Dock rule may seek any GML claim against the negligent vessel owner.

Adversely, Judge Barbier did acknowledge that there are more restrictions when asserting claims against an RP.¹⁹⁵ He noted that all claims against an RP for damages covered by OPA must comply with OPA’s presentment procedure.¹⁹⁶ Judge Barbier did not, however, state that there were any further constraints.¹⁹⁷

Judge Lemelle held quite the opposite. In *Gabarick*, a claimant suing a non-responsible third party argued that “OPA doesn’t prevent claims against third parties because § 2709 states that a person, rather than the RP alone, ‘may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law.’”¹⁹⁸ Further, because non-responsible third parties are not addressed in OPA, the OPA damage restrictions do not apply to them.¹⁹⁹ Ultimately, Judge Lemelle sided with Congressional intent; however, he interpreted it differently than Judge Barbier. Judge Lemelle stated that the intent behind OPA was to minimize lawsuits, and as a result, claimants should sue only RPs under OPA.²⁰⁰ The RP may then seek redress from third parties.²⁰¹ Under this perspective, the hypothetical

¹⁹² *Id.* at 961.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 962.

¹⁹⁵ *Id.*

¹⁹⁶ *In re Oil Spill*, 808 F. Supp. 2d at 962.

¹⁹⁷ *See generally In re Oil Spill*, 808 F. Supp. 2d 943 (E.D. La. 2011).

¹⁹⁸ *Gabarick*, 623 F. Supp. at 750 (E.D. La. 2009).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

individual would be required to sue the barge owner. The barge owner is then able to sue the negligent vessel owner.

Halliburton Energy Services provided a Brief of Amicus Curiae during the Deepwater Horizon litigation that coincides with Judge Lemelle's reasoning.²⁰² It stated that Judge Barbier's assertion that OPA does not displace claims against non-responsible parties could potentially and unfairly expose them to greater liability than RPs.²⁰³ OPA addresses the potential liability for non-responsible parties by virtue of its contribution provision.²⁰⁴ This provision provides that a person may bring a civil action for contribution against any other person who is liable under OPA or any other applicable law.²⁰⁵ The brief states that Judge Lemelle thus correctly concluded that claimants should pursue OPA claims against the responsible party; the RP may then seek to recover from third parties.²⁰⁶ The brief lays out a helpful hypothetical: "assume an oil spill in which all claimants assert damages related to physical damage to a proprietary interest (such that there is no difference between damages available under OPA or general maritime law)."²⁰⁷ In this scenario, the RP is liable only for compensatory damages, and under the contribution scheme, the non-responsible party is liable for its proportionate share of the damages.²⁰⁸ Importantly, however, Judge Barbier's conclusion would leave the non-responsible party additionally exposed to punitive damages under GML while leaving the RP liable for only compensatory damages.²⁰⁹ This result is illogical.

VIII. Conclusion

Punitive damage availability seems to result in inequitable disparities in its application under an OPA regime, most of which require only logical considerations. Halliburton's hypothetical portrays the resulting imbalance when punitive damages are sought against the

²⁰² Brief for Halliburton Energy Services, Inc. as Amicus Curiae in Support of BP Appellants' Request for Reversal of Ruling Regarding OPA Displacement of General Maritime Law Claims, *In re Oil Spill*, 844 F. Supp. 2d 746 (E.D. La. 2011) (no. 14-31374), 2016 WL 5345761.

²⁰³ *Id.* at 5.

²⁰⁴ *Id.* at 7.

²⁰⁵ 33 U.S.C. § 2709.

²⁰⁶ Halliburton Brief *supra* note 198 at 8.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 8-9.

RP but not a non-responsible third party. This scheme is rejected by Judge Lemelle.²¹⁰ The result is equally unfair when the scenario is reversed. If a negligent third party collides with and causes a discharge from a designated RP, what purpose would it serve to allow punitive damages against the innocent RP? Because punitive damages exist to punish an individual for egregious behavior, its purpose and function becomes trivial if it may be sought against the innocent RP yet shielded from the truly responsible third party. Additionally, what if both the RP and non-responsible third party are both grossly negligent? Does one party, although equally at fault, escape punitive damage liability? In the interest of equity, if punitive damages are to be available for marine pollution, they must be available against any liable party. This would require a broader interpretation of OPA that is simply unsupported by statute and jurisprudence.

These liability disparities are also evident when considering OPA's strict liability regime. Strict liability imputes that an individual is liable for all consequences flowing from their conduct, regardless of how unforeseeable such consequences are. However, OPA places limits on the RP's liability. These limits do not apply when, although only one exception, the discharge is proximately caused by gross negligence or willful misconduct by the RP. Fundamentally, gross negligence and willful misconduct are both examples of prerequisites for punitive damage awards. The result is that "in many ways, the test for limitation of liability seemingly parallels the test the courts have historically used to determine if punitive damages are appropriate."²¹¹ If the first step in deterrence is to strip liability limitations, a second step would be required to then seek punitive damages. The paradox, however, is that the test for both steps is essentially the same. Although this similarity is behind much of Judge Barbier's support for OPA punitive damages, litigating two nearly identical tests contravenes congressional intent "to minimize piecemeal lawsuits."²¹²

There are also numerous arguments in support of OPA punitive damages. Because OPA was drafted in large part because marine pollution laws in place were not an adequate deterrent to such disasters, would not punitive damages further deter? OPA was introduced into the legislative process more than a year before *Miles* during a period of general support for GML punitive damages. Perhaps existing punitive damages did not accomplish the desired result. In fact, Minnesota

²¹⁰ *Gabarick*, 623 F. Supp. 2d at 750 (2009).

²¹¹ Linda Schlueter & Kenneth R. Redden, *PUNITIVE DAMAGES*, 24 (4th ed. 2000).

²¹² *Gabarick*, 623 F. Supp. at 750 (2009).

representative Arlan Stangeland specifically stated during a 1989 hearing on OPA that “[Congress is] not looking for punitive or unworkable new laws.”²¹³ Further, because OPA was drafted in response to the EXXON VALDEZ spill, surely Congress contemplated punitive damages considering the accusations that the tanker’s captain was intoxicated — conduct that would assuredly warrant it. Punitive damage advocates too may argue that it is justified simply due to the devastation surrounding oil pollution. However, the maritime shipment of oil would not satisfy the requirements to be deemed an ultrahazardous or abnormally dangerous activity, a designation that demands the same strict liability regime that OPA already provides.

Finally, punitive damages contravene congressional intent regarding the expansion of recoverable claimants. A main goal of OPA was to broaden the scope of claimants that may seek recovery, in large part due to the restrictive nature of the Robins Dry Dock rule. Individuals that do not satisfy the Robins Dry Dock rule may not claim GML damages, such as punitive damages. Specifically, a victim must have a proprietary interest in damaged property to assert punitive damages for marine pollution. Importantly, “the most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct.”²¹⁴ As a result, if punitive damage availability hinges solely on a wrongdoer’s conduct regardless of the victim’s conduct, why would its availability thus be restricted by the victim’s status as either a GML or OPA claimant? This result is entirely contradictory to the purpose of punitive damages. It hardly makes an “example” of a grossly negligent party if they evade punitive damages because of a victim’s status. Consider this hypothetical: two grossly negligent tankers collide, and one discharges a large amount of oil, thoroughly polluting a marina. Although none of the marina’s businesses are physically damaged, it may go bankrupt due to a lack of business during the cleanup period. None of these business owners may claim punitive damages for marine pollution. Notwithstanding the tanker captains’ grossly negligent conduct, the claim is unavailable because the Robins Dry Dock rule does not provide for loss of profits.

It appears that OPA precludes GML punitive damages. For reasons ranging from provision interpretation to the heart of the

²¹³ Oil Spill Liability and Compensation: Hearing Before the Subcommittee on Water Resources of the Committee on Public Works and Transportation, 101 Cong. 1 (1989) (Statement of Arlan Stangeland).

²¹⁴ Schlueter & Redden, *supra* note 211.

punitive damage purpose, preclusion likely triumphs. In the face of OPA and the wake of *Batterton*, punitive damage advocates may soon need to abandon ship.