ECONOMIC LOSS, PUNITIVE DAMAGES, AND THE EXXON VALDEZ LITIGATION

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Note: This Article was accepted for publication before the Deepwater Horizon incident in late April 2010. As opposed to the Exxon Valdez case, which was litigated under general maritime law (and area-specific legislation), the Deepwater Horizon incident is subject to the Oil Pollution Act, which was enacted in the wake of the Exxon Valdez spill. Thus, my critical analysis of judge-made tort law does not require any modification following the recent disaster. Nonetheless, I intend to use the general theoretical framework to assess post-Exxon Valdez statutory reform in a follow-up article.
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INTRODUCTION

On March 24, 1989, an Exxon supertanker ran aground on Bligh Reef off the Alaskan coast, spilling millions of gallons of crude oil into Prince William Sound. Exxon spent nearly $2.1 billion in cleanup efforts, pleaded guilty to criminal violations occasioning fines, settled a civil action by the United States and Alaska, and paid $303 million in voluntary settlements with private parties, principally fishermen. Subsequent civil litigation has spanned nearly two decades, resulted in a $287 million compensatory damages award to commercial fishermen, as well as a settlement with Native Alaskans, and culminated in the recent Supreme Court ruling on the proper amount of punitive damages. At the time, the spill was probably the worst environmental disaster in American history, and it sparked unusually extensive and complex litigation, as well as a vast academic literature. However, the natural focus on concrete legal and procedural questions has left at least one abstract juridical puzzle unsolved—one that goes to the very foundation of tort liability.

This Article uncovers a fundamental yet unnoticed inconsistency in American land-based and maritime tort law that surfaced following the unprecedented spill. The understandable emphasis on the award of punitive damages in recent literature has overshadowed an extremely important part of the Exxon Valdez litigation; namely the wholesale rejection of numerous claims for purely economic loss by the federal district court in the

2 Id. at 2613.
3 Id. at 2614.
4 Id. at 2633–34. Nonetheless, litigation has not ended yet. See, e.g., Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1079–82 (9th Cir. 2009) (discussing issues related to interest and appellate costs).
5 See George J. Church, The Big Spill: Bred from Complacency, the Valdez Fiasco Goes from Bad to Worse to Worst Possible, Time, Apr. 10, 1989, at 38–39 (calling the spill “an unprecedented ecological disaster”).
6 See, e.g., Victor P. Goldberg, Recovery for Economic Loss Following the Exxon Valdez Oil Spill, 23 J. LEGAL STUD. 1, 1–2 (1994) (discussing the ”legal cleanup” after the spill); Deborah S. Bardwick, Note, The American Tort System’s Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study, 19 STAN. ENVTL. L.J. 259, 262, 263–64 (2000) (discussing both the vast amounts of litigation and various theories pursued after the spill).
early 1990s. Thus, on the one hand, liability for economic loss was strictly limited under the renowned Robins Dry Dock & Repair Co. v. Flint, leaving many victims uncompensated. On the other hand, liability was expanded through an award of punitive damages to relatively few successful claimants. I contend that while these two components of the legal saga might not seem incompatible from a simple doctrinal perspective, they are inconsistent on a deeper—justificatory—level. This inconsistency transcends the Exxon Valdez litigation. It is a troubling trait of land-based and maritime tort law, which happened to surface when the Exxon oil submerged. By uncovering this inconsistency, this Article not only sheds new light on the particular proceedings and on the common law of torts, but also lays the foundation for a more holistic approach to legal reasoning: a transition from fragmentation to integration.

Figure 1. A Simple Sketch of the Exxon Valdez litigation

Plainly, courts cannot set and implement contradictory rules or principles. In a coherent legal system, a rule that confers a right cannot coexist with a rule that denies the same right in a specific case, and a rule that imposes a duty cannot coexist with a rule

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7 See infra notes 257–72 and accompanying text.
8 275 U.S. 303, 309 (1927) (denying recovery for purely economic losses without physical damage).
9 See Bardwick, supra note 6, at 262 ("[T]he legal system in fact denied redress to many plaintiffs who lost most of their livelihoods as a result of damage to natural resources."). But see infra notes 281–91 and accompanying text.
10 See infra notes 249–72 and accompanying text (explaining that the vast majority of claims were rejected while Native Alaskans and commercial fishermen recovered punitive damages).
that negates the same duty. For instance, the rule "do X" cannot coexist with the rule "do not do X" within a specific case. Equally important but often neglected is the idea that courts should not fashion and implement rules or principles that aim to simultaneously achieve conflicting goals. A legal system is incoherent not only when it embraces two conflicting norms, such as "do X" and "do not do X," but also when it embraces two nonconflicting norms that advance conflicting goals. For instance, the rule "do X" cannot be applied together with the rule "do Y" \((X \neq Y)\) in a specific setting if the underlying goal of the former is to yield a certain outcome, and the aim of the latter is to avoid the same outcome. This type of inconsistency is generally more difficult to discern because it is not apparent on the doctrinal level and entails a deeper analysis on the justificatory level.

The *Exxon Valdez* litigation illustrates an inconsistency of this sort. Exclusion of liability for purely economic loss is not incompatible with the award of punitive damages on the doctrinal level. The exclusionary rule determines who is entitled to recover,\(^{11}\) whereas the punitive damages doctrine pertains to the extent of recovery by successful claimants.\(^{12}\) However, the application of both in a particular setting, as in the *Exxon* case, seems incoherent on the justificatory level because the two serve opposing goals.

The exclusionary rule and the punitive damages doctrine are both exceptions to general principles of private law. 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, which is probably the most fundamental principle in modern tort law.\(^{13}\) The exclusionary rule reduces the extent of liability to prevent adverse consequences, such as over-deterrence or undue punishment.\(^{14}\) Punitive damages are an exception to the general principle that tort damages should restore the victim to the pre-tort condition \(*restitutio in integrum*\), which

\(^{11}\) See discussion *infra* Part I.A.

\(^{12}\) See discussion *infra* Part II.A.

\(^{13}\) See Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 773 (2006) (explaining that the no-recovery rule is an exception to general negligence doctrine).

\(^{14}\) See discussion *infra* Part I.B.1.
is the most fundamental principle in the modern law of remedies.\textsuperscript{15} They are used as a supplementary sanction in exceptional cases where compensatory damages do not provide the necessary levels of deterrence and retribution.\textsuperscript{16}

When both the exclusionary rule and the punitive damages doctrine are applicable to a particular case, such as the \textit{Exxon Valdez}, they simultaneously increase and decrease the wrongdoer’s liability, thereby canceling out each other’s allegedly legitimate effects. The exclusionary rule limits liability to prevent over-deterrence, over-punishment, etc.,\textsuperscript{17} whereas the punitive damages doctrine expands liability to enhance deterrence and retribution.\textsuperscript{18} Hence, at least one of these rules cannot realize its underlying goals. If the fears of over-deterrence and over-punishment justify exclusion of liability for some of the actual loss, then an award of punitive damages mitigates the desired effects of the exclusionary rule. If deterrence and retribution justify imposition of punitive damages over and above actual loss, exclusion of liability for some of the actual loss mitigates the desired effects of punitive damages. Increasing and decreasing liability simultaneously is unwarranted not only because it makes the application of at least one rule frivolous, but also because it comes at the price of two problematic deviations from general principles of private law. There is also a distributive concern: in \textit{Exxon}, numerous plaintiffs were denied recovery for actual losses caused by the defendants’ wrongdoing, whereas a few others obtained damages that significantly exceeded their actual loss.

\textsuperscript{15} Cf. United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) (“The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.”); Livingstone v. Rawyards Coal Co., (1880) 5 App. Cas. 25 (H.L.) [39] (appeal taken from Scot.) (stating that compensation should be an amount that will put the victim “in the same position as he would have been if he had not sustained the wrong”); \textit{RESTATEMENT (SECOND) OF TORTS} § 901 cmt. a (1979) (“The law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.”).


\textsuperscript{17} See discussion \textit{infra} Part I.B.

\textsuperscript{18} See discussion \textit{infra} Parts II.B.2, II.B.3.
This Article sets out to identify and elucidate the problem and put forward general guidelines for its resolution. The first two Parts introduce the clashing rules and their underlying rationales. Part I discusses the origins of the exclusionary rule, its scope of application, and most importantly its main justifications in American case law and academic literature. Part II provides a short history of punitive damages and discusses the common justifications for this private law anomaly. Next, Part III shows how the two sets of rules were applied through the Exxon Valdez litigation and explains why their in tandem application gives rise to incoherence on the justificatory level. As indicated above, although the problem is manifest in the Exxon Valdez litigation, it is definitely not limited to this particular setting.

After delineating the contours of the stark incongruity, this Article proposes a conceptual framework for resolution. Generally, it holds that if courts believe liability must be expanded beyond the limits set by the exclusionary rule to obtain certain levels of deterrence and retribution, then relaxing the exclusionary rule and allowing more victims to recover is a more defensible path than awarding punitive damages to a very few claimants. The former simply extends the application of two general principles of tort law, whereas the latter is based on problematic exceptions to these universal principles and generates distributive injustice. Through this analysis, this Article highlights the need for a more holistic approach to legal reasoning. Legal rules and principles are not discrete objects but interrelated components of a single unified system; they should not contradict or cancel each other out not only on the doctrinal level, but also on the deeper justificatory level.

\[\text{Given the purpose and scope of this Article, I only discuss the main justifications for the two rules.}\]
I. ECONOMIC LOSS

A. THE LAW

The various economic losses that resulted from the Exxon Valdez oil spill may be classified as relational losses. A relational economic loss is a loss of profit or a positive outlay "that stems from physical injury to the person or property of a third party, or to an ownerless resource." With very few deviations, American courts have consistently denied recovery for this kind of loss. The first reported case directly addressing this matter was *Anthony v. Slaid*. A contractor who committed to support all paupers in a certain town at a fixed sum per annum incurred extra expense when one of those paupers was beaten and sought recovery of the expenditure from the assailant. The court held that

[i]t is not by means of any natural or legal relation between the plaintiff and the party injured, that the plaintiff sustains any loss by the act of the [defendant], but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect.

The Supreme Court first tackled the question in *Insurance Co. v. Brame*. An insurance company sought to recover the amount it had to pay under a life insurance policy following the intentional shooting of the insured by the defendant. Although the Court found that the damage was too remote, the main reason for denying recovery was that "no civil action lies for an injury which

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21 52 Mass. 290 (1846).
22 Id. at 290–91.
23 Id. at 291.
24 95 U.S. 754 (1877).
25 Id.
26 Id. at 758–59 (explaining that the injury to the plaintiff was "an incidental circumstance, a remote and indirect result").
results in... death." Unsurprisingly, and despite the partial overlap between the two, Brame is usually cited as authority for the time-honored doctrine concerning death, not in support of the economic loss rule.

The leading authority for the exclusionary rule is undoubtedly Robins Dry Dock & Repair Co. v. Flint, in which the Supreme Court held that "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." Notwithstanding its explicit reference to a contractual relationship between the plaintiff and the immediate victim of the wrong and to the defendant's unawareness of such relationship, this case was broadly interpreted to exclude liability for any relational economic loss, whether the relationship between the two victims was contractual or noncontractual, known or unknown to the doer of the wrong. Further attempts to restrict

27 Id. at 756; see also Conn. Mut. Life Ins. Co. v. N.Y. & New Haven R.R., 25 Conn. 265, 276–77 (1856) (holding that the life insurer's loss is too remote and that the death of a person is not an actionable injury).

28 The roots of this doctrine may be traced to the English case of Baker v. Bolton, (1808) 170 Eng. Rep. 1033 (K.B.); 1 Camp. 493 (holding that the death of a human being is not actionable). It currently applies in most common law jurisdictions. See, e.g., Woolworths Ltd. v. Crotty (1942) 66 CLR 603, 605 (H. Ct.) (Austl.) (considering the rule that "in a civil court the death of a human being cannot be complained of as an injury"); Monaghan v. Horn, [1882] 7 S.C.R. 409, 420 (Can.) (Ritchie, C.J.) ("No civil action can be maintained at common law for an injury which results in death.").

29 275 U.S. 303 (1927).


32 See, e.g., Steele v. J & S Metals, Inc., 335 A.2d 629, 630 (Conn. Super. Ct. 1974) (finding that mere possession of knowledge by the defendants of a business relationship was not sufficient to create liability); PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1060
the Court's ruling to lost profits as opposed to positive outlays, to negligence as opposed to other forms of action (e.g., nuisance), or to the maritime law as opposed to land-based common law have also failed.

Federal courts have generally accepted the broad interpretation of Robins Dry Dock, and applied it to the great majority of relational loss cases. Only a few narrow exceptions have been

(La. 1984) (deeming knowledge of a contract to be irrelevant when determining a tortfeasor's liability for economic loss); Messina v. Sheraton Corp. of Am., 291 So. 2d 829, 830–31 (La. Ct. App. 1974) (finding that although defendant had knowledge of the contract in this case unlike the defendant in Robins, plaintiff was still not entitled to recovery); Ferguson v. Green Island Contracting Corp., 355 N.Y.S.2d 196, 197–98 (App. Div. 1974) (rejecting cause of action for negligently depriving an employer of his contractual interest in an employee even when defendant was aware of the employee's importance to the employer's business operation).

See, e.g., Barber Lines, 764 F.2d at 51–52 (including added expenses and lost profits in exclusionary rule enunciated in Robins); In re Cleveland Tankers, 791 F. Supp. at 677 (rejecting argument that plaintiff can recover for increased expenses).

See, e.g., Barber Lines, 764 F.2d at 56–57 (refusing attempts to allow plaintiffs to sue due to a negligent nuisance); Testbank, 752 F.2d at 1030–31 (rejecting plaintiffs' attempt to recover for pure economic loss under a public nuisance theory); Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023, 1025 n.4 (5th Cir. 1978) (rejecting attempt to rephrase a claim as a public nuisance to avoid the exclusionary rule); Rickards v. Sun Oil Co., 41 A.2d 267, 269 (N.J. 1945) (noting that proximate cause is a limitation to nuisance and negligence).

See, e.g., Ballard Shipping, 32 F.3d at 627–28 (finding no evidence that Robins's exclusion of recovery for purely economic damages was only applicable in admiralty law); In re Nautilus Motor Tanker Co., 900 F. Supp. 697, 703 (D.N.J. 1995) (noting that the Robins holding is not specifically grounded in maritime law).

See, e.g., Taira Lynn Marine Ltd. No. 5 v. Jays Seafood, Inc. (In re Taira Lynn Marine Ltd. No. 5), 444 F.3d 371, 375–81 (5th Cir. 2006) (applying Robins to deny recovery for business owners who suffered economic loss due to an evacuation order caused by defendants' barge colliding with a bridge and discharging gaseous substance); Getty Ref. & Mktg. Co. v. MT Fadi B, 766 F.2d 829, 830, 832–33 (3d Cir. 1985) (denying recovery under Robins to marine terminal operator who asserted damages for negligent interference with contractual obligations); Barber Lines, 764 F.2d at 51–52 (granting no relief under Robins for additional expenses incurred by plaintiff when defendant spilled oil); Testbank, 752 F.2d at 1021–28 (holding no recovery allowed under Robins for various plaintiffs who suffered no physical damage from a chemical spill in the Mississippi River gulf outlet); Hercules Carriers, Inc. v. Florida, 720 F.2d 1201, 1202 (11th Cir. 1983) (finding no recovery under Robins for economic losses due to negligence from owner of vessel which collided with bridge); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 152–53 (6th Cir. 1983) (rejecting claim for additional expenses associated with delays caused by the defendant grounding its ship in a waterway under Robins); Kingston Shipping Co. v. Roberts, 667 F.2d 34, 35 (11th Cir. 1982) (rejecting claims associated with delay caused by defendant's ship blocking waterway in accordance with Robins); Marine Navigation Sulphur Carriers, Inc. v. Lone Star Indus., Inc., 638 F.2d 700, 701–02 (4th Cir. 1981) (finding defendants not liable for economic losses
recognized. Most state courts have also embraced the bright-line rule. Only a few courts replaced it with a more generous approach. The New Jersey Supreme Court, for example, held that "[one] owes a duty of care to take reasonable measures to avoid the risk of causing [purely] economic [loss] . . . to particular [individuals] or [individuals] comprising an identifiable class with respect to whom [one] knows or has reason to know are likely to suffer such [loss] from [one's] conduct." Still, the Restatement (Second) of Torts explicitly endorsed the majority view.

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. Overriding a general principle requires defensible reasons; and if these reasons cease to exist, the exception must be set aside, and the general principle should be

associated with the collision caused by the defendants which closed the bridge for months; Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212, 213–14 (5th Cir. 1980) (rejecting claim for economic loss following negligent severance of power line because of rule that there can be no recovery for negligent interference with contractual relations); Louisville & Nashville R.R. Co. v. M/V Bayou LaCombe, 597 F.2d 469, 470, 472–74 (5th Cir. 1979) (denying recovery to railroad company seeking damages for loss of the use of a bridge negligently struck by a vessel under Robins); Dick Myers Towing Serv., 577 F.2d at 1023–25 (denying claim for negligent interference with business expectations of tugboat operator when the lock on river failed and the river closed for months by applying Robins); Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957, 958 (5th Cir. 1972) (finding no recovery under Robins for economic losses caused when a third party's pipeline supplying gas to plaintiff was punctured).

37 See Perry, supra note 20, at 1613–17 (discussing the exceptions).
40 RESTATEMENT (SECOND) OF TORTS § 766C (1979) ("One is not liable to another for pecuniary harm not deriving from physical harm to the other.").
41 See supra note 13 and accompanying text.
reinstated. We now turn to the exception’s justifications in American case law and academic literature.

B. THE MAIN JUSTIFICATIONS

1. Indeterminate Liability. Some of the common justifications for exclusion of liability for relational losses turn on the fear of open-endedness. In *Ultramares Corp. v. Touche*, Justice Cardozo observed that allowing claims for purely economic loss may expose the wrongdoer to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”

Although *Ultramares* was not a relational loss case, the same rationale has been invoked in numerous relational loss cases as the principal reason for exclusion of liability.

The soundness of this argument rests on two assumptions: a real likelihood of open-endedness and its undesirability.

The validity of this argument rests on two assumptions: a real likelihood of open-endedness and its undesirability.

The soundness of the first assumption seems self-evident. A negligent infliction of bodily injury may result in economic loss to the injured person’s relatives, customers, creditors, suppliers, employers, and partners. Furthermore, the loss of each of those

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42 174 N.E. 441, 444 (N.Y. 1931). This case was an action for negligent misrepresentation. *Id.* at 442.

43 See *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985) (asserting justification for rule against recovery of economic loss is that the number of people suffering foreseeable financial harm from an accident is usually much greater than the number of those who suffer physical harm); *In re Waterstand Marine, Ltd.*, No. 87-1516, 1988 U.S. Dist. LEXIS 3242, at *12-13 (E.D. Pa. Apr. 12, 1988) (emphasizing that the policy underlying *Robins* is that liability for purely economic harms could lead to liability in an “indeterminate amount for an indeterminate time to an indeterminate class”); *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 979–80 (E.D. Va. 1981) (recognizing that even the most critical commentators of the general rule against economic damages have acknowledged that some limitation to liability is necessary due to the large set of potential plaintiffs); *Byrd v. English*, 43 S.E. 419, 420 (Ga. 1903) (arguing the absurdity of allowing plaintiffs to recover for mere economic loss).

Jane Stapleton observes that the concern with indeterminate liability is one of the “three crude ideas” used to rationalize the exclusionary rule. Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused “Middle Theory,”* 50 UCLA L. Rev. 531, 536 (2002). Anita Bernstein similarly finds that this concern is the most widely shared understanding of the exclusionary rule. Bernstein, supra note 13, at 802–03.

44 See *Champion Well Serv., Inc. v. NL Indus.*, 769 P.2d 382, 385 (Wyo. 1989) (indicating that a duty to third persons would be a broad and unwieldy development that might involve damages to victim’s “friends, his fishing buddies, his business partners, his employer, his grocery man, or his cleaning lady”).
persons may economically affect others, and so on. Similarly, injuring a factory may cause economic loss to its suppliers of raw materials, distributors, consumers, business partners, and employees; owners of shops and restaurants where employees or their families customarily shop and dine may lose profits; and so forth. Theoretically, such proliferation of economic losses is boundless, so the potential number of relational victims is vast and indeterminate. This phenomenon has been termed "the ripple effect," "the domino effect," and the "chain reaction." The larger the number of valid claims, the more extensive the liability, and if the potential number of victims is large and uncertain, potential liability is also large and uncertain.

As regards undesirability, three aspects of the ripple effect should be distinguished: the number of victims, the extent of liability, and uncertainty about both. The potential number of victims may in itself have some normative significance. For example, denial of liability in cases of multiple victims may be the natural and most efficient way to secure loss spreading ex post.

45 See, e.g., J.A. Smillie, Negligence and Economic Loss, 32 U. TORONTO L.J. 231, 241 (1982); see also PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1061-62 (La. 1984) (noting customers and employees were possible victims if production at PPG was halted due to lack of fuel).

46 See, e.g., Stevenson v. E. Ohio Gas Co., 73 N.E.2d 200, 203-04 (Ohio Ct. App. 1946) (including among others potentially affected, neighborhood restaurants that may rely on the business of factory employees and thus would face substantial loss if the factory employees' wages were affected by a factory shut down); Smillie, supra note 45, at 241 (pondering potential economic loss in event of damage to manufacturing plant).


48 E.g., Owen, supra note 30, at 163 (describing "domino effect of cause-in-fact leading to enormous liabilities to remote plaintiffs").

49 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129 (5th ed. 1984) ("[W]hile physical harm generally has limited effects, a chain reaction occurs when economic harm is done and may produce an unending sequence of financial effects.").

50 Cf. Spartan Steel & Alloys Ltd. v. Martin & Co., [1973] Q.B. 27 (A.C.) at 39 (Eng.) ("[I]n such a hazard as this, the risk of economic loss should be suffered by the whole community who suffer the losses—usually many but comparatively small losses—rather than on the one pair of shoulders, that is, on the [defendant] on whom the total of them, all added together, might be very heavy."); Robert Hayes, The Duty of Care and Liability for Purely Economic Loss, 12 MELB. U. L. REV. 79, 114 (1979) ("[I]t is appropriate that the risk should be shared around."); Ronen Perry, Relational Economic Loss: An Integrated Economic
Furthermore, allowing recovery by numerous relational victims may "open the door to a mass of litigation which might very well overwhelm the courts."51 Slightly rephrased, the possibility of a large number of plaintiffs with somewhat different claims "threatens to raise significantly the cost of even relatively simple tort actions."52 Arguably, this problem may be solved through procedural mechanisms such as consolidation of actions or class actions in appropriate cases,53 as demonstrated by the Exxon

Justification for the Exclusionary Rule, 56 Rutgers L. Rev. 711, 761–63 (2004) ([When] the number of relational victims is potentially very large, it is preferable to leave their losses where they fall, and refrain from saddling a single injurer with them all."); Richard A. Posner, Common-Law Economic Torts: An Economic and Legal Analysis, 48 Ariz. L. Rev. 785, 788 (2006) ("[I]f the victims of an economic tort are numerous . . . and each incurs only a small loss, then letting the loss rest with them, rather than shifting it to the injurer, is an automatic if highly imperfect form of insurance."); Note, Negligent Interference with Contract: Knowledge as a Standard for Recovery, 63 Va. L. Rev. 813, 817 n.34 (1977) ("Denial of recovery may effectively spread the loss over the contractors rather than concentrating it on the individual tortfeasor.").

51 Stevenson, 73 N.E.2d at 203; accord Dundee Cement Co. v. Chem. Labs., Inc., 712 F.2d 1166, 1172 (7th Cir. 1983) (noting "legitimate fear that a crushing burden of litigation would result from allowing recovery for economic damages"); Caltex Oil (Austl.) Pty. Ltd. v. Dredge "Willestad" (1976) 136 CLR 529, 562–63 (Austl.) (Stephen, J., concurring) (finding exclusion of purely economic loss justified by reference to uncontrolled, expanding liability and a great influx of cases); Bow Valley Husky (Berm.) Ltd. v. Saint John Shipbuilding Ltd. (1997), 153 D.L.R. 4th 385, 404 (Can.) (discussing the discouragement of a multiplicity of lawsuits as a reason for confining economic claims to contract); Smillie, supra note 45, at 231 (recounting fear that liability for foreseeable economic loss would "lead to a multiplicity of litigation arising out of a single event which could present serious administrative problems"); L.L. Stevens, Negligent Acts Causing Pure Financial Loss: Policy Factors at Work, 23 U. Toronto L.J. 431, 452 (1973) (considering "the physical ability of the courts to cope with the increase of cases which an extension of liability to economic damages would bring"); Ann O'Brien, Note, Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss, 31 Ariz. L. Rev. 989, 966–67 (1989) (discussing defendant's unlimited liability for negligent infliction of economic loss in terms of the administrative problem of overloading the courts); John G. Rich, Comment, Negligent Interference with Prospective Economic Advantage—J'Aire Corp. v. Gregory, 1980 Utah L. Rev. 431, 434 (1980) (noting fear of excessive litigation as administrative argument for not extending the scope of liability to purely economic losses); Recent Case, Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), 88 Harv. L. Rev. 444, 449 (1974) (recognizing that a basis for the nonliability rule is "to contain the amount of litigation arising out of negligent acts").

52 Barber Lines A/S v. MV Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985).

53 See Caltex Oil, 136 CLR at 606 (Murphy, J., concurring) (noting that avoidance of multiple actions can be achieved by representative actions or joinder); Christopher V. Panoff, In re the Exxon Valdez Alaska Native Class v. Exxon Corp.: Cultural Resources, Subsistence Living, and the Special Injury Rule, 28 Env'tl. L. 701, 711–12 (1998)
Valdez litigation. However, this is not a perfect solution because courts still need to assess each plaintiff’s loss and decide whether the defendant’s negligence caused that loss. Where different classes of plaintiffs exist, courts need to decide the question of duty for each. Moreover, each plaintiff may be individually accused of assumption of risk, contributory negligence, or failure to mitigate the loss.

Still, the relevance of the potential number of claimants largely depends on the rough correlation between the number of valid claims and the extent of tort liability. The likelihood of extensive liability is deemed normatively relevant for several reasons. First, from an interest-hierarchy distributive perspective, assuming that any defendant has a limited pool of assets that all successful claimants ultimately need to share, denial of liability for relational losses may be required to guarantee full recovery for injuries to physical interests which may be considered more worthy of legal protection. This argument loses much of its force where the primary injury is to a tangible resource. Even if the superiority of life and bodily integrity is undisputed, any distinction between property damage and purely economic loss in terms of interest-hierarchy is hard to justify. After all, property is a manifestation of wealth.

Second, from a compensatory perspective, assuming once again that defendants have limited funds, each victim may end up with

(explaining the role of class actions in discouraging a multiplicity of suits for economic damages).


55 See, e.g., Mark Geistfeld, Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money, 76 N.Y.U. L. REV. 114, 125 (2001) (observing, inter alia, that physical injury is more disruptive to the pursuit of one’s life plan than is the loss of money and that “[i]f no amount of money is equivalent to a human life, then safety interests apparently dominate ordinary economic interests”).

compensation for a very small fraction of his or her loss, making the costly process futile (and a "mere rhetorical justice").

Third, from a retributive justice perspective, allowing recovery for relational losses may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong. I will elaborate on the concept of retributive justice below. For now, suffice it to say that an insignificant and perhaps absentminded deviation from the objective standard of

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57 Dominion Tape of Can. Ltd. v. L.R. McDonald & Sons Ltd. (1971), 21 D.L.R. 3d 299, 300 (Can. Ont. Cnty. Ct.); see also id. ("[A] judgment pompously engrossed which cannot be executed for want of sufficient assets on the part of the judgment debtor [turns the] trial into a futile exercise.").

58 See Phx. Prof'l Hockey Club, Inc. v. Hirmer, 502 P.2d 164, 165 (Ariz. 1972) (noting that protecting contractual interests from negligent interference could impose a severe penalty on one guilty of mere negligence); Aikens v. Balt. & Ohio R.R. Co., 501 A.2d 277, 279 (Pa. Super. Ct. 1985) (finding that allowing economic damages action would create a disproportion between the large amount of damages that might be recovered and the extent of the defendant's fault); Caltex Oil, 136 C.L.R. at 551, 591 (recognizing that requiring wrongdoer to compensate all those who suffered a pecuniary loss would impose a disproportinate burden); Can. Nat'l Ry. Co., 91 D.L.R. 4th at 365–66 (proposing that it would be unfair to permit all economic loss related to a negligent act to be recovered); Leigh & Sillavan Ltd. v. Aliakmon Shipping Co., [1986] A.C. 785 (H.L.) 816 (Eng.) (rejecting idea that person guilty of want of care should be subject to unlimited liability by an indefinite number of people); RESTATEMENT (SECOND) OF TORTS § 766C cmt. a (1979) ("[Courts] apparently have been influenced by...the probable disproportion between the large damages that might be recovered and the extent of the defendant's fault."); Robert L. Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 STAN. L. REV. 1513, 1534 (1985) (asserting that abhorrence of disproportionate penalties for wrongful behavior is the most plausible explanation for judicial reluctance to allow recovery for pure economic loss); see also Gabriel, supra note 30, at 286 (stating that those who favor a rule barring recovery of economic damages frequently fear "defendants will be held liable to an extent far exceeding their culpability"); Hayes, supra note 50, at 82 ("[A] defendant should not be subject to a liability which is disproportionate to his wrong."); Smillie, supra note 45, at 231 ("[I]t was felt that to allow victims of purely economic loss to recover...impose[s] a burden of liability on defendants out of all proportion to their culpability."); O'Brien, supra note 51, at 967 ("[A] small act of negligence could result in incredible economic losses for which the defendant should not be held liable."); Rich, supra note 51, at 434 (recognizing the fear that holding "a defendant responsible for all foreseeable economic harm stemming from negligent conduct would impose a potentially limitless liability out of proportion to culpability"); Comment, Foreseeability of Third Party Economic Injuries—A Problem in Analysis, 20 U. CHI. L. REV. 283, 296 (1953) (suggesting that expansion of liability to encompass third party economic harms is an "overwhelming degree of liability for mere negligence"); Note, supra note 50, at 817 ("[T]he burden that might be placed on tortfeasors is unfairly disproportionate to a 'merely' negligent act."); Recent Case, supra note 51, at 448 (finding that liability for all foreseeable economic consequences of negligence is an excessive burden on a single defendant and out of proportion to wrongfulness of defendant's conduct).

59 See discussion infra Part II.B.2.
care cannot justify the imposition of such an onerous penalty.\textsuperscript{60} This argument is very common in American case law and literature, and seems one of the most important traditional justifications for the exclusionary rule.\textsuperscript{61}

Fourth, the marginal deterrent effect of tort liability is diminishing to zero, either because at a certain point no further precautions are available or because the expected payment is limited by defendants' financial capacity or statutory caps.\textsuperscript{62} Any expansion of the class of victims entitled to compensation carries a price in administrative costs. Allowing recovery where the marginal benefit in terms of deterrence is smaller than the respective cost is economically wrong. In other cases, unconstrained liability may unduly restrict the freedom of action of potential tortfeasors.\textsuperscript{63} The fear of open-ended liability may hinder socially beneficial initiatives and activities. These arguments are also among the most important traditional justifications for exclusion of liability in American law.

\textsuperscript{60} But see Geistfeld, supra note 54, at 1931–32 (criticizing this type of argument and suggesting mitigation defense).

\textsuperscript{61} See supra note 58 and accompanying text.

\textsuperscript{62} Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985) (stating that there is a point at which greater accident costs lose meaning and the incentive curve flattens); Donald Harris & Cento Veljanovski, Liability for Economic Loss in Tort, in THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS 45, 53 (Michael Furmston ed., 1986) (noting that potential defendants discount anticipated damages by probability of accident occurring or probability that defendant will actually have to pay amount claimed). The natural limit of the injurer's liability equals its individual ability to pay. Sometimes a limit on the extent of liability is set by law. See, e.g., 46 U.S.C. § 30505 (2006) (limiting liability of vessel owners).

\textsuperscript{63} See Phx. Prof' Hockey Club, 502 P.2d at 165 (reasoning that such liability "would place an undue burden on freedom of action"); Aikens, 501 A.2d at 279 (noting it "would create an undue burden upon industrial freedom of action"); Andrew W. McThenia & Joseph E. Ulrich, A Return to Principles of Corrective Justice in Deciding Economic Loss Cases, 69 VA. L. REV. 1517, 1520 n.17 (1983) (opining that assigning liability for all economic repercussions of an act of negligence would "unduly limit[ ] freedom of action for fear of incurring too much liability"); Roger B. Godwin, Note, Negligent Interference with Economic Expectancy: The Case for Recovery, 16 STAN. L. REV. 664, 676 (1964) ("The defendant has a legitimate interest in a maximum amount of freedom to order his own affairs without being under an excessively extensive duty of care toward ... others."); O'Brien, supra note 51, at 967–68 ("[D]isproportionate liability may limit a potential tortfeasor's commercial freedom."); Rich, supra note 51, at 435 ("Liability for merely negligent interference with purely economic relations would unduly restrict the freedom to conduct one's own affairs."); Note, supra note 50, at 817 ("Some courts say liability ... would unduly restrict the freedom of action of potential tortfeasors.").
Fifth, from an ex post perspective, unconstrained liability may be “crushing.” Businesses whose activities are generally beneficial might be overburdened, their operation might be impaired, and some may even collapse. Workers will lose their jobs, and means of production will remain idle or not be utilized efficiently.

Sixth, as the extent of potential liability grows, insurance companies may refuse to cover liability, demand an unreasonable premium, or set an upper limit for the coverage. Even a large insurance company will not agree to insure potential injurers against potentially catastrophic liability or to set a reasonable premium for an immeasurable risk. This may thwart loss spreading. Seventh, and closely related, if potential liability is truly very large, potential injurers’ motivation to purchase liability insurance, where available, dwindles dramatically, and losses are not spread.

The third aspect of the ripple effect is that the extent of potential liability—the number of potential victims and the particulars of individual harms—is uncertain, leaving potential injurers incapable of preparing for contingencies.

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64 See Dundee Cement Co. v. Chem. Labs., Inc., 712 F.2d 1166, 1171 (7th Cir. 1983) (noting fear of commentators that recovery for purely economic damage would result in “crushing, virtually open-ended liability”); Leadfree Enters., Inc. v. U.S. Steel Corp., 711 F.2d 805, 808 (7th Cir. 1983) (recognizing that there is a fear of “crushing liability on a tortfeasor” in economic loss cases); Can. Nat’l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 365–66 (Can.) (McLachlin, J.) (suggesting potential defendants could be subject to “liability which . . . may cripple their ability to do business”); Bruce Feldthuser, Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?, 8 TORT L. REV. 33, 49 (2000) (noting fear of commentators that recovery for purely economic damage would result in “unwarranted curtailment of productive activity”); Recent Case, supra note 51, at 449 (“[L]iability might be so great as to cause economic or social dislocation.”).


66 See STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 240 (1987) (showing how injurers whose “assets are lower than the harm they may cause” can be in a better position without insurance); cf. Harris & Veljanovski, supra note 62, at 53 (noting that potential defendants may underinsure if they believe they are judgment-proof or to discourage litigation).

67 See ROBBY BERNSTEIN, ECONOMIC LOSS 200–01 (1993) (observing one early court’s fear that allowing a cause of action for anyone who sustained economic losses from an act of negligence would make it difficult for trade to be carried on); F.A. TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 298–99 (1985) (explaining that the defendant might be burdened with liability “the exact extent of which would be impossible to determine in
Furthermore, first-party insurance is arguably a more efficient means of spreading losses than liability insurance associated with tort liability,\textsuperscript{68} and uncertainty related to the ripple effect augments the advantages of the former. While first-party insurance will cover well-defined injuries to the insured's interests, liability insurance will cover third parties' losses whose number and extent are unknown in advance.\textsuperscript{69}

I admitted elsewhere that the assumption of open-endedness may be unsound in certain types of cases.\textsuperscript{70} In some fact situations the number of potential victims is limited and reasonably foreseeable, and any concern related to the ripple effect seems irrelevant.\textsuperscript{71} Moreover, a multiplicity of victims does not necessarily yield multiple actions and extensive liability. The fear of open-ended liability presupposes that all or most victims ultimately sue and recover, and this supposition seems false. The ordinary principles of tort liability, such as proximate cause, serve as rough screening devices, reducing the likelihood of recovery by all victims.\textsuperscript{72} Even those entitled to compensation may choose not to bring an action because tort litigation is wearisome and costly, its outcome is uncertain, and collecting an award may prove difficult, especially if the defendant's resources are limited.\textsuperscript{73} However, these reservations do not apply to environmental disasters like the Exxon Valdez oil spill where the number of

\textsuperscript{68} See infra notes 108-11 and accompanying text.

\textsuperscript{69} See Posner, supra note 50, at 737-38 (showing difficulties in calculating risk of loss to third parties).

\textsuperscript{70} Perry, supra note 20, at 1600–01.

\textsuperscript{71} See Fleming James, Jr., Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 VAND. L. REV. 43, 55–57 (1972) (discussing situation of a ship's charterer losing the use of the ship due to a defendant's negligence and concluding that "[t]here seems to be no valid reason why defendant should escape this . . . damage").

\textsuperscript{72} See Gabriel, supra note 30, at 266, 282 (arguing that fear of extensive liability for economic damages is "best quelled by . . . proximate cause analysis").

\textsuperscript{73} Cf. John Summers, Comment, The Case of the Disappearing Defendant: An Economic Analysis, 132 U. PA. L. REV. 145, 145, 150 (1983) (observing that if the injurer is insolvent, or it is too costly for the victim to bring an action against the injurer, then from the victim's perspective the injurer has "disappeared," and the victim will receive no compensation).
victims is not only uncertain ex ante, but potentially enormous; where procedural mechanisms reduce per capita cost of litigation thereby inducing victims to sue; and where the defendant is one of the wealthiest corporations in the world.

2. Additional Sources of Over-Deterrence.

a. Economic Losses Are Not True Social Costs. A conventional economic justification for Robins Dry Dock and its progeny is that many financial losses, relational in particular, are not true social costs. According to economic theory, efficient deterrence requires internalization of the social cost of every inefficient act by the actor. In the assessment of social costs, it is important not to add private losses that reflect "wealth transfers," namely diminution of personal wealth that generates corresponding gains to others. Such gains do not mitigate the private loss, but they cancel it out in the calculation of the externalized social cost. Internalization of private losses irrespective of the parallel gains may lead to over-deterrence. Arguably, many relational economic losses correspond to resulting economic gains. Thus, exclusion of liability prevents over-deterrence.

74 W. Bishop, Economic Loss in Tort, 2 OXFORD J. LEGAL STUD. 1, 1 (1982) (arguing that many financial losses may not be social costs).
75 See, e.g., Robert D. Cooter, Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization, 79 OR. L. REV. 1, 16 (2000) ("The goal of deterrence typically requires the injurer to internalize the harm that he caused.").
76 See Bishop, supra note 74, at 4 (noting that in efficiency calculations a transfer payment is a cost to one but a private benefit to another).
77 See id. ("A transfer has a net social cost of zero and so should not figure in the efficiency calculation.").
78 This view is now firmly established in the academic literature. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 251 (1987) (positing liability for negligently caused economic loss might result in over-deterrence); RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 467-68 (1982) (discussing potential of over-deterrence if third parties are allowed to sue for economic losses); SHAVELL, supra note 66, at 138 ("[A]wards for economic losses might have an undesirable chilling effect on activities that are relatively likely to lead to economic losses . . ."); Feldthusen, supra note 64, at 50-51; Bruce Feldthusen & John Palmer, Economic Loss and the Supreme Court of Canada: An Economic Critique of Norsk Steamship and Bird Construction, 74 CAN. B. REV. 427, 436, 439 (1995) (arguing most relational losses are not true social costs); Israel Gilead, Tort Law and Internalization: The Gap Between Private Loss and Social Cost, 17 INT'L REV. L. & ECON. 589, 593-94 (1997); Goldberg, supra note 6, at 19-22, 31-32, 36-37 (1994) (explaining that relational economic losses overstate damage to society); McThenia & Ulrich, supra note 63, at 1531 (claiming that the court has to first
Assume, for example, that an excavation contractor is considering the use of certain precautions that might reduce the probability of accidental harm to electricity cables owned by the public utility company from 0.2 to 0.1. Replacing an injured cable costs $10,000, whereas the cost of precaution is $5,000. Under these assumptions, it would be inefficient to take precautions because the cost outweighs the benefit ($5,000 > (0.2 - 0.1) \times 10,000 = 1,000$). Now assume that several factories produce a certain product, that demand for this product is cyclic, and that the size of each factory is optimal. Assume further that if the contractor accidentally injures an electricity cable, production halts in one of the factories resulting in loss of profits.

If the competitors can increase their production during the interference at no extra cost beyond what the normal production costs would have been, their gain will fully offset the unfortunate factory’s loss. If the relational loss is higher than $40,000, allowing recovery will encourage the contractor to choose an inefficient level of care because the cost of precaution is lower than the consequent reduction in expected liability ($5,000 < (0.2 - 0.1) \times (10,000 + 40,000 + e) = 5,000 + e$), although it still exceeds the true social cost ($1,000$). On the other hand, if the competitors cannot increase production during the interference at a cost similar to what the normal cost would have been, prices will increase and sales will drop. In such a case, there is an actual social cost in addition to the cost of repairing the cable.

The critical question is when can a producer expand its level of production without destabilizing the market equilibrium. If the accident occurs at an off-peak time, the competitors can easily increase their production, utilizing their excess manufacturing potential.\footnote{Cf. Posner, supra note 50, at 737 ("Most retail establishments operate most of the time with a bit of excess capacity in order to handle peak demands.").} If, however, the accident occurs at peak, the costs of
production may rise and the supply curve will shift upward. The farther demand is from its peak, the smaller the halted plant's market share, and the shorter the interruption, the easier it is for the competitors to stand in for the unfortunate factory without destabilizing the market equilibrium. Because demand is only seldom at its peak we may conclude that in most cases a temporary disturbance to production in a single plant does not give rise to a social cost or that the private losses of the halted plant greatly exceed such cost. Exclusion of liability for the relational losses thus prevents internalization of wealth transfers. True, considerable social costs may occur once in a while. But identifying these rare cases and trying to evaluate the respective social costs is not worthwhile. The cost of gathering and processing the necessary information is significantly higher than the social cost that would consequently be internalized.

Furthermore, even if the interruption occurs at peak, the market share of the halted plant is relatively high, and the interruption is rather long, social cost will not necessarily ensue. Consumers may sometimes have an inventory that can be utilized during the interruption and then renewed. In other cases, especially where the interruption affects production of durables, they may prefer to postpone new acquisitions regardless of the unavailability of an inventory. In both cases, the halted plant's profits are not lost but rescheduled. Also, the halted plant or its competitors may use their own inventories to meet demand. In all of these cases, the market equilibrium will not destabilize.

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80 See Bishop, supra note 74, at 14-15 (discussing how accidents at peaks create real social costs).
81 See id. at 15 (noting there is no cost-increasing effect from accidents taking place at off-peak times).
82 Id. at 17 (arguing that costs in the form of court and litigation expenses would be greater than the efficiency gain).
83 Perry, supra note 50, at 736.
84 Producers and consumers may well hold larger than optimal inventories for fear of negligent interruptions of production. This means that negligent interruptions cause true social costs—the cost of holding the additional inventory. However, I think that since nonnegligent interruptions are usually more frequent than negligent ones, and since there are other commercial reasons for holding inventories, the impact of negligent interruptions on inventory strategies is not considerable.
In earlier articles, I discussed possible criticism of this line of argument and concluded that it has merit in many cases. At any rate, although this is definitely not one of the traditional explanations for the exclusionary rule, and although it has never been endorsed by American courts (or any court, as far I know), it is probably the most influential theoretical justification for the rule in American literature mostly due to the prominence of economic theory in academic discourse in the 1980s and 1990s.

b. The Effect of Liability for the Physical Injury. Another justification for exclusion of liability for relational losses turns on the fact that the injurer is already liable for the physical injury. The marginal deterrent effect obtained from holding the injurer liable for a relational loss may be nil whenever the cost of taking optimal care is lower than the ensuing reduction in expected liability toward the primary victim. Put differently, liability for the primary victim's loss may provide an adequate incentive. Alternatively, the marginal deterrent effect of a relational claim may be lower than the administrative cost involved in shifting the additional loss. So even if all relational losses were true social costs, allowing recovery might not be cost-justified.

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85 See, e.g., Perry, supra note 50, at 733–45.
86 Bishop's seminal article was cited only once, along with other relevant papers and without any discussion of the main theoretical argument, in Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 53 (1st Cir. 1985).
87 Harris & Veljanovski, supra note 62, at 52–53.
88 See Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 301 (Can. (La Forest, J., dissenting) ("[I]n such cases, the right of action of the property owner already puts pressure on the defendants to act with care. The deterrent effect of tort law, to the extent that it survives the advent of widespread insurance, is already present."); Bruce Feldthuesen, Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow, 17 CAN. BUS. L.J. 356, 377–79 (1991) (questioning whether scarce judicial resources should be allocated to the substantial costs of adjudicating additional liability); Smillie, supra note 45, at 239 (doubting whether there is an additional deterrent effect in holding defendants liable to third parties for purely economic loss due to the cost involved in shifting the loss); cf. Bernstein, supra note 67, at 163 (suggesting that defendant's exposure to a substantial damages claim from primary victim should be sufficient to encourage care); Posner, supra note 50, at 740 (asserting that liability for primary plaintiffs may provide sufficient deterrence).
89 To the extent that relational losses are not true social costs, no resources should be invested in preventing them.
3. Self-Protection.
   a. Contract. Traditionally, courts viewed contract law as the appropriate venue for economic loss claims. However, this perception has taken varying forms in different contexts. For example, a common argument in shoddy products cases, such as *East River Steamship Corp. v. Transamerica Delaval Inc.*, was that allowing the buyer or the user to sue the seller or the producer in tort might undermine or circumvent the contractual allocation of risk. In relational economic loss cases, the abstract perception of the contract-tort interrelation has assumed a somewhat different form.

   Many judges and scholars contend that the typical relational victim could protect his or her interest through a contract with the primary victim and that failing to do so justifies exclusion of liability. This proposition has several justifications. First, one may argue that a victim, who was aware of the financial risk and could easily protect against it but refrained from doing so, assumed the risk and cannot recover upon its realization. Second, where a potential victim enters a contract and agrees to bear a certain risk, the risk is usually priced into the contract. The potential victim is thereby compensated ex ante for the risk

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90 See Stapleton, supra note 43, at 536, 551 (discussing the "primacy of the contract").
91 476 U.S. 858 (1986).
92 Id. at 872-73 ("Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. . . . Since a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties' allocation of the risk." (citation omitted)); see also Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965).
93 Stapleton, supra note 43, at 551-54.
94 See, e.g., Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985) ("A shipowner, for example, might contract with a dock owner for 'inaccessibility' compensation; and the dock owner . . . might recover this compensation as part of its tort damages."); John G. Fleming, *Tort in a Contractual Matrix*, 3 TORT L. REV. 12, 19 (1988) (examining whether liability for economic loss should be denied where claimant should have self-protected through contract or insurance); Stapleton, supra note 47, at 266, 285-86 (exploring adequate alternative means of protection and the possibility that a plaintiff could protect itself by contract arrangement with a third party).
95 See David Howarth, *Economic Loss in England: The Search for Coherence*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 27, 48 (Efstathios K. Banakas ed., 1996) (explaining that such a victim "could have negotiated terms in the contract to cover the situation that arose").
and should not be compensated again ex post.\textsuperscript{96} Nonpricing of the risk may indicate that it was deemed insignificant by the parties,\textsuperscript{97} and tort law should not be used to protect personal interests from insignificant risks. Third, tort litigation is time-consuming, wearisome, and costly.\textsuperscript{98} Arguably, if one can protect one’s interest in a simpler and less costly manner, one should be encouraged to do so. Fourth, directing potential victims to the contractual venue is supported by the general preference for consensual transactions over collective intervention (laissez-faire policy).

A possible response to this line of argument is that protection through contract is frequently impractical due to asymmetric bargaining power,\textsuperscript{99} lack of information about potential risks,\textsuperscript{100} the prohibitive cost of negotiating contractual provisions for each and every contingency,\textsuperscript{101} or the absence of any contractual link between the plaintiff and the primary victim.

A more sophisticated version of the same argument is that where an injury to a certain person or to a person’s property may result in economic losses to others, and where transaction costs are low, the law seeks to “channel” economic losses through the primary victim to save the cost of multiple tort actions.\textsuperscript{102} A channeling contract is a contractual arrangement whereby the primary victim agrees to indemnify relational victims for their losses.\textsuperscript{103} Channeling saves the costs of litigating independent


\textsuperscript{97} But see id. (considering this argument and responding that disparity of bargaining positions may explain lack of indemnification).

\textsuperscript{98} Perry, supra note 20, at 1585.

\textsuperscript{99} See Can. Nat’l Ry. Co., 91 D.L.R. at 351 (La Forest, J., dissenting) (noting inequality of bargaining power is a reason why contract may not be a real alternative); id. at 374 (McLachlin, J.) (asserting that assumption of “contractual allocation of risk” is that all parties to a transaction have equal bargaining power).

\textsuperscript{100} See id. at 351 (La Forest, J., dissenting) (“[T]he risk which materializes may be so unusual that the parties never contemplated it.”).

\textsuperscript{101} See William Bishop & John Sutton, Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule, 15 J. LEGAL STUD. 347, 366 (1986) (“[I]t would be wasteful for parties to negotiate over relatively remote contingent events.”).

\textsuperscript{102} Mario J. Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. LEGAL STUD. 281, 283 (1982).

\textsuperscript{103} Id.
relational loss claims and may thus be economically desirable.\textsuperscript{104} According to this argument, the law encourages channeling by denying recovery for relational losses and allowing recovery for economic losses that have been shifted to the primary victim. The former rule induces potential relational victims to demand channeling provisions, and the latter facilitates the primary victim's consent.\textsuperscript{105}

However, this line of argument seems generally unpersuasive. It is valid only if four conditions are met: (1) allowing recovery for the shifted loss is in itself warranted, (2) the costs of negotiating channeling provisions are truly lower than the subsequent reduction in administrative costs, (3) the traditional legal dichotomy encourages potential victims to negotiate channeling arrangements that they would not otherwise consider, and (4) there is no better way to minimize administrative costs.\textsuperscript{106} As I showed elsewhere, in most cases one or more of these conditions will not be met.\textsuperscript{107} At any rate, the argument does not apply to the Exxon Valdez case because oceanic resources have no owner with whom potential victims can negotiate channeling provisions.

\textit{b. Insurance.} Another common justification for the exclusionary rule derives from the notion of loss spreading. The underlying assumption is that first-party insurance is a more efficient means of spreading relational losses than liability insurance associated with tort liability.\textsuperscript{108} First, the cost of

\begin{flushright}
\textsuperscript{104} Id.
\hspace{0.5em} \textsuperscript{105} Id.
\hspace{0.5em} \textsuperscript{106} Perry, supra note 20, at 1602.
\hspace{0.5em} \textsuperscript{107} Id. at 1601–04.
\hspace{0.5em} \textsuperscript{108} See, e.g., Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985) (claiming that tort liability insurance is a “cheaper, alternative compensation” for the “financially injured”); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985) (posturing that first-party insurance is more “feasible”); Bow Valley Husky (Berm.) Ltd. v. Saint John Shipbuilding Ltd. (1997), 153 D.L.R. 4th 385, 404 (Can.) (“[I]t may be more efficient to place the burden of economic loss on the victim, who may be better placed to anticipate and insure its risk.”); Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 350 (Can.) (La Forest, J., dissenting) (asserting that the "weight of opinion" supports proposition that first-party insurance is cheaper); Feldthusen & Palmer, supra note 78, at 449–44 (detailing the advantages of first-party insurance); James, supra note 71, at 52–53 (discussing considerations that tend to favor first-party insurance as a means to compensate accident victims); O'Brien, supra note 51, at 968 (asserting that first-party "insurance costs will be less expensive and, consequently, the overall effect will be
information required for the evaluation of the risk is usually higher in the case of liability insurance. A potential relational victim knows better than the potential injurer what the nature of the personal risk is, in what circumstances it will materialize, and what the magnitude of the loss will be.\textsuperscript{109} Second, the costs of establishing the right for compensation are higher in the case of liability insurance because first-party insurance does not hinge on tort litigation or tort negotiation.\textsuperscript{110} Exclusion of liability induces potential victims to insure themselves against prospective personal losses and potential injurers not to insure themselves against liability for these losses. It thereby guarantees efficient loss spreading while preventing double insurance.\textsuperscript{111}

c. Ex Ante Precautions and Ex Post Mitigation. Exclusion of liability for relational losses may reduce the likelihood of inefficient expenditures.\textsuperscript{112} Assume, for example, that a negligently operated dredge fractures an oil pipeline. The company that used the pipeline under contract with its owner to obtain petroleum products decides to utilize alternative means of transportation at a considerably higher cost during the repairs.\textsuperscript{113}

\textsuperscript{109} See also Recent Case, supra note 51, at 449 ("[I]t is arguably more efficient for potential plaintiffs to obtain first-party insurance on their own limited interests than for potential defendants to obtain insurance in vast amounts for all possible types of economic loss.").

\textsuperscript{110} See Michael MacGrath, The Recovery of Pure Economic Loss in Negligence—An Emerging Dichotomy, 5 OXFORD J. LEGAL STUD. 350, 375 (1985) (supporting proposition that first-party insurance "tends to be more readily available at more reasonable rates because of the absence of the high cost of litigation or arbitration").

\textsuperscript{111} Can. Nat’l Ry. Co., 91 D.L.R. 4th at 352, 354 (La Forest, J., dissenting) (asserting that denial of recovery incentivizes parties to act in ways that minimize overall losses which is "a legitimate and desirable goal for tort law"); Feldthusen, supra note 64, at 48–49 (noting uncertainty about potential liability encourages wasteful overlapping insurance); James, supra note 71, at 52–55 ("[T]he wide and systematic distribution of losses according to insurance principles tends to minimize the social disutility of these losses . . . ."). "Ambiguous liability formulas (such as ‘proximity’) frequently result in double insurance." Perry, supra note 50, at 767.

\textsuperscript{112} See Perry, supra note 50, at 754–56 (developing this argument).

\textsuperscript{113} Caltex Oil (Austl.) Pty. Ltd. v. Dredge "Willemstad" (1976) 136 CLR 529, 544 (Austl.) (detailing a similar fact pattern).
Doing so is inefficient if the increased production cost exceeds the product's utility to consumers or if competitors can produce the same product at a lower cost during the interruption. Denial of liability may help prevent the inefficient expenditure under those circumstances, albeit imperfectly.114

A related argument is that exclusion of liability for relational losses gives potential victims an incentive to take precautions to prevent harm115 and gives actual victims an incentive to mitigate damages.116 For example, to avoid loss of profits in cases of accidental power failure, businesses can install standby systems ex ante, or they can try to make up for the loss by doing more work when the interruption ends.117 Similarly, where a towed barge sinks, the owners of the tugboat will not suffer economic loss if they use it to haul another ship;118 and when a factory is damaged and closed for repairs, workers will not incur economic loss if they obtain alternative employment.119

According to this argument, allowing recovery for relational losses may have three adverse consequences. First, it may induce potential victims not to invest in mobility and malleability of resources ex ante, even where such an investment is socially desirable.120 Second, it may weaken victims' incentives to turn their capital to alternative and perhaps equally valuable uses after the accident.121 Third, a loss of profit that could be mitigated by

114 The company will incur this expenditure regardless of the legal rule if the cost of production using the alternative means of transportation is lower than the market price. However, exclusion of liability is still justified because imposing liability is tantamount to subsidizing inefficient activity.

115 See Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 55 (1st Cir. 1985) (explaining that liability for economic loss might result in "lessened incentive for financial victims to avoid harm or to mitigate damage").

116 Hayes, supra note 50, at 114 (explaining that liability for economic loss might “discourage [victim’s] invention of alternatives to deal with the emergency situation and would positively encourage corporate management to allow plant and equipment to remain idle for as long as possible during the emergency").


118 Bishop, supra note 74, at 23–24.

119 Id. at 17–18. However, one may say that if workers of the damaged factory find alternative employment they displace other workers. Mario J. Rizzo, The Economic Loss Problem: A Comment on Bishop, 2 OXFORD J. LEGAL STUD. 197, 205 (1982).

120 Bishop, supra note 74, at 18–19.

121 Goldberg, supra note 6, at 17.
the victim is not a social cost externalized by the injurer, so imposing liability will result in over-deterrence of potential injurers.\textsuperscript{122} Although the defenses of comparative negligence and mitigation of damages may provide the necessary incentives,\textsuperscript{123} exclusion of liability can do so at a much lower administrative cost.\textsuperscript{124} Indeed, the administrative advantage cannot in itself justify a rule of no recovery because such a rule may reduce or even eliminate potential injurers' incentives to take due care. However, as explained above, in cases of relational economic loss the injurer is already liable for the physical injury. Therefore, a general rule of no recovery provides appropriate incentives to victims at a lower administrative cost than the classical defenses without eliminating injurers' incentives.

4. \textit{Simplicity.} The exclusionary rule is frequently said to provide a certain and easily applicable limitation on tort liability.\textsuperscript{125} As a "bright-line rule,"\textsuperscript{126} it enables potential injurers and victims to better prepare for contingencies;\textsuperscript{127} impels actual victims to avoid fruitless litigation, thereby saving its cost; and makes the administration of tort actions by the courts easier and less costly.\textsuperscript{128} A possible response is that justice is more important

\begin{thebibliography}{99}
\bibitem{Gilead} Gilead, \textit{supra} note 78, at 591–92.
\bibitem{SHAVELL} \textit{SHAVELL, \textit{supra} note 66, at 144–46.}
\bibitem{Goldberg} \textit{See Goldberg, \textit{supra} note 6, at 17 ("A rule of no liability encourages the victim to adapt efficiently without worrying about a judicial assessment of the reasonableness of the response.").}
\bibitem{Candlewood} Candlewood Navigation Corp. v. Mitsui O.S.K. Lines Ltd., [1986] A.C. 1 (P.C.) 25 (appeal taken from N.S. Wales) ("[The exclusionary rule] has the merit of drawing a definite and readily ascertainable line."); Leigh & Sillavan Ltd. v. Aliakmon Shipping Co., [1986] A.C. 785 (H.L.) 816 (Eng.) (noting the exclusionary rule is "simple to understand and easy to apply").
\bibitem{Gabriel} \textit{See Gabriel, \textit{supra} note 30, at 275 (discussing Fifth Circuit's approval of exclusionary, bright-line rule); Stapleton, \textit{supra} note 47, at 256 (contemplating a "bright-line" rule of no recovery for pure economic loss).}
\bibitem{O'Brien} Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co. (1992), 91 D.L.R. 4th 289, 355 (Can.) (La Forest, J., dissenting); O'Brien, \textit{supra} note 51, at 967 (mentioning argument that "tortfeasors [could] easily predict their potential liability"); Smillie, \textit{supra} note 45, at 254 (suggesting that no liability rule "provide[s] a clear and satisfactory basis for commercial and insurance parties").
\bibitem{Louisiana} \textit{Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985) ("[The exclusionary rule] operates as a rule of law and allows a court to adjudicate rather than manage."). For a slightly different version of this argument, see Bernstein, \textit{supra} note 13, at 779–80 (opining that the exclusionary rule aims to make the law fit the limited cognitive capabilities of the average juror).}
\end{thebibliography}
than certainty; otherwise there would be no liability at all. Liability should be limited in a just and principled manner, not through arbitrary bright lines. A milder version of this argument is that certainty may be relevant but not decisive: it must be weighed against other relevant factors. A less certain set of rules may be warranted if it yields fairer or more efficient outcomes. It is thus highly doubtful that certainty can justify blanket exclusion of recovery for all relational losses.

II. PUNITIVE DAMAGES

A. THE LAW

Punitive damages are sums awarded to a tort claimant over and above his or her actual harm. The idea of noncompensatory damages was known in ancient legal systems. However, the modern doctrine of punitive damages dates back to the mid-eighteenth century. Originating in England, the doctrine was soon imported to America. The first reported case recognizing punitive damages was *Genay v. Norris*, in which the court succinctly held that a person poisoned by another was entitled to exemplary damages.

A few years later, in a breach of promise of

129 See Gabriel, supra note 30, at 278 ("[The exclusionary rule] does not provide... certainty that the potential claimants excluded are the least meritorious.").
130 No liability at all is probably the most certain rule and the easiest to apply.
133 See Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (C.P.) 498 ("[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment. . . ."); Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B) 769 (introducing the term “exemplary damages” to explain an award that exceeded actual damage). The doctrine is firmly entrenched in England. See Kuddus v. Chief Constable of Leicestershire Constabulary, [2001] UKHL 29, [2002] 2 A.C. 122 (H.L.) 129 ("The parties agree that an award of exemplary damages may be made in appropriate cases in English law. . . . As the law now stands that agreement in my view is well founded.").
134 1 S.C.L. (1 Bay) 6 (1784).
135 Id. at 6 (calling the offense "a very wanton outrage").
marriage case, a New Jersey court instructed the jury “not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example’s sake, to prevent such offences in future.”

A fierce debate about the legitimacy of punitive damages erupted in the mid-nineteenth century between Simon Greenleaf and Theodore Sedgwick. On the positive level, Greenleaf insisted that “[d]amages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less . . . .” Sedgwick, on the other hand, contended that “[w]henever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule.” It permits punitive damages, thereby blending the public and private interests. Greenleaf responded that Sedgwick misinterpreted the case law, confusing courts’ willingness to let juries weigh intangible harms in assessing damages with recognition of noncompensatory damages. On the more interesting normative level, Greenleaf opined that a plaintiff in tort could not be permitted to prove that the defendant’s act was injurious not only to the plaintiff but also to the whole state because “the state is competent to vindicate its own wrongs.” This statement reflects the view that a clear scientific distinction exists between private law and public law. Sedgwick replied that a division between

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136 Coryell v. Colbaugh, 1 N.J.L. 77, 77 (1791).
137 See 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 276 n.2 (7th ed. 1858) (critiquing Sedgwick’s approach); THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 666 (3d ed. 1858) (undermining Greenleaf’s perspective on case law).
138 GREENLEAF, supra note 137, at 276.
139 SEDGWICK, supra note 137, at 666.
140 Id.
141 See GREENLEAF, supra note 137, at 276 n.2 (arguing that Sedgwick has not pointed to any express decision on the point); Simon Greenleaf, The Rule of Damages in Actions Ex Delicto, 9 L. REP. 529, 530-38 (1847) (detailing various instances where courts allowed juries to consider the totality of the circumstances when determining damages).
142 Greenleaf, supra note 141, at 530.
143 See Rustad & Koenig, supra note 132, at 1299 (noting Greenleaf’s opposition to punitive damages was because it was in the “borderland between public and private law”).
the public and private interests was "entirely fanciful and imaginary," and that "the sooner the idea [of damages as compensation] is got out of the head of a practical lawyer the better." 

It appears that current perceptions represent a compromise between the two extremes. While courts did not do away with the principle of reparation for actual harm as suggested by Sedgwick, very few repudiated the doctrine of punitive damages as advocated by Greenleaf. In Day v. Woodworth, the Supreme Court held that it was a well-established principle of the common law that the jury in a tort action could inflict exemplary, punitive, or vindictive damages on the defendant based on the enormity of the defendant's wrong rather than the measure of the plaintiff's harm. The Court opined that despite past controversy, "repeated judicial decisions for more than a century are to be received as the best exposition of what the law is." However, even at this stage the legitimacy of the anomalous doctrine was not wholly undisputed. In 1872, the Superior Court of Judicature of New Hampshire held that punishment should be confined to the realm of criminal law and that it is "out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies." And if this was insufficiently conclusive, the court concluded that "[t]he idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."

Three points need to be mentioned. First, since 1818 it has been clear that punitive damages are available not only in land-

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144 SEDGWICK, supra note 137, at 671.
145 Id. at 672.
146 Rustad & Koenig, supra note 132, at 1299.
147 54 U.S. 363, 371 (1851); see also Denver & Rio Grande Ry. v. Harris, 122 U.S. 597, 609–10 (1887) (describing right to punitive damages as long settled); McWilliams v. Bragg, 3 Wisc. 424, 431 (1854) (noting array of cases in U.S. and English courts).
150 Id.; see also Murphy v. Hobbs, 5 P. 119, 121, 125 (Colo. 1884) (holding that punitive damages transgress the boundaries between private law and criminal law); Pike v. Dilling, 48 Me. 539, 544 (1861) (Rice, J., dissenting) (finding the doctrine "unsound and pernicious in principle").
based common law, but also under general maritime law.\textsuperscript{151} Second, by the end of the nineteenth century most jurisdictions allowed punitive damages awards not only against individuals but also against corporations. At this time there was still some controversy about the availability of such damages against corporations liable under the doctrine of respondeat superior;\textsuperscript{152} and this controversy has not been settled since.\textsuperscript{153} Third, while punitive damages were originally awarded in cases of malicious and mean-spirited conduct, the doctrine has been gradually expanded to cases of recklessness and even gross negligence.\textsuperscript{154} These three developments laid the foundations for the unprecedented, though ultimately reduced, punitive damages award in the \textit{Exxon Valdez} case.

In the twentieth century, the doctrine was somewhat restrained. In several states, the plaintiff was required to satisfy a higher standard of proof, such as "clear and convincing evidence," to obtain punitive damages.\textsuperscript{155} Moreover, in many states, punitive damages were subject to a statutory cap.\textsuperscript{156} Finally, the Supreme Court held that "the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or

\textsuperscript{151} The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818).
\textsuperscript{152} See Rustad & Koenig, \textit{supra} note 132, at 1295–97 (discussing one academic commentator who found a split in courts on the issue).
\textsuperscript{153} See Dorsey D. Ellis, Jr., \textit{Fairness and Efficiency in the Law of Punitive Damages}, 56 S. CAL. L. REV. 1, 63 (1982) ("[Some courts] follow the respondeat superior rule and hold that an employer may be liable for punitive damages for wrongful acts committed by employees in the course of their employment. [Others] follow the 'complicity rule' and limit vicarious punitive damage liability to those situations where wrongful acts were committed or specifically authorized or ratified by a managerial agent, or were committed by an unfit employee who was recklessly employed or retained." (footnote omitted)).
\textsuperscript{154} See Rustad & Koenig, \textit{supra} note 132, at 1305 (noting the expansion from mean-spirited conduct to extremely negligent conduct); \textit{see also} \textit{Restatement (Second) of Torts} § 908(2) (1979) (stating that punitive damages may be awarded for reckless indifference to the rights of others); Ellis, \textit{supra} note 153, at 20 (listing the circumstances when punitive damages may be awarded).
\textsuperscript{156} See \textit{id.} at 483 n.59 (noting that eighteen states have enacted a cap).
arbitrary penalties on a tortfeasor.”157 A punitive damages award is therefore subject to substantive due process review.

How does a court determine if a punitive damages award is excessive? In BMW of North America, Inc. v. Gore, the Court held that in reviewing awards of punitive damages under the Due Process Clause, courts ought to consider three guideposts.158 The first is the degree of reprehensibility of the defendant’s misconduct.159 Factors relevant in determining the degree of reprehensibility include the type of harm caused, victims’ vulnerability, defendant’s intentional malice or reckless disregard for health and safety of others, repetitive misconduct, and defendant’s efforts to mitigate the harm caused.160 The second guidepost is the disparity between the plaintiff’s actual or potential harm and the punitive damages award.161 In State Farm Mutual Automobile Insurance Co. v. Campbell, the Court opined that a single-digit ratio between punitive and compensatory damages was more likely to accord with due process than awards with ratios in the range of 500 to 1 (or even 145 to 1, as in Campbell).162 However, the Court emphasized that greater ratios could be consistent with the Due Process Clause where “a particularly egregious act has resulted in only a small amount of


158 BMW, 517 U.S. at 575–85.

159 See id. at 575–80 (indicating the degree of reprehensibility was the most important indicium of the reasonableness of punitive damages).

160 See Baker v. Exxon Mobile Corp., 490 F.3d 1066, 1085–89, 1095 (9th Cir. 2007) (applying these factors).

161 BMW, 517 U.S. at 580–83.

162 See 538 U.S. at 425 (arguing that in practice few awards exceeding the single-digit ratio would to a significant degree satisfy due process).
economic damages.\textsuperscript{163} The third guidepost is the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases.\textsuperscript{164}

One of the most fundamental principles in the modern law of torts is that damages should restore the victim to the pre-tort condition \textit{(restitutio in integrum)}.\textsuperscript{165} Punitive damages are noncompensatory by definition.\textsuperscript{166} So although the specific goals of the punitive damages doctrine are yet to be explored, it is clearly inconsistent with the fundamental remedial maxim.\textsuperscript{167} Just like the exclusionary rule, it is an exception that needs to be justified, and if its justifications cease to exist, the general principle must be reinstated.

\section*{B. THE MAIN JUSTIFICATIONS}

\subsection*{1. Compensation for Noncompensable Harm.} A historical justification for punitive damages, "which showed up in some of the early cases," was the need to compensate for noncompensable harms such as hurt feelings, dignitary harm, and embarrassment.\textsuperscript{168} The Supreme Court observed in \textit{Cooper Industries v. Leatherman Tool Group} that until the nineteenth century, "punitive damages frequently operated to compensate for

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\item \textsuperscript{163} Id. Perhaps \textit{TXO Production Corp. v. Alliance Resources Corp.}, 509 U.S. 443, 443, 462 (1993) is such an exceptional case: compensatory damages were only $19,000, the defendant "set out on a malicious and fraudulent course," and punitive damages were set at $10 million.
\item \textsuperscript{164} See \textit{BMW}, 517 U.S. at 583–85 (instructing a reviewing court to accord "substantial deference" to legislative judgments for appropriate sanctions). For a while, it was unclear whether these guideposts should be explained to juries or used solely by appellate courts discussing the constitutionality of punitive damages awards. However, in \textit{Phillip Morris USA v. Williams}, 549 U.S. 349, 355 (2007), the Court implied that the jury should be advised of the proper guidelines.
\item \textsuperscript{165} See \textit{supra} note 15 and accompanying text.
\item \textsuperscript{166} See \textit{RESTATEMENT (SECOND) OF TORTS} § 908(1) (1979) (characterizing punitive damages as those other than compensatory or nominal damages).
\item \textsuperscript{167} See, e.g., \textit{Bennis v. Michigan}, 516 U.S. 442, 469 n.13 (1996) (Stevens, J., dissenting) ("Tort law is tied to the goal of compensation (punitive damages being the notable exception).")
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intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time. Anthony Sebok opined that "punitive damages have never served the compensatory function attributed to them by the Court in *Cooper*" because compensation was never regarded as their exclusive or even primary goal and because they were said to compensate for losses that are still noncompensable today. Nonetheless, the historical rationale has waned over time with the expansion of compensatory remedies. A less common argument was that punitive damages were needed to compensate the victim for litigation costs, which were generally irrecoverable in American law. This argument has garnered very little support in the case law. In sum, punitive damages are currently deemed separate and distinct from compensatory damages in most jurisdictions, with very few exceptions.

2. Retribution. Clearly, a doctrine that awards extra-compensatory damages (by definition) is inconsistent with corrective justice theories that focus on rectification of the harm

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171 See id. at 204–05 (noting mental suffering from mere insult is not a form of compensable injury under current tort law).
172 See Sloane, *supra* note 155, at 481–82 (acknowledging the need for the gap-filling function has waned with the onset of awarding damages for nontangible injuries).
173 See, e.g., Doroszka v. Lavine, 150 A. 692, 692–93 (Conn. 1930) ("[T]he purpose is not to punish the defendant... but to compensate the plaintiff... and so-called punitive or exemplary damages cannot exceed the amount of the plaintiff's expenses of litigation, less taxable costs."); Walther & Plein, *supra* note 168, at 381 ("[P]unitive damages give the plaintiff compensation for his litigation expenses.").
174 See James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1136 (1992) ("In virtually all suits the victorious party is not awarded attorney fees.").
175 See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) (noting a consequence of broadening compensatory damages was that American courts tend to speak of punitive damages as separate and distinct from compensatory damages).
What then is the purpose of punitive damages? In the past it was very frequently said that the aim of these awards was “to punish and deter.” This language has been used in court decisions, professional and academic literature, and even jury instructions. This phrase is somewhat misleading, since punishment—as this word is currently understood—is not a purpose but a mechanism. Punishment may be defined as “imposing a sanction.” It may have various goals, such as retribution, deterrence, appeasement of the victim, incapacitation of the wrongdoer, education, etc. Saying that punitive damages are meant to punish is consequently tautological. It may be transformed into the odd sentence, “the purpose of imposing this sanction is to impose a sanction.”

Still, it is clear that the word “punish” in the phrase “to punish and deter” has not been used in vain. Courts and scholars sometimes use the terms “punishment” and “retribution” interchangeably. This usage is perplexing but still accepted. So whenever courts say that punitive damages are supposed to “punish and deter” they seem to suggest that punitive damages are aimed at retribution and deterrence. This explanation is the most reasonable for the classical punish/deter dichotomy. In

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179 See, e.g., RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (indicating purpose of punitive damages is to punish and deter); Howard A. Denemark, Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant, 63 OHIO ST. L.J. 931, 935 (2002) (same); Walther & Plein, supra note 168, at 372–73 (same).
180 See, e.g., RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 98 (3d ed. 1993) (setting forth jury instruction that the purpose of punitive damages is to punish and deter).
182 See id. (describing various purposes of punishment).
183 See, e.g., Ellis, supra note 153, at 3–4 (arguing that punitive damages serve deterrence and retribution); David G. Owen, A Punitive Damages Overview: Functions, Problems and
recent American decisions, a more accurate terminology has been used. For example, in \textit{State Farm} the Supreme Court held that "Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution."\textsuperscript{184}

Retribution may be defined as imposing a sanction that corresponds to individual moral desert.\textsuperscript{185} Wrongdoers deserve to be punished on account of their wrongful conduct and ought to be punished fairly regardless of the consequences of their punishment.\textsuperscript{186} Thus, the concept of retribution entails two components: wrongfulness and just desert.\textsuperscript{187} The content of the wrong, for which a punishment is deserved, is not consensual, nor does it have to be. Retribution is a \textit{form} of justice, an apparatus, not an independent substantive moral standard.\textsuperscript{188} It determines how justice should be done whenever a wrong is committed. The definition of wrongfulness is left to legal philosophers.

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\textsuperscript{184} 538 U.S. 408, 416 (2003) (citation omitted); \textit{see also id. at 417} (noting punitive damages awards serve the same purposes as criminal penalties); Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) (noting punitive damages are aimed principally at retribution and deterring harmful conduct); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence.").

\textsuperscript{185} \textit{See Fletcher, supra note 181, at 52} ("[B]y the use of the . . . term 'retributive,' I simply mean imposing punishment because it is deserved on the basis of having committed a crime . . . .[R]etributivism is a jealous theory in the sense that whatever the beneficial side-effects of punishment, if it is not deserved it cannot possibly be justified.").

\textsuperscript{186} Retributive justice is therefore \textit{retrospective}, in that it looks backward to the particular wrongdoing, not forward to the consequences of the sanction.

\textsuperscript{187} \textit{See Ellis, supra note 153, at 4–5} (noting the term punishment denotes a notion of desert and that one should be punished for a morally wrongful act).

\textsuperscript{188} For this reason I do not find Kaplow and Shavell's criticism of the idea of retribution very appealing. \textit{See Louis Kaplow & Steven Shavell, \textit{Fairness Versus Welfare}, 114 \textsc{Harv. L. Rev.} 961, 972 (2001)} ("Retributive theorists assert . . . that punishment should follow automatically from the commission of a wrongful act, but they fail to offer a theory of which acts are wrongful . . . .").
Retributive justice does not require that the sanction be identical to the wrong committed, unlike the ancient lex talionis; it merely insists on proportionality between the severity of the sanction and the gravity of the wrong. The sanction must be fair in light of the conceptual and concrete features of the wrong for which it is imposed. The fairness of a legal sanction is determined by two complementary principles: cardinal (or absolute) proportionality and ordinal (or relative) proportionality. According to the former, the sanction should not be too harsh or too lenient with respect to the absolute gravity of the wrong committed. For example, it seems unfair to impose a life sentence on a person who did not pay for parking; similarly, it seems unfair to impose a small fine on a cold-blooded murderer. According to the principle of ordinal proportionality, the sanction imposed for a certain wrong must reflect the relative gravity of the wrong: if wrong X is graver than wrong Y, the sanction for wrong X must be more severe than the

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189 "The law of retaliation; which requires the infliction upon a wrongdoer of the same injury which he has caused to another." BLACK'S LAW DICTIONARY 913 (6th ed. 1990).

190 Peter Cane, Retribution, Proportionality, and Moral Luck in Tort Law, in THE LAW OF OBLIGATIONS 141, 143, 160-61 (Peter Cane & Jane Stapleton eds., 1998) (reasoning that punishments for different crimes should be proportional to reflect the offenses and culpabilities of those committing them); Tony Honoré, The Morality of Tort Law—Questions and Answers, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 87 (David G. Owen ed., 1995) [hereinafter Honoré, Morality of Tort Law] (retribution requires imposition of a sanction that is in proportion to the moral gravity of the misconduct, and forbids imposition of a sanction that is out of proportion to the gravity of the misconduct); TONY HONORÉ, RESPONSIBILITY AND FAULT 13, 83-84, 87, 92, 123, 138 (1999) (recognizing that the principle of retribution requires that a penalty should not be disproportionate to the moral gravity of the offense); Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. REV. 1659, 1690 (1992) (same); Jeffrie G. Murphy, Does Kant Have a Theory of Punishment?, 87 COLUM. L. REV. 509, 530-32 (1987) (same) (investigating Kant's view that for punishment to be legitimate, it must be proportional to the offenses committed); Note, Punitive Damages and Libel Law, 98 HARV. L. REV. 847, 851 (1985) ("Fairness... demands that the punishment be proportionate to the severity of the act. . . .")

191 Honoré, Morality of Tort Law, supra note 190, at 86-87.

192 See ANDREW VON HIRSCH, CENSURE AND SANCTIONS 29-46 (1983); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 40-46 (1985); see also Cane, supra note 190, at 161 ("Cardinal proportionality would require that the sanction for each tort should be proportional to that tort; and ordinal proportionality would require that more 'serious' torts should attract greater sanctions."); Ellis, supra note 153, at 6-7 (discussing the principle of desert).

193 Cane, supra note 190, at 143.
sanction for wrong \( Y \), and vice versa.\footnote{See id. (describing proportionality in relation to the gravity of the offense).} For example, the punishment for murder must always be more severe than the punishment for nonpayment for parking.\footnote{Ronen Perry, The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory, 73 Tenn. L. Rev. 177, 182 (2006).} The principle of cardinal proportionality sets the upper and lower limits of the possible sanction in a given society regardless of the relative gravity of the wrong.\footnote{Id.} “The principle of ordinal proportionality narrows those boundaries, so that the order of harshness of actual sanctions will correspond to the order of gravity of the given wrongs.”\footnote{Id.}

As mentioned before, punitive damages are accepted in nearly all common law jurisdictions. However, they are highly unusual.\footnote{See, e.g., David Luban, A Flawed Case Against Punitive Damages, 87 Geo. L.J. 359, 360-62 (1998) (presenting a statistical overview of punitive damage awards).} Awarding noncompensatory damages is inconsistent with the corrective structure of tort law. Therefore, punitive damages are awarded merely at the margins, where courts feel that a compensatory award is an extremely lenient sanction with regard to the gravity of the defendant’s conduct.\footnote{Id. at 364 (noting that punitive damages are designed to be awarded “against defendants who have been ‘really mean’ or ‘really stupid’”).} In other cases, the discrepancy between the gravity of the wrong and the severity of the sanction is left untouched for the sake of corrective justice. As observed by the Supreme Court,

[i]t 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.\footnote{State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).}
Between deterrence and retribution, retributive justice seems to be the dominant goal in part due to its constitutional underpinnings. Courts have been cautious not to award punitive damages in violation of the principles of retributive justice. It was held that an award of punitive damages must reflect the gravity of the respective wrong, and that punitive damages are subject to the Due Process Clause that prohibits the imposition of grossly excessive or arbitrary penalties. Substantive due process review follows the *BMW v. Gore* guideposts. The first guidepost, degree of reprehensibility, which is also the most important one, can be easily explained in retributive terms. Determining the severity of the sanction in light of the degree of reprehensibility—absolute and relative—is purely an exercise of retributive justice. The third guidepost, relation to civil penalties in comparable cases, seems to aim at ordinal proportionality: similar wrongs deserve similar sanctions. The second guidepost, ratio between punitive damages and actual harm, may also be linked with the notion of retributive justice. Although it is separate from the first, the potential harm is in fact one of the primary indicators of the gravity of the defendant’s conduct. However, the second guidepost is apparently intended to prevent the plaintiff from acquiring an unreasonable windfall, not just to ensure that the defendant’s sanction is due. In any event, the first guidepost is the dominant one.

Now egregious conduct may give rise to various types of sanctions, legal—criminal, administrative, civil, or disciplinary—and extra-legal such as reputational harm. To avoid disproportion between the overall burden imposed on the defendant and the gravity of her wrong, these sanctions must be taken into account in deciding whether punitive damages may be awarded in a specific case and in determining their amount. Some jurisdictions have barred punitive damages in a civil action following or

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202 See *supra* note 157 and accompanying text.
203 See *supra* notes 158–64 and accompanying text.
204 *BMW*, 517 U.S. at 575 (“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”).
205 See *supra* note 161.
206 See *supra* note 163.
pending criminal conviction for the same conduct.\textsuperscript{207} However, the prevailing view in the United States is that criminal conviction does not bar punitive damages, although it should be taken into account in determining the extent of the award.\textsuperscript{208}

An interesting question concerns judicial readiness to award punitive damages against firms. \textquoteright\textquoteright[F]irms are not persons, and when punitive damages are imposed\textquoteright\textquoteright on them those who suffer may not be wrongdoers at all.\textsuperscript{209} A punitive damages award may end up injuring not the firm so much as stockholders (if the firm absorbs the cost or a fraction of it), consumers (if the firm spreads the cost ex post through price increases), and employees (if the firm is forced to cut back or goes into liquidation) who had nothing to do with the underlying wrong.\textsuperscript{210} \textquoteright\textquoterightIt is far from clear that juries awarding punitive damages are aware of this point, and it is also far from clear that they can be easily convinced that the point is correct.\textquoteright\textquoteright\textsuperscript{211}

The dominance of the retributive justification is apparent not only in judicial rhetoric but also in jury perceptions of the goals of punitive damages. Empirical evidence suggests that \textquoteright\textquoterightjuries [do not attempt] to promote optimal deterrence\textquoteright\textquoteright but to \textquoteright\textquoterightpunish wrongdoing with, at most, a signal designed to ensure that certain misconduct will not happen again.\textquoteright\textquoteright\textsuperscript{212}

\textsuperscript{207} See Walther & Plein, supra note 168, at 384 (identifying Indiana as one such jurisdiction).
\textsuperscript{208} See, e.g., Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991) (holding that the imposition of criminal sanctions on the defendant for its conduct should be considered in assessing the reasonableness of a punitive damages award); In re Exxon Valdez, 270 F.3d 1215, 1226 (9th Cir. 2001) \textquoteright\textquoteright([A] prior criminal sanction does not...bar punitive damages.\textquoteright\textquoteright); Saunders v. Gilbert, 72 S.E. 610, 615 (N.C. 1911) (noting that a defendant\textquoteright\textquoterights criminal punishment can be considered in mitigating punitive damages); RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979) \textquoteright\textquoteright(The awarding of punitive damages is not prevented by a prior criminal conviction for the same act, which is relevant only to the amount of the award.\textquoteright\textquoteright); Annotation, Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages, 98 A.L.R.3d 870, 875 (1980) (stating that where a defendant is subject to criminal punishment the general view is that recovery of punitive damages is not precluded).
\textsuperscript{209} Sunstein et al., supra note 183, at 2114 n.157.
\textsuperscript{211} Id.; see also Ellis, supra note 153, at 66-67 (discussing the effect of such vicarious liability); Kaplow & Shavell, supra note 188, at 1067-68 (noting that fairness arguments favoring compensation for victims may be inapplicable when victims are firms).
\textsuperscript{212} Sunstein et al., supra note 183, at 2085.
[O]rdinary people do not spontaneously think in terms of optimal deterrence when asked questions about appropriate punishment, and it is very hard to get them to think in these terms. People come to the role of juror with retributive intuitions, and it remains unclear whether and to what extent the courtroom can overcome those intuitions.\textsuperscript{213}

3. Deterrence. As explained above, American courts have perceived deterrence as one of the two principal justifications for punitive damages.\textsuperscript{214} The additional sanction may serve to deter the specific defendant from repeating the wrong and others from committing similar wrongs.\textsuperscript{215} Two questions arise in this respect. First, what types of wrongfulness do punitive damages aim to deter? The simplistic answer, following the Benthamite tradition, conflates the end and the means. Deterrence is such an integral and distinctive feature of utilitarian and economic theories of law that a sanction must deter inefficient conduct. But American courts seem to have a somewhat different intuition. For instance, in Cooper, the Supreme Court opined that the deterrent function of punitive damages was not exclusively efficiency-oriented: "Citizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct . . ."\textsuperscript{216}

The second question is why deterrence of unwarranted conduct requires extra-compensatory damages. As Gary Schwartz correctly observed, judicial opinions that point to deterrence as one of the main goals of punitive damages "are rendered almost useless by their obliviousness to the basic point that ordinary civil

\textsuperscript{213} Id.
\textsuperscript{214} See supra notes 178–80, 184 and accompanying text.
\textsuperscript{215} See Ellis, supra note 153, at 3 (discussing the purposes of punitive damages).
damages—in the course of providing compensation—concurrently function to deter."\(^{217}\)

Modern theorists have proposed three answers to this challenge.\(^{218}\) First, compensatory damages might not be sufficient if the defendant might escape liability for the wrongful conduct. Efficient deterrence entails internalization of the harm caused by wrongful conduct to the extent that such harm reflects true social cost. Only if the expected liability is equivalent to or greater than the expected harm will the potential injurer internalize the expected harm and act efficiently. Alas, there is a series of factors—external to substantive tort law—that let many negligent injurers off scot-free. For instance, some victims are unaware that the harms they incurred are the result of wrongful conduct;\(^{219}\) others do not have sufficient evidence to substantiate their case;\(^{220}\) some may not sue because the expected costs of doing so may outweigh the expected compensation;\(^{221}\) and many victims refrain from suing if there is a familial, social, professional, or other connection between them and the injurer.\(^{222}\)

The main economic argument is that punitive damages may be used to overcome problems of under-enforcement.\(^{223}\) Under this perception, total damages should be the actual harm multiplied by the reciprocal of the probability that the defendant \emph{will} be found liable when she \emph{should} be found liable; punitive damages would then consist of the excess of total damages over compensatory damages.\(^{224}\) This theory has a relatively weak descriptive power and severe normative deficiency. From a descriptive standpoint,


\(^{218}\) See Ellis, \textit{supra} note 153, at 7 (setting forth and discussing three answers to this challenge).


\(^{220}\) Id.

\(^{221}\) Id.


\(^{224}\) SHAVELL, \textit{supra} note 66, at 148.
an under-enforcement rationale can hardly explain why in all common law jurisdictions punitive damages are unusual and hinge on the defendant's state of mind.\textsuperscript{225} After all, under-enforcement exists in most cases, including those of negligence or no-fault liability, not only in cases of reprehensible conduct.\textsuperscript{226} Moreover, the extent of punitive damages is determined predominantly in accordance with the reprehensibility of the conduct, not with the probability of escaping liability.\textsuperscript{227} This observation must be qualified though because in addition to culpability, heavier punitive awards have been deemed justifiable when wrongdoing is hard to detect (increasing chances of getting away with it)\textsuperscript{228} or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue).\textsuperscript{229} From a normative perspective, administrative and criminal law may be regarded as efforts to compensate for private under-enforcement of law; if tort law also attempts to handle under-enforcement through punitive damages, over-deterrence may ensue.\textsuperscript{230}

Second, compensatory damages might not provide the appropriate incentive if the wrongdoer derives morally illicit gains, financial or nonfinancial, from the wrongful conduct. In the leading English case of \textit{Rookes v. Barnard},\textsuperscript{231} Lord Devlin opined that if a person expects personal profit from wrongdoing to exceed the harm to others, compensation is insufficient: "Exemplary damages can properly be awarded whenever it is necessary to

\textsuperscript{226} Schwartz, \textit{supra} note 217, at 141.
\textsuperscript{227} See id. at 144 ("[T]he precise 'degree of reprehensibility' in the defendant's conduct is a key element in calculating the quantum of punitive damages.").
\textsuperscript{228} BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("A higher ratio may also be justified in cases in which the injury is hard to detect.").
\textsuperscript{229} Id. ("[L]ow awards of compensatory damages may properly support a higher ratio . . . if, for example, a particularly egregious act has resulted in only a small amount of economic damages.").
\textsuperscript{230} Sunstein et al., \textit{supra} note 183, at 2084.
\textsuperscript{231} [1964] A.C. 1129 (H.L.) (Eng.).
teach a wrongdoer that tort does not pay."\textsuperscript{232} This argument has also found support in the law and economics literature.\textsuperscript{233}

Third, compensatory damages might not suffice if some of the actual harm caused by wrongful conduct is legally noncompensable. Interestingly, Dorsey Ellis contends that these noncompensable losses include relational economic and emotional harms.\textsuperscript{234} This argument is admittedly problematic. The problem of under-compensation, like that of under-enforcement, is also characteristic of cases of negligence and strict liability, where punitive damages are not allowed. Moreover, if existing law fails to compensate for significant elements of harm, the proper strategy entails reforming or revising the law directly "rather than straining for a surrogate result through reliance on punitive damages."\textsuperscript{235} This is a perfect conclusion for Part II, because the view that punitive damages should not be used if the desired result can be obtained by allowing recovery for currently irrecoverable harm is the core of my thesis in Part III.

III. THE CLASH

A. THE DOCTRINAL LEVEL

1. Economic Loss. Aquatic pollution may have harsh and widespread repercussions. In addition to environmental harm, property damage, and possibly physical injuries, various economic losses may ensue. Commercial fishermen, oystermen, crabbers, and the like may lose their livelihood. Customers of these fishermen, such as seafood restaurants, retail shops, or canned food manufacturers, may incur additional expenses or even shut down temporarily, and suppliers of services and goods to the local fishing industry may lose profit. Owners of shoreline hotels,

\begin{itemize}
\item \textsuperscript{232} Id. at 1227; see also Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989) ("If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.").
\item \textsuperscript{233} See, e.g., Robert D. Cooter, Economic Analysis of Punitive Damages, 56 S. CAL. L. REV. 79, 98 (1982) ("Punitive damages should be computed at a level that offsets the illicit pleasure of noncompliance or the exceptional costs of compliance that motivated the injurer.").
\item \textsuperscript{234} Ellis, supra note 153, at 28.
\item \textsuperscript{235} Schwartz, supra note 217, at 139–40.
\end{itemize}
resorts, recreational areas, and other tourist-based businesses may also suffer economic loss. Many other suppliers, customers, employees, and relatives of any of the above may lose profits or incur unanticipated expenses. These economic losses are generally subject to *Robins Dry Dock*. Put differently, relational economic losses caused by aquatic pollution are generally irrecoverable.

This common law rule, when applied to environmental disasters, has a single well-defined exception. Courts have consistently allowed commercial fishermen, oystermen, crabbers, etc., to recover for lost fishing profits following a tortious diminution of aquatic life. The exception originated in the renowned case of *Union Oil Co. v. Oppen*, in the wake of the Santa Barbara oil spill of 1969. The Court of Appeals for the Ninth Circuit upheld the exclusionary rule but concluded, relying on existing exceptions, that it was not foreclosed by precedent from examining commercial fishermen’s claims against the polluter on their merits. The court explained that the chief element in determining whether a defendant owed a duty of care to the plaintiff is the foreseeability of the risk and that the defendants in this case undoubtedly realized that negligence on their part might result in a substantial oil spill that would diminish aquatic life and injure commercial fishermen. It opined that the direct causal link between the impact of escaping oil on aquatic life and plaintiffs’ losses, public disapproval of environmental harm, the policy of preventing such harm, and the fact that the oil company was the cheapest cost avoider also pointed to the existence of a duty of care. Yet the court was at pains to emphasize that its holding “does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded

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236 See, e.g., Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1021, 1028–29 (5th Cir. 1985) (denying recovery for economic losses under Robins).
237 501 F.2d 558, 570 (9th Cir. 1974).
238 See generally ROBERT O. EASTON, BLACK TIDE: THE SANTA BARBARA OIL SPILL AND ITS CONSEQUENCES (1972) (exploring in depth the Santa Barbara oil spill).
239 *Oppen*, 501 F.2d at 563–64.
240 Id. at 565–68.
241 Id. at 568–69.
242 Id. at 569–70.
by the oil spill.”

Thus, recovery for pollution-related economic harms is strictly limited to commercial marine harvesters. Moreover, the exception does not apply to fishermen who engage in commercial fishing without licenses required by the state.

According to the prevailing view, the fishermen’s exception is based on unique environmental concerns. Several judges have even suggested that this is not a genuine exception because fishermen have a constructive proprietary interest in fish in waters they normally harvest, making their loss equivalent to property damage rather than purely economic. At any rate, this exception is well established. More than a decade after Oppen, the Fifth Circuit upheld the general rule of no recovery for purely economic losses consequent on marine pollutions, recognizing an exception for commercial fishermen.

Following the Exxon Valdez oil spill, over 200 lawsuits were brought in federal and state courts, involving more than 30,000 victims. Other victims are not entitled to recover. See, e.g., Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1021 n.2, 1027 n.10 (5th Cir. 1985) (discussing claims by others that were dismissed and stating that commercial fishermen’s claims were not precluded).


See Channel Star Excursions, Inc. v. S. Pac. Transp. Co., 77 F.3d 1135, 1138 (9th Cir. 1996) (“Union Oil is limited to the environmental sphere; if it is under admiralty law, it can only be said to have carved out a unique exception to the Robins Dry Dock rule by placing a duty on oil drillers to fish and the marine ecosystem.”); cf. Richard A. Epstein, Too Pragmatic by Half, 109 YALE L.J. 1639, 1654 (2000) (reviewing DANIEL A. FARBER, Eco-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD (1999)) (“It looks as though convenience favors allowing actions by immediate parties with large stakes, such as fishermen or owners of lakes, but denies them to parties one step removed, such as processors and retail fish stores.”).
Exxon's liability to commercial fishermen was undisputed. In fact, Exxon undertook a voluntary claims program, ultimately paying out $303 million, principally to fishermen whose livelihood was disrupted from 1989 through 1994. Moreover, 10,000 commercial fishermen were allowed to sue in a federal court, and recovered $287 million in compensatory damages, based on the market value of the fish they would have caught but for the spill. Note, however, that even fishermen were allowed to recover only the value of their lost catch and were denied recovery for the reduction in value of their fishing permits and for lost profits from other businesses. Similarly, there was no dispute that native Alaskans had a right to recover economic damages "flowing from loss of fishing resources," and their claims for harvest damages were settled. Indeed, from the fact that the Supreme Court allowed fishermen and native Alaskans to recover punitive damages, one may infer that the Court implicitly accepted their standing to claim compensatory damages.

In contrast, other claims were generally rejected under the Robins Dry Dock doctrine. The district court dismissed, inter alia, claims by providers of goods (such as fishing gear), services (such as maintenance and repair of fishing boats), and accommodation to commercial fishermen; by businesses that relied on an uninterrupted supply of seafood by local fishermen, including fish

249 Goldberg, supra note 6, at 1.
254 Exxon Valdez, 1994 U.S. Dist. LEXIS 6009, at *23 (noting that a fisherman may recover for lost fishing income, but not for lost income from distributing "Fish Hog" fishing gear).
255 Alaska Native Class v. Exxon Corp., 104 F.3d 1196, 1197–98 (9th Cir. 1997).
tenderers, seafood wholesalers, seafood processors, taxidermists and even the Cordova Air Service; and by businesses that relied on the commercial fishing industry as both consumers and suppliers, such as a business that produced fishing baits from salmon carcasses. The district court also rejected claims by employees of the above businesses, such as cannery workers, as well as providers of goods and services to these businesses, including the Kodiak Electric Association, which suffered reduced power usage by seafood processors and a company selling refrigeration systems to those associated with the fishing industry.

In addition, the court dismissed claims related to the tourism and leisure industry, including loss of enjoyment claims by sport fishermen, photographers, and kayakers and—more importantly—economic loss claims of guides for sport fishermen and nature lovers, boat charterers and the like. Finally, the district courts in Alaska and California dismissed more tenuous claims brought by scientists who allegedly lost income from scientific activities, research funding, future intellectual property, etc., and who were unable to capture and sell sea otters to aquariums and zoos; the Old Harbor Native Corporation, which allegedly lost profit due to congressional disapproval of an exchange of Native Corporation lands for oil exploration rights in

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260 Id.; Exxon Valdez, 767 F. Supp. at 1514.
263 Id. at *15.
269 Exxon Valdez, 767 F. Supp. at 1511, 1514.
270 Exxon Valdez, 1994 U.S. Dist. LEXIS 6009, at *12–14 ("[S]cientists are not fishermen and otters are not fish which may be lawfully taken and sold.").
the Arctic National Wildlife Refuge following the oil spill; and California drivers, who had to pay higher prices for gasoline following the spill.

In an attempt to circumvent the harsh implications of *Robins Dry Dock*, many claims were brought under federal and state legislation. The Federal Oil Pollution Act (OPA) was enacted only in the aftermath of the *Exxon Valdez* oil spill, so it did not apply to any of the claims arising from this particular incident. The most promising statutory venue for the various victims of the spill was the Trans-Alaska Pipeline Authorization Act (TAPAA). The Act imposes strict liability for damages resulting from marine pollution, apparently without the *Robins Dry Dock* limit; yet its

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scope is very limited. First, the Act applies only to oil pollutions, not to the release of other hazardous substances. Second, it only covers incidents related to the operation of the trans-Alaska pipeline system. Third, it grants a cause of action only against certain classes of polluters, namely owners and operators of vessels on which oil transported through the trans-Alaska pipeline was loaded at the pipeline's terminal facilities. Last, but most important, the Act sets rigid liability caps. In the case of a discharge from a vessel, liability cannot exceed $100 million, of which the owner and operator of the vessel are liable for the first $14 million, and the Trans-Alaska Pipeline Liability Fund is liable for the balance. Robins Dry Dock applied to any damages in excess of the $100 million recoverable under TAPAA.

Some claims were based on the Alaska Environmental Conservation Act, which imposes strict liability for damages—including economic losses—caused by unauthorized release of hazardous substances. A controversy emerged regarding the possible preemption of this provision by general maritime law. Under Southern Pacific Co. v. Jensen, state legislation may incidentally affect maritime affairs, unless it "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and

Valdez, 767 F. Supp. 1509, 1515 (D. Alaska 1991); In re Glacier Bay, 746 F. Supp. 1379, 1386 (D. Alaska 1990). But cf. Benefiel, 1990 U.S. Dist. LEXIS 13251, at *2-3 (holding that Robins Dry Dock applies to claims under TAPAA). On appeal, the Ninth Circuit affirmed the district court's decision without directly discussing the applicability of Robins Dry Dock. Applying the principles of proximate cause, the court held that plaintiffs' losses are "remote and derivative ... [and] fall outside the zone of dangers against which Congress intended to protect when it passed TAPAA." Benefiel, 959 F.2d at 807; see also David P. Lewis, Note, The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?, 10 ALASKA L. REV. 87, 116-30 (1993) (supporting the district court's position).

279 Id. § 204(c)(3), 87 Stat. at 586. The pipeline operator "collect[s] from the owner of the oil ... a fee of five cents per barrel," and the collection ceases upon the accumulation of $100 million. Id. § 204(c)(5), 87 Stat. at 586.
280 Exxon Valdez, 767 F. Supp. at 1515; see also Exxon Valdez, 1992 U.S. Dist. LEXIS 22495, at *12-13 ("Congress' abrogation of federal maritime law, including Robins Dry Dock, operates only to the extent of the terms of TAPAA, to the $100 million mark.").
281 ALASKA STAT. § 46.03.822–24 (2008).
uniformity of that law in its international and interstate relations. The district court in Alaska held that Robins Dry Dock applied to claims brought against Exxon under the Act because state law may not conflict with federal maritime law. Other courts, interpreting comparable legislation in other states in the late 1980s and early 1990s, including the Fifth Circuit, reached similar conclusions.

However, both the Supreme Court of Alaska and the Ninth Circuit on appeal from the district court of Alaska decided that Robins Dry Dock did not preempt liability for purely economic loss under state legislation, and this seems to be the dominant view today. According to this stance, Robins Dry Dock is not a


283 Exxon Valdez, 767 F. Supp. at 1515–16; see also In re Exxon Valdez, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20555, at *5–7 (D. Alaska Jan. 26, 1994); Exxon Valdez, 1992 U.S. Dist. LEXIS 22495, at *17–20. More accurately, the court held that Robins Dry Dock only applied to claims under the Alaska Act against entities not liable under TAPAA and claims against entities liable under TAPAA in excess of TAPAA’s $100 million cap. The Alaska Act was technically not preempted by TAPAA to the extent of TAPAA’s $100 million liability because the remedy was uniform whether a claim was brought under the Alaska Act or under TAPAA. Exxon Valdez, 767 F. Supp. at 1515. However, the vessel owner and operator are liable for only $14 million under TAPAA. Thus, in a subsequent decision, the same court explained that damages claimed against the vessel-interest-defendants (as opposed to the Fund) under either TAPAA or the Alaska Act in excess of $14 million were subject to the application of Robins Dry Dock. In re Glacier Bay, 865 F. Supp. 629, 637 (D. Alaska 1991).

284 See Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985) (“The federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. We believe that such is the case here. The Robins rule has proved to be a workable and useful tool in our maritime jurisprudence. To permit recovery here on state law grounds would undermine the principles we seek to preserve today.”). The court reiterated this stance in a slightly different context in IMTT–Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1195 (5th Cir. 1993). See also In re Ballard Shipping Co., 810 F. Supp. 359, 364–66, 368–69 (D.R.I. 1993) (finding state law allowing compensation for economic loss following environmental injuries is preempted by Robins); In re Oriental Republic Uru., 821 F. Supp. 950, 955–56 (D. Del. 1993) (same).

285 In re Exxon Valdez, 270 F.3d 1215, 1251–53 (9th Cir. 2001); Kodiak Island Borough v. Exxon Corp., 991 F.2d 757, 767–69 (Alaska 1999).

286 See Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994) (finding that the Rhode Island Act is not preempted by the admiralty clause of the Constitution); Slaven v. BP Am. Inc., 786 F. Supp. 853, 864–65 (C.D. Cal. 1992) (holding that state law claims that go beyond Robins are not preempted); cf. In re Nautilus Motor Tanker Co., 900
“characteristic feature” of maritime law because it neither “originated in admiralty” nor has “exclusive application” in maritime law.\(^\text{287}\) Moreover, to determine whether state law “interferes with the proper harmony and uniformity” of maritime law, the court needs to apply “a balancing test that weighs state and federal interests on a case-by-case basis.”\(^\text{288}\) The balance in our case tips in favor of the state: “Alaska’s strong interest in protecting its waters and providing remedies for damages resulting from oil spills outweighs the diminished federal interest in achieving interstate harmony through the uniform application of Robins.”\(^\text{289}\) Consequently, the Ninth Circuit reversed the district court’s rulings on this issue and remanded the case for reconsideration of several economic loss claims under Alaska law.\(^\text{290}\) Following this decision, Exxon apparently settled these claims.\(^\text{291}\) Still, as in the case of TAPAA or OPA, recovery for economic losses hinged on the intricacies of a special legislative scheme.

2. Punitive Damages. The recent Supreme Court ruling on punitive damages arose from commercial fishermen’s and Native Alaskans’ actions against Exxon.\(^\text{292}\) The factual basis for the demand of award was simple. The Exxon Valdez captain, a relapsed alcoholic, consumed enough alcohol to incapacitate a nonalcoholic shortly before boarding the vessel\(^\text{293}\) and inexplicably exited the bridge during a critical maneuver, leaving a tricky course correction to unlicensed subordinates.\(^\text{294}\) Although the captain’s superiors knew he had completed an alcohol treatment

\(^{287}\) Exxon Valdez, 270 F.3d at 1251; Kodiak, 991 P.2d at 767.

\(^{288}\) Exxon Valdez, 270 F.3d at 1251.

\(^{289}\) Id. at 1253 (citing Kodiak, 991 P.2d at 769).

\(^{290}\) Id. (remanding “so that the district court can determine whether tenderboat operators and crews, and seafood processors, dealers, wholesalers, and processor employees can establish allowable damages”).

\(^{291}\) See, e.g., Sea Hawk Seafoods, Inc. v. Exxon Corp., 484 F.3d 1098, 1099–1100 (9th Cir. 2007) (noting that a claim brought under Alaska law by a seafood processing business was settled).


\(^{293}\) Id. at 2612.

\(^{294}\) Id.
program, it was unclear whether they also knew about his relapse. On trial, the jury found Exxon reckless (hence potentially liable for punitive damages) under instructions providing that a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment. Thereafter, in 1994, the jury awarded $287 million in compensatory damages to commercial fishermen (from which prior voluntary payments were deducted). The jury also awarded $5,000 in punitive damages against the captain and $5 billion against Exxon.

The procedural history from this point onward is quite complex. Exxon moved for a reduction or remittitur of punitive damages, but that motion was denied. Once a final judgment was entered, Exxon appealed, challenging both the allowability of punitive damages in the particular case and the amount of the award. The Ninth Circuit upheld the jury instruction on corporate liability but remanded "for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in BMW." The court explained that "the $5 billion punitive damages award is too high to withstand the review we are required to give it under BMW and Cooper Industries. It must be reduced." The district court consequently reduced the punitive damages award to $4 billion. After final judgment was entered on the $4 billion award, Exxon appealed a second time. While the appeal was pending, the Supreme Court decided State Farm v. Campbell. The Ninth Circuit vacated the $4

295 Id.
296 Id. at 2614. Exxon brought a motion for a new trial on this issue, arguing that the evidence was legally insufficient to find the company liable for punitive damages on the basis of the captain's behavior and that there was no other basis for punitive damages. The district court denied this motion. In re Exxon Valdez, No. A89-0095-CV, 1995 U.S. Dist. LEXIS 12953, at *12-14 (D. Alaska Jan. 27, 1995).
297 Baker, 128 S. Ct. at 2614.
298 Id.
300 In re Exxon Valdez, 270 F.3d 1215, 1221 (9th Cir. 2001).
301 Id. at 1236.
302 Id. at 1241.
303 Id. at 1246 (footnotes omitted).
billion punitive damages judgment and remanded the case to the district court to reconsider the award in light of State Farm.305 Upon remand, the district court increased punitive damages to $4.5 billion.306 Exxon appealed a third time, and the Ninth Circuit remitted the punitive damages award to $2.5 billion, explaining that a ratio above 5-to-1 between punitive and compensatory damages would violate due process standards.307 Exxon appealed to the Supreme Court.

![Punitive Damages Timeline](image)

**Figure 2. Punitive Damages Timeline**

On appeal, Exxon raised three arguments. Its first argument was that it was an error to instruct the jury that a corporation "is responsible for the reckless acts of...employees...in a managerial capacity while acting in the scope of their employment."308 Put differently, the court cannot award punitive damages under maritime law against shipowners for actions by underlings not "directed," "countenanced," or "participated in" by the owners.309 The plaintiff, on the other hand, argued that maritime law should conform to land-based common law,310 in which punitive damages can be awarded against a principal because of an act by an agent, inter alia, where "the agent was employed in a managerial capacity and was acting in the scope of employment."311 The Court was equally divided on this question.


307 Baker v. Exxon Mobile Corp., 472 F.3d 600, 602, 625 (9th Cir. 2006); see also Baker v. Exxon Mobile Corp., 490 F.3d 1066, 1073, 1095 (9th Cir. 2007).


309 Id. (drawing on language from the Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1819)).

310 Id. at 2616.

311 RESTATEMENT (SECOND) OF TORTS § 909(c) (1979).
and therefore left the Ninth Circuit's opinion undisturbed without setting a precedent on this matter.\textsuperscript{312}

Exxon's second argument was that the Clean Water Act\textsuperscript{313} preempted the maritime law remedy of punitive damages.\textsuperscript{314} The Supreme Court rejected this argument, finding that there was "no clear indication of congressional intent to occupy the entire field of pollution remedies," and that "punitive damages for private harms [would not] have any frustrating effect on the CWA remedial scheme."\textsuperscript{315}

Exxon's last argument was that the $2.5 billion punitive damages award exceeded the bounds justified by the underlying goals of this remedy.\textsuperscript{316} The Court reiterated the view that punitive damages are aimed at retribution and deterrence, and limited to cases of "enormity," in which a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference to others' rights, or even more deplorable behavior.\textsuperscript{317} The Court observed that during recent decades the median ratio of punitive to compensatory awards had remained less than 1:1 and that there was no marked increase in the percentage of cases with punitive awards.\textsuperscript{318} It opined, however, that the unpredictability of high punitive awards was in tension with their punitive function because of the implication of unfairness that an eccentrically high punitive verdict carries.\textsuperscript{319} "[A] penalty should be reasonably predictable in its severity, [to enable every person] to know what the stakes are in choosing one course of action or another"; and a penalty scheme ought to

\textsuperscript{312} Baker, 128 S. Ct. at 2616 ("[T]he disposition here is not precedential on the derivative liability question.").
\textsuperscript{314} Baker, 128 S. Ct. at 2616.
\textsuperscript{315} Id. at 2619.
\textsuperscript{316} Id. at 2619–20.
\textsuperscript{317} Id. at 2621. The Court then noted that state regulation of punitive damages varies. Id. at 2622. A few states award them rarely, or not at all, and others permit them only when authorized by statute. Id. Many states have imposed statutory limits on punitive awards, in the form of absolute monetary caps, a maximum ratio of punitive to compensatory damages, or, frequently, some combination of the two. Id. at 2623. A comparative perspective followed. Id. at 2623–24.
\textsuperscript{318} Id. at 2624; see also id. (positing that most recent studies undercut many of the criticisms received in recent decades).
\textsuperscript{319} Id. at 2627.
threaten defendants with a fair probability of suffering in like degree for like damage.\textsuperscript{320} Since punitive damages serve the same goals as criminal sentencing—retribution and deterrence—“eliminating unpredictable outlying punitive awards by more rigorous standards than the constitutional limit [would] probably have to take the form adopted in those States that have looked to the criminal-law pattern of quantified limits.”\textsuperscript{321} The Court concluded that in a well-functioning system, awards at or below the empirically established median would roughly express jurors’ sense of reasonable penalties in cases like the case at bar, which have no earmarks of exceptional blameworthiness (such as malice or avarice) and raise no unique obstacles to enforcement (such as a modest harm or low likelihood of detection).\textsuperscript{322} Accordingly, and given the need for predictability, the Court held that a 1:1 ratio was a fair upper limit in such maritime cases.\textsuperscript{323} “Cases in which the defendant’s conduct is more egregious than reckless are not so limited.”\textsuperscript{324}

\textbf{B. THE JUSTIFICATORY INCOHERENCE}

1. \textit{The Essence of the Problem}. Liability for purely economic loss and punitive damages were treated as separate and distinct legal matters throughout the \textit{Exxon Valdez} litigation, and this is indisputably correct from a purely doctrinal perspective. Only Justice Stevens seems to have noticed the interrelation between the two on the justificatory level, finding that maritime law precludes, at least in part, recovery for negligent infliction of purely emotional distress and for purely economic loss, and that “[u]nder maritime law, then, more than in the land-tort context, punitive damages may serve to compensate for certain sorts of intangible injuries not recoverable under the rubric of compensation.”\textsuperscript{325} This observation is problematic for two reasons. First, as explained above, punitive damages are currently deemed

\textsuperscript{320} Id.
\textsuperscript{321} Id. at 2629.
\textsuperscript{322} Id. at 2633.
\textsuperscript{323} Id.
\textsuperscript{324} Jones, \textit{supra} note 256, at 1302.
\textsuperscript{325} \textit{Baker}, 128 S. Ct. at 2637 (Stevens, J., concurring in part and dissenting in part).
noncompensatory, namely separate and distinct from compensation.\textsuperscript{326} Second, punitive damages are awarded only to those entitled to compensation for their actual harm, not to those denied recovery for their losses. Thus, punitive damages cannot truly compensate for generally irrecoverable relational economic losses. But Justice Stevens was correct in identifying a possible link between the two seemingly unrelated legal issues discussed here.

To understand the essence of the problem let us assume first that the exclusionary rule sets a justifiable limit on liability. Put differently, it is justified to limit liability as the law does for reasons set forth in Part I.B. The main purpose of the exclusionary rule is to address the specter of indeterminate and potentially enormous liability. The fear of overwhelming the court system with numerous claims proved exaggerated in the \textit{Exxon Valdez} litigation, where the use of procedural methods, such as consolidation of actions, alleviated the judicial burden to a practicable level. Although the court rejected many claims, thousands of claims were handled quite efficiently. Still, the likelihood of extensive liability, correlated with the prospect of numerous claims, is normatively relevant for various reasons. Most importantly, extensive liability may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong (a retributive injustice); unduly restrict the freedom of action of potential tortfeasors; crush productive businesses; and make liability insurance not worthwhile to insurers and potential injurers alike. However, if the exclusionary rule reduces liability to a normatively defensible level, an award of punitive damages necessarily increases the extent of liability beyond that level.\textsuperscript{327} And if in certain types of cases an expansion is justified, how can liability for economic loss still be denied on the grounds of the need to reduce liability?

Another aspect of the ripple effect of economic losses is that the extent of potential liability is uncertain, leaving potential injurers

\textsuperscript{326} See supra Part I.A.

\textsuperscript{327} For example, assuming that the exclusionary rule makes liability insurance more readily available, punitive damages—if covered by liability insurance—may reinstate the problem.
incapable of preparing for contingencies. The exclusionary rule is said to eliminate most of this uncertainty. Yet an award of punitive damages, subject only to general constitutional guideposts, reinstates a high degree of uncertainty into the system, as the Supreme Court in the Exxon Valdez case correctly observed. Potential injurers cannot accurately predict the extent of compensatory damages, which serve as a benchmark for punitive damages, or the ultimate ratio between punitive and compensatory damages. Note that the 1:1 ratio, which reduces uncertainty to some extent, applies only in maritime law, and even there it may be relaxed in certain circumstances.

Two arguments relating to defendants' limited funds require special attention. Given the limited pool that all successful claimants ultimately need to share, liability for relational losses may prevent full recovery for injuries to physical interests which may be more worthy of legal protection. Additionally, each victim may end up with compensation for a very small fraction of his or her loss, making the costly process futile. Both lines of argument assume that allowing recovery for economic losses would extend liability beyond the defendant's capacity. Alas, if the exclusionary rule sets the appropriate limit, an award of punitive damages generates a similar, albeit nonidentical problem. Assume, for example, that the defendant can pay $1 million, the average personal loss is $10,000, and there are 10,000 victims. Under these circumstances, each claimant might end up with compensation for only 1% of the personal loss. The exclusionary rule is said to prevent this absurdity by allowing only some of the victims, possibly the most meritorious, to recover. Now assume arguendo that tort law sets the limits of liability in accordance with the defendant's capacity. In our example, only 100 victims will recover (100 x $10,000 = $1,000,000). An award of punitive damages to all successful claimants will be futile and wasteful in terms of administrative costs because it will not change the ultimate payment to each claimant. An award of punitive damages to some of the successful claimants will result in undercompensation of the others.

The conventional economic justification for Robins Dry Dock is that many financial losses are not true social costs. Thus, exclusion of liability prevents over-internalization, hence over-deterrence. However, if limiting liability is required to prevent over-deterrence, an award of punitive damages increases the extent of liability beyond the normatively defensible level. And if in certain types of cases an expansion is nonetheless justified, there is no reason to prefer a noncompensatory sanction to compensation for actual losses. An economic theorist might argue that each of the two rules deals with a different problem: the exclusionary rule prevents internalization of private losses that do not correspond to social costs, and punitive damages are used to overcome problems of under-enforcement. These two problems entail independent modifications of the extent of liability, so the simultaneous application of the two rules is justified. Because this seems like a general challenge to my thesis, I discuss it at length below.

Another deterrence-based justification for the exclusionary rule turns on the fact that the injurer is already liable for the physical injury. The marginal deterrent effect obtained from holding the injurer liable for relational economic losses is said to be lower than the administrative cost involved in shifting the additional loss. In cases like the Exxon Valdez, liability for property damage is negligible and does not provide an appropriate incentive; but criminal fines, together with civil liability towards commercial fishermen and Native Alaskans might definitely suffice. If so, awarding punitive damages may not be cost-justified. Although the cost of assessing punitive damages in a particular case is probably lower than the cost of handling additional claims, the administrative cost is still significant, as illustrated by the Exxon Valdez litigation, and may outweigh the benefit in terms of marginal deterrence. Again, if in certain cases an expansion of liability is necessary to achieve the twin goals of retribution and deterrence, the justification for denying recovery for economic losses no longer applies.

330 See supra Part I.B.2.a.
331 See supra note 223 and accompanying text.
332 Perry, supra note 50, at 782.
Many "contend that the typical relational victim could protect his or her interest through a contract with the primary victim and that failing to do so justifies exclusion of liability."\textsuperscript{333} I have shown here and elsewhere the weaknesses of this argument. In particular, protection through contract is frequently impractical. The \textit{Exxon Valdez} case is a clear example of impracticability because oceanic resources have no owner with whom potential victims can bargain. Therefore, even if the contractual protection argument were valid in other contexts, it is utterly irrelevant here.

Another explanation for the exclusionary rule is the need to incentivize victims' ex ante precautions and ex post mitigation.\textsuperscript{334} Admittedly, an award of punitive damages does not fully cancel out this benefit. After all, punitive damages are awarded to those entitled to compensation. Relational victims are generally not entitled to compensation, so their incentives are not affected by the award of punitive damages to others. However, one must recall that incentivizing potential victims is a relatively weak and uncommon justification for the exclusionary rule and for good reason. The doctrines of comparative negligence and mitigation of damages provide the necessary incentives; they do so at a somewhat higher administrative cost, but they are more sensitive to the goals of interpersonal fairness and efficient deterrence.\textsuperscript{335} The net benefit of an absolute bar to liability is too limited and speculative to justify such a rule. In any case, losses attributable to the victim's imprudence, before or after the accident, are not social costs externalized by the injurer. So denying recovery for such losses not only provides an incentive to potential victims but also prevents over-deterrence of potential injurers. Awarding punitive damages under these circumstances once again adds a deterrent beyond the warranted level.

Finally, the exclusionary rule is said to provide a certain and easily applicable limitation on tort liability.\textsuperscript{336} I have opined that liability should be limited in a just and principled manner, not through arbitrary bright lines. But, even if simplicity were a valid

\textsuperscript{333} Perry, \textit{supra} note 20, at 1585.
\textsuperscript{334} Perry, \textit{supra} note 50, at 757.
\textsuperscript{335} Perry, \textit{supra} note 20, at 1592.
\textsuperscript{336} \textit{Id.} at 1595.
justification for blanket exclusion of liability, the benefit would once again be counterbalanced by an award of punitive damages. The Supreme Court explained that the “real problem” with punitive damages “is the stark unpredictability” of the awards; while “the median ratio of punitive to compensatory awards falls within a reasonable zone,” the variance is quite high.\textsuperscript{337} Although the Court set an upper limit to the ratio between punitive and compensatory damages in cases of recklessness tried under maritime law,\textsuperscript{338} it left a relatively high degree of uncertainty in cases of more reprehensible conduct and in land-based common law. The common law, despite the constitutional constraints, is incapable of eliminating the uncertainty associated with punitive damages.

Now let us look at the other side of the coin. Punitive damages aim to increase liability to a normatively desirable degree. They are awarded where courts feel that a compensatory award is an extremely lenient sanction with regard to the gravity of the defendant’s conduct, or that an additional extra-compensatory sanction is required to secure the necessary level of deterrence. If compensation for actual harm is insufficient to obtain proper levels of retribution and deterrence, it seems odd that an extra-compensatory supplement intended to increase liability to a desirable level, namely punitive damages, is accompanied by a significant reduction in overall liability for actual harm through the exclusionary rule. If liability should exceed actual harm, denial of recovery for a substantial portion of the aggregate loss is counterintuitive, not to say absurd.

In sum, if in a particular case there is good reason to set liability below actual harm, as the exclusionary rule does, liability should be limited, and the effects of such limitation should not be cancelled out by a subsequent increase in overall liability. If, on the other hand, there is good reason to increase liability beyond actual harm, as the punitive damages doctrine does, liability should increase, and the effects of the expansion should not be alleviated by a wholesale denial of recovery for some of the actual harm. However, what if in the particular case there are legitimate


\textsuperscript{338} Id. at 2633.
reasons to reduce liability, along with equally legitimate reasons to expand liability? The question should then be whether—all things considered—the scope of liability must equal, exceed, or fall short of actual harm. In the absence of a specific reason to conclude otherwise, liability must equal actual harm. If liability must fall short of actual harm, a reasonable limitation of liability is warranted, while punitive damages are not. If liability must exceed actual harm, punitive damages are warranted and exclusion of liability for some of the provable loss is not. Either way, the exclusionary rule and the punitive damages doctrine should not be applied simultaneously.

This contention must be defended. As implied above, one may argue that the exclusionary rule and the punitive damages doctrine are intended to solve separate and independent problems and entail incommensurable modifications in the scope of tort liability. Arguably, one set of justifications requires a certain reduction, while another requires a certain unequal expansion. Thus, the two rules should be allowed to apply simultaneously, each in accordance with its own rationale. A traditional economic version of this argument might be that the exclusionary rule prevents internalization of private losses that do not correspond to social costs, whereas the punitive damages doctrine addresses problems of under-enforcement. For example, assume that a wrongful conduct causes a $1 million loss to private entities, of which $100,000 constitute true social cost, and that the probability of escaping liability is 0.75. In accordance with the two-layer approach, the court should award compensatory damages to the extent of the social cost, namely $100,000, and subsequently award $300,000 in punitive damages ($100,000/0.25 – $100,000) to make up for cases of impunity.

The answer seems almost trivial. Again, the normatively desirable scope of liability always equals, exceeds, or falls short of actual harm. If, considering the justifications of the exclusionary rule on the one hand and those of punitive damages on the other, the court concludes that liability must be equal to or lower than actual harm, as in the foregoing example, awarding punitive

339 See supra notes 74–78 and accompanying text.
340 See supra notes 223–25.
damages while denying recovery for actual harm is implausible from conceptual and distributive justice perspectives.

Both the exclusionary rule and the punitive damages doctrine are exceptions to general principles of private law. Victims of wrongful conduct should generally be allowed to recover for their losses, and every victim should be restored, as much as possible, to the pre-tort condition. If there is reason to limit liability, it should be done with minimal encroachment on these fundamental principles. Thus, it is better to allow more victims to recover for their actual loss than to deny such recovery in violation of the principle of liability for wrongful harm, while bestowing a windfall on a few claimants in violation of the principle of *restitutio in integrum*.

Besides being incoherent from a conceptual perspective, the two-layer approach is inferior from a distributive justice (“fairness”) perspective: if liability is limited, the limited amount should be distributed according to merit. It is unreasonable to prioritize enrichment of the already compensated few over compensation to additional deserving victims. In the numerical example, the law should endeavor to compensate victims for actual harm up to the desirable extent of approximately $400,000. In the last section I propose a principled method for doing so.

Similarly, if after considering all relevant factors the court concludes that total liability must exceed the aggregate loss, all victims should be compensated for their established losses, and punitive damages should be awarded in addition. The traditional two-layer approach of the common law to cases of this sort, namely denying recovery for economic losses and then awarding punitive damages to successful claimants, requires an exceptionally large award of punitive damages to make up for the partial compensation. A smaller amount of punitive damages would reduce total liability to an undesirable level. Moreover, because many victims have no standing, the exceptional punitive award is distributed among relatively few claimants. Thus, instead of

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allowing recovery to all victims who incurred real harm and keeping the average windfall modest, the law bestows a substantial windfall on a very few claimants while leaving many victims with nothing.

2. The Scope of the Problem. Hitherto I have shown that the exclusionary rule and the punitive damages doctrine were applied in tandem in the Exxon Valdez litigation, and explained that this was problematic because the two cancel out each other’s allegedly warranted effects. In this section I wish to demarcate the boundaries of the problem. First, I extract the precondition of in tandem application of the two rules from the Exxon Valdez case itself. Then, I examine whether and to what extent the problem identified here transcends the unique setting of a massive maritime pollution.

Regarding the precondition of in tandem application, the Exxon Valdez litigation is illustrative. The exclusionary rule applies only when the interference with the plaintiff’s economic relation is unintentional.\textsuperscript{342} Traditionally, punitive damages can be awarded when the defendant’s conduct is outrageous, because his or her acts were done with an evil motive, or because they were done with reckless indifference to the rights of others;\textsuperscript{343} but in some jurisdictions even gross negligence suffices.\textsuperscript{344} So in tandem application of the two rules may occur in cases of recklessness, of which the Exxon Valdez case is an example, and possibly in cases of extreme negligence. Recklessness is a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person, and gross negligence is a significant deviation from the objective standard of reasonable care.\textsuperscript{345}

\textsuperscript{342} However, intentional interference is actionable. \textit{Restatement (Second) of Torts} §§ 766–766B (1979).

\textsuperscript{343} \textit{Restatement (Second) of Torts} § 908(2) (1979).

\textsuperscript{344} See, e.g., TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 887 (W. Va. 1992) ("[T]he punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm."); Rustad & Koenig, \textit{supra} note 132, at 1305 (expressing desire to deter both forms of unpleasant conduct: mean-spirited conduct and extremely negligent conduct).

\textsuperscript{345} See Ellis, \textit{supra} note 153, at 21 (defining reckless conduct).
The problem discussed in this Article does not arise in cases of ordinary negligence, where punitive damages are currently precluded.\textsuperscript{346} Intentional conduct, on the other hand, can yield simultaneous application of the exclusionary rule and the punitive damages doctrine, even though the former does not apply to intentional interference with economic relations. This is so because a mean-spirited tort directed towards the person or property of one person may unintentionally cause economic loss to others, who are economically dependent on the intended victim. In these cases, the unintended relational losses will be irrecoverable under \textit{Robins}, while punitive damages may be deemed appropriate due to the gravity of the wrong.

The incoherence transcends the unique setting of a massive maritime pollution. First and foremost, it is not limited to maritime law. As explained in Parts I–II, both rules are well-established not only in maritime law, but also—and primarily—in land-based common law.\textsuperscript{347} The rules may collide in similar circumstances in nearly all jurisdictions. There are, of course, numerous nuances. For instance, punitive damages may be capped in some states, and caps may vary.\textsuperscript{348} Similarly, some courts may recognize exceptions to the exclusionary rule, and these exceptions may also vary from one jurisdiction to another.\textsuperscript{349} But the clash between the two rules may surface in almost all states.\textsuperscript{350} In fact, I showed that the problem might be even more acute under state law, where juries often have more discretion regarding the size of punitive damages awards, making them more unpredictable. This works against the exclusionary rule in terms of certainty.

Moreover, the problem is not limited to environmental disasters. It had not been noticed until a very salient event

\textsuperscript{346} See \textit{Restatement (Second) of Torts} § 908 cmt. b (1979) ("Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment, and the like, which constitute ordinary negligence.").

\textsuperscript{347} See supra notes 35, 38, 151 and accompanying text.


\textsuperscript{349} See Perry, supra note 50, at 779 (recognizing variance among jurisdictions in recognition and application of the exclusionary rule).

\textsuperscript{350} However, Nebraska does not allow punitive damages at all. See Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989).
occurred and high-profile litigation ensued, but it may arise whenever unintended economic losses ripple out from a physical injury caused by intentional, reckless, or—in some jurisdictions—grossly negligent conduct. For instance, suppose that picketers recklessly injure a generator or a cable that supplies electricity to an industrial zone. The factories in the area will not be allowed to claim damages for their unintended economic losses. However, the injurers' recklessness may be a sufficient ground for awarding punitive damages. The picketers' liability will be simultaneously limited by the exclusionary rule and expanded by the punitive damages doctrine. Similarly, assume that a vehicle driven recklessly by an intoxicated driver collides with a bridge, thereby blocking the highway over the bridge and the navigable waterway under it, causing economic loss to thousands. Drivers and ship owners will not be able to recover for these losses, but the gravity of the wrong might enable the bridge owner to claim punitive damages, in addition to compensation for property damage.

One comment is in order. Arguably, the problem of contradictory adjustments of the extent of liability was ultimately evaded in the *Exxon Valdez* case. The Ninth Circuit found that the Alaska Environmental Conservation Act was not preempted by *Robins Dry Dock*, enabling at least some of the relational victims to claim damages. This decision, however, does not undermine my thesis. First, the Alaska Act is an esoteric state legislation of limited application. It seemingly removes the incoherence with regard to a specific type of events (unauthorized release of hazardous substances) that take place in a limited geographical area (Alaska). The problem may still arise in other cases, as

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351 See, e.g., Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212, 214 (5th Cir. 1980) (denying recovery for economic loss caused to plaintiff when defendant severed a power line owned by the electric utility company); Byrd v. English, 43 S.E. 419, 421 (Ga. 1903) (same); Spartan Steel & Alloys Ltd. v. Martin & Co., [1973] Q.B. 27 (A.C.) at 38–39 (Eng.) (same).

352 See, e.g., Channel Star Excursions, Inc. v. S. Pac. Transp. Co., 77 F.3d 1135, 1137–38 (9th Cir. 1996) (holding that party could not recover for economic losses incurred due to a negligent blockage of a waterway); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51–53 (1st Cir. 1985) (same); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (5th Cir. 1983) (same); Kingston Shipping Co. v. Roberts, 667 F.2d 34, 35 (11th Cir. 1982) (same); Kinsman Transit Co. v. Buffalo, 388 F.2d 821, 821–22 (2d Cir. 1968) (same).

353 *In re Exxon Valdez*, 270 F.3d 1215, 1250–53 (9th Cir. 2001).
explained in this section. Second, the Ninth Circuit neither recognized the incoherence nor endeavored to remove it. Its decision focused on the proper interpretation of Southern Pacific Co. v. Jensen concerning preemption, not on the proper scope of liability in the common law of torts (maritime or land-based). So it is unclear whether the ultimate scope of Exxon's liability was indeed warranted, all relevant factors being considered. And even if it was, this outcome was haphazard rather than planned. Interestingly, the Ninth Circuit in its 2001 decision allowed claims under the Alaska Act, but ordered the district court to reduce the award of punitive damages. This would have been consistent with the normative proposition of this Article if the ultimate scope of liability had been determined after a conscious and careful consideration of the various concerns underlying the exclusionary rule and the punitive damages doctrine.

3. Guidelines for Resolution. The preceding analysis reveals an awkward phenomenon. Courts may simultaneously apply rules that pull the bounds of liability in opposing directions: The exclusionary rule reduces while the punitive damages doctrine increases liability, both with seemingly legitimate reasons. In cases of in tandem application, each rule cancels out the effects of the other, at least to some extent. So far, I have implied that courts need to determine the proper scope of liability, in accordance with the various considerations outlined in Parts I–II, and then give the fullest possible effect to general principles of tort law—liability for wrongful harm and *restitutio in integrum*—with the necessary limit in mind. In other words, neither the exclusionary rule nor the punitive damages doctrine should be applied separately, without regard to the rationale and effects of the other. In this section, I wish to propose a possible framework for the implementation of my normative commitment, assuming once again that the justifications for both rules have merit.

354 Id. at 1251.
355 Id. at 1250–53.
356 Id. at 1241.
357 Clearly, if either the exclusionary rule or the punitive damages doctrine is theoretically unsound, a totally different analysis is mandated.
The simplest case is that of ordinary negligence resulting in physical injury and relational economic losses. In this case, only the rationale for the exclusionary rule is relevant, and liability should be limited accordingly. If, on the other hand, intentional, reckless, or grossly negligent conduct is involved, the traditional justifications for punitive damages emerge and call for an expansion of liability. In this case, the court must first determine the extent of the necessary expansion.

If the normatively desirable scope of liability is equal to or lower than the aggregate loss, including provable relational economic losses, the court should allow recovery for actual losses incrementally up to the desirable amount and preclude punitive damages. An incremental expansion of liability does not entail a radical change in existing law. As Jane Stapleton observed, British Commonwealth courts have already recognized that,

while the total extent of economic loss and the total number of victims in an economic loss case may be indeterminate, this factual feature need not be fatal to a claim. There is no legal problem of indeterminacy if: first, the law can, on a normatively justifiable basis, restrict those who can sue, and second, this normatively justified class is reasonably determinate...358

American courts can endorse this perception as easily as they imported the punitive damages doctrine.

The next question is what the normatively justifiable formula for limiting liability should be. Inasmuch as the expansion of liability is mandated by the underlying rationale of punitive damages, this formula must comply with this rationale. Thus, it seems reasonable to set the limit of liability in accordance with the gravity of the defendant’s wrong. The graver the conduct, the more relational victims are compensated. The idea of incremental expansion of liability for actual losses caused by wrongful conduct based on its gravity is innovative but not entirely unheard of in

358 Stapleton, supra note 43, at 544.
the Western legal tradition. The Austrian Civil Code (ABGB) distinguishes two types of compensation for property damage: "indemnification" is compensation that enables restoration of the object to its pre-tort condition, or replacement; "full satisfaction" includes loss of profit. In cases of malicious intention or gross negligence, the owner is entitled to full satisfaction, whereas in cases of ordinary negligence the owner is only entitled to indemnification. Although the idea of incremental expansion on the basis of the gravity of the wrong is used here to determine what losses will be recoverable by a successful claimant, it can also be used in cases of purely economic loss to determine who will be allowed to recover. There is some support for this line of thought in American case law. Any expansion of liability will enable another sphere of relational victims whose losses are more remote from the primary injury to obtain compensation.

Now if liability for actual losses is expanded to the exact level mandated by the twin goals of retribution and deterrence, the need for an additional sanction ceases to exist. The Supreme Court held that "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." Relaxing the exclusionary rule enables the court to align the scope of compensatory damages

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360 ABGB § 1324.

361 See, e.g., J'Aire Corp. v. Gregory, 598 P.2d 60, 63 (Cal. 1979) (holding that the moral blame attached to the defendant's conduct is relevant in deciding whether a duty of care exists). Note, however, that in J'Aire, as opposed to paradigmatic relational loss cases, there was no physical injury, and the plaintiff was the only one who suffered economic loss. See also O'Brien, supra note 51, at 969-70, 972 (concluding based on California case law that "[l]iability for negligent infliction of economic loss is imposed only when the defendant's conduct is significantly below that of a reasonable person. The defendant's conduct is frequently so negligent that it constitutes 'gross' negligence or 'willful', 'wanton,' or 'reckless' negligence." (footnotes omitted)).

362 Cf. Stapleton, supra note 43, at 544-45 (stating that directness may be the normatively justifiable basis for expanding liability for economic loss).

363 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003); see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (finding the degree of reprehensibility to be the most important indicium of the reasonableness of a punitive damages award).
with the defendant's culpability and makes punitive damages redundant.

As explained, expanding liability for actual harm is better than strict adherence to the exclusionary rule and a simultaneous award of punitive damages. Both the exclusionary rule and the punitive damages doctrine are exceptions to general principles of private law: the principle of liability for foreseeable harm caused by unreasonable conduct and the principle of *restitutio in integrum*, respectively. If there is reason to limit liability, it should be done with minimal encroachment on these fundamental principles. The proposed method enables more victims to recover for their actual loss without bestowing an extra-compensatory windfall on a very few. Moreover, it is superior from a distributive justice perspective, as it prioritizes compensation to more victims over enrichment of the already compensated few.

If the normatively desirable scope of liability exceeds the aggregate provable loss, including relational economic losses, the court should allow relational victims to recover and award punitive damages up to the necessary level. This is preferable to in tandem application of the exclusionary rule and the punitive damages doctrine. Allowing recovery to all victims who incurred real harm, and keeping the average windfall (in the form of extra-compensatory damages) modest, is better than bestowing a substantial windfall on a very few victims, while leaving many others with nothing. Here too, relaxing the exclusionary rule would be based on the concept of incremental expansion of liability in accordance with the gravity of the wrong.

The proposed reform entails not only modification of substantive law, but also some procedural adjustments. Most notably, to apply the new model it is necessary to determine at a relatively early stage if and to what extent expansion of liability is warranted. Without this preliminary ruling, a court cannot decide whether additional claims for economic loss should be dismissed or allowed to proceed. In fact, a preliminary decision of this sort was made in the *Exxon Valdez* litigation. The jury was asked to consider whether Exxon was reckless, hence potentially liable for punitive damages, before making any decision on compensatory
Parenthetically, the applicability of liability caps under the Oil Pollution Act, which was enacted only after the *Exxon Valdez* spill, also hinges on a preliminary ruling on the gravity of the wrong.\(^{365}\)

The main purpose of this Article is to elucidate a problem, not to resolve it. So although this section puts forward some general guidelines for resolution, the proposed framework is still abstract and not necessarily exclusive. Courts that recognize the problem and endorse this framework will have to work out the details progressively, in the old-fashioned case-by-case method of the common law.

4. Possible Criticism. A possible criticism of my proposal may be that tort liability is very often vicarious in cases like the present one. Vicarious liability is not based on the breach of any personal duty owed by employers, but on their employees' torts being imputed to them. Arguably, it is unrealistic to calibrate liability on the degree of the employer's fault.\(^{366}\) This argument would be persuasive if the idea of incremental expansion were used against those who could not be held liable for punitive damages. But here we are dealing with cases in which courts are willing to award punitive damages against the employer. Presumably, courts believe that awarding punitive damages against an employer on account of the employee's outrageous conduct serves the goals of retribution and deterrence well. However, if imposing additional liability on the employer is justified, the proposed alternative of expanding liability for currently irrecoverable losses is equally defensible. Once again, I assume that awarding punitive damages against employers based on their employee's conduct is in itself defensible. Otherwise, the law governing punitive damages should be reconsidered.

A somewhat stronger criticism might be that even if the financial sanction under the proposed model is similar to that imposed under current law, punitive damages serve the punitive

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\(^{365}\) See 33 U.S.C. § 2704(c)(1) (2006) (stating limits on liability do not apply if the incident was proximately caused by gross negligence, willful misconduct, or violation of a federal rule).

goals (retribution and deterrence) better than additional liability for actual harm. This may be so for two reasons. To begin with, punitive damages carry with them a quasi-criminal stigma. They signify exceptionally antisocial conduct and a corresponding social resentment. This element is arguably absent in the case of expanded liability for economic loss. On the more practical level, punitive damages, unlike compensatory damages, are not covered by liability insurance. They are ultimately borne by the wrongdoer and not spread through insurance. This outcome seems more consistent with the twin goals of retribution and deterrence.

However, fault-based liability carries a symbolic value even without punitive damages. More importantly, if my proposal is accepted, the exclusionary rule will be relaxed, and liability for economic loss will be allowed only where punitive damages would have been appropriate. Holding a defendant liable for losses it would not normally have to bear due to the special gravity of its conduct, as a substitute for punitive damages, will probably have the same symbolic impact as an award of punitive damages. I find it difficult to believe that imposing an additional civil sanction for the same reasons and with similar judicial rhetoric will have a lesser effect just because the sanction has a slightly different title. Finally, the symbolic aspect may be secured or enhanced through criminal law, as the Exxon Valdez case illustrates. As regards insurance, recall that in many states even punitive damages are generally insurable. But assuming punitive damages are not or at least should not be covered by liability insurance, compensatory damages awarded as a “substitute” for punitive damages should also be uninsurable. The public policy justifying uninsurability depends on the nature of the conduct and the purpose of the sanction, not on the exact title of the latter. For example, most

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367 See Baker, 128 S. Ct. at 2613 (“The United States charged the company with criminal violations . . . .”).


369 See, e.g., Nw. Nat’l Cas. Co. v. McNulty, 307 F.2d 432, 440–42 (5th Cir. 1962) (explaining that uninsurability is necessary to achieve the goals of punitive damages).
states exclude from coverage intentional conduct, and this exception applies to punitive and compensatory damages alike.

The strongest criticism of my normative proposition would probably be that replacing punitive damages with incremental expansion of liability for economic loss entails a significant increase in administrative costs. While an award of punitive damages requires a single assessment of the gravity of the conduct, an expansion of liability adds new claims with all the inevitable consequences. I admit that current law has a certain advantage from an administrative cost perspective. I think, however, that this advantage should not be overemphasized. First, because all claims are associated with a single event, there are very good procedural mechanisms for reducing administrative costs. Once again, the Exxon Valdez litigation is illustrative: although there were initially more than 30,000 claimants, only 200 lawsuits were brought on their behalf. And even if more than one category of claimants were allowed to recover, many determinations of fact and law would be applicable to all or most lawsuits. Second, awarding punitive damages also involves a considerable administrative cost. Although the Exxon Valdez case seems quite exceptional in its complexity, the amount of a punitive damages award can always be a source of controversy, all the more so in land-based common law, often reaching appellate courts. Last but definitely not least, every expansion of liability entails an additional administrative cost. But this must always be weighed against the benefits. After all, if the administrative cost were

370 See, e.g., CAL. INS. CODE § 533 (West 2005) ("An insurer is not liable for a loss caused by the willful act of the insured . . . ."); see also Russell B. Wuehler, Comment, Rethinking Insurance's Public Policy Exclusion: California's Befuddled Attempt to Apply an Undefined Rule and a Call for Reform, 49 UCLA L. REV. 651, 658 (2001) ("Some form of the public policy exclusion defining uninsurable conduct can be found in almost every jurisdiction.").


372 Goldberg, supra note 6, at 1.
controlling, liability in tort would have to be abolished altogether. The proposed model is conceptually coherent and distributively just, and this may justify the additional cost.

IV. CONCLUSION

The Exxon Valdez oil spill was probably the worst environmental disaster in American history and sparked unusually complex litigation and vast academic literature. The purpose of this article was to uncover an unnoticed inconsistency in American land-based and maritime tort law that surfaced in the backdrop of this unprecedented event. To do so, this Article advocated a holistic approach to legal reasoning: It took two decades of litigation as a single whole, rather than focusing on doctrinally unrelated fragments and explored the subterranean link between two seemingly independent doctrines: the exclusionary rule (also known as the economic-loss rule) and the punitive damages doctrine.

Part I showed that relational economic losses are generally irrecoverable under Robins Dry Dock and its progeny. It then reviewed the main justifications for the so-called exclusionary rule. Many justifications seem to rest on the fear of open-ended liability associated with the "ripple effect." The likelihood of open-endedness is normatively significant for various reasons. In cases of multiple victims, denial of recovery provides natural loss spreading and arguably prevents a flood of litigation. Allowing recovery for relational economic losses may prevent full recovery for injuries to physical interests more worthy of legal protection, or let each victim recover only a very small fraction of his or her loss. Liability may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong, unduly restrict the freedom of action, crush productive enterprises, and make liability insurance not worthwhile to insurers and potential injurers.

Other deterrence-based rationales are that many relational economic losses are not true social costs, so exclusion of liability prevents over-internalization, hence over-deterrence, and that the injurer is already liable for the physical injury, so the marginal deterrent effect is lower than the administrative cost involved in
shifting the loss. A third set of justifications hinges on victims’ ability to protect themselves through contract, first-party insurance, ex ante precautions, and ex post mitigation. Finally, the exclusionary rule is frequently said to provide a certain and easily applicable limitation on tort liability.

Part II showed that despite some controversy in the mid-nineteenth century, American courts are generally willing to award punitive noncompensatory damages whenever the defendant’s conduct surpasses a certain level of gravity. This Part then reviewed the dominant justifications for this time-honored doctrine, namely retribution and deterrence. Courts were cautious not to award punitive damages in violation of the principles of retributive justice. They held that the scope of punitive damages must correspond to the gravity of the respective wrong, and that the award is subject to substantive due process review under general guideposts that also reflect retributive concerns. From a deterrence perspective, and keeping in mind the deterrent effect of compensatory damages, punitive damages may be said to make up for problems of under-enforcement, defendants’ illicit gains, and uncompensated losses.

Part III first demonstrated application of the two doctrines in tandem throughout the Exxon Valdez litigation. In accordance with the Oppen exception to the exclusionary rule, Exxon was found liable for the lost catch of commercial fishermen and Native Alaskans. In stark contrast, all other claims for relational economic losses were rejected under Robins Dry Dock. At the same time, the jury awarded the successful claimants $5 billion in punitive damages. For more than a decade the issue went back and forth between the district court and the court of appeals, until the Supreme Court ultimately reduced the punitive damages award to $507.5 million.

Next, Part III explained why application of the exclusionary rule and the punitive damages doctrine in tandem is problematic

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373 See supra notes 157–61 and accompanying text.
374 See supra Part III.A.
375 See supra notes 257–72 and accompanying text.
377 Id. at 2619–34.
on the justificatory level.\textsuperscript{378} If in a particular case there is good reason to set liability below actual harm, as the exclusionary rule does, liability should be limited, and the effects of such limitation should not be cancelled out by a subsequent increase in overall liability through a punitive damages award. If there is good reason to increase liability beyond actual harm, as the punitive damages doctrine does, liability should increase, and the effects of the expansion should not be alleviated by a wholesale denial of recovery for some of the actual harm. If in the particular case there are legitimate reasons to reduce liability along with equally legitimate reasons to expand liability, it seems almost absurd to deny compensation to numerous victims, while resorting to a noncompensatory supplement to reach the necessary level of liability. Applying the two rules in this case futilely violates general principles of tort law and generates a distributive injustice. Despite the singularity and salience of the 	extit{Exxon Valdez} litigation, which certainly attracted my attention and motivated this study, the clash between the exclusionary rule and the punitive damages doctrine transcends this particular case. It is a troubling trait of land-based and maritime tort law.

Part III then put forward general guidelines for resolution.\textsuperscript{379} If the court believes liability must be expanded beyond the bounds set by the exclusionary rule to obtain certain levels of deterrence and retribution, relaxing the exclusionary rule and allowing more victims to recover is a more defensible path than awarding punitive damages to a very few successful claimants. The court should allow recovery for actual losses incrementally up to the desirable amount, in accordance with the gravity of the defendant's conduct. Inasmuch as the desirable amount equals or falls short of the aggregate loss, punitive damages should be precluded. Finally, Part III addressed possible criticisms of this proposal, recognizing its shortcoming in terms of administrative costs.

Through the analysis of a high-profile test case, this Article highlighted the need for a holistic approach to legal reasoning. Legal rules are not discrete fragments but interrelated

\textsuperscript{378} See supra Part III.B.
\textsuperscript{379} See supra Part III.B.3.
components of a single unified system. They should not contradict or cancel out each other, not only on the doctrinal level but also on the deeper justificatory level. "Can two walk together, except they be agreed?" the biblical prophet rhetorically inquires.\textsuperscript{380} The \textit{Exxon Valdez} litigation shows that they can, but this Article concludes that they \textit{should} not.

\textsuperscript{380} \textit{Amos} 3:3 (King James).