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The BP Catastrophe: When Hobbled Law and Hollow Regulation Leave Americans Unprotected

William L. Andreen
University of Alabama - School of Law, wandreen@law.ua.edu

Alyson Flournoy
University of Florida - Levin College of Law, flournoy@law.ufl.edu

Sidney A. Shapiro
Wake Forest University - School of Law, shapirsa@wfu.edu

Thomas Owen McGarity
University of Texas at Austin - School of Law, tmcgarity@mail.law.utexas.edu

James Goodwin
Center for Progressive Reform, jgoodwin@progressivereform.org

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By CPR Member Scholars Alyson Flournoy, Sidney Shapiro, William Andreen, and Thomas McGarity, and CPR Policy Analyst James Goodwin

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Founded in 2002, the Center for Progressive Reform (CPR) is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes that sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes that people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. The Center for Progressive Reform is grateful to the American Association for Justice for funding this report, as well as to the Bauman Foundation, the Deer Creek Foundation, and the Open Society Institute for their generous support of its work in general.

This white paper is a collaborative effort of the following Member Scholars and staff of the Center for Progressive Reform: **Alyson Flournoy** is a Professor of Law and Alumni Research Scholar at the University of Florida Levin College of Law and a Member Scholar of the Center for Progressive Reform. **Sidney Shapiro** holds the University Distinguished Chair in Law at the Wake Forest University School of Law, is the Associate Dean for Research and Development, and is a member of the Board of Directors of the Center for Progressive Reform. **William Andreen** is the Edgar L. Clarkson Professor of Law at the University of Alabama School of Law and a Member Scholar of the Center for Progressive Reform. **Thomas McGarity** holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas in Austin, is a member of the Board of Directors of the Center for Progressive Reform, and is the immediate past president of the organization. **James Goodwin** is a Policy Analyst with the Center for Progressive Reform.

For more information about the authors, see page 32.

www.progressivereform.org

For media inquiries contact Matthew Freeman at mfreeman@progressivereform.org or Ben Somberg at bsomberg@progressivereform.org.

For general information, email info@progressivereform.org

Cover photo: 05 May 2010, Crewmembers of the Coast Guard Cutter Oak assisting with the Deepwater Horizon oil spill response.

U. S. Coast Guard photo by Ensign Jason Radcliffe.

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Introduction

On the evening of April 20, 2010, an explosive bubble of methane gas raced up the mile-long riser pipe that connected BP's Macondo well on the Gulf of Mexico floor to the Deepwater Horizon drilling rig, located on the Gulf's surface about 41 miles off the coast of Louisiana. When it reached the top, the bubble triggered a tragic chain of events resulting in one of the largest industrial catastrophes in U.S. history. An explosion ripped through the drilling rig, killing 11 crew members, and forcing 115 others—17 of them severely injured—to quickly abandon ship, either in lifeboats or by jumping directly into what had become a dark, oily sea. After burning for 36 hours, the Deepwater Horizon sank, dragging the remains of the riser pipe down with it. Over the next three months, before the well was finally capped on July 15, 2010, 4.9 million barrels of oil spewed into the Gulf of Mexico—making the BP oil spill the largest accidental spill in world history.[1] At its largest expanse, the resulting oil slick covered a surface area nearly the size of South Carolina. Oil and other hydrocarbons from the spill fouled beaches in four states, killed thousands of birds and other wildlife, damaged numerous ecosystems, and disrupted entire communities along the Gulf Coast. The full extent of this damage will not be known for many years.

Every year, a number of major industrial catastrophes occur in the United States. They often result in tragic losses in terms of human life and environmental degradation. They also produce substantial losses for the U.S. economy, sidelining industrial capacity and wasting millions, if not billions, of dollars. While such catastrophes are not entirely preventable, two bedrock U.S. legal institutions—the regulatory and civil justice systems—offer powerful tools for avoiding them, *if* they are permitted to function effectively. In recent years, however, both the regulatory and civil justice systems have been marked by dysfunction and constraints. Years of attack by the antiregulatory and tort reform movements, respectively, have left these systems unable to fulfill their respective functions, and set the stage for major catastrophes like the BP oil spill. Unless these systems are reinvigorated and freed from unnecessary constraints, the likelihood of another industrial catastrophe will remain unacceptably high.

This white paper will carefully examine the BP oil spill as a case study in regulatory failure and the erosion of tort law. The paper will first explain how the regulatory and civil justice systems form a complex and dynamic partnership for protecting both people and the environment. Next, it will review both regulatory failures and civil justice constraints that affected the offshore oil drilling industry, and how they enabled BP's corporate culture—which willingly sacrificed worker safety and environmental protection in pursuit of ever-greater profits—to thrive.[2] The paper will conclude by exploring potential legal reforms that could reduce or eliminate some of the civil justice constraints that contributed to the BP oil spill.

While industrial catastrophes are not entirely preventable, two bedrock U.S. legal institutions—the regulatory and civil justice systems—offer powerful tools for avoiding them.

While regulatory failures and civil justice constraints contributed to the BP oil spill, the civil justice system still has a chance to help remedy the situation by holding BP accountable for its negligent or perhaps reckless behavior, and by adequately compensating the victims of this catastrophe. At the moment, it appears that the Gulf Coast Claims Facility (GCCF)—the BP-established $20 billion alternative settlement fund being administered by Ken Feinberg—will serve as the primary mechanism by which many of the oil spill victims will seek compensation. It is still unclear how well this settlement process or the more traditional civil justice system will fulfill their corrective justice functions in this case. However, if these legal mechanisms are going to deter unreasonably risky action by oil companies in the future, it is imperative that they play their corrective justice roles well by compensating the victims for all of their losses in the months and years to come. The effective functioning of these compensation mechanisms, along with the implementation of the reforms discussed in this paper, will help us to better avoid industrial catastrophes in the future.

The Role of the Regulatory and Civil Justice Systems in Avoiding Industrial Catastrophes

The BP oil spill offers an object lesson in the consequences that can result when corporations, which may have too little regard for public safety or the environment, are permitted to operate without either adequate regulatory oversight or the special deterrence offered by the civil justice system. Under these conditions, the likelihood of an industrial catastrophe is substantially increased.

Something as complicated and inherently dangerous as deepwater offshore oil drilling will never be entirely safe.[3] But, by taking reasonable precautions, it is possible for corporations engaged in complex and dangerous activities to reduce many occurrences of serious or irreversible harm. The problem, however, is that virtually all of the incentives that drive free markets discourage corporations from taking adequate precautions against environmental or safety risks.[4] Even the best-intentioned corporations face strong market pressure to ignore or underestimate risks and to cut corners on safety and environmental protections in order to produce short term profits. Left to their own devices, corporations too often succumb to these pressures. Depending on their corporate cultures with respect to public safety and the environment, some corporations may succumb more easily than others.

To counter these pressures, U.S. law relies upon two approaches. The first, the regulatory system, seeks to *prevent* harm to people and the environment by requiring corporations to take certain steps to ensure safety and protect the environment. Inspections or reporting combined with a threat of penalties, fines, and other sanctions provide corporations with an incentive to abide by the applicable regulatory requirements.

The second approach, the civil justice system, seeks to *discourage* corporations from undertaking unreasonably dangerous or reckless actions—regardless of whether those actions are prohibited by regulation—by holding them financially accountable for the harms their actions cause. The threat of paying compensation has a deterrent effect that supplements the regulatory system's efforts to prevent harm before it occurs.[5] In addition, the civil justice system compensates victims after harm has occurred. This complementary role is especially important because regulation cannot always succeed in preventing harm. For example, there may be gaps in regulatory coverage, flaws in regulatory design, inadequacies in implementation, or weaknesses in enforcement. In these cases, the civil justice system serves as a critical backup to the regulatory system.

When the regulatory and civil justice systems function effectively, the protections they provide can be formidable. In recent years, however, the regulatory and civil justice systems have grown increasingly dysfunctional, and not by accident. Years of attack by the regulatory reform and tort reform movements, funded by substantial industry and conservative foundation dollars, have left both institutions in varying states of disrepair

and contributed to an increasing lack of accountability for corporations so far as environmental health and safety are concerned. The unfortunate result is that corporations like BP have generally had substantial leeway to place profits above people and the environment, thereby increasing the likelihood of industrial catastrophes.

The Regulatory Failures and Civil Justice Constraints That Contributed to the BP Oil Spill

Regulatory Failures

Hollow Government

Hollow government is a primary source of regulatory dysfunction in agencies like the Minerals Management Service (MMS), the agency charged with regulating offshore drilling at the time that BP was carrying out its drilling activities for the Macondo well.[6] Hollow government occurs when obstacles beyond the agency's control literally undermine the agency, rendering it incapable of achieving its mission of protecting people and the environment. In the case of the MMS, a combination of weak legal authority and inadequate resources had hampered the agency for decades. As a result, the MMS was unable to establish many meaningful environmental and safety regulations or to effectively monitor and enforce the inadequate regulations it had on the books.

Weak Legal Authority

Many of the MMS's problems began with the Outer Continental Shelf Lands Act (OCSLA),[7] the principle statute governing the development of oil and gas resources on the Outer Continental Shelf (OCS). The OCSLA's provisions offer few tools for protecting worker safety and the environment, and instead focus almost entirely on energy development. Broadly speaking,[8] the shortcomings of the OCSLA include the following:

- *The OCSLA does not establish any clear enforceable mandates setting forth adequate environmental standards with which oil and gas drilling activities must comply.*[9] Environmental protection and safety technology is one area in which the lack of adequate standards is especially troubling. Rather than authorizing the MMS to establish technology-based standards, like the Clean Air Act or the Clean Water Act, the OCSLA instead only gives the agency broad discretion to balance competing interests in oil and gas development, safety, and environmental protection. The lack of technology-based standards prevented the MMS from requiring oil companies to develop and deploy better spill prevention technologies to match their rapidly expanding extraction capabilities.[10]

- *The OCSLA does not allow for adequate environmental review at each step of the oil development process.*[11] Historically, little environmental review has occurred during the latter stages of the development process, even though the decisions made at each of those stages raise important and unique questions regarding environmental protection. The OCSLA provides little guidance on how to carry out environmental reviews at those stages,[12] and even discourages meaningful environmental review.[13]

- *The OSCLA does not provide adequate enforcement authority to deter oil companies from violating applicable regulatory requirements.* The fines authorized by the statute are grossly inadequate and undermine the deterrent effect of the enforcement provisions.[14] In addition, the OCSLA's assurance bonding requirements, which are intended to ensure that businesses undertaking oil and gas development activities can cover the damages and other costs associated with their activities, are too weak to achieve that purpose.[15]

Currently, the MMS has only about 60 inspectors for the nearly 4,000 oil and gas development facilities in the Gulf of Mexico.

Inadequate Resources

Along with weak legal authority, the MMS has lacked sufficient resources to carry out the enormous and complex task of regulating offshore drilling to ensure protection of public safety and the environment.[16] At the time of the Deepwater Horizon blowout, the MMS regulated about 3,795 offshore production platforms and managed about 8,124 active oil and gas leases on approximately 43 million acres of the OCS.[17] In the last 10 years, the operations the MMS regulates have undergone rapid technological change and have increasingly shifted to deepwater and ultra-deepwater environments,[18] a change that has increased the level and complexity of monitoring and the time needed for permit and plan reviews and inspections of operations.[19]

Despite the enormous challenges involved in ensuring that offshore drilling does not harm people or the environment, the MMS has faced a number of critical resource constraints over the last couple of decades. These resource restraints include:

- *The MMS's entire budget has remained relatively flat.*[20] From 1992 to 2005, the MMS's budget increased by only 7.2 percent or $19 million.[21]

- *Staffing of the MMS has remained stable at best, with some reductions.*[22] The number of inspectors employed by the MMS in the Gulf of Mexico has fluctuated between 55 and 60 since 1985. Currently, the MMS has only about 60 inspectors for the nearly 4,000 oil and gas development facilities in the region.[23] In contrast, the MMS employs 10 inspectors for just 23 development facilities along the Pacific Coast, the other U.S. region in which offshore oil and gas development is permitted.[24]

- *The MMS is unable to recruit highly qualified personnel.* These individuals almost invariably opt to pursue private sector employment, since industry is able to offer considerably higher wages and bonuses.[25]

- *The MMS is unable to provide its staff with continuous, up-to-date training, further reinforcing the expertise gap that exists between agency personnel and regulated industry.* The training programs for inspectors are in many cases several decades old, and fail to account for the technological advancements that have occurred in offshore oil and gas development.[26]

These and other similar revelations from the recent congressional investigations as well as the agency's own investigations and statements demonstrate that the MMS lacks the resources and expertise it needs to effectively develop, implement, and enforce regulations for the complex, highly sophisticated, and rapidly changing technology employed in deepwater and ultra-deepwater drilling. Instead, it has relied heavily on industry to self-regulate and self-monitor,[27] the disastrous results of which are now clear.

Regulatory Capture

The MMS is a regrettably apt illustration of the captive agency theory of administrative agencies.[28] This theory postulates that some federal agencies have had a tendency to move so far in the direction of accommodating the interests of the entities they are supposed to regulate that ultimately they may fairly be seen as a "captive" of the regulated companies.[29] The MMS's inattentive, if not disdainful, implementation of safety and environmental requirements, its reliance on industry to develop standards, and its lax monitoring and enforcement all suggest a captive agency.

In retrospect, it is clear that the very culture of the MMS had been tainted by its close connections to industry and the identification of the agency staff with the interests of industry.[30] The MMS had developed so pervasive a culture of deference to and identification with corporate interests that agency staff failed even to recognize unethical, inappropriate, and unlawful behavior in many cases. The culture documented in various investigations and reports included inappropriate relationships between staff and members of the industry, widespread socializing, acceptance of impermissible or unreported gifts from oil and gas companies, and a revolving door that appeared to impair agency staff's objectivity and zeal for enforcement.[31]

Commenting on the cozy relationship between the agency and industry, an MMS District Manager told an investigator with the Department of the Interior Inspector General's office:

> Obviously, we're all oil industry. . . . We're all from the same part of the country. Almost all of our inspectors have worked for oil companies out on these same platforms. They grew up in the same towns. Some of these people, they've been friends with all their life. They've been with these people since they were kids. They've hunted together. They fish together. They skeet shoot together . . . . They do this all the time.[32]

Conditions that fostered this unhealthy relationship and allowed it to prosper have roots deeper than inadequate ethics training or the failure of individual personnel to follow rules and policies. These conditions included the following:

- *The MMS's legal mandate is skewed to advance the development of energy resources without sufficient attention to health, safety, and the environment.*

- *The organizational structure of MMS at the time of the explosion failed to adequately separate those officials charged with permitting and enforcement from those charged with collecting revenue for the government from oil and gas operations.* The lack of independence between these two divisions of MMS created a conflict of interest in which concerns over revenue collection could improperly influence decisions regarding regulatory enforcement.[33]

- *Over the past few decades, oil drilling revenues have become an increasingly significant source of the MMS's budget.* Consequently, as pressure to reduce agency budgets has grown, the MMS has become more dependent on drilling in order to fulfill its protective functions, in clear conflict with its obligation to protect the environment.[34]

- *A large expertise gaps exists between the MMS and the regulated industry.* Because of inadequate funding, the MMS has become dependent on industry expertise to aid it in developing regulatory standards. In one case, the MMS issued regulations that incorporated by reference nearly 100 industry standards developed by the American Petroleum Institute.[35]

- *A strong revolving door exists between the MMS and regulated industry.* Because of its superior resources, industry often serves as the primary training ground for many MMS staff. At the same time, the MMS has experienced high rates of turnover in many of its key positions, with many staff members leaving the agency to seek more lucrative industry jobs,[36] including as oil and gas industry lobbyists.[37]

In the wake of the BP well blowout, President Obama noted how this corrosive power dynamic led to lax regulation and enforcement. "What's also been made clear from this disaster is that for years the oil and gas industry has leveraged such power that they have effectively been allowed to regulate themselves."[38] Tyler Priest, clinical professor of business history and director of global studies at the University of Houston's C.T. Bauer College of Business, and a member of the MMS's OCS Scientific Advisory Committee described the dynamic in this way: "MMS workers often rely on the offshore industry for the technical knowledge to do their jobs. In that respect, the agency is a sort of junior partner to the industry and prone to accepting its preference for self-regulation."[39] Thus, due to the revolving door problem and cozy industry-regulator relationship, even the regulations that are adopted are not uniformly enforced.[40]

Civil Justice Constraints

Because of various constraints on federal and state tort law opportunities, the civil justice system routinely under-compensates nearly all of the victims of maritime industrial catastrophes, such as the BP oil spill. These constraints are largely a product of outdated statutes and troubling court decisions that have restricted the ability of victims to recover damages in federal courts. By failing to fully compensate these victims, the civil justice

system is clearly not fulfilling its corrective justice function. This failure also means that the federal civil justice system is not adequately fulfilling its deterrence function. If corporations perceive that the federal civil justice system will not require them to bear the full costs of their actions, then they are more likely to undertake the kind of unreasonably dangerous activities that can lead to industrial catastrophes at sea.

Federal Legislation and Court Decisions Limit Civil Justice Opportunities

The body of federal law governing civil claims in a mammoth maritime catastrophe such as the BP oil spill comprises a complex hodgepodge of overlapping legal rules and statutes. This body of law delineates distinct sets of civil justice opportunities for different classes of potential claimants, which are defined by reference to the claimants' legal status and their relationship to the potential defendant. This section examines some of the more important federal statutes and case law that have impacted the different sets of civil justice opportunities. Many of the statutes defining civil justice opportunities are now several decades old. At the time, they codified crucial advances in the cause of ensuring corrective justice for victims of maritime accidents. But, because Congress has failed to update these statutes to reflect new developments in tort law, they bar claimants from pursuing civil justice opportunities that are now regarded as fundamental components of corrective justice. To make matters worse, intervening statutes and court decisions have worked to limit civil justice opportunities even further. As the following examples demonstrate, the resulting body of law produces gross disparities in compensation for otherwise similarly situated claimants in a way that violates modern notions of fairness and justice.

Many of the statutes defining civil justice opportunities for victims of maritime industrial catastrophes are now several decades old.

The Workers Killed and Injured on the Deepwater Horizon Rig

The Jones Act

The Jones Act—a 1920 statute that, among other things, allows seamen[41] or their families to recover for damages suffered as a result of an employer's negligence—fails to provide a full recovery to the families of rig workers killed in the Deepwater Horizon blowout. While the Jones Act authorizes family members of a killed seaman to bring a wrongful death claim,[42] it bars recovery for a form damages known as "loss of society."[43] By awarding loss of society damages, the modern tort system compensates family members for the loss of love, affection, and companionship caused by the death of a loved one. As a result of the older nature of the Jones Act, family members who suffer no economic loss (*e.g.*, because they do not depend on the decedent's wages) could potentially receive no compensation (except, perhaps, for funeral expenses), despite the very real benefits of familial membership they lose when their loved one dies.[44] And even where the survivors are financial dependants, there is no compensation for the very real loss of the relationship.

The Jones Act may also bar the recovery of punitive damages, although the federal courts have yet to rule on this issue definitively. Punitive damages are primarily intended to punish and to deter the defendant and others from engaging in the same kind of actions that gave rise to the lawsuit. The deterrent effect of punitive damages is particularly important in situations where failures in the civil justice system systematically under-compensates certain classes of claimants.[45] As a general rule, punitive damages are only available in cases in which the defendant's actions are egregious. As described below, BP made several decisions regarding the operations of the Macondo well that appear to evince a reckless disregard for worker safety. Accordingly, general tort principles would likely support awarding punitive damages in lawsuits brought against BP. However, by potentially barring recovering of punitive damages, the Jones Act may not allow claimants to seek those damages.

The Jones Act does not bar all forms of non-economic damages, however; the statute does permit recovery of a form of damages known as "pre-death pain and suffering" in survival actions.[46] Even with the availability of this form of damages, the Jones Act still leaves the family members of seamen killed while on the job woefully undercompensated for their loss.

The Longshore and Harbor Workers' Compensation Act (LHWCA)

The Longshore and Harbor Workers' Compensation Act (LHWCA)[47] provides the legal vehicle for harbor workers[48] or their families to seek compensation from an employer for work-related injuries or death. In contrast to the Jones Act, the LHWCA preempts civil litigation by establishing a federal workers' compensation system for harbor workers injured or killed while on the job.[49] Like other workers' compensation systems, it employs a damages schedule that severely under-compensates harbor workers and their families. For injured harbor workers, the LHWCA limits compensation to economic losses, including a percentage of lost wages and all necessary medical expenses.[50] The LHWCA also provides additional compensation in instances of permanent disability.[51] This compensation schedule, therefore, fails to compensate injured workers for all of their economic losses, and it fails to compensate them for non-economic losses, such as pain and suffering.

The LHWCA workers' compensation schedule similarly under-compensates the families of harbor workers who are killed on the job. Under this statute, family members can only recover death benefits based on their economic losses, including up to $3,000 in funeral expenses and a percentage of the decedent's lost wages calculated according to a formula based on a family member's relationship to the decedent.[52] Though the death benefits provided by the LHWCA are often better than those provided under many states' workers' compensation laws, they still fall short in several key aspects. As with the statute's injury benefits schedule, the LHWCA's death benefits scheme does not fully compensate family members for all of their economic losses, and it fails entirely to compensate them for non-economic losses, such as loss of society damages.

The Death on the High Seas Act (DOHSA)

The Death on the High Seas Act[53] (DOHSA) presents additional obstacles to full recovery for the families of rig workers killed on the Deepwater Horizon, regardless of whether they are deemed to be a seaman or harbor worker. First enacted in 1920, this statute authorizes families of individuals killed on the high seas (*i.e.*, in waters more than three miles offshore) to bring a wrongful death claim against a vessel owner or operator for deaths arising from negligence or the unseaworthy condition of the vessel.[54] Like the Jones Act, the DOHSA bars recovery for loss of society damages, leading to systematic under-compensation of the families of killed rig workers.[55] Congress, however, has taken some limited steps to deal with this unjust result. In 2000, following a number of high profile commercial airplane crashes that occurred on the high seas, Congress amended the statute to allow family members of individuals killed in such disasters to seek loss of society damages.[56] Nevertheless, intense lobbying from the cruise ship industry has blocked subsequent congressional attempts to modernize the DOHSA, so that loss of society damages are recoverable for *all* individuals killed on the high seas.[57]

Next, the DOHSA bars the estates of anyone killed on the high seas from recovering pre-death pain and suffering damages as part of a survival action.[58] This restriction is particularly unjust in the cases of those rig workers on the Deepwater Horizon who are deemed to be harbor workers as opposed to seamen. The estates of rig workers deemed to be seamen will be able to seek this form of damages as part of a survival action under the Jones Act, as noted above. In contrast, the estates of harbor workers will have no alternative vehicle for seeking these damages. Because of these inconsistencies in the law, the civil justice system will systematically provide greater compensation to the estates of some rig workers than to others, despite the fact that general principles of justice and fairness would seem to support equivalent compensation for the estates of all classes of workers killed on the Deepwater Horizon rig.

Finally, the DOHSA also bars recovery of punitive damages.[59] Thus, considering that loss of society, pre-death pain and suffering, and punitive damages are all unavailable under the statute, the DOHSA clearly leaves many victims of maritime tragedy undercompensated for their injuries, undermining the ability of the federal civil justice system to deter vessel owners and operators from making unreasonably risky decisions.

Because of inconsistencies in the law, the civil justice system will systematically provide greater compensation to the estates of some rig workers than to others.

Individuals and Businesses Along the Gulf Coast Affected by the Oil Spill

The civil justice system will also likely under-compensate the individuals and businesses harmed by the BP oil spill's damage to natural resources and property, although probably not to the same extent as the rig workers injured and the families of rig workers killed in the Deepwater Horizon blowout. These individuals' and businesses' claims are governed by the Oil Pollution Act of 1990 (OPA),[60] which Congress enacted in the wake of the

Exxon Valdez oil spill in Prince William Sound, Alaska, in part to provide a comprehensive framework for compensating any party suffering damages arising from such spills. The OPA recognizes claims for various types of damages, including the costs of cleaning up the oil, damage to property, damage to natural resources that a claimant used for subsistence purposes, and lost income.[61]

Overall, the OPA—as written—appears to be a fairly effective mechanism for ensuring that most victims of oil spills receive timely and adequate compensation for their losses. Significantly, the statute expands upon the types of claimants and range of damages that would otherwise be available under maritime law for victims of oil spills.[62] In addition, the statute appears to establish an effective process for allowing claimants to settle claims with the party responsible for the oil spill.[63] While these settlement procedures will likely leave many claimants somewhat under-compensated for their injuries, they do allow claimants to receive at least a substantial portion of the compensation that they deserve in a more timely fashion and without the stress and uncertainty of long, drawn-out litigation.

The Oil Pollution Act suffers from several limitations that undermine the effective functioning of the federal civil justice system for compensating oil spill victims.

Nevertheless, the OPA also suffers from several limitations that undermine the effective functioning of the federal civil justice system for compensating oil spill victims. One potential limitation of the statute is the $75 million liability cap that it places on offshore drilling facilities for damages associated with an oil spill.[64] This cap does not apply when an oil spill is caused by the responsible party's gross negligence or by its violation of applicable federal safety regulations,[65] and thus will probably not limit BP's liability. Because of these exceptions, the OPA's liability cap probably does not have much of an impact on the statute's capacity to deter unreasonably risky behavior by the offshore oil industry. Nevertheless, the liability cap does threaten to prevent the victims of oil spills from receiving full compensation in cases where the spill was not caused by gross negligence or a violation of applicable federal safety regulations, and thus could hinder the ability of the civil justice system from achieving corrective justice.

Another limitation of the OPA is its complex "presentation requirement." Before claimants can file a lawsuit seeking damages under the OPA, they are required to "present" their claims to the responsible party.[66] Regulations governing the claims procedure process require plaintiffs to support their claims with significant evidence and documentation.[67] While it is important that individuals who are ineligible for compensation do not receive it, gathering these materials may prove inordinately time-consuming and expensive for many plaintiffs, and the burden of doing so will likely be significantly greater for poorer and less sophisticated claimants. In other cases, obtaining the necessary documentation may be impossible. For example, in certain informal economies along the Gulf Coast, a worker's wage may be established through oral agreement and without written documentation. It is unclear whether the OPA's regulations are flexible enough to allow for alternative forms of evidence, such as sworn affidavits, to support claims in the absence of written documentation.

To make matters worse, the OPA's presentation requirement also establishes a minimum waiting period that must pass between the time when the plaintiff has presented his claim to the responsible party and the time when the plaintiff is permitted to file his lawsuit. Rather than establish a definite endpoint for this waiting period, the OPA gives the responsible party nearly unilateral discretion to determine when a plaintiff's waiting period will end.[68] In theory, then, the responsible party could string along the waiting period for nearly as long as it wishes.[69] Such delays in compensation can be particularly hard on individuals whose businesses have been seriously damaged by an oil spill and are thus surviving on little or no income. If a plaintiff's circumstances are particularly dire, a prolonged delay may force him to forgo filing a lawsuit in federal court, and to instead accept an inadequate settlement offer from the responsible party. Together, the documentation requirements for presenting a claim and a lengthy waiting period could prevent many plaintiffs from pursuing any compensation under the OPA.

Another limitation of the statute is that it may preclude recovery of punitive damages. While the Supreme Court has not ruled directly on the issue, several lower federal courts have held that punitive damages are not available in claims brought under the OPA.[70] Such a limitation would weaken the ability of the OPA to deter reckless behavior by the oil and gas development industry. Even if such damages were available, however, they would have somewhat limited deterrent effect since the Supreme Court has severely restricted the size of punitive damages recoverable in certain maritime cases. In 2008, the Court held in *Exxon Shipping Co. v. Baker*[71] that while punitive damages are recoverable under general maritime law, they cannot exceed the value of the compensatory damages under certain circumstances, such as cases in which the compensatory damages are already massive. This holding suggests that in any large consolidated litigation brought against BP under the OPA, punitive damages could be limited to a 1:1 ratio to the compensatory damages awarded. Assuming that BP is found to have engaged in the kind of egregious conduct that warrants the award of punitive damages, this limitation on punitive damages would limit the ability of the OPA to deter offshore oil drilling companies from engaging in similarly reckless behavior in the future.

State Legislation and Court Decisions Limit Civil Justice Opportunities

As with their federal counterpart, the state civil justice systems in the four Gulf Coast states affected by the BP oil spill—Louisiana, Mississippi, Alabama, and Florida—are also plagued by external constraints, leading them to routinely under-compensate the victims of maritime industrial catastrophes. The limits on tort law opportunities in these states will mostly affect the individuals and businesses harmed by the oil spill's damage to natural resources and property.

To begin with, Louisiana state law creates a number of significant obstacles to tort law opportunities for the victims of the BP oil spill. General tort law in the state bars recovery of pure economic losses, such as lost income, for plaintiffs who have not suffered personal

injury or property damage.[72] Louisiana's general tort law also bars punitive damages.[73] In addition, Louisiana has enacted the Louisiana Oil Spill Prevention and Response Act (LOSPRA),[74] a statute that governs liability in state courts for oil spills. Unlike the OPA, this statute does not allow fisherman and tourism-based companies to recover for economic losses in state court.[75] Another potential limitation of the LOSPRA is that it likely does not allow for recovery of attorneys' fees, although state courts have not ruled on this issue yet.[76] Recovery of these fees is significant because it encourages plaintiffs to bring these types of suits, which in turn aids in achieving the public policy goal of deterring unreasonably risky behavior.

Mississippi state law is generally more favorable to the victims of the BP oil spill, but it does bar recovery of pure economic losses in the absence of personal injury or property damage.[77] In contrast to Louisiana, though, Mississippi law does authorize the other victims of the BP oil spill to seek attorneys' fees and punitive damages.[78] However, the Mississippi state legislature has enacted legislation that caps punitive damages according to a schedule based on the amount of compensatory damages that a claimant has recovered.[79]

Alabama state law likewise bars recovery of pure economic losses in the absence of personal injury or property damage,[80] preventing commercial fishermen and the tourism industry from bringing a claim in state court. In other ways, however, Alabama state law is not as restrictive on tort law opportunities. Most notably, Alabama law authorizes the victims of the oil spill to seek punitive damages. Like other states in the region, however, Alabama has capped the amount of punitive damages that a claimant can recover. Specifically, state law caps punitive damages at a 3:1 ratio to compensatory damages in most forms of civil actions.[81]

Finally, in contrast to the other Gulf Coast states, Florida state law does not *currently* place many significant restrictions on tort opportunities that would result in under-compensating the victims of the BP oil spill. The Florida state legislature has established a program called the Florida Coastal Protection Trust Fund (FCPTF), which, like the OPA, provides an alternative source of recovery for damages arising from oil spills.[82] Significantly, in an opinion handed down less than two months after the Deepwater Horizon blowout, the Florida Supreme Court overturned a lower court, which had held that the FCPTF did not allow recovery of pure economic damages in the absence of personal injury or property damage.[83] The state supreme court also held that Florida's general tort law does not bar the recovery of such damages either.[84] Thus, many of Florida's victims of the BP oil spill, including fisherman and tourism-related businesses, may be able to recover for economic losses both under the state's general tort law and through the FCPTF.

How BP's Choices on Safety and the Environment Led to the BP Oil Spill

BP's Disregard of Safety and the Environment

The various regulatory failures and civil justice system constraints affecting the deepwater oil industry created a fertile environment in which BP's troubling corporate culture was able to thrive. Consistent with this corporate culture, BP managers repeatedly cut corners on safety and environmental protection in order to boost profits as it carried out its drilling activities at the Macondo well, even though one BP engineer had described the well as a "nightmare."[85] At the time of the blowout, the Deepwater Horizon project was weeks behind schedule and millions of dollars over-budget, providing further motivation to cut costs and save time. Accordingly, as the House Committee on Energy and Commerce observed in a letter to former BP Chief Executive Officer Tony Hayward, "[t]ime after time, it appears that BP made decisions that increased the risk of a blowout to save the company time or expense."[86]

Consistent with its corporate culture, BP managers repeatedly cut corners on safety and environmental protection in order to boost profits as it carried out its drilling activities at the Macondo well.

These decisions included the following:

- *BP chose to equip its blowout preventer for the Macondo well with only one blind shear ram.* This device—a crucial component of the blowout preventer (BOP)—provides the last hope of shutting off a well before all control is lost. Citing both their importance and their propensity to fail, experts have recommended since at least 2001 that oil companies outfit their BOPs with a second blind shear ram as a backup, in case the first one fails as occurred on the Macondo well. Nevertheless, in order to save money and avoid costly delays in initiating the Macondo exploration well, BP elected not to retrofit its BOP with a second blind shear ram or to obtain a new one with two blind shear rams.[87]

- *BP chose not to install an "acoustic trigger" on its BOP.* Norway and Brazil require offshore oil drilling operations to employ BOPs with an acoustic trigger, but these devices are not required in the United States. BP failed to make the $500,000 investment to equip its BOP with one, and this cost-saving measure may have deprived the corporation of its best hope for preventing the catastrophic spill.[88]

- *BP chose to use only six "centralizers" on the well casing even though they were advised to use at least 21 in order to minimize the risk of explosive gas bubbles from reaching the wellhead.* Based on a computer analysis of the well, an engineer for Halliburton, whom BP had contracted to help drill the Macondo well, recommended that BP use at least 21 centralizers. Despite the risks involved, BP proceeded to complete the well using only the six centralizers it had on-hand at the Deepwater Horizon rig, rather than expend the additional time and money to obtain the 15 more that were recommended.[89]

- *BP chose to use a single casing system to line the bottom section of the well, even though the company knew this well design would make it easier for explosive gas to escape the oil reservoir.* After drilling the final section of the well in early April of 2010, BP had two options for lining that section with a well casing. Internal BP documents reveal that corporate mangers selected the cheaper of the two options—the single casing system— in order to save time and money, despite the greater risks associated with this option.[90]

- *BP chose to bypass a recommended procedure called a "bottoms up" circulation of drilling mud prior to beginning the well's cement job.* Bypassing this procedure may have saved BP as much as 12 hours. BP instead performed an abbreviated version of this test that lasted only 30 minutes.[92]

- *BP chose not to perform a "cement bond log," a critical quality check that would have identified channels in the well casing's cement that could cause gas flow problems so that they could be fixed.* By some estimates, BP saved around $118,000 and 9 to 12 hours by skipping this test, and one expert has characterized this decision as "horribly negligent."[91]

- *BP chose to follow an unusual plan for completing the well that significantly increased the risk of a blowout.* Specifically, BP's plan postponed installation of a critical safety device known as a "lockdown sleeve" until after rig workers had replaced the drilling mud in the riser pipe with seawater and capped the well with a large cement plug. Internal BP documents reveal that corporate managers had considered following the usual course of action of installing the lockdown sleeve first, but presumably this plan was rejected to save time and money.[93]

- *BP chose to proceed with plans to replace the drilling mud in the riser pipe despite the fact that two critical pressure tests indicated that gas was leaking into the well, a sign that a possible blowout was imminent.* Given these test results, BP should have instead thoroughly investigated the source of the well leak, and then they should have taken any necessary steps to ensure the integrity of the well before replacing the drilling mud. BP has since admitted that proceeding with the drilling mud replacement was possibly a "fundamental mistake."[94]

The troubling corporate culture reflected in BP's decision-making leading up to the Deepwater Horizon blowout was already firmly entrenched long before work began on the Macondo well. Indeed, this corporate culture contributed to BP's troubling safety and environmental record, which included two of the nation's largest industrial catastrophes prior to the oil spill. The first involved a massive explosion at the BP oil refinery in Texas City, Texas, in March 2005, which left 15 workers dead and injured 180 others. In the wake of the tragedy, federal regulators charged the corporation with several violations of environmental and worker safety statutes.[95] The second catastrophe occurred in late February of 2006 when a badly corroded BP pipeline ruptured, leaking 267,000 gallons of oil over 1.9 acres of

Alaska's ecologically fragile Northern Slope—the worst oil spill in the history of the region. Investigators concluded that the spill was caused by BP's poor pipeline inspection and maintenance practices.[96]

The Failure to Stop BP's Disregard of Safety and the Environment

The failures of the regulatory system aided and abetted BP's callous disregard of worker safety and the environment. As discussed, the MMS failed to put in place a regulatory system that would have required BP to take greater precautions despite its corporate culture that sacrificed safety and environmental protections for greater profits. Beset by inadequate legal authority and resources, and subject to agency capture by the oil industry, the MMS provided little or no deterrence to BP's relentless efforts to save money.

As CPR has previously discussed, the civil justice system is a necessary and important backup to the regulatory system.[97] One reason is that it is more difficult for regulated industries to capture the tort system than it is for them to influence regulators. For this and other reasons, the civil justice system may deter industries for unreasonable risky behavior even if the regulatory system fails. It is not entirely clear why this did not happen in the case of BP. The limited and inadequate nature of the protection of workers under existing statutes may have something to do with the lack of deterrence. On the other hand, the most significant vehicle for deterring unreasonably risky behavior by offshore oil drilling facilities—the OPA—appears to establish a fairly effective mechanism for ensuring that most victims of oil spills receive timely and adequate compensation for their losses. Why, then, did this statute not sufficiently deter BP from making the unreasonably risky decisions discussed above?

It appears that some members of the oil industry, including BP, had become largely complacent about the risks involved in deepwater offshore drilling.

One likely answer to this question is that while a well functioning civil justice system can provide a substantial deterrent effect, this deterrent effect is no guarantee against all reckless or negligent conduct. Available data suggest that the OPA has in fact served as an effective deterrent against overly risky decision-making by the oil industry. For example, the number of oil spills has generally decreased since 1990, with a particularly large drop in oil spills starting around 2002. Moreover, the total volume of oil spills has also decreased dramatically since 1990.[98]

A second possible answer is that some members of the oil industry, including BP, had become largely complacent about the risks involved in deepwater offshore drilling. The threat of liability under the OPA would have rung hollow because these companies had underestimated these risks. Every year, hundreds of major accidents occur at offshore drilling operations in the Gulf of Mexico, but, until the BP oil spill, all of them had been quickly contained before significant damage ensued.[99] This track record may have caused some oil companies to be overly confident in their ability to avert the worst consequences of accidents. For example, in its exploration plan for the Macondo well, BP asserted that "[d]ue to the distance to shore (48 miles) and the response capabilities that would be implemented, no significant adverse effects [on wetlands] are expected."[100] Statements such

as this suggest that unwarranted over-confidence may have contributed to the company's distorted decision-making in the lead up to the Deepwater Horizon blowout. Companies like BP also face strong market forces to maximize profits, which serve only to reinforce this over-confidence. These pressures skew companies' decision-making by encouraging them to focus on short-term concerns (to the exclusion of long-term ones) and to underestimate or ignore the risks of their activities.

A third possible answer is that uncertainty about the efficacy of the OPA had undermined its deterrent effect. Until now, the statute had never been invoked to compensate victims of a major oil spill. As such, questions have likely persisted as to whether and how strictly the OPA would hold oil companies accountable for oil spills. Even after several months, it is still unclear how well the Gulf Coast Claims Facility—the BP-established $20 billion alternative settlement fund being administered by Ken Feinberg—will compensate the victims of the oil spill. If this process turns out to be a success, it could substantially enhance the deterrent effect of the OPA in the future.

Finally, the civil justice system unfortunately is hampered in its capacity to address catastrophes on the scale of the BP oil spill—catastrophes that literally pose an existential threat to entire communities, economies, and ways of life. In each offshore oil drilling project, human fallibility, engineering complexity that pushes the technological envelope, and the earth's violent geological forces are set on a collision course. Fortunately, we are able to avoid disaster in nearly every case. However, when disaster does strike, the consequences reverberate on a scale and with such a level of intensity and complexity that the civil justice system, in its present form, may not offer the appropriate tools for holding the responsible party accountable or for ensuring that every victim is adequately compensated.[101] The civil justice system may need to be significantly transformed before it can effectively address such catastrophic events.

While the civil justice system did not deter BP's reckless behavior, it still performs the important function of providing a way for the innocent victims of BP's behavior to receive compensation for their damages. Yet, as noted, some victims will receive only partial compensation or even no compensation because of various limitations that impede recovery. Workers and their families are the biggest losers in this regard.

Eliminating Civil Justice Constraints to Help Avoid Future Industrial Catastrophes

The regulatory and civil justice systems were not permitted to operate at full strength during the years leading up to the BP oil spill, and, for the most part, they remain in a similarly weakened state today. As described above, the problems of hollow government and regulatory capture hindered the ability of the regulatory system to prevent this catastrophe. Likewise, limits placed on federal and state tort law opportunities have hampered the ability of the civil justice system to discourage oil companies like BP from making decisions that place people and the environment at unreasonable risk when carrying out oil exploration and production activities. If nothing else, the BP oil spill clearly illustrates that Congress, the Obama Administration, and the states must take swift and decisive action to reinvigorate the regulatory and civil justice systems, so that we are better able to avoid future industrial catastrophes. Here, we focus on some critical reforms that will help to eliminate constraints on the civil justice system.[102] These reforms will also better enable the victims of oil spills to achieve a fairer measure of corrective justice for the harms they suffer.

The BP oil spill clearly illustrates that Congress, the Obama Administration, and the states must take swift and decisive action to reinvigorate the regulatory and civil justice systems.

Federal Reforms

Congress should modernize the DOHSA. In it present form, the DOHSA only allows the families of people killed in commercial airplane accidents to seek loss of society damages. No principled reason under tort law exists to justify this disparate treatment. As such, Congress should amend the DOHSA to allow for the families of anyone killed on the high seas to seek loss of society damages. In addition, the DOSHA bars the estates of anyone killed on the high seas from seeking pre-death pain and suffering damages. Congress should amend the statute to authorize these damages as well. Finally, the DOHSA bars recovery of punitive damages in all cases, no matter how egregious the defendant's conduct is. Accordingly, Congress should also amend the statute to allow recovery of punitive damages.

Congress should modernize the Jones Act/Federal Employers Liability Act (FELA). Under the Jones Act—which expands FELA to cover claims involving seamen—the families of seamen killed through their employer's negligence are not able to recover loss of society damages. Congress should amend FELA to make this form of damages available. Furthermore, Congress should amend the Jones Act and FELA as necessary to allow for recovery of punitive damages as well.

Congress should amend the OPA to eliminate (or increase significantly) the $75 million liability cap it places on offshore oil drilling facilities for damages associated with an oil spill. To be sure, the liability cap likely would not apply to most large oil spills—including the BP oil spill—because of the significant restrictions that the OPA places on its applicability. Nevertheless, these kinds of liability caps are inimical to the proper functioning of the civil justice system, because they potentially create an unjust barrier to full compensation for victims of industrial catastrophes. As such, Congress should eliminate the OPA's liability cap for offshore oil facilities, or at least increase it substantially.

Congress should amend the OPA to make it easier for potential claimants to satisfy the presentation requirement. For too many victims of oil spill disasters, the complexity of the OPA presentation requirement serves only to delay justice or discourage its pursuit outright. Deserving plaintiffs cannot seek compensation under the statute in federal courts until they have satisfied this process. If they are unable or unwilling to comply with this process, then the door to the federal courthouse remains shut on their legitimate OPA claims. Undoubtedly, this barrier to justice will disproportionately harm poorer and less sophisticated plaintiffs. To prevent such injustices, Congress could amend the OPA to simplify the evidentiary burden for satisfying the presentation requirement and to allow greater flexibility in providing the necessary supporting documentation. In addition, Congress should amend the presentation requirement so that it includes a definite sunset on the waiting period that must pass before plaintiffs can bring their claims in court.

Congress should amend the OPA to clarify that plaintiffs can recover punitive damages as part of claims brought under the statute. One of the purposes of the OPA is to establish a comprehensive legal framework for preventing oil spills. The threat of liability for punitive damages would act as a deterrent for oil companies, discouraging them from taking reckless actions that might result in an oil spill.

Congress should enact legislation establishing new guidelines for awarding punitive damages in federal maritime cases. Federal maritime law has long recognized the availability of punitive damages, such as in cases involving willful misconduct. The Supreme Court appears to have significantly limited these damages in certain kinds of maritime cases (not to exceed a 1:1 ratio to compensatory damages), undermining the ability of punitive damages to serve their twin function of punishing defendants for engaging in egregious behavior and deterring the defendant and others from engaging in similarly egregious behavior in the future. Congress can and should enact legislation that either eliminates this cap on punitive damages or increases it significantly.

State Reforms

The state legislatures in Louisiana, Mississippi, and Alabama should enact legislation that amends the states' respective Civil Code/tort laws to recognize claims for pure economic losses in cases in which the plaintiff has not suffered any personal injury or property damage. By failing to recognize this claim, the civil justice systems in these states are denying compensation to an entire class of oil spill victims for the injuries they have suffered.

The Louisiana state legislature should enact legislation amending the state's Civil Code to clarify that all victims of gross negligence or nuisance involving gross negligence are authorized to recover punitive damages. Through this reform, the Louisiana Civil Code will better discourage corporations from engaging in the kind of reckless behavior that can lead to an industrial catastrophe.

The Louisiana state legislature should amend the LOSPRA to allow recovery of both (1) economic losses by plaintiffs who have not suffered any personal injury or property damage and (2) punitive damages. These reforms will better compensate the victims of oil spills in Louisiana, and the amendments would enhance the deterrent effect that the LOSPRA has on oil companies to ensure that they do not carelessly or recklessly sacrifice environmental protection and public safety in pursuit of greater profits.

The Civil Justice System to the Rescue?

Regulatory failures and civil justice system constraints may have contributed to the BP oil spill, but the civil justice system may still emerge as the hero in this ongoing story. An important objective of the civil justice system is to compensate victims after they have suffered harm caused by a company's unreasonably dangerous activities. The civil justice system therefore serves as the ultimate backup when other legal institutions fail to prevent harm. Thus, through its corrective justice function, the civil justice system still has a critical role to play in determining whether the BP oil spill story has a happy ending. The civil justice system's success in playing this role will be measured by how well it provides the victims of this catastrophe with fair opportunities to obtain adequate compensation for their spill-related harms. Accordingly, the success with which the civil justice system plays its corrective justice role will have a direct impact on how well the victims of the BP oil spill are able to overcome their losses and get on with their lives. More indirectly, this will also likely determine how effective the civil justice system will be in the future at deterring corporations' unreasonably dangerous activities—and thus, supplementing the regulatory system's efforts to avoid similar industrial catastrophes in the future.

Through its corrective justice function, the civil justice system still has a critical role to play in determining whether the BP oil spill story has a happy ending.

It is still too early to determine how well the civil justice system will fulfill its corrective justice function in the wake of the BP oil spill. In the absence of necessary reforms, it appears that the families of rig workers killed during the Deepwater Horizon blowout will be woefully under-compensated. But, the larger question is how well the civil justice system will work for the land-based individuals and businesses that were harmed by the ensuing oil spill. At least initially, most of the victims will likely rely on the Gulf Coast Claims Facility (GCCF) to obtain compensation. While the GCCF has been no stranger to controversy,[103] it does appear to offer a few advantages. One advantage is the administration of the fund has been transferred away from BP to an independent body overseen by Ken Feinberg. This independent administration will better ensure that claims presented to the GCCF receive more objective evaluation than they might have received from BP. Another advantage is that the GCCF will likely provide compensation to oil spill victims more quickly and with less administrative expense than would traditional litigation.

Other aspects of the GCCF's design and implementation are raising serious concerns, however. One concern is that because the government is not involved in the administration of the GCCF, it may not operate under certain basic public accountability mechanisms. A government-run process would be more likely to provide claimants with some minimal level of explanation for their denied claims as well as an adequate opportunity to appeal adverse decisions. It is not yet clear whether the GCCF process will incorporate these features. A related concern is that the GCCF will operate with less transparency than would a government-run settlement process. As such, the public may never know what standards or procedures the GCCF employed to determine whether to award claims and how much money to grant for each claim that it does award.

Other concerns regarding the GCCF arise from the murky relationship between the alternative settlement process it creates and the provisions of the OPA. One unanswered question is whether the GCCF will be administered in a way that provides compensation to all the claimants who are covered by the OPA. In setting up the GCCF, Ken Feinberg has talked about drawing lines to delineate who will be covered by the settlement fund and who will not. It is not yet clear whether and how these lines will match up with OPA mandates.[104] A second unanswered question is whether filing a claim with the GCCF satisfies the OPA's complex presentation requirement. It would place a tremendous burden on potential claimants if they had to go through the expensive and time-consuming process of filing another claim and awaiting a response again. Going through this process twice might effectively prevent many claimants from obtaining the corrective justice they deserve.

One final concern is that the GCCF places too many unwarranted restrictions on individuals and businesses that receive money for their claims through the settlement process. In particular, claimants who accept a single final settlement claim under the GCCF must agree to waive their right to bring a tort action against BP in court. In addition, claimants filing for a single final settlement claim under the GCCF must do so within three years after the GCCF began operating. These conditions increase the likelihood that many claimants will be left significantly under-compensated for the harms they suffer. It may take several years before the worst consequences of the BP oil spill begin to manifest themselves. In many cases, claimants will have no way of knowing the full extent of the harms they have suffered until after they have accepted a final settlement offer, or even until after the three-year deadline for filing claims has passed.

In the end, the potential weaknesses of the GCCF could undermine its effectiveness in delivering corrective justice to the victims of the BP oil spill. Not only do they threaten the legitimacy of the process, but they could also leave far too many of the spill's victims drastically under-compensated. Such a result could be disastrous from a deterrence standpoint, because it might limit the OPA's ability to hold oil companies accountable, and therefore to discourage unreasonable risk-taking in offshore oil and gas development. If, however, the GCCF functions effectively to compensate the victims of the BP oil spill fairly, then it could greatly enhance the capacity of the OPA to deter future catastrophic oil spills.

Conclusion

The BP oil spill has revealed with profound clarity the catastrophic consequences that can result when our regulatory and civil justice systems are not permitted to function effectively. Under these conditions, companies like BP are more willing and able to take a cavalier attitude toward environmental protection and public safety. Every decision they make is like a round of Russian roulette. Eventually, their luck—and ours—runs out, and tragedy results.

This state of affairs is not inevitable. With well-designed laws and policies backed by sufficient political will, we can revitalize these crucial legal institutions upon which all Americans depend. In the wake of the BP oil spill, Congress and the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE)—the newly created successor agency to the MMS—have taken some steps to institute reforms to improve the effectiveness of the regulatory and civil justice systems. But, as this white paper shows, more can and should be done on the federal and state levels so that we are better able to avoid future industrial and environmental catastrophes.

Endnotes

[1] Campbell Robertson & Clifford Krauss, *Gulf Spill is the Largest of Its Kind, Scientists Say*, N.Y. Times, Aug. 2, 2010, *available at* http://www.nytimes.com/2010/08/03/us/03spill.html.

[2] To simplify the analysis of this case study, the white paper will focus on how the regulatory and civil justice systems apply to the actions and decisions of BP only. Accordingly, those regulatory failures or civil justice constraints that uniquely affect the other corporations that are responsible for the Deepwater Horizon catastrophe will not be discussed here. For example, the Limitation of Liability Act (LOLA), 46 U.S.C. §§181-196, may constrain the ability of the civil justice system to hold Transocean accountable for its unreasonably dangerous actions or decisions leading up to the oil spill, but it has no effect on BP. As such, this case study will not include an analysis of the LOLA.

[3] William L. Andreen, *Alabama Voices: 'Magic' not Policy*, Montgomery Advertiser, July 18, 2010, *available at* http://www.progressivereform.org/opEds.cfm; Joel Achenbach, *Freak Accident or Frontier Enterprise? Deep-Water Drilling is Still a Big Unknown*, Wash. Post, Sept. 30, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/29/AR2010092906587.html.

[4] *See* Robert U. Ayres & Allen V. Kneese, *Production, Consumption, and Externalities*, *in* The Economics Of The Environment 3, 3-18 (Wallace E. Oates ed., 1992) (casting this problem as a specific example of the "tragedy of the commons").

[5] William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1588-89 (2007).

[6] Regulatory failures also affected the federal government's response to the BP oil spill, hindering the ability of federal agencies to stop the spill quickly and minimize its impacts. For example, various regulatory failures may have contributed to the Coast Guard's botched effort to extinguish the fire on the Deepwater Horizon rig and prevent it from sinking, which would have likely averted much of the oil spill. These regulatory failures are beyond the scope of this white paper, however. Rather, this white paper focuses on the actions of the MMS, since that federal agency had the primary responsibility for *preventing* these kinds of catastrophes at the time of the BP oil spill.

[7] The Act defines the "outer Continental Shelf," as "all submerged lands lying seaward and outside of the areas . . . [under state control] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control . . . ." Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331(a).

[8] For a more detailed discussion of the weak legal authority provided by the OCSLA, see Alyson Flournoy et al., Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence 12-20 (CPR White Paper 1007, Sept. 2010), *available at* http://www.progressivereform.org/articles/BP_Reg_Blowout_1007.pdf [hereinafter Flournoy et al., Regulatory Blowout].

[9] *See, e.g.,* OCSLA, 43 U.S.C. §1347(b). This provision contains a weak mandate for safety and health regulations, which appears to apply specifically to worker safety rather than safety of the operation. It directs the Department of the Interior to require "the use of the best available and safest technologies which the Secretary determines to be economically feasible, wherever the failure of equipment would have a significant effect on safety health or the environment, except where the Secretary determines that the incremental benefits are clearly insufficient to justify the incremental costs of utilizing such technologies." Even if interpreted to apply broadly to all aspects of a drilling project's operational safety, this provision is extremely cumbersome in that it imposes the dual burden that the Secretary demonstrate not only that the technology is economically feasible but also that the failure of the equipment would have significant effect on safety, health, or the environment, in order to trigger the mandate for technology-based regulations. Added to this, the statute leaves the Secretary with discretion *not* to require the best available equipment if he determines that the costs outweigh the benefits.

[10] U.S. Coast Guard et al., Spill of National Significance (Gulf SONS) Joint After Action Report 22 (2002), *available at* http://www.uscg.mil/history/docs/2002SONSAARfinalReport.pdf.

[11] Oil and gas development activities managed under the OCSLA occur in four distinct stages: (1) development of a five-year leasing plan; (2) issuance of oil and gas leases (often called the lease-sale); (3) approval of a lessee's exploration plan; and (4) approval of a lessee's development and production plan.

[12] For example, the MMS's regulations include a vague requirement to consider all available environmental information at the lease-sale stage. 30 C.F.R §256.26 (a)-(b). In practice, however, the agency seems to assess only the very general information already prepared as part of the planning process rather than develop any new site-specific information for each lease-sale.

[13] For example, under the statute, an oil company could be entitled to compensation if the MMS cancels a lease or permit for site-specific environmental reasons after the company had already developed an exploration or development plan. OCSLA, 43 U.S.C. §1334(a)(2)(C)(i). This compensation requirement provides the MMS with a strong incentive to ignore or downplay significant environmental concerns that emerge at the exploration or development stages of the OCSLA's development process. To make matters worse, the OCSLA only gives the MMS 30 days in which to approve or disapprove an exploration plan and accompanying documents such as the spill response plan required by the Oil Pollution Act (OPA). OCSLA, 43 U.S.C §§1340, 1334(a)(2)(c). Thirty days is not enough time to adequately assess the site-specific environmental impacts of an exploration plan.

[14] Federal law currently caps the maximum allowable civil penalties under the OCSLA at only $35,000 per day and the maximum allowable criminal penalties at only $100,000 per day. 30 C.F.R. § 250.1403 (maximum civil penalty under the OCSLA); OCSLA, 43 U.S.C. §1350(b)(2) (maximum criminal penalty under the OCSLA).

[15] Current regulations require a bond of only $200,000 at the time of submitting an exploration plan. 30 C.F.R. §256.53. Clearly, however, the scale of the damage caused by the BP oil spill demonstrates that the costs of a drilling-related catastrophe can be far greater than this paltry sum.

[16] For a more detailed discussion regarding the MMS's inadequate resources, see Flournoy, et al., Regulatory Blowout, *supra* note 8, at 21-23.

[17] Minerals Mgmt. Serv., U.S. Dept. of the Interior, Budget Justifications and Performance Information, Fiscal Year 2011 at 113 (2010), *available at* http://www.boemre.gov/adm/PFD/2011BudgetJustification.pdf [hereinafter MMS, FY 2011 Budget Justifications].

[18] *Id.* at 56 ("Deepwater has continued to be a very important part of the total GOM [Gulf of Mexico] production, providing approximately 74 percent of the oil and 43 percent of the gas from the region in 2008.").

[19] Minerals Mgmt. Serv., U.S. Dept. of the Interior, FY 2006 Budget Request 70 (2005), *available at* http://www.boemre.gov/adm/PFD/2006BudgetJustification.pdf [hereinafter MMS, FY 2006 Budget Request]. *See also* Statement of John Martinez, Consulting Production Engineer, Production Associates, *Hearing On Legislation To Respond To The BP Oil Spill And To Prevent Future Oil Well Blowouts, Before the Subcomm. on Energy and Environment of the H. Comm. on Energy and Commerce* 4 (June 30, 2010), *available at* http://energycommerce.house.gov/documents/20100630/Martinez.Testimony.06.30.2010.pdf.

[20] *See* Statement of Gale Norton, Former Secretary of the Interior, 2001-2006, *Hearing on the Role of the Interior Department in the Deepwater Horizon Disaster, Before the Subcomm. on Energy and Environment and the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce* 3 (July 20, 2010), *available at* http://energycommerce.house.gov/documents/20100720/Norton.Testimony.07.20.2010.pdf (discussing the MMS's budget during the period of 2001-2006).

[21] MMS, FY 2006 Budget Request, *supra* note 19, at iii-iv (correcting for inflation by converting dollar amounts to 2004 dollars using the consumer price index).

[22] *Id.*; MMS, FY 2011 Budget Justifications, *supra* note 17, at 64 (Table 12) (highlighting the addition of six new inspectors for the Gulf of Mexico region, representing a 10 percent increase).

[23] Opening Statement of Rep. Bart Stupak, Chairman, Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, *Hearing on the Role of the Interior Department in the Deepwater Horizon Disaster, Before the Subcomm. on Energy and Environment and the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce* 1 (July 20, 2010), *available at* http://energycommerce.house.gov/documents/20100720/Stupak.Statement.07.20.2010.pdf.

[24] Statement of Mary L. Kendall, Acting Inspector General, U.S. Dept. of the Interior, *Hearing on The Deepwater Horizon Incident: Are the Minerals Management Service Regulations Doing The Job?, Before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Resources* 2 (June 17, 2010), *available at* http://resourcescommittee.house.gov/images/Documents/20100617/2010_06_17_energy/testimony_kendall.pdf. It is not clear what accounts for this difference. It is likely that the citizens along the Pacific Coast are generally more sensitive to the dangers of offshore oil development following the 1969 Santa Barbara oil spill, and thus demand a greater level of environmental protection in exchange for the exploitation of their natural resources than do the citizens along the Gulf Coast. It will be interesting to see whether the BP oil spill has an equalizing effect.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 3; MMS, FY 2006 Budget Request, *supra* note 19, at 70.

[28] This theory was first enunciated in 1955 by Professor Marver H. Bernstein in his book *Regulating Business by Independent Commission*. For a more detailed discussion of how captive agency theory applies to the MMS, see Flournoy, et al., Regulatory Blowout, *supra* note 8, at 23-27.

[29] Statement of Sidney A. Shapiro, Associate Dean for Research and Development and University Distinguished Chair in Law, Wake Forest University School of Law, and Member Scholar and Vice President, Center for Progressive Reform, *Hearing on Protecting the Public Interest: Understanding the Threat of Agency Capture, Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary* 4-7 (Aug. 3, 2010), *available at* http://judiciary.senate.gov/pdf/08-03-10%20Shapiro%20Testimony.pdf.

[30] Office of the Inspector General, U.S. Dept of Interior, Investigative Report: Island Operating Company et al. (2010) *available at* http://www.doioig.gov/images/stories/reports/pdf//IslandOperatingCo.pdf [hereinafter OIG, Island Operating Company]; U.S. Gov't Accountability Office, Oil and Gas Management: Key Elements to Consider for Providing Assurance of Effective Independent Oversight 10 (2010), *available at* http://www.gao.gov/new.items/d10852t.pdf [hereinafter GAO, Independent Oversight].

[31] OIG, Island Operating Company, *supra* note 30, at 2-6; GAO, Independent Oversight, *supra* note 30, at 10.

[32] OIG, Island Operating Company, *supra* note 30, at 3.

[33] Secretary of the Interior Ken Salazar has implemented a reorganization of the agency and instituted various new ethics policies designed to address some of these concerns. *Change of the Name of the Minerals Management Service to the Bureau of Ocean Energy Management, Regulation, and Enforcement*, Order of the Secretary No. 3302, U.S. Dept. of the Interior (June 18, 2010) *available at* http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=35872; Statement of Ken Salazar, Secretary of the Interior, *Hearing on the Role of the Interior Department in the Deepwater Horizon Disaster, Before the Subcomm. on Energy and Environment and the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce* 1-8 (July 20, 2010), *available at* http://energycommerce.house.gov/documents/20100720/Salazar.Testimony.07.20.2010.pdf.

[34] This pattern is apparent from a review of the MMS Budget Justifications for the years 1998 through 2011. *See, e.g.*, Minerals Mgmt. Serv., U.S. Dept. of the Interior, Budget Justifications and Performance Information, Fiscal Year 1998 (1997), *available at* http://www.boemre.gov/adm/PFD/1998BudgetJustification.pdf; MMS, FY 2006 Budget Request, *supra* note 19; MMS, FY 2011 Budget Justifications, *supra* note 17.

[35] Les Blumenthal & Erika Bolstad, *U.S. Agency Let Oil Industry Write Offshore Drilling Rules*, McClatchy, May 10, 2010, *available at* http://www.mcclatchydc.com/2010/05/10/.

[36] Memorandum from Mary Kendall, Acting Inspector General, U.S. Dept. of the Interior, to Ken Salazar, Secretary of the Interior, Accompanying the Office of the Inspector General's Investigative Report on Island Operating Company, et al. (May, 24, 2010), *available at* http://www.doioig.gov/images/stories/reports/pdf//IslandOperatingCo.pdf; GAO, Independent Oversight, *supra* note 30, at 4.

[37] *See* Dan Eggen & Kimberly Kindy, *Three of Every Four Oil and Gas Lobbyists Worked for Federal Government*, Wash. Post, July 22, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072106468.html.

[38] Office of the Press Secretary, Exec. Office of the President, *Remarks by the President on the Gulf Oil Spill* (May 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-gulf-oil-spill.

[39] Tyler Priest, Opinion, *The Ties That Bind MMS and Big Oil*, Politico, June 9, 2010, http://www.politico.com/news/stories/0610/38270.html (last visited Sept. 1, 2010).

[40] GAO, Independent Oversight, *supra* note 30, at 8.

[41] General maritime law defines a seaman as one who does the work of a vessel and whose employment-related connection is both substantial in duration (*i.e.*, involving more than 30 percent of the time one dedicates to work) and nature (*i.e.*, exposing the worker to sea-related perils). Harbor Tug and Barge Company v. Papai, 520 U.S. 548 (1997). Because general maritime law defines the term vessel to include moveable drilling rigs like the Deepwater Horizon, Marathon Pipe Line Co. v. Drilling Rig ROWAN/ODESSA, 761 F.2d 229, 233 (5th Cir. 1985), the determinative question is whether the workers killed in the blowout were engaged in employment that satisfied both the duration and nature requirements. If their employment did satisfy these conditions, then they are regarded as a seamen.

[42] A wrongful death claim is a type of tort action in which survivors of someone who is killed, usually members of the decedent's family, can seek compensation for the loss they suffer because of the individual's death.

[43] The Jones Act's bar on recovering loss of society damages arises from two Supreme Court opinions, rather than the statute's language. In the first decision, issued in 1913, the Court held in *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913), that the Federal Employers Liability Act (FELA), which the Jones Act extended to govern seaman's negligence claims, does not allow for recovery of loss of society damages. The Court's decision was very much a product of its time when many crucial aspects of modern tort law were still in their formative stages. As a result, tort law did not fully recognize damages such as loss of society, which are now regarded as fundamental components of the tort system's corrective justice function. Nevertheless, in 1990, the Supreme Court relied on *Vreeland* to hold in *Miles v. Apex Marine*, 498 U.S. 19 (1990), that the Jones Act contains the same bar on recovery as FELA.

[44] This limitation will affect some families of workers killed on the Deepwater Horizon rig, though it is not yet clear who will be affected. Chris Kirkham, *Deepwater Horizon Oil Well was Increasingly Out of Control Before Fatal Explosion, Widows Testify*, Times-Picayune, June 7, 2010, *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/deepwater_horizon_oil_well_was.html; Stephanie Mencimer, *Will the Cruise Ship Industry Do BP's Dirty Work?*, Mother Jones, June 14, 2010, *available at* http://motherjones.com/politics/2010/06/cruise-ship-industry-bp-liability; Barry Meier, *Calls to Update Maritime Laws*, N.Y. Times, July 5, 2010, *available at* http://www.nytimes.com/2010/07/06/business/06seas.html.

[45] *See* Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3 (1990).

[46] A survival action is another type of tort action—distinct from a wrongful death claim—that allows the decedent's estate to seek recovery of damages that the decedent could have sought had she survived her injury. For example, an individual who is injured in an automobile accident caused by the negligence of another can seek damages for pain and suffering. If, however, the individual dies as a result of the automobile accident, then the individual's estate may seek pre-death pain and suffering damages on her behalf, with her designated beneficiaries—such as her family members—ultimately receiving the compensation that results from the lawsuit.

[47] Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§901-950.

[48] A harbor worker is a maritime worker that does not meet the general maritime legal definition of a seaman.

[49] LHWCA, 33 U.S.C. §903. However, the statute does authorize the families of deceased harbor workers to bring a wrongful death claim against non-employer vessel owners when the vessel owner's negligence contributed to the harbor worker's death. LHWCA, 33 U.S.C. §905(b).

[50] LHWCA, 33 U.S.C. §§906-907.

[51] LHWCA, 33 U.S.C. §908.

[52] LHWCA, 33 U.S.C. §909.

[53] Death on the High Seas Act (DOHSA), 46 U.S.C. §§30301-30308.

[54] DOHSA, 46 U.S.C. §§30302-30303. Under general maritime law, a vessel is deemed unseaworthy if it presents an unreasonably unsafe condition for the individuals on board the vessel. The available theories for recovery vary slightly according to the legal status of the individual who is killed. Families of seamen who are killed on the high seas can recover by demonstrating that the death was caused either by the negligent act of the vessel owner or operator or by the unseaworthy condition of the vessel. Since general maritime law restricts the concept of seaworthiness to just seamen, families of all non-seamen killed on the high seas must instead prove that the death was caused by a negligent action of the vessel owner or operator.

[55] The DOHSA generally only allows family members to recover for purely economic damages, such as lost wages or other "out of pocket" expenses—which do not include loss of society damages DOHSA, 46 U.S.C. §§30302-30303

[56] DOHSA, 46 U.S.C. §30307(b); *see generally* Stephen R. Ginger & Will S. Skinner, *DOHSA's Commercial Aviation Exception: How Mass Commercial Aviation Disasters Influenced Congress on Compensation for Deaths on the High Seas*, 75 J. of Air Law & Comm. 137 (2010).

[57] Stephanie Mencimer, *Will the Cruise Ship Industry Do BP's Dirty Work?*, Mother Jones, June 14, 2010, *available at* http://motherjones.com/politics/2010/06/cruise-ship-industry-bp-liability; Barry Meier, *Calls to Update Maritime Laws*, N.Y. Times, July 5, 2010, *available at* http://www.nytimes.com/2010/07/06/business/06seas.html.

[58] The Supreme Court established this limitation in its decision in *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998). The Court went on to hold that these damages also cannot be recovered as part of a survival action brought under general maritime law because the DOHSA preempts maritime law on all negligence claims involving a death on the high seas.

[59] The exclusion of punitive damages under the DOHSA also applies to claims involving the deaths of individuals in commercial airplane disasters on the high seas.

[60] Oil Pollution Act (OPA), 33 U.S.C. §§2701 – 2761, 46 U.S.C. §3703a. The OPA expands upon an earlier regime dealing with oil spills that was enacted in 1970 and is found in section 311 of the Clean Water Act. 33 U.S.C. § 1321.

[61] Notably, however, the OPA does not establish an independent claim for personal injury, wrongful death, or for survival actions. The OPA thus does not apply to claims brought by family members of workers killed on the Deepwater Horizon or by the workers who were injured as a result of the blowout. In addition, the OPA does not apply to claims brought by response workers who were injured or killed while cleaning up the oil spill.

[62] With respect to oil spill damage claims, the OPA supersedes a traditional rule of maritime law known as the rule of *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303 (1927), which holds that a plaintiff may not recover damages for pure economic losses, such as lost income, in the absence of personal injury or property damage. The rule of *Robins Dry Dock* is significant for many of the individuals and businesses who are often most harmed by oil spills—namely, fisherman and businesses engaged in the tourism industry. These victims suffer economic harm because of damages to natural resources such as fisheries and beaches, but they cannot recover for this economic harm because they have no proprietary interest in these natural resources. Recognizing the harsh consequences the rule of *Robins Dry Dock* had on many victims of maritime industrial accidents, the Fifth Circuit Court of Appeals created an exception to the rule for commercial fisherman. *See* Louisiana ex rel. Guste v. M/V TESTBANK, 752 F.2d 1019, 1021 (5th Cir. 1985). By superseding the rule of *Robins Dry Dock*, the OPA ensures that other oil spill victims without a proprietary interest in natural resources—most notably members of the tourism industry—will also have a vehicle for seeking compensation.

[63] As discussed below, the OPA requires claimants to attempt to settle their claims with the responsible party before filing suit. Alternatively, the claimant can present their claim to the Oil Spill Liability Trust Fund, a fund created by the OPA that can provide up to $1 billion per oil spill to clean up the oil and pay claims for damages. OPA, 33 U.S.C. §2712.

[64] OPA, 33 U.S.C. §2704(a)(3).

[65] OPA, 33 U.S.C. §2704(c)(1).

[66] OPA, 33 U.S.C. §2713; *see* Gabrick v. Laurin Maritime (America), Inc., 2009 WL 102549 (E.D. La. 2009) (holding that presenting the claim is a mandatory condition precedent to filing private lawsuits under the OPA).

[67] *See* 33 C.F.R. §§136.105, 109, and 113.

[68] The plaintiff cannot file suit until either of the following occurs: (1) the responsible party denies all liability for the particular claim, or (2) either 90 days has passed after the plaintiff presented the claim or the responsible party begins advertising alternative procedures for filing claims, whichever is later. OPA, 33 U.S.C. §2713(c).

[69] For example, the responsible party can extend the waiting period by both refusing to respond to the plaintiff's presented claim and postponing the announcement of an alternative claims procedure (assuming it has any intention of announcing an alternative claims procedure).

[70] *See, e.g.*, South Port Marine LLC v. Gulf Oil Ltd., 234 F.3d 58 (1st Cir. 2000); Clausen v. M/V NEW CARISSA, 171 F.Supp.2d 1127 (D. Ore. 2001).

[71] 128 S.Ct. 2605 (2008).

[72] PPG Industries v. Bean Dredging, 447 So.2d 1058 (La. 1984).

[73] Louisiana allows punitive damages only where expressly authorized by statute. 1 Linda L. Schlueter, Punitive Damages §2.2, at 29 (5th ed. 2005). No statute appears to authorize punitive damages in these cases.

[74] La Rev. Stat. Ann. §§30:2451-2496.

[75] *Compare* La Rev. Stat. Ann. §30:2454(5) *with* OPA, 33 U.S.C. §2702(b)(2)(E) (pure economic damages available to those without a proprietary interest in the damaged natural resources).

[76] *See* La Rev. Stat. Ann. §30:2496 (providing that the LOSPRA "shall be the exclusive authority on oil spill prevention, response, removal, and the limitations of liability"). This provision will likely be read as superseding La Rev. Stat. Ann. §30:29, which outlines state liability for oil spills on land. The land oil spill provision explicitly allows for attorneys' fees, but the LOSPRA does not.

[77] *See, e.g.,* Cranford v. Shelton, 378 So.2d 652, 655 (Miss.1980).

[78] Warren v. Derivaux, 996 So.2d 729, 732 (Miss. 2008) (holding that the award of attorneys' fees is proper in those cases in which punitive damages are proper); Miss. Code Ann. §11-1-65(1)(a) (allowing for punitive damages in cases in which the claimant is able to "prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud").

[79] *See* Miss. Code Ann. §11-1-65(1)(e). It is not clear whether general maritime law would preempt the state caps on punitive damages in cases arising from the BP oil spill. BP and other parties responsible for the oil spill may argue that maritime law preempts Mississippi punitive damages cap if they determine that maritime law would impose a more stringent cap than Mississippi state law.

[80] *See, e.g.,* Purcell Co., Inc. v. Spriggs Enterprises, Inc., 431 So.3d 515, 533 (Ala.1983).

[81] Ala. Code §§6-11-21(a), (d).

[82] Fla Stat. §§376.011-376.021, 376.313(3).

[83] Curd v. Mosaic Fertilizer, No. SC08-1920, slip op. at 13 (Fla. June 17, 2010), *available at* http://www.floridasupremecourt.org/decisions/2010/sc08-1920.pdf.

[84] *Id.* at 6.

[85] Brandon Keim, *BP's 'Nightmare' Well: Internal Documents Uncover Negligence*, Wired, June 15, 2010, http://www.wired.com/wiredscience/2010/06/bp-nightmare-email/ (last visited Oct. 6, 2010).

[86] Letter from Henry Waxman, Chairman, H. Comm. on Energy and Commerce, et al., to Tony Hayward, Chief Exec. Officer, BP 13 (June 14, 2010), *available at* http://energycommerce.house.gov/documents/20100614/Hayward.BP.2010.6.14.pdf [hereinafter House Committee Letter to Hayward].

[87] David Barstow et al., *Regulators Failed to Address Risks in Oil-Rig Fail-Safe Device*, N.Y. Times, June 20, 2010, *available at* http://www.nytimes.com/2010/06/21/us/21blowout.html. The blind shear ram is a critical component of the BOP—the large valve that sits on top of an oil well that is used to monitor the well and regulate changes in pressure and oil flow in order to protect the drilling rig and its crew. In the event that the BOP fails causing a blowout to occur, the blind shear ram is supposed to trigger two massive blades that cut through the drill pipe and seal off the well. It remains unclear why BP's blind shear ram failed, but experts have observed that the Deepwater Horizon rig would not have sunk, and the oil spill could have been minimized, had it worked properly.

[88] Tim Dickinson, *The Spill, the Scandal, and the President*, Rolling Stone, June 24, 2010, *available at* http://www.rollingstone.com/politics/news/17390/111965; Gregory Patin, *$500K Device May Have Prevented Oil Spill*, Orlando Independent Examiner, May 2, 2010, *available at* http://www.examiner.com/independent-in-orlando/500k-device-may-have-prevented-oil-spill. An acoustic trigger provides an alternative mechanism for activating the blind shear ram in case the direct electronic controls fail. In the case of the Deepwater Horizon blowout, a failure in the electronic controls may have prevented the blind shear ram from activating. With an acoustic trigger, the Deepwater Horizon rig may have still been able to activate the blind shear ram before complete well control was lost, thereby averting the resulting oil spill.

[89] House Committee Letter to Hayward, *supra* note 86, at 8-9. Centralizers are devices attached to the outside of well casing—the metal pipes inserted into an oil well as it is being drilled—that are used to keep the well casing properly centered in the middle of the well so that cement can be evenly spread into the space surrounding the well casing. This cement is used both to strengthen the well's walls and to create another barrier for preventing explosive gas bubbles from escaping from the oil reservoir. If this cement is not evenly spread, then there is an increased risk of channels forming, which might enable explosive gas to escape up to the wellhead.

[90] *Id.* at 4-6, 11-12; Ben Casselman & Russell Gold, *BP Decisions Set Stage for Disaster*, Wall St. J., May 27, 2010, *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704026204575266560930780190.html. Instead, BP's managers should have selected an engineering method known as the "Liner/Tieback casing" system. This system is more expensive and takes longer to install than the single casing system, but it also provides additional barriers between the oil reservoir and the wellhead, making it more difficult for explosive gas to escape.

[91] House Committee Letter to Hayward, *supra* note 86, at 9-11.

[92] *Id.* at 11-12; Ben Casselman & Russell Gold, *BP Decisions Set Stage for Disaster*, Wall St. J., May 27, 2010, *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704026204575266560930780190.html. As the name suggests, this procedure involves circulating drilling mud from the bottom of the well all the way up to the wellhead. Drilling mud is a dense fluid that is injected into a borehole as it is being drilled in order to cool the drilling bit, maintain borehole stability, and to prevent hydrocarbons from surging out of the oil reservoir. The purpose of the bottoms up procedure is to test for and remove any gas pockets that may have built up in the drilling mud, and to clear out debris from the bottom of the well, which might undermine the integrity of the cement job.

[93] House Committee Letter to Hayward, *supra* note 86, at 12-13; Ben Casselman & Russell Gold, *BP Decisions Set Stage for Disaster*, Wall St. J., May 27, 2010, *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704026204575266560930780190.html; David Hammer, *Safety Fluid was Removed Before Oil Rig Exploded in Gulf*, The Times-Picayune, June 14, 2010, *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/safety_fluid_was_removed_befor.html. The lockdown sleeve is designed to restrain the top section of the well casing against any pressure surges, so that the well casing section cannot be pushed through the wellhead seal and cause a blowout. The risk of a pressure surge is particularly great during the process of replacing the drilling mud in the riser pipe with sea water, since the weight of the mud acts as a barrier holding down any oil and gas that is trying to escape up the well. Thus, the lockdown sleeve helps protect against a blowout until the cement plug is implanted. As it turns out, BP was never able to implant the cement plug, because the Deepwater Horizon blowout occurred soon after it had replaced the drilling mud in the riser pipe. Had the lockdown sleeve been in place at the time, it may have helped to avert the catastrophe.

[94] Ben Casselman & Russell Gold, *BP Decisions Set Stage for Disaster*, Wall St. J., May 27, 2010, *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704026204575266560930780190.html; David Hammer, *Safety Fluid was Removed Before Oil Rig Exploded in Gulf*, The Times-Picayune, June 14, 2010, *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/safety_fluid_was_removed_befor.html; Josh Harkinson, *Did BP's Rig Pass A Key Safety Test—Or Not?*, Mother Jones, June 15, 2010, *available at* http://motherjones.com/environment/2010/06/bp-deepwater-negative-pressure-test.

[95] While investigating the incident, the Occupational Safety and Health Administration (OSHA) found over 300 safety violations, and fined BP $21 million. Sarah Lyall, *In BP's Record, a History of Boldness and Costly Blunders*, N.Y. Times, July 12, 2010, *available at* http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?_r=1. In 2009, OSHA subsequently fined BP an additional $87 million—still, the largest fine in the agency's history—for failing to correct safety hazards revealed in the investigation of the 2005 refinery explosion; BP is currently challenging a large part of the fine. Steven Greenhouse, *BP to Challenge Fine for Refinery Blast*, N.Y. Times, Oct. 30, 2009, *available at* http://www.nytimes.com/2009/10/31/business/31labor.html; *BP Agrees to Pay Record $50.6m Fine for Texas Explosion*, BBC News, Aug. 12, 2010, *available at* http://www.bbc.co.uk/news/business-10960486.

[96] BP was later found guilty of a misdemeanor violation of the Clean Water Act and paid $20 million in fines. Sarah Lyall, *In BP's Record, a History of Boldness and Costly Blunders*, N.Y. Times, July 12, 2010, *available at* http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?_r=1. A congressional investigation of the incident turned up internal BP documents revealing that the company had made a number of conscious decisions to cut corners on pipeline inspection and maintenance in order to save money. The then head of the U.S. Chemical Safety and Hazard Investigation Board, an independent federal agency charged with investigating industrial accidents, testified before the House Committee on Energy and Commerce that the 2006 oil spill, like the 2005 refinery explosion, was the direct result of BP's cost-cutting on safety and environmental protection measures. Statement of Carolyn W. Merritt, Chairman and Chief Exec. Officer, U.S. Chem. Safety Bd., *Hearing on the 2006 Prudhoe Bay Shutdown: Will Recent Regulatory Changes and BP Management Reforms Prevent Future Failures?, Before the Subcomm. on Investigations and Oversight of the H. Comm. on Energy and Commerce* 1 (May 16, 2007), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-oi-hrg.051607.Merritt-Testimony.pdf.

[97] *See, e.g.*, William Buzbee, et al., "Fifty FDAs": An Argument for Federal Preemption of State Tort Law that Is Less than Meets the Eye (CPR White Paper 911, Oct. 2009) *available at* http://www.progressivereform.org/articles/50FDAs911.pdf; Thomas McGarity, et al., The Truth About Torts: Regulatory Preemption at the Federal Railroad Administration (CPR White Paper 910, Oct. 2009), *available at* http://www.progressivereform.org/articles/RailroadPreemption910.pdf; William Buzbee, et al., The Truth About Torts: Rethinking Regulatory Preemption (CPR White Paper 902, Mar. 2009), *available at* http://www.progressivereform.org/articles/RethinkingPreemption902.pdf.

[98] U.S. Coast Guard, Dept. of Homeland Security, Polluting Incidents in and Around U.S. Waters: A Spill/Release Compendium: 1969 – 2008, 8 (2010) , *available at* http://homeport.uscg.mil/mycg/portal/ep/contentView.do?contentTypeId=2&channelId=-18374&contentId=120051&programId=91343&programPage=%2Fep%2Fprogram%2Feditorial.jsp&pageTypeId=13489&BV_SessionID=@@@@0794307840.1287800865@@@@&BV_EngineID=ccccadelkiegjlmcfjgcfgfdffhdghm.0 (Follow "View Document" hyperlink; select "save as"; download zipped file). *See also* William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537, 591 (2004) ("According to the U.S. Coast Guard, the number of oil spills has steadily decreased since 1972. . . . The magnitude of this improvement [in recent years] strongly suggests that . . . the new Oil Pollution Act [has] had a real positive impact upon the industry.").

[99] David A. Fahrenthold & David S. Hilzenrath, *Shallow-Water Platform Fire Raises Wider Questions on Oil Safety*, Wash. Post, Sept. 3, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090205382.html?nav=emailpage.

[100] BP Exploration & Production, Initial Exploration Plan, Mississippi Canyon Block 252 (2009), *available at* http://www.gomr.mms.gov/PI/PDFImages/PLANS/29/29977.pdf.

[101] *See* David Segal, *Should BP's Money Go Where the Oil Didn't?*, N.Y. Times, Oct. 23, 2010, *available at* http://www.nytimes.com/2010/10/24/business/24claim.html?_r=1 (discussing the challenges of applying tort law to the various kinds of claims being brought against BP in the wake of the oil spill).

[102] For a more detailed discussion regarding potential legislative and administrative reforms that will help to reinvigorate the regulatory system so that it is better able to prevent future industrial catastrophes, see Flournoy, et al., Regulatory Blowout, *supra* note 8, at 12-27.

[103] *See* Dionne Searcy, *Bumpy Start to BP Fund Puzzles Gulf*, Wall St. J., Oct. 20, 2010, *available at* http://online.wsj.com/article/SB10001424052748703673604575549970587948384.html.

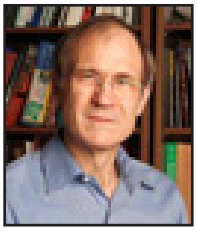
[104] David Segal, *Should BP's Money Go Where the Oil Didn't?*, N.Y. Times, Oct. 23, 2010, *available at* http://www.nytimes. com/2010/10/24/business/24claim.html?_r=1&pagewanted=1.

About the Authors

Alyson C. Flournoy is Professor of Law and Alumni Research Scholar at the University of Florida Levin College of Law where she directs the Environmental and Land Use Law Program. Professor Flournoy's scholarship focuses on environmental ethics, decision-making processes under environmental and natural resource laws, and the intersection of science and law.

Sidney A. Shapiro holds the University Distinguished Chair in Law at the Wake Forest University School of Law and is the Associate Dean for Research and Development. He is a member of the Board of Directors of the Center for Progressive Reform. Professor Shapiro has taught and written in the areas of administrative law, regulatory law and policy, environmental policy, and occupational safety and health law for 25 years. Professor Shapiro has been an active participant in efforts to improve health, safety, and environmental quality in the United States. He has testified before congressional committees on administrative law and occupational safety and health issues.

William L. Andreen is the Edgar L. Clarkson Professor of Law at the University of Alabama School of Law. Professor Andreen has taught courses in Administrative Law, Environmental Law, Torts, International Environmental Law, and Public International Law. He has published numerous chapters and articles on water pollution control, environmental law in the developing world, water law, environmental impact assessment, hazardous waste liability, and environmental enforcement.



Thomas O. McGarity holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas in Austin. He is a member of the Board of Directors of the Center for Progressive Reform, and the immediate past president of the organization. Professor McGarity has published widely in the areas of regulatory law and policy. His recent scholarship on issues of regulatory preemption includes numerous law review articles and his recent book, *The Preemption War*, published by Yale University Press.

James A. Goodwin works with CPR's "Clean Science" and "Government Accountability" issue groups. Mr. Goodwin joined CPR in May of 2008. Prior to joining CPR, Mr. Goodwin worked as a legal intern for the Environmental Law Institute and EcoLogix Group, Inc. He is a published author with articles on human rights and environmental law and policy appearing in the *Michigan Journal of Public Affairs* and the *New England Law Review*.

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- **Corrective Lenses for IRIS: Reforms to Improve EPA's Integrated Risk Information System** (CPR White Paper 1009, October 2010), by CPR Member Scholars Rena Steinzor and Wendy Wagner, CPR Senior Policy Analyst Matthew Shudtz, and CPR Policy Analyst Lena Pons.

- **Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence** (CPR White Paper 1007, October 2010), by CPR Member Scholars Alyson Flournoy, William Andreen, Rebecca Bratspies, Holly Doremus, Victor Flatt, Robert Glicksman, Joel Mintz, Daniel Rohlf, Amy Sinden, Rena Steinzor, Joseph Tomain, and Sandra Zellmer, and CPR Policy Analyst James Goodwin.

- **From Ship to Shore: Reforming the National Contingency Plan to Improve Protections for Oil Spill Cleanup Workers** (CPR White Paper 1006, September 2010), by CPR Member Scholars Rebecca Bratspies, Alyson Flournoy, Thomas McGarity, Sidney Shapiro, and Rena Steinzor, and CPR Policy Analyst Matthew Shudtz.

- **Plausibility Pleading: Barring the Courthouse Door to Deserving Claimants** (CPR White Paper 1005, May 2010), by CPR Member Scholars William Funk, Thomas McGarity, and Sidney Shapiro, and CPR Policy Analyst James Goodwin.

- **Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short** (CPR White Paper 1004, April 2010), by CPR Member Scholar Robert Glicksman and CPR Policy Analyst Yee Huang.

- **Workers at Risk: Regulatory Dysfunction at OSHA** (CPR White Paper 1003, February 2010), by CPR Member Scholars Thomas McGarity, Rena Steinzor, and Sidney Shapiro, and CPR Policy Analyst Matthew Shudtz.

- **The Future of Environmental Protection: The Case for a National Environmental Legacy Act** (CPR White Paper 1002, January 2010) by CPR Member Scholar Alyson Flournoy, former CPR Policy Analyst Margaret Clune Giblin, and Ryan Feinberg, Heather Halter and Christina Storz.

- **Obama's Regulators: A First-Year Report Card** (CPR White Paper 1001, January 2010), by CPR Member Scholars Rena Steinzor and Amy Sinden, CPR Executive Director Shana Jones, and CPR Policy Analyst James Goodwin.

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