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LIMITED SOLUTION TO A DANGEROUS PROBLEM: THE FUTURE OF THE OIL POLLUTION ACT

*Garry A. Gabison*¹

I. INTRODUCTION

Catastrophic incidents have the potential to provoke government action. In the words of former Chief of Staff for President Barack Obama, Rahm Emmanuel, “[y]ou never want a serious crisis to go to waste.”² In the case of two major past environmental disasters, Congress did not let the opportunity for new environmental legislation to pass unrealized. In 1980, following the 1979 *Love Canal* incident,³ the United States Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴ Similarly, Congress passed the Oil Pollution Act⁵ of 1990⁶ (OPA) following the 1989 *Exxon Valdez* environmental disaster.⁷

1. Ph.D. in Economics at Yale University and J.D. at the University of Virginia School of Law. I would like to thank Prof. Richard Brooks for inspiring this Comment during our conversations about his own paper. I would also like to thank Prof. George Cohen for our conversations about the implication of lender liability. All mistakes are my own.

2. Gerald Seib, *In Crisis, Opportunity For Obama*, WALL ST. J., November 21, 2008, <http://online.wsj.com/article/SB122721278056345271.html>.

3. Starting in the 1920’s, the Hooker Chemical Company dumped pollutants into the Love Canal. In 1953, the Company sold the dumpsite to the local municipality and the municipality built houses on the site. Local inhabitants of the site started exhibiting medical problems and, in response, drastic measures were taken. Not only did the State of New York purchase the property and evacuate the residents, but President Carter declared a state of emergency and, eventually, Congress passed CERCLA. See Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 17-18 (1979), available at <http://www.epa.gov/aboutepa/history/topics/lovecanal/01.html>.

4. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

5. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of titles 16, 26, 33, 43 and 46 U.S.C.) [hereinafter OPA].

In 2010, British Petroleum's *Deepwater Horizon* exploded and released 4.9 million barrels of oil into the Gulf of Mexico.⁸ This event was one of the most catastrophic environmental events in U.S. history and yet, Congress has failed to pass sweeping environmental reform.⁹ Not only have the enormous environmental and economic impacts caused by the release put the OPA to the test, but the OPA has proven insufficient. Although Congress designed the OPA with tanker spills in mind, this Comment finds that, even for tanker spills, the OPA is flawed. Further, this Comment will suggest ways to improve the OPA and argues that Congress should act by increasing financial and criminal liability in order to prevent future spills.

Part II of this Comment provides a brief history of water pollution in the United States and continues to discuss the *Exxon Valdez* disaster, the OPA,¹⁰ and the *Deepwater Horizon* disaster. Part III argues that the OPA is inefficient because it only sufficiently focuses on medium sized tanker spills, leaving large spills at the mercy of the benevolence of the polluter while doing little to deter minor spills. Part IV discusses different ways to address the OPA's inefficiencies and Part V concludes that Congress can reduce the occurrence of environmental disasters by extending liability to lenders, shareholders, and employees through the use of criminal liability.

6. In the United States, "[t]he Oil Pollution Act (OPA) of 1990 streamlined and strengthened the [Environmental Protection Agency]'s ability to prevent and respond to catastrophic oil spills . . . The Office of Emergency Management (OEM) works with other federal partners to prevent accidents as well as to maintain superior response capabilities." EPA, SUMMARY OF THE OIL POLLUTION ACT, <http://www.epa.gov/lawsregs/laws/opa.html> (last visited Sept. 22, 2011).

7. The oil tanker *Exxon Valdez* sunk and discharged approximately 11 million gallons of oil into the Prince William Sound. NORA CHIDLOW, U.S. COAST GUARD, THE COAST GUARD'S ROLE IN THE EXXON VALDEZ INCIDENT, *available at* <http://www.uscg.mil/history/articles/EV.pdf>.

8. NAT'L INCIDENT COMMAND, INTERAGENCY SOLUTIONS GRP., FLOW RATE TECHNICAL GRP, ASSESSMENT OF FLOW RATE ESTIMATES FOR THE DEEPWATER HORIZON/MACONDO WELL OIL SPILL (2011).

9. See Justin Gillis, *Where Gulf Spill Might Place on the Roll of Great Disasters*, N.Y. TIMES, June 19, 2010, at A1.

10. Three elements of the OPA that are discussed include: (1) the outlawing of single-hull tankers; (2) increased tort liability and the creation of a private right of action to deal with medium to small spills; and (3) the creation of a fund for victims.

II. HISTORY: *EXXON VALDEZ*, THE OIL POLLUTION ACT, AND *DEEPWATER HORIZON*

Water pollution, as a basis for a cause of action, was first litigated in U.S. courts in 1828.¹¹ Litigation efforts based on water pollution tended to utilize private¹² or public nuisance.¹³ The use of nuisance, although somewhat successful, was often inadequate to deal with pollution problems and was a “meager response to the crowdedness of society.”¹⁴

To remedy this inadequacy, Congress passed the Federal Water Pollution Control Act in 1948.¹⁵ However, Congress limited the remedies available to water pollution victims as “[u]nder the [Federal Water Pollution Control Act of 1948], private parties could not recover damages or cleanup costs caused by an oil spill from a vessel” and “the private plaintiff had to establish culpable negligence.”¹⁶ Congress amended this act numerous times and in 1978 passed a sweeping amendment to the Act called the Clean Water Act (CWA).¹⁷ Although the CWA removed some liability limits, states were charged with bringing legal action, a form of enforcement that did not “establish effective preventive and immediate response mechanisms.”¹⁸ Further substantive Congressional action did not happen until a catastrophic environmental disaster occurred.

11. *See, e.g.*, *Tate v. Parrish*, 23 Ky. 325 (7 T.B.Mon. 325)(1828) (questioning whether the defendant was liable for polluting a spring by placing a dead hog in it).

12. *See id.* *See also* *Howell v. McCoy*, 3 Rawle 256 (Pa. 1832) (holding that a tenant along a river bed could not “empty the contents of his tan-yard into the stream” as it was a private nuisance that violated private property rights).

13. *But see* *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 149 (D. Vt. 1972) (“[r]evitaliz[ing] ‘poor old nuisance’ as a legal theory useful in the resolution of pollution conflicts involving interstate or navigable waters”).

14. *Id.* at 149 n. 6.

15. Federal Water Pollution Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1387).

16. Browne Lewis, *It’s Been 4380 Days and Counting Since Exxon Valdez: Is It Time to Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 103 (2001).

17. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C.A. §§ 1251-1387. *See also* EPA, HISTORY OF THE CLEAN WATER Act, <http://www.epa.gov/lawsregs/laws/cwahistory.html> (last visited Aug. 27, 2011).

18. Lewis, *supra* note 16, at 104.

A. The Exxon Valdez Disaster

“Shortly after midnight on March 24, 1989, the 987-foot tank[er] vessel *Exxon Valdez* struck Bligh Reef in Prince William Sound, Alaska. What followed was the largest oil spill in U.S. history.”¹⁹ The Coast Guard immediately closed the Port of Valdez to all traffic.²⁰ In total, nearly eleven million gallons of oil, out of the fifty-three million gallons of oil on board, spilled into the Sound.²¹

The *Exxon Valdez* disaster cost Exxon over \$3.4 billion dollars, including \$2.1 billion for cleanup efforts, \$125 million in fines and restitution for pleading guilty to violations of the Clean Water Act and other statutes,²² at least \$900 million to settle a civil action with the United States and Alaska, and another \$303 million in voluntary payments to private parties.²³ Despite Exxon’s efforts and expense, the spill caused irreversible damage still present over twenty years after the accident.²⁴

B. The Oil Pollution Act

In the aftermath of the *Exxon Valdez* disaster, the U.S. Congress passed the Oil Pollution Act (OPA).²⁵ The OPA capped liability²⁶ for responsible parties with respect to removal costs and damages for oil spills that are not the result of gross negligence.²⁷ On top of these federal

19. SAMUEL K. SKINNER & WILLIAM K. REILLY, NAT’L RESPONSE TEAM THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT (1989), available at http://docs.lib.noaa.gov/noaa_documents/NOAA_related_docs/oil_spills/ExxonValdez_NRT_1989_report_to_president.pdf.

20. NORA CHIDLOW, U.S. COAST GUARD, THE COAST GUARD’S ROLE IN THE EXXON VALDEZ INCIDENT, available at <http://www.uscg.mil/history/articles/EV.pdf>.

21. *Id.*

22. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 479 (2008).

23. *Id.*

24. “[A]fter the passage of twenty-one years, spilled oil remains just beneath the surface of the rocky shoreline of Prince William Sound and the region’s famed herring runs have still not returned to their pre-spill levels. According to a recent report on the aftermath of that oil spill, despite the appearance of Prince William Sound today, ‘the area has not fully recovered.’” Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the Second Decade*, 36 TUL. MAR. L.J. 1, 4 (2011).

25. See OPA, *supra* note 5.

26. 33 U.S.C. §§ 2703-2704 (2006).

27. 33 U.S.C. § 2701 (2006). See also *United States v. Locke*, 529 U.S. 89, 101-102 (2000). See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-795T, COST OF MAJOR

caps, Congress left room for individual states to add further liability.²⁸ Following Congress's suggestions, most (though not all) coastal states passed legislation creating unlimited liability for vessel operators, vessel owners, and lenders.²⁹ Beyond the cap, the OPA limits liability in three situations: the wrongdoers are not liable if the spill was due to an "act of God," an "act of war," or "an act or omission of a third party."³⁰ Finally, the OPA fixed one problem with the Clean Water Act by creating a private right of action.³¹

Congress also provided the Coast Guard with some means to deal with future spills. The OPA gave authority to the Coast Guard and the EPA to use the Oil Spill Liability Trust Fund (the Fund) to establish a first response³² and gave the Coast Guard responsibility to investigate and determine the identity of the responsible parties.³³

The OPA also authorized the direct regulation of tankers and established incremental dates to phase in a requirement that all covered tanker vessels have a double hull.³⁴ The next section discusses the *Deepwater Horizon* disaster, which also falls under the OPA.

SPILLS MAY IMPACT VIABILITY OF OIL SPILL LIABILITY TRUST FUND, 8 tbl. 1 (2010), <http://www.gao.gov/cgi-bin/getrpt?> [hereinafter USGAO-1] (providing detail on the damage caps).

28. 33 U.S.C. § 2706(c)(2) (2006) (allowing "[s]tate and local officials...[to] assess natural resource damages...for the natural resources under their trusteeship."). See also Michael A. de Gennaro, *Oil Pollution Liability and Control, Under International Maritime Law: Market Incentives as an Alternative to Government Regulation*, 37 VAND. J. TRANSNAT'L L. 265, 272-73 (2004) ("Congress did not cap liability, deciding instead to permit states to impose liability in addition to the federal liability, though many states have failed to impose additional liability on oil transporters.").

29. Richard R. W. Brooks, *Liability and Organizational Choice*, 45 J. L. & ECON. 91, 101 tbl. 1 (2002) (showing how different coastal states have reacted. For example, Virginia and Texas kept a limited cap on liability whereas Washington and Oregon removed the cap on liability).

30. 33 U.S.C. § 2703(a) (2004). Other environmental statutes, like CERCLA, have an identical provision. See 42 U.S.C. § 9607(b) (2002). These statutes imply that a transporter must have some fault in an accident to be held liable for environmental damages. However, other inherently dangerous activities have not shielded some principals from liability, as discussed below.

31. "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law." 33 U.S.C. § 2709 (2006).

32. USCG, *The Oil Spill Liability Trust Fund (OSLTF)*, http://www.uscg.mil/npfc/About_NPFC/osltf.asp (last visited Sept. 10, 2011).

33. See OPA, *supra* note 5.

34. *United States v. Locke*, 529 U.S. 89, 102 (2000). See also 46 U.S.C. § 3703a (2006).

C. Deepwater Horizon Disaster

On April 20, 2010, an explosion occurred on the oil rig *Deepwater Horizon* that caused oil to spew into the Gulf of Mexico.³⁵ Of the 126 crew members, 11 men were killed, and at least 17 others were physically injured.³⁶ The Coast Guard, Transocean (the owner of the Rig), and British Petroleum coordinated and attempted to close the well but, despite their efforts, it took three months to stop the leak.³⁷ At its conclusion, a staggering 4.9 million barrels of oil spilled into the ocean, making it the largest oil spill in United States history.³⁸

In the aftermath of the spill, the Coast Guard designated the *Deepwater Horizon* as a “mobile offshore drilling unit,” which placed the vessel under the umbrella of the OPA.³⁹ Under the OPA, the Coast Guard designated British Petroleum⁴⁰ and Transocean⁴¹ as responsible parties, a designation that both accepted.⁴² Although Transocean, a leading offshore drilling contractor, owned and operated the *Deepwater Horizon*,⁴³ British Petroleum (BP), one of the world’s largest energy companies, leased *Deepwater Horizon* and was the principal operator of the Macondo oil field. As a consequence, they were ultimately responsible for the spill by contract.⁴⁴

35. H.R. REP NO. 111-521, at 5 (2010).

36. *Id.*

37. USCG, ON THE SCENE COORDINATION REPORT DEEPWATER HORIZON OIL SPILL, APP. (Sept. 2011), http://www.uscg.mil/foia/docs/DWH/FOSC_DWH_Report.pdf.

38. CAMPBELL ROBERTSON, *U.S. Puts Oil Spill Total at Nearly 5 Million Barrels*, N.Y. TIMES (Aug. 2, 2010), <http://www.nytimes.com/2010/08/03/us/03flow.html>.

39. Under U.S. law, a mobile offshore drilling unit is “a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility.” 33 U.S.C.A. § 2701(18) (2010).

40. Letter from U.S. Dep’t of Homeland Sec. and U.S. Coast Guard to BP Exploration & Prod. Inc. (Apr. 28, 2010), <http://www.uscg.mil/foia/docs/DWH/2886.pdf>.

41. Letter from U.S. Dep’t of Homeland Sec. and U.S. Coast Guard to Transocean Holdings Inc. (Apr. 28, 2010), <http://www.uscg.mil/foia/docs/DWH/2886.pdf>.

42. Although Transocean accepted responsible party designation for any above-water discharge of oil, Transocean denied designation as a responsible party “for any underwater discharges of oil from the well head...” Letter from the Law Firm of Nicoletti Hornig & Sweeny to U.S. Coast Guard (May 3, 2010), available at <http://www.uscg.mil/foia/docs/DWH/2094.pdf>. See also *Liability Issues Surrounding the Gulf Coast Oil Disaster: Testimony Before The Comm. on the Judiciary, U.S. House of Representatives*, (May 27, 2010) (statement of Rachel Giesber Clingman, Acting as Co-General Counsel, Transocean [in re Horizon Incident]) <http://judiciary.house.gov/hearings/pdf/Clingman100527.pdf>.

43. H.R. REP NO. 111-521, at 5 (2010).

44. *Id.*

Immediately after the incident, BP put \$20 billion dollars in escrow to help compensate for damages caused by the oil spill.⁴⁵ However, this was only the beginning. In March 2012, BP agreed to a settlement⁴⁶ and to date, BP has spent approximately \$14 billion in cleanup, \$8 billion in payments to individuals and businesses, and \$7.8 billion in settlements.⁴⁷ BP did attempt to recoup some of its losses from Transocean, but failed⁴⁸ when the Eastern District Court of Louisiana found that the contract required BP “to indemnify Transocean for compensatory damages asserted by third parties against Transocean related to pollution that did not originate on or above the surface of the water.”⁴⁹

Despite the ability to blame several companies for the spill,⁵⁰ the OPA does not hold every person involved equally liable. It is for this reason that the *Deepwater Horizon* incident calls into question the functioning and the existence of the OPA.

III. THE LIMITATIONS OF THE OPA

The single hull tanker prohibition is a command-and-control regulation. Command-and-control regulations specify a precise standard of care that market participants must follow in order to take part in the market.⁵¹ On the other hand, market-based regulations, like the liability

45. Editorial, *Settlement for the Gulf*, N.Y. TIMES, Mar. 7, 2012, available at <http://www.nytimes.com/2012/03/08/opinion/settlement-for-the-gulf.html>.

46. John Schwartz, *BP Settlement, Milestone for Some Victims, a Setback for Others*, N.Y. TIMES, Mar. 19, 2012, available at <http://www.nytimes.com/2012/03/20/us/bp-settlement-leaves-some-spill-victims-unhappy.html>.

47. John Schwartz, *Papers Detail BP Settlement in Gulf Oil Spill*, N.Y. TIMES, Apr. 18, 2012, available at <http://www.nytimes.com/2012/04/19/us/papers-detail-bp-settlement-in-gulf-of-mexico-oil-spill.html>.

48. John M. Broder, *Ruling Favors Owner of Rig in Gulf Spill*, N.Y. TIMES, Jan. 26, 2012, available at <http://www.nytimes.com/2012/01/27/business/energy-environment/transocean-not-liable-for-some-gulf-spill-claims-judge-rules.html>.

49. *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*. MDL No. 2179 at *29 (E.D. La. Jan. 26, 2012), [http://www.laed.uscourts.gov/OilSpill/Orders/012612Order\(TransoceanIndemnity\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/012612Order(TransoceanIndemnity).pdf).

50. BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT, REPORT REGARDING THE CAUSE OF THE APRIL 20, 2010 MACONDO WELL BLOWOUT, 173-89 (Sept. 14 2011), http://docs.lib.noaa.gov/noaa_documents/DWH_IR/reports/dwhfinal.pdf (placing some blame on Halliburton, who conducted the cement job, Sperry Sun, who was monitoring the well, and Cameron, who designed the blowout preventer stack) [hereinafter BOEMRE report].

51. See generally Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, (1960). Coase argues for caution when setting these standards. “What has to be decided is whether the gain from preventing the harm is greater than the loss which would be

and victims fund aspects of the OPA, let market participants pick their level of care. Nonetheless, participants must pay taxes⁵² and purchase transferable emission permits in order to take part in the market.⁵³ Whereas command-and-control regulations tend to be rigid and often not adaptable, market-based regulations are more adaptable if properly calibrated.

suffered elsewhere as a result of stopping the action which produces harm.” *Id.* at 14. Additionally, Coase argues that the forbearance of all activities with negative externalities may decrease overall social welfare because stopping polluters from polluting also stops production. He advocates that well-defined property rights, whether liability or property rules, are essential to reach the optimal outcome. This article famously led to the Coase theorem: “[i]t is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them.” *Id.* at 7.

52. *See generally* ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE*, (1920). As early as 1920, Pigou built on Alfred Marshall’s concept of externalities, which recognizes that valuation of the same good may vary from the private producer to the public. *See* 1 ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS*, (9th ed. 1961). Pigou recommends a “tax . . . , [the levy of which] would make the values of the marginal trade net product of resources . . . more nearly similar to the value of the marginal trade net product of resources in general.” *Id.* at 193.

53. *See* J.H. Dales, *Land, Water, and Ownership*, 1 *THE CANADIAN J. OF ECON.* 791, 801 (1968) (advocating a “market-based” solution to the problem of pollution and depletion using transferrable permits. Dales suggests assigning pollution rights and selling those rights to market participants.). This work inspired a number of regulations such as the Clean Air Act, which created a market for permits to emit sulfur dioxide. Clean Air Act, 42 U.S.C. §§ 7651-76511 (1990). Under the Clean Air Act, a polluter must hold as many valid permits in his emission bank, supervised by the Environmental Protection Agency (EPA), as emissions he has emitted over the year. *Id.* at § 7651(g). These permits constitute what is akin to a *de jure* right to pollute. The idea of allowance permits has often been attributed to Dales, even though Dales focused his research on water rights. *See* Robert W. McGee & Walter E. Block, *Pollution Trading Permits as a Form of Market Socialism and the Search for a Real Market Solution to Environmental Pollution*, 6 *FORDHAM ENVTL. L. REV.* 51, 51 (2011). Two years before Dale, however, Thomas D. Crocker published similar research on air rights. Thomas D. Crocker, *The Structuring of Atmospheric Pollution Control Systems*, in *THE ECONOMICS OF AIR POLLUTION*. (Harold Wolozin ed. 1966). *See also* W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 *J. OF ECON. THEORY* 395 (1972) (attempting to provide a deeper analysis of the use of an allowance market to deal with pollution problems).

A. Single Hull Tanker Prohibition

1. Single-Hull Prohibition Focuses on Major Spills

Command-and-control regulations require careful crafting. Before drafting the OPA to prohibit the use of single-hull tankers,⁵⁴ Congress identified single-hull tankers as the most likely source of risk because a single hull increases the chance of hull failure and these hulls are often associated with large spills.⁵⁵

The attempt by Congress to eliminate major spills from single-hull tankers appears to be the most efficient course of action in that major incidents constitute the main source of pollution by quantity spilled.⁵⁶ Although this attempt perceived as efficient, large incidents are rare and were decreasing in number even before the passing of the OPA.⁵⁷ Moreover, hull failures were involved in only 7% of oil spills.⁵⁸ Thus, the Congressional focus on single-hull vessels may not have led to as efficient regulation as first perceived.

2. From Single-Hull Tankers to Aging Tankers

Unfortunately, the single-hull ban created in the OPA was not enforced until December 31, 2010, and the phasing-out⁵⁹ provisions of the OPA allow for some retrofitted ships to stay in service until January 1, 2015.⁶⁰ As a result of this slow, single-hull phase-out and the grandfathering provisions, the OPA might have actually increased the chance of pollution from a single-hull tanker as the OPA requires all new tankers to have a double hull.⁶¹ Thus, the OPA actually incentivizes

54. OPA, *supra* note 5, at §4115.

55. USGAO-1, *supra* note 27, at 19 n. 41 (“Of the 51 major oil spills, all 24 major spills from tank vessels (tankers and tank barges) involved single-hull vessels.”). Notable spills involving single hull tankers include the *Valdez* (1989), *Erika* (1999), and *Prestige* (2002) incidents. *Id.*

56. Major spills were responsible for 42% of all oil spilled in the 1970’s and 73% of oil spilled in the 1990’s. The Int’l Tanker Owners Pollution Fed’n Ltd., *Information Services, Statistics*, Fig. 7, <http://www.itopf.com/information-services/data-and-statistics/statistics/> (last visited Sept. 6, 2011) [hereinafter ITOPF].

57. Dropping from 55% of all incidents recorded during the 1970’s to only 7% during the 2000’s. *Id.* at Fig. 2.

58. *Id.* at Fig. 13.

59. 46 U.S.C. § 3703(a) (2012).

60. *Id.*

61. 46 U.S.C. 3703(a) (2012). This grandfatherization problem is well documented. *See, e.g.*, Randy A. Nelson, Tom Tietenberg & Michael R. Donihue, *Differential*

companies to keep single-hull tankers in use longer than they would have without the OPA.⁶² Older vessels also pose a greater risk to the environment as there is “a proven tendency for the incidence of serious casualties to increase as vessel age rises.”⁶³

Additionally, the Congressional focus on the type of hull instead of the age of the tanker may have been counterproductive. The phasing-out was too slow and too lenient. This phasing-out allowed oil tankers up to forty years old to remain in use.⁶⁴ In comparison, the European Community (EC) phased in their prohibition of single-hull tankers within only six years, from 2001 to 2007.⁶⁵

Furthermore, the OPA is focused on the transport of oil and hazardous products, but does not discuss storage facilities.⁶⁶ Tanker

Environmental Regulations: Effects on Electricity Utility Capital Turnover and Emissions, 75 REV. ECON. & STAT. 368, 368 (1993). For instance, in 1970, Congress passed the National Ambient Air Quality Standards and the New Source Performance Standards. *Id.* at 369. These two pieces of legislation capped the emissions of newly constructed plants, while they grandfathered older plants. *Id.* Randy A. Nelson, Tom Tietenberg and Michael R. Donihue estimated the effect of the first amendments of the Clean Air Act Amendment on the lifespan of plants and found that these early regulations increased the lifespan by 3.29 years on average. *Id.* at 373. However, they estimate that without regulation, emissions would have been 34.6% higher. *Id.*

62. Guillaume Gourdet & Paulo Biasotto, *Converting Single Hull F(P)SO Challenges Regarding Inspection, Repair and Maintenance*, VERISTAR, [http://www.veristar.com/content/static/veristarinfo/images/2966.1.Converted%20single%20hull%20F\(P\)SO%20challenges%20regarding%20inspection,%20repair%20and%20maintenance.pdf](http://www.veristar.com/content/static/veristarinfo/images/2966.1.Converted%20single%20hull%20F(P)SO%20challenges%20regarding%20inspection,%20repair%20and%20maintenance.pdf) (last visited Feb. 15, 2013) [hereinafter Gourdet]. If a tanker travels through multiple states/countries with different minimum criteria for their tankers, the contractor or oil transporter will use a tanker that fulfills the most stringent regulation. *Id.*

63. Org. for Econ. Co-operation and Dev. THE COST TO USERS OF SUBSTANDARD SHIPPING 8 (2001), <http://www.oecd.org/dataoecd/27/18/1827388.pdf> [hereinafter OECD]. The relative risk of a spill increases for ships over the age of fifteen. *See id.* at app. 4.

64. Comm'n from the Comm'n to the European Parliament and the Council on the Safety of the Seaborne Oil Trade, 25 (Mar. 21, 2000), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0142:FIN:EN:PDF>. The International Convention for the Prevention of Pollution from Ships was quicker to phase out single hull tankers in comparison to the OPA. *Id.*

65. *See* Eur. Parl. Reg. 417/2002 (on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and the repeal of Council Regulation (EC) No 2978/94). However, the EC may have benefited from the U.S. phase-out because they knew that any transporter willing to trade with the United States would have had to phase-out by 2010 regardless. Thus, the regulation did not seem as harsh to transporters and may not have encountered as much resistance.

66. “[F]loating production, storage, and offloading vessels (FPSOs)...are large ships equipped with oil processing and storage capabilities.... However, FPSOs are largely treated in MARPOL as floating platforms.... Because FPSOs do not carry or deliver the

companies took advantage of this omission by converting single-hull tankers into storage facilities.⁶⁷ While these conversions may have soothed some of the discontent associated with the phase-out, concerns remain about the solidity of these storage facilities. Using single-hull tankers as storage facilities increases the number of container transfers and this has the potential to increase the chance of an oil spill, as most spills do not occur due to hull breaks or accidents but during loading and discharging.⁶⁸

3. Lessons to Be Learned

In the past, Congress has rushed to create environmental law in the wake of catastrophic environmental disasters.⁶⁹ As a result, Congress may not have properly addressed problems exposed by disaster. If Congress favors⁷⁰ command-and-control policies,⁷¹ Congress could look to policies other countries have implemented. For instance, the *Deepwater Horizon* blowout preventer “did not have a remote-control shut-off switch (‘acoustic switch’), a last-resort protection mechanism, [as] it is not required by U.S. regulators, but is mandatory in Brazil and

oil anywhere..., they do not fall under the definition of oil tanker.” Carlos J. Moreno, *Oil and Gas Exploration and Production in the Gulf of Guinea: Can the New Gulf Be Green?*, 31 HOUS. J. INT’L L. 419, 433 (2009).

67. Gourdet, *supra* note 62.

68. ITOPE, *supra* note 56, at table 4 (demonstrating that about a third of all accidents are due to loading and discharging of oil tankers and the large majority of oil spills are due to tanker operations rather than accidents).

69. *See supra* Part I.

70. Until 1990, Congress favored command-and-control regulations; however, these regulations were maladapted. For instance, one of the early projects of the Environmental Protection Agency (EPA), after its creation in 1970, was the phase-out of leaded gasoline. However, as the maximum lead content in gasoline became harder to meet, it “caus[ed] small refiners substantial difficulty in meeting the standards on time.” Richard G. Newell & Kristian Rogers, *The Market-Based Phasedown*, in *MOVING TO MARKETS IN ENVIRONMENTAL REGULATION* 171, 178 (Jody Freeman & Charles D. Kolstad eds., 2007). As a result, the EPA opted for the first large-scale, market-based federal solution to a pollution problem by using a permit system to deal with the lead problem. *See EPA Sets New Limits on Lead in Gasoline*, U.S. ENVTL. PROTECTION AGENCY (Mar. 4, 1985), <http://www.epa.gov/history/topics/lead/01.html> (last visited Feb. 21, 2013).

71. The same year Congress passed the OPA, it opted for a market-based solution to reduce sulfur dioxide emissions. Congress resorted to this market-based solution after multiple failed attempts in the Clean Air Act of 1963, and its amendments in 1970 and 1977, failed. *See History of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/air/caa/caa_history.html (last visited Feb. 21, 2013).

Norway, and is used by other major oil companies even where not mandatory.”⁷²

One way to react swiftly in the face of environmental disaster may be to give an administrative agency power to research a problem and implement a solution that would better serve the environment. The Bureau of Ocean Energy Management, Regulation, and Enforcement (Bureau) investigated the *Deepwater Horizon* disaster and identified a number of possible human,⁷³ mechanical,⁷⁴ and design errors that may have contributed to the explosion.⁷⁵

The Bureau’s report offered a number of suggestions to prevent future accidents⁷⁶ and called for several regulatory changes.⁷⁷ The report found that regulations were maladapted to both shallow and deeper water drilling⁷⁸ and suggested mechanical, structural, and design changes to drilling wells.⁷⁹ The report also suggested that the Bureau research the problems further to make safety suggestions⁸⁰ and stated that the Bureau should inspect wells more often and more thoroughly.⁸¹

A regulatory agency’s ability to react quickly to make pertinent regulatory changes after an environmental disaster with limited political consideration, makes it a potential valuable Congressional delegate for fixing problems with the OPA.

B. Increasing Financial Liability

1. Restitution for Victims

Under the OPA, Congress gave victims of oil spills an opportunity to obtain ex-post restitution to be made whole.⁸² Congress also increased

72. Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 55 (2011).

73. BOEMRE report, *supra* note 50, at 109-14.

74. *Id.* at 125-28.

75. *Id.* at 155-56.

76. The Bureau “found that [current] regulations in place at the time of the blowout could be enhanced in a number of areas, including: cementing procedures and testing; [blowout preventer] configuration and testing; well integrity testing; and other drilling operations. In addition, the Panel found that there were a number of ways in which the [current] drilling inspections program could be improved.” *Id.* at 7.

77. *Id.* at 207-09.

78. *See id.* at 172.

79. *Id.* at 202-03.

80. *Id.* at 204-07.

81. *Id.* at 207-09.

82. 33 U.S.C. § 2702 (2012).

liability in an attempt to give victims socially and privately efficient incentives to pursue a suit.⁸³ Litigation costs, however, may thwart this opportunity. On the one hand, victims of these large spills would likely overcome the transaction costs and liquidity constraints of a class action lawsuit because other members of society, such as law firms, will likely offer their services for a contingent fee. However, polluters will likely deal with large spills, regardless of liability, in an effort to maintain good will. For example, in the *Deepwater Horizon* incident, BP established a twenty billion dollar fund in June 2010 before any lawsuit was filed to deal with potentially arising claims.⁸⁴ One explanation for this action is that BP was attempting to regain the good will it lost as a result of the catastrophic spill.⁸⁵

On the other hand, victims may find it hard to deal with small to medium size spills as the expected tort restitution does not suffice to overcome transaction costs or liquidity constraints of victims.⁸⁶ Enforcement of the OPA likely suffers from this issue in that the Coast Guard or the Bureau will not pursue all cases due to budget constraints.⁸⁷

2. Pollution Deterrence

Congressional attempts to deter spills may backfire as large liability incentivizes financially responsible corporations to cease operations, outsource oil transportation, and hide behind the corporate veil. The transport of oil may be left to small, judgment-proof operators, with rusty

83. *Id.*

84. *BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions*, BP (June 16, 2010), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>.

85. See Jackie Calmes & Helene Cooper, *BP Chief to Express Contrition in Remarks to Panel*, N.Y. TIMES (June 16, 2010), <http://www.nytimes.com/2010/06/17/us/politics/17obama.html>.

86. See Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 142-43 (2004) (arguing that large transaction costs and large class action costs associated with environmental protection may create gaps that, if too large, cannot be filled by court-supported litigation and may require the intervention of a regulatory body).

87. The liquidity constraint issue is widespread. For instance, when enforcing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2006), the “EPA places a higher priority on cases in which it hopes to recover more than \$200,000” because of budget constraint, and hardly prosecutes or attempts to recover from smaller incidents. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09656, SUPERFUND LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS 32, available at <http://www.gao.gov/new.items/d09656.pdf>.

ships and limited resources, to prevent spills or to clean them up.⁸⁸ This problem materialized very quickly after the *Valdez* incident: Exxon created a wholly owned subsidiary SeaRiver Maritime, Inc., to which it transferred the *Valdez* and subsequently renamed it to avoid any prejudice associated with the name.⁸⁹

However, unlike Exxon, other major oil companies have not systematically divested their fleet. In fact, many of these companies have moved in the opposite direction and are now transporting more of their own crude oil in U.S. waters (both as a percentage and in absolute terms), than they did before the heightened liability imposed in the wake of the *Exxon Valdez* accident.⁹⁰ This lack of divestiture could cause these large financially responsible corporations to lose some goodwill when accidents occur as their name often remains associated with the shipwreck.⁹¹ The corporations may also be found vicariously liable for

88. See Jennifer H. Arlen & Bentley W. Mcleod, *Beyond Master-Servant: A Critique of Vicarious Liability*, in *EXPLORING TORT LAW* 122-24 (M. Stuart Madden ed., 2005) (discussing the general claim that individual tort liability encourages firms to contract out risky activities in order to take advantage of so-called judgment-proof opportunities). For more empirical evidence, see Al H. Ringleb & Steven N. Wiggins, *Liability and Large-Scale, Long-Term Hazards*, 98 J. POL. ECON. 574 (1990); Jay B. Barney, Frances L. Edwards & Al H. Ringleb, *Organizational Responses to Legal Liability: Employee Exposure to Hazardous Materials, Vertical Integration, and Small Firm Production*, 35 ACAD. MGMT. J. 328 (1992). See also Kathleen Segerson, *An Assessment of Legal Liability as a Market Based Instrument*, in *MOVING TO MARKETS IN ENVIRONMENTAL REGULATION* 264-65 (discussing the results of a number of studies supporting that firms have a tendency to outsource hazardous operations to small judgment-proof firms).

89. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 478 n. 1 (2008) (“[t]he tanker survived the accident and remained in Exxon’s fleet, which it subsequently transferred to a wholly owned subsidiary, SeaRiver Maritime, Inc. The *Valdez* ‘was renamed several times, finally to the *SeaRiver Mediterranean*, [and] carried oil between the Persian Gulf and Japan, Singapore, and Australia for 12 years. . . . In 2002, the ship was pulled from service and ‘laid up’ off a foreign port . . . , although, according to some reports, the vessel continues in service under a foreign flag.”)

90. Brooks, *supra* note 29, at 110. In *Exxon Shipping Co. v. Baker*, Exxon fought the award of punitive damages. *Exxon Shipping Co.*, 554 U.S. at 481. A jury trial awarded \$5 billion in punitive damages that was later reduced to \$2.5 billion by the Circuit Court. *Id.* The Supreme Court further reduced the award, setting the punitive damages at a 1:1 ratio with compensatory damages or \$507.5 million. *Id.* at 515.

91. The *Total Erika* episode exemplifies this problem: the company attempted to distance itself from the incident but the public held Total responsible for the disaster. “‘There must always be a devil,’ Daniel Soulez-Larivière, the lawyer coordinating Total’s defense, told the court. He said the legal proceedings had been ‘contaminated’ against Total by public opinion after the sinking of the *Erika*.” Heather Smith, *Total Presents Defense in Criminal Trial Resulting from Erika Oil Spill*, N.Y. TIMES (June 6,

the actions of their subsidiary.⁹² For instance, in the *Total Erika* incident, the ship was carrying oil that Total France, SA sold to Total International Ltd., who hired a third party for the transport of oil.⁹³ Regardless, in March 2010, Total was found criminally liable on appeal⁹⁴ and had to pay a fine of €375,000 as “[t]he presiding judge . . . held Total responsible as the ‘real charterer of the boat.’”⁹⁵ In general, the “defenses [in the Act] are not merely limited, but they are also narrowly construed by the courts. Consequently, responsible parties are rarely successful in establishing a complete defense to liability under OPA”⁹⁶ and courts have a narrow construction of the third-party defense that “rarely enables a party to avoid liability.”⁹⁷

Outsourcing may also not be privately efficient because a judgment-proof transporter that the oil company hires is also judgment-proof in respect to the oil company. As a result, the transporter may not take reasonable care to avoid a spill and may destroy a large amount of the cargo, costing the oil company millions of dollars. Consequently, the fear that the OPA created over-deterrence never fully materialized. One explanation for this may be that liability is capped.⁹⁸ Thus, increasing financial liability might lead a company to take more responsibility and avoid spills.

2007), <http://www.nytimes.com/2007/06/06/business/worldbusiness/06iht-total.4.6026965.html>.

92. Total’s vicarious liability suits illustrate a danger that companies face when operating in the United States.

93. Nicolas de Sadeleer, *Liability for Oil Pollution Damages Versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims*, 21 J. ENVTL. L. 299, 300 (2009). In *Commune de Mesquer v. Total France SA*, the European Court of Justice (Grand Chamber), the court held that the producer of a product who already sold the product can also be found liable if his conduct contributed to the risk. *Id.* at 304.

94. Total settled most of the civil claims. As of September 2009, over seven thousand tort liability compensatory claims had been submitted. Over eighty-five percent of those claims have been settled, mostly through the international pollution fund (IOPC). The rest of the claims have been rejected, while nineteen are still pending. Insurers paid ten percent of these claims.

95. Matthew Saltmarsh, *French Court Upholds Verdict in Oil Spill*, N.Y. TIMES (Mar. 20, 2010), available at <http://www.nytimes.com/2010/03/31/business/energy-environment/31total.html>. See Sadeleer, *supra* note 93.

96. Robert Force et al., *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 900 (2011).

97. *Id.* at 902.

98. 33 U.S.C. § 2704 (2011).

3. Lessons to Be Learned

The OPA must better address small and medium spills. One way to address the high transaction costs and liquidity constraints faced by parties bringing suit when such spills occur is to allow punitive damages. One obstacle to this approach, however, is that the U.S. Supreme Court has capped the level of punitive damages available in such cases to the level of compensatory damages awarded.⁹⁹ This amount of damages is simply not enough to incentivize parties to litigate such suits, causing small to medium sized spills to go legally unaddressed. Therefore, Congress should pass legislation allowing punitive damages to encourage greater enforcement.

Congress should also address the potential for large spills by removing the current cap on cleanup costs. Without doing so, victims will not receive full compensation and will not efficiently participate in the market. Removing this cap may also efficiently deter potential polluters by forcing them to internalize all of their costs.¹⁰⁰ Still, it is important to note that completely removing the cap on clean up costs may lead to over-deterrence of an efficient activity,¹⁰¹ and large punitive damage awards could make the issue even worse.¹⁰²

The current system is designed based on the low probability of accidents. For example, the OPA does not require a responsible party to be able to cover its whole fleet, but “only to meet the amount of the maximum liability applicable to the vessel having the greatest maximum

99. In *Exxon Shipping Co.*, the Court held that the Clean Water Act does not preempt maritime common law on punitive damages, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 (2008), and that the common law limits punitive damages to an amount equal to the amount of compensatory damages awarded. *Id.* at 513. The broad and inaccurate assumption that every spill is equally costly to mitigate and the fact that only major spills are litigated, both give rise to inefficient levels of deterrence. The former incentivizes over-deterrence and the latter incentivizes under-deterrence. Thus tanker companies may find it hard to properly estimate the actual cleanup costs of a spill. Punitive damages and the number of spills litigated both have deterrent effects, and may help to achieve efficient levels of deterrence.

100. Theoretically, complete liability is not necessary to reach the efficient level of care because part of the cost of an accident is externalized by victims. This reality encourages potential tortfeasors to maintain a level of care above the socially efficient level. However, the theoretical model depends on the transporters' wealth, making the pool of socially efficient transporters relatively small and quite close to full capitalization. Lisa L. Posey, *Limited Liability and Incentives when Firms Can Inflict Damages Greater than Net Worth*, 13 INT'L R. OF L. & ECON. 325, 325 (1993). For this reason, the level of activity may remain inefficient even when the level of care is not.

101. Perry, *supra* note 72, at 17.

102. *Id.*

liability,”¹⁰³ as two concurrent accidents by vessels in the same fleet is highly unlikely. If removing the cap on clean up costs creates too great of a deterrent effect, Congress could require liability insurance in order to navigate, or in the case of offshore drilling, operate in U.S. waters.¹⁰⁴ An insurance system gives transporters and drillers some marginal incentive to take proper care because any incident will affect their premiums and deductibles.

Finally, Congress should impose strict vicarious liability on all potentially responsible parties, including the oil owners.¹⁰⁵ Currently, corporations can shield themselves from liability by outsourcing.¹⁰⁶ Oil companies may not have full control over third party contractors,¹⁰⁷ but imposing vicarious liability will encourage oil companies to better monitor their subcontractors. When deciding whether to contract out, oil companies make two decisions: (1) with whom to enter into a contract; and (2) on what terms to contract.

Congress can deal with the first decision in one of two ways. First, the OPA needs to encompass strict, joint, and vicarious liability of all involved parties. The potential responsible parties can sort out the allocation of liability through contractual obligation¹⁰⁸ and the parties could have a clear default rule that would allow these companies to negotiate more efficiently.¹⁰⁹

103. 33 U.S.C. § 2716 (2010).

104. While the traditional problems of moral hazard associated with insurance still arise with mandatory insurance, adverse selection is completely eradicated. In the aftermath of *Erika*, the European Commission touched on this issue. Eduard Somers & Gwendoline Gonsaeles, *The Consequence of the Sinking of the M/S Erika in European Waters: Toward a Total Loss for International Shipping Law?*, 41 J. MAR. L. & COM. 57, 63 (2010) (“[T]he Commission considers the thresholds for losing the right to limit liability for ship owners too high and even refers to a general trend since the 1990’s to abolish limitation of liability linked to a compulsory insurance mechanism.”).

105. USGAO-1, *supra* note 27, at 22 (suggesting extending liability to owners as an option that could decrease the Fund’s vulnerability).

106. Peter S. Menell, *Legal Advising on Corporate Structure in the New Era of Environmental Liability*, 1990 COLUM. BUS. L. REV. 399, 402-03 (1990) (suggesting that a corporation’s exposure to liability can be minimized by creation of subsidiaries, or through contractual relations).

107. 33 U.S.C. § 2703(a)(3)(2004).

108. BP and Transocean dealt with this issue of allocation in their *Deepwater Horizon* contract. *See In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, No. 2179 (E.D. La. Jan. 26, 2012)* (order granting and denying parties’ motions for summary judgment).

109. In the absence of such negotiations, Congress ought to create some default rules: (1) blame can be based on financial responsibility and capacity to pay; (2) blame can be

Of course, over-deterrence may not be an issue as much as under-deterrence. In the case of the *Deepwater Horizon* incident, Transocean contracted its liability out and therefore lacked the incentive to take proper care.¹¹⁰ As the party assuming liability, BP had an incentive to take precautions. Thus, the incentive does not disappear, it moves, and knowing who has that incentive and responsibility is crucial for all involved. However, joint liability may be better for third parties, as joint liability can help to avoid lengthy litigation for the victims and avoid litigation costs due to the complexities that accompany corporate use of liability-shielding strategies.

Second, the OPA needs to create a better negligent hiring rule. The hiring company, its employees, and managers need to be held vicariously liable for knowingly or negligently hiring a reckless transporter, regardless of the business judgment rule.¹¹¹ Even though this negligent hiring rule already exists, it is rarely applied¹¹² and can be difficult to prove because it requires some evidence of the hiring motives.

Moreover, Congress needs to rewrite the statute and change the burden of proof. If victims must sue the hiring company because the subcontractor is judgment-proof, the hiring company ought to bear the

based on the parties' share of the profits. The contours and implications of these default rules are, however, beyond the scope of this paper.

110. *Transocean Inc.*, N.Y. TIMES, http://topics.nytimes.com/top/news/business/companies/transocean_tld/index.html (last updated Jan. 3, 2013).

111. Managers and board members enjoy the protection of the business judgment rule, which counsels courts to give these decision makers some deference. "Under the business judgment rule, courts defer to fiduciaries' business judgments as long as there is no conflict of interest present and the decision is reached conscientiously, on the basis of reasonably full information, and with a good faith belief that the decision is in the best interests of the firm." Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1022 (2011). Under this rule, the manager of a tanker company may cut corners to increase profits without personal penalties. For instance, in *In re Citigroup Inc. Shareholder Derivative Litigation*, the court found that the directors did not breach their duty of care to the corporation when they made a poor investment decision. *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 139 (Del. Ch. 2009).

112. For instance, in *Cassano v. Aschoff*, the court held that the principal was not vicariously liable for the tort of his independent contractor even though the principal did not inquire whether the contractor was insured. *Cassano v. Aschoff*, 543 A.2d 973, 976 (N.J. Super. 1988). See also *Richmond v. White Mount Recreation Ass'n*, 674 A.2d 153, 155 (N.H. 1996) (holding that the principal was not negligent when he hired the independent contractor without inquiring into the equipment and personnel to be employed); *Mavrikidis v. Petullo*, 707 A.2d 977, 983 (N.J. 1998) (holding that an owner was not liable for hiring an independent contractor who did not have insurance and was driving with a suspended license).

burden of proof because the hiring company knows its motive and has access to the evidence. This presumption against the contracting companies would provide more deterrence for medium size spills than increasing caps on liability would. This is because it would substantially decrease the cost of litigation and further encourage victims to seek retribution.

Congress must also address the second question of contract terms. The contracting company may offer payments that are too low for the transport or drilling company to take proper care; the value of the contract affects the level of care taken.¹¹³ Thus, even if the oil company attempts to circumvent liability by delegating control,¹¹⁴ a below-market offer should also be grounds for liability.¹¹⁵

This scheme of hiring and contracting liability will affect the distribution of liability for small and medium spills. It will also encourage victims to bring such actions for small and medium spills, and will thereby prevent more of these spills from occurring. These changes will not affect the enforcement actions taken against large spills. A

113. A simple model could show that an oil company, like a principal, may be in a position to know *ex-ante* how its transporting contractor will behave, based on reputation and/or other public information like the type of ships that the transporter uses and the age of those ships.

114. Principals usually are responsible for the torts their agents cause *within* the scope of employment because principals control or have the right to control their agents' actions and because employers reap the benefits of their employees' work and thus must also bear the costs. *See, e.g.,* Heims v. Hanke, 93 N.W.2d 455, 457-58 (Wis. 1958) (holding that the defendant was vicariously liable for the action of his nephew because the action of his gratuitous helper was under his control, or he at least had the right to control). Control is a question of fact and courts look to evidence of the right to control such as the right to discharge the agent's employees, the regularity and duration of the agent's employment, and more importantly, the degree of supervision over the agent. *See* Nationwide Mutual Ins. v. Darden, 503 U.S. 318, 323-24 (1992); RESTATEMENT (SECOND) OF AGENCY § 220(2)(1958) (listing factors such as the extent of the principal's control over details of the work, skills required, line of business, and length of contract, that elevate an independent contractor relationship to an agency liability carrying relationship).

115. Oil companies are large and hence are likely to have some monopsony power and leverage to negotiate the price of the transport. Three of the top five Fortune 500 companies are oil companies and, because of their size, some leverage in the bargaining process is to be expected. *Fortune 500*, CNN MONEY http://money.cnn.com/magazines-fortune/fortune500/2012/full_list/ (last visited Feb. 21, 2013). The five largest oil companies (British Petroleum, Chevron, Exxon Mobil, Royal Dutch/Shell, and Texaco) accounted for the majority of oil shipments after passage of the OPA. Brooks, *supra* note 29, at 110.

second mechanism deals with small and medium spills: the Fund. The next section discusses the Fund in more detail.

C. Oil Spill Liability Trust Fund

The Fund is a market-based solution to oil spills “financed primarily from a per-barrel tax on petroleum products.”¹¹⁶ The Fund has a balance of about one hundred million dollars¹¹⁷ and was created to “pay for oil spill costs when the responsible party cannot or does not pay.”¹¹⁸ The responsible party may not pay for the cost of a spill for a number of reasons: the Coast Guard cannot identify the polluter; the polluter is judgment proof; the victims face liquidity constraints;¹¹⁹ the victims do not have enough private incentive;¹²⁰ or, the cost may simply be capped.¹²¹

The Fund fills an important gap because most spills fall under the small-spill category, and are not litigated. “The majority of spills from tankers result from routine operations such as loading, discharging and bunkering which normally occur in ports or at oil terminals. The

116. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1085, MAJOR OIL SPILLS OCCUR INFREQUENTLY BUT RISKS TO THE FEDERAL OIL SPILL FUND REMAIN 2 (2011), <http://www.gao.gov/cgi-bin/getrpt?GAO-08-1085> (2007) [hereinafter USGAO-2]. The Fund is used to cover the costs of: the removal and disposal of oil; the salary of employees working on spill responses; prevention measures; reimbursement for damage to natural resources or to real or personal property; reimbursement for loss of the means of subsistence and for lost governmental revenues; and public services rendered in the wake of the accidents. *Id.* at 12 tbl. 1.

117. *The Oil Spill Liability Trust Fund*, U.S. COAST GUARD, http://www.uscg.mil/npfc/About_NPFC/osltf.asp (last updated Feb. 22, 2012).

118. USGAO-1, *supra* note 27, at 1.

119. Claim adjudication may take a number of years and victims must pay their own litigation costs. For instance, in *Exxon Shipping Co.*, over twenty years elapsed from the date of the accident to the date that the case was decided by the U.S. Supreme Court. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 471 (2008). In the end, the Ninth Circuit Court held that each party would bear their own litigation costs. *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077, 1081 (9th Cir. 2009). Similarly, litigation following the *Total Erika* spill dragged on for close to ten years. *See Smith, supra* note 91. Private individuals are required to pay court fees and other litigation expenses, which may be hard to afford initially, let alone maintain for long periods.

120. Small spills also run into some transaction cost issues. Because boats move and water flows, the costs of forming a class action and identifying the polluter are likely to outweigh the private benefits of a suit.

121. Damages for oil spills that do not qualify as grossly negligent remain capped. *See USGAO-1, supra* note 27, at 8 tbl. 1.

majority of these operational spills are small, with over 90% involving quantities of less than 7 ton[*s*].¹²²

The Fund avoids leaving these small spills unattended to accumulate over time. Between 1990 and 2006, “51 oil spills [occurred] involving removal costs and damage claims totaling \$1 million or more. In all, the Fund spent \$240 million on these spills, and the responsible parties themselves spent about \$620 million to \$840 million.”¹²³ Less than two percent of oil spills from vessels, since 1990, had removal costs and damage claims of \$1 million or greater.¹²⁴ Even for smaller spills, the Fund contributed between a third and a quarter of the cleanup cost.¹²⁵

On one hand, the advantage of such a Fund is that it avoids the transaction costs associated with litigation of small and medium spills.¹²⁶ On the other hand, the disadvantage is that funds, in general, have substantial administrative costs and potential improper-allocation inefficiencies.¹²⁷ These internal problems have threatened the existence of the Fund.

However, the Fund has a more concrete threat: potential complete depletion after a major spill from a judgment-proof party.¹²⁸ Its balance

122. Tim Wadsworth, *To Carry or Not to Carry? Onboard Spill Response Equipment – Is it Practicable?*, ITOPF LTD. 1 (1998), http://www.itopf.com/information-services/publications/papers/documents/OnboardEquipment_000.pdf.

123. USGAO-2, *supra* note 116, at 15.

124. *Id.*

125. *Id.*

126. Other environmental legislation like CERCLA has attempted to incorporate these cost savings. Thomas A. Rhoads & Jason F. Shogren, *Current Issues in Superfund Amendment and Reauthorization: How is the Clinton Administration Handling Hazardous Waste?*, 8 DUKE ENVTL. L. & POL’Y F. 245, 257 (1998) (“A push towards legislation that would reduce some of the private party litigation through *de micromis* and *de minimis* liability relief is expected to provide greater efficiency in allocating responsibility under CERCLA.”).

127. The Fund has several documented allocation problems that include: disbursement without proper document; disbursement without adequate administrative approval; disbursement without documentation of the use of funds; improper disbursement of the fund; or even, wasteful spending. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-340R, U.S. COAST GUARD NATIONAL POLLUTION FUNDS CENTER: IMPROVEMENTS ARE NEEDED IN INTERNAL CONTROL OVER DISBURSEMENTS 30-38 (2004), <http://www.gao.gov/cgi-bin/getrpt?GAO-04-340R> (2004) [hereinafter USGAO-3]. See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-114R, U.S. COAST GUARD NATIONAL POLLUTION FUNDS CENTER: CLAIMS PAYMENT PROCESS WAS FUNCTIONING EFFECTIVELY, BUT ADDITIONAL CONTROLS ARE NEEDED TO REDUCE THE RISK OF IMPROPER PAYMENTS 25 (2003), <http://www.gao.gov/cgi-bin/getrpt?GAO-04-114R> [hereinafter USGAO-4].

128. “The Fund is currently authorized to pay out a maximum of \$1 billion on a single spill for response costs, with up to \$500 million for natural resource damage claims.” USGAO-1, *supra* note 27, at 22. Large incidents like the *Exxon Valdez* had an estimated

is about \$1.1 million, and could be completely depleted by any catastrophe similar to the *Valdez*, which required Exxon to spend some \$2.2 billion in cleanup efforts.¹²⁹ The *Deepwater Horizon* spilled almost twenty times the content of the *Valdez*: this spill only reinforced the fear. The Fund does not deter these small spills because polluting companies only carry a portion of the cost. Thus, the polluters do not fully internalize the cost of their own pollution. Instead, victims of pollution bear the burden of the true cost of pollution, even though these victims did not voluntarily decide to participate in the market.

The Fund requires that each market participant pay a tax with the proceeds of the tax being used to pay some of the costs that result from an accident. This “fundraising” resembles an insurance system where the pool of market participants is the pool of the insured. The Fund circumvents some of the insurance moral hazard problems by requiring participants to pay based on the amount of barrels produced. However, some moral hazard problems remain, as other market participants and victims still must bear costs associated with the accident, not borne by the polluter.

The Fund is a market-based solution subject to the same problem as every market-based solution: pricing issues. The Fund relies on a Pigovian tax¹³⁰ that is currently set too low.¹³¹ Proposed legislation¹³² has advocated “raising the tax from the current \$0.08 per barrel to \$0.34

“\$2.2 billion for cleanup costs alone, according to the vessel’s owner.” *Id.* at 21. This cost should put in perspective that the disaster could have been much worse: the *Exxon Valdez* only discharged about 20 percent of the oil it was carrying. A catastrophic spill from a vessel could result in costs that exceed those of the *Exxon Valdez*, particularly if the entire contents of a tanker were released in a ‘worst-case discharge’ scenario.” *Id.* at 21 n. 47.

129. *Id.* at 21.

130. “The Fund is financed primarily from a per-barrel tax on petroleum products either produced in the United States or imported from other countries.” USGAO-1, *supra* note 27, at 12.

131. Ian W.H. Parry & Kenneth Small, *Does Britain or the United States Have the Right Gasoline Tax?*, 95 AM. ECON. REV. 1276, 1283 (2005), have estimated that the proper Pigovian tax, to internalize all the costs of transportation including pollution, should be closer to \$1.01 per gallon or more than twice the current rate. They also account for the “Ramsey” component, which argues that less elastic products should be taxed more to raise revenues. They estimate that the demand price elasticity is 0.55, which is less than the elasticity threshold. The same exercise was performed for the United Kingdom and it was found that the gasoline tax there is set at twice the socially optimal level. *Id.*

132. *See, e.g.*, American Jobs and Closing Tax Loopholes Act of 2010, H.R. 4213, 111th Cong. (2010).

[to] . . . increase the likelihood that there is sufficient money available in the Fund if costs exceed the responsible party's liability limits."¹³³

To prevent this problem, Congress ought to make the tax adjustable. It should be adjusted every year for inflation. Additionally, Congress should set the tax as a percentage of the cost of the barrel with a floor, below which the tax cannot fall. Congress can alternatively give the Bureau or the Coast Guard power to change the tax yearly, depending on the current size of the Fund and accidents in the previous one to five years.

Oil transporters and drillers may complain that imposing a tax, as well as liability, on an oil transporter amounts to a double payment for an accident. This double payment has the potential to over-deter and decrease the level of care taken. The Coast Guard, however, can address this problem by providing an annual refund of the taxes levied on particular oil companies displaying good behavior each year. Consequently, the fund and tax could be used like a "security deposit" on the environment, thus improving transporter and driller incentives. Although the solution will have some administrative costs, these costs will probably be present under any solution and will be out weighted by the significant benefits.

Previous scholars have advocated for the widespread use of tradable permits as a solution to the pollution.¹³⁴ Others have reiterated that these permits may be the solution to this particular problem.¹³⁵ The greatest

133. USGAO-1, *supra* note 27, at 22.

134. In *Land, Water, and Ownership*, J.H. Dales is one of the first to advocate a "market-based" solution to the problem of pollution and depletion using transferrable permits. J.H. Dales, *Land, Water, and Ownership*, 1 CANADIAN J. ECON. 791, 801 (1968). He suggests creating transferable pollution rights that can be sold to market participants. *Id.* Title IV-A of the Clean Air Act Amendments (1990), codified 42 U.S.C. §§ 7651 et seq., created a market for permits to emit sulfur dioxide. A polluter had to hold valid permits in his emission bank, supervised by the Environmental Protection Agency (EPA), equal to the polluters emissions over the course of the year. These permits constitute what is akin to a *de jure* right to pollute. The idea of allowance permits has often been attributed to Dales. However, Dales focused his research on water rights, whereas two years earlier Thomas D. Crocker focused his research on air rights. Thomas D. Crocker, *The Structuring of Atmospheric Pollution Control Systems*, THE ECONOMICS OF AIR POLLUTION (1966). Furthermore, W. David Montgomery attempted to provide a deeper analysis of the use of allowance markets to deal with pollution problems in his article entitled "Markets in Licenses and Efficient Pollution Control Programs." W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 J. OF ECON. THEORY 395 (1972).

135. Michael A. de Gennaro, *Oil Pollution Liability and Control Under International Maritime Law: Market Incentives As an Alternative to Government Regulation*, 37 VAND. J. TRANSNAT'L L. 265 (2004). Similar to the Sulfur Dioxide market, created by Title IV

advantage of tradable permits is that the highest value users purchase them at a price set by competitive market mechanisms.¹³⁶

Unfortunately, however, permits present a number of problems. First, liquidity constraints and transaction costs may prevent market participants, such as coastal inhabitants, from purchasing these permits even though such participants value the permits more. One option would be to have the property rights divided into small enough portions to make them affordable to all market participants; however, this division also increases transaction costs. Second, assigning permits to current market participants increases barriers for new participants who may be more innovative and environmentally friendly. Third, if the permits are assigned to current participants to circumvent the liquidity constraint discussed above, then a number of other problems may arise such as the holdout problem. Regardless of whether the permits are assigned to the polluters or potential victims, some transaction costs may render the market inefficient in spite of its cost savings potential.

Administratively, tradable permits do not lower costs further than a tax would. The agency in charge still has to identify the culprit of the spills, and for spills without a culprit, permits will fail completely. This issue does not exist in other markets, like in the sulfur dioxide market, because the sources of pollution do not move and are mandatorily monitored. Permits altogether may not be well adapted to water transport, and they may be more successful for oil rigs; nonetheless, the same double payment causes problems with both permits and liability.

Congress ought to strengthen its protection of the environment, but water pollution requires a different solution than air pollution. The next section extends further on the current system, and discusses extending financial liability.

IV. FURTHER CHANGES

The OPA was reactive legislation. Hence, more reactions should come following the *Deepwater Horizon* incident. This Section argues that Congress should extend liability to all parties who have the potential

of the Clean Air Act, U.S.C §§ 7651-7651o (1990), he suggests having tradable and bankable permits such that the companies who can decrease pollution as cheaply as possible will decrease pollution and sell their permits, whereas the companies for whom it is expensive to decrease pollution will purchase these permits.

136. The U.S. Environmental Protection Agency (EPA) has worked on a proposed policy entitled Water Quality Trading Policy, 67 FR 34709-01 (2002), and recommended such permits because of their cost savings potential. See <http://www.epa.gov/evaluate/pdf/wqt.pdf> (last visited Sept. 18, 2011).

to control the level of care or the level of activity and who benefit from the activity. Finally, since small spills are rarely enforced, the punishment should be proportional to the enforcement to reach optimal deterrence.

A. Lender Liability

Like in every business, oil transportation involves a large number of individuals.¹³⁷ Since most of these actors benefit from these transactions and a few of these actors may encourage cutting corners, all actors who benefit from the transaction should be held liable in an effort to prevent environmental disaster.

The first of such actors are lenders to the oil transport and oil drilling companies. Previous regulations have debated whether to hold lenders liable.¹³⁸ Five reasons support lender liability. First, lenders can be the better cost bearers because they have deeper pockets than borrowers, and they can internalize the cost of the whole activity.¹³⁹ Since borrowers must borrow to undertake the risky activity, lenders can foresee that they are, or will become, judgment-proof. Holding lenders liable assures that these lenders steer the activity toward a more socially efficient level of care, or in the alternative, lend enough to ensure an efficient level of care.

137. OECD, *supra* note 63, at 76, gives a detailed exposition of all the parties who stand to lose from an accident.

138. CERCLA opened the door to lender liability but later amendments required the lender to participate in the management of the operation. 42 U.S.C. § 9601(20)(E)(ii) (2002). In 1990, in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991), the Eleventh Circuit opened the door to a wide range of liability when it stated that “a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.” *Id.* at 1557. In the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-462 (Sept. 30, 1996) (codified at 42 U.S.C. §§ 9601, 9607(n) (2006)), Congress attempted to clarify CERCLA’s definition of participating in management and stated that “[p]articipation in management . . . does not include merely having the capacity to influence, or the underexercised right of control, vessel or facility operators.”

139. During a Congressional hearing entitled “Lender Liability Under Superfund before the Subcommittee on Transport and Hazardous Materials,” “[r]epresentative Alex McMillan of North Carolina suggested a further expansion in the search for ‘deep pockets’ to protect the public tax monies already contained in the Superfund.” See Michael I. Greenberg & David M. Shaw. *To Lend or Not to Lend – That Should Not Be The Question: The Uncertainties of Lender Liability Under CERCLA*, 41 DUKE L.J. 1211, fn. 53 (1992).

Second, lender liability rests on their right to directly control their borrowers: their judgment-proof borrowers may be able to afford the precautionary care,¹⁴⁰ but they do not have enough private incentive to exercise the optimal level of care because they externalize the resulting harm. Lenders should be responsible for the consequences of their control, or failure to exercise that right, because lenders can correct this incentive imbalance. Lenders may either give enough indirect financial incentive or exercise direct monitoring of their borrowers.

Third, fairness supports lender liability: lenders get the benefit of the activity, thus they should bear the costs. The benefits the lenders receive are in the form of interest payments or even rent if the lender acts as a receiver of a bankrupt borrower; nonetheless, they currently do not bear the cost they put on society.

Fourth, lenders may have superior knowledge about the risk involved in a potentially polluting activity because borrowers may be new to the business. Lenders are repeat players who deal with different kinds of borrowers. This asymmetric information makes lenders the superior risk-bearer and the better party to decide whether to undertake a given activity.¹⁴¹

Finally, lenders can also spread the risk among their borrowers. Since lenders have multiple borrowers, lenders can diversify their risks, as long as the borrowers' pollution risks are uncorrelated.

In conclusion, lender liability may advance efficiency but these arguments have some detractors.¹⁴² First, the deep pocket justification

140. "It is now even harder for tanker owners to obtain bank finance for single-hulled ships. Apart from the inherent greater threat of pollution that these vessels pose, much single-hulled tonnage now has a very limited prospective trading life on routes to or from the USA and Europe." OECD, *supra* note 63, at 69.

141. Even if borrowers are the least cost avoidant because they are better able to understand precautions, lender liability will encourage knowledgeable lenders to gather and disseminate better information about the risks involved.

142. See generally Rohan Pitchford, *How Liable Should a Lender Be? The Case of Judgment-Proof Firms and Environmental Risk*, 85 AM. ECON. REV. 1171 (1995) [hereinafter Pitchford 1995] (Pitchford creates a binary model of accident to explore whether imposing lender liability has *Pareto*-improving qualities. In his model, the lender is vicariously liable for the wrongdoings of its customers. He does not find that holding lenders vicariously liable has welfare improving effects. He explains that a higher than socially efficient level of activity can occur as well as socially inefficient care because with full lender liability, lenders charge premiums in the no-accident state of the world. These premiums distort incentive, making the no-accident state less attractive without affecting the desirability of the accident state. However, with no-lender liability, the decision maker does not invest enough of his capital to take efficient care. Finally, he finds that a "minimum-equity requirement" level of care leads to more efficient levels of care. As will be discussed below, this amounts to borrower selection in the vain of agent

does not carry any efficiency weight. The relationship between a borrower and a lender suffers from information asymmetry: the lenders may not have all the information they need to determine what kind of risk a borrower will take. Nonetheless, lenders can estimate the kind of borrower and risk taker they face from the borrower's financial statement and prior history.¹⁴³

Second, the lender may not have any clear right to control, or the ability to exercise any actual control over the borrowers.¹⁴⁴ Therefore,

selection.); Tracy R. Lewis & David E. M. Sappington, *How Liable Should a Lender Be? The Case of Judgment-Proof Firms and Environmental Risk: Comment*, 91 AM. ECON. REV. 724 (2001) (Revisiting Pitchford's model and modifying the model to make damages continuous. They find that depending on the damage level to the initial producer's wealth, lender liability can be *Pareto*-improving.); Dieter Balkenborg, *How Liable Should a Lender Be? The Case of Judgment-Proof Firms and Environmental Risk: Comment*, 91 AM. ECON. REV. 731 (2001) (Revising Pitchford's model and modifying it even further, he makes the level of care a function of the payment the firm receives instead of its final wealth. He turns to the effect of the respective bargaining power of the lender and borrower and finds that lenders can exercise leverage on the judgment-proof borrower to move toward a more socially optimal outcome. He affirms that making the lender vicariously liable can be welfare-improving in some cases.); Rohan Pitchford, *How Liable Should a Lender Be? The Case of Judgment-Proof Firms and Environmental Risk: Reply* 91 AM. ECON. REV. 739 (2001) [hereinafter Pitchford 2001] (Rohan Pitchford responds that this re-enforces the idea that a "minimum-equity requirement" will be *Pareto*-superior because the lender essentially makes a take-it-or-leave-it offer to the borrower: the borrower must exercise this minimum level of care or the lender does not grant a loan. If the lender has enough information and good enough monitoring, the minimum can be set at the privately efficient level, which coincides with the socially efficient level because of full internalization.).

143. Pitchford discusses how the lender's demands will depend upon the borrower's finances because the borrower's wealth affects the kind of risks that the borrower will take. "If financiers face some liability, then they may require owners to invest more of their wealth in the firm to provide an extra incentive for keeping the accident probability low." Pitchford 1995, *supra* note 142, at 1171. David Leebron argues that lenders will need to know and monitor the wealth of the owners to assess the risk of the credit; however, if the lender can form well-founded expectations about their wealth, they will still lend without definite information but at a higher rate. David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUMBIA L. REV. 1565, 1593 n. 91 (1991).

144. Lenders may draft loan documents in which they reserve a right of control in certain situations like in the case of bankruptcy. Nonetheless, courts distinguish between this right of control and actual control because of the potential gap between the two. The Second Circuit found in *In re W.T. Grant Company* that the common law duty of a lender to a borrower or a third party depends upon the exercise of control. *In re W.T. Grant Company*, 699 F.2d 599, 609 (2d Cir. 1983). Control differs from the prospectus of control or even the language in the loan documents. *Id.* The language of loan contracts restricting the borrower's activities or requiring the borrower's actions in case of default may help show lender liability; however, this language or the leverage used to obtain this

holding the lender liable in this situation amounts to wealth transfer without efficiency implications. However, the lenders can create some incentives for borrowers to exercise better care through the lending contract.¹⁴⁵

Third, passing on the cost of pollution to all borrowers may price out some liquidity-constrained borrowers and thus deprive society of some socially efficient activities. However, the relevant argument explained that large oil companies took on more responsibility once Congress increased their liability.¹⁴⁶ Lenders may follow the same route.

Fourth, lenders may not be the least cost avoider considering borrowers may have a better understanding of their own activity and industry. Still, this may not be the case for borrowers in a new industry. Furthermore, lenders have financial analysts and the experience that most borrowers and industry starters lack. Finally, spreading the pollution cost on all borrowers will increase the cost of borrowing and price out some potentially efficient activity. Nonetheless, the socially inefficient activities deterred may outweigh the socially efficient activities.

Congress ought to extend liability to all parties with the capacity to control, and all who benefit from the activity. Although vicarious strict lender liability presents some inefficiencies, a negligent lending liability rule can address some of these inefficiencies. A lender should be held liable for "negligent lending" which could be defined as lending to risky borrowers whose risks the lender knew or should have known. This negligent lending liability mirrors negligent hiring discussed above. The next section turns to other decision makers and expands the argument to include criminal liability.

language does not equal control. *Id.* at 609-10. Having the right to control in case of default is different from exercising control.

145. If the loan contract fully specifies how payments vary with the borrower's actions or if the loan contract allows for restrictions that create credible commitments, then loans may be equivalent to a fully capitalized polluter because the lender will minimize payment only when the borrower uses the privately and socially optimal level of care and the borrower will be able to credibly commit. However, Pitchford argues that such contracts are quite complicated and not the norm. Pitchford 2001, *supra* note 142, at 740. However, having lender liability may make these efficiency-inducing restrictions more common.

146. *See* Brooks, *supra* note 29, at Table 2. This table shows that even though Congress increased corporate liability exposure with the passage of the OPA in 1990, the major oil producing corporations shipped more of their product in-house and hence they internalized more of the shipping risks.

B. Shareholder and Employee Liability

Capacity to control justifies the previous argument supporting lender liability. In agency law, courts can turn to the notion of “actual control” to impose vicarious liability; this is referred to as the control test. Mendelson offers an alternative test of liability.¹⁴⁷ She argues that capacity to control is a superior test to actual control for imposing vicarious liability.¹⁴⁸ Lenders would fall under this category, as would shareholders who have the capacity to control the board and managers. Whether this rule is efficient and provides good incentive has yet to be tested. However, “[t]here is no reason to suppose that unlimited liability would discourage shareholder investment except in firms that, under the prevailing norms of tort law, impose net costs on society.”¹⁴⁹ Congress ought to ensure that all parties that benefit from low care, and with capacity to control, are held financially responsible.

This liability can also be extended to all employees who have a capacity to control the care and activity.¹⁵⁰ One of the dangers is that employees will steer away from risky activity, or in the alternative, employees will likely request premiums or indemnification.¹⁵¹ To prevent employees from avoiding financial liability, Congress should create a non-delegable duty for any action that may harm society beyond a certain threshold, or any action that can be avoided with reasonable care.¹⁵² Furthermore, Congress ought to make this financial liability a

147. Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1278-80 (2002).

148. *Id.* at 1278.

149. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1933 (1991).

150. See generally A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993) (arguing that employees should be held personally liable because corporations can only impose minimum sanctions on them. They advocate for different liability standards, with a negligence rule for the employee and strict liability for the firm to assure they internalize all the costs of doing business).

151. “A combination of doctrine and statute--the almost abstention-like business judgment rule and laws permitting exculpation and indemnification of officers and directors for failure to exercise due care--has created conditions in which liability for breach of the duty of care is practically nonexistent.” Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 648 (2011).

152. See, e.g., *Kleeman v. Rheingold*, 614 N.E.2d 712 (N.Y. 1993) (holding that service of a defendant was a non-delegable duty); *Hixon v. Sherman-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982) (noting that inherently dangerous activities carry vicarious liability).

criminal liability or fine, and impose it on employees with capacity to control and incentives to exercise low care.

Criminal liability exists in a number of other contexts for employee decisions within a corporate setting. For instance, the Sherman Act¹⁵³ states that employees who “engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding . . . \$1,000,000, or by imprisonment not exceeding 10 years.”¹⁵⁴ Another example of employee decisions leading to incarceration are insider trading laws.¹⁵⁵

This begs the question, why does Congress condemn and attempt to deter securities fraud and antitrust behavior so heavily? These improprieties are wealth transfers and rent seeking behaviors that prosecutors can address through disgorgement and restitution. The environment is not afforded the same level of deterrence, be it prison or even treble damages, despite the fact that the effects on the environment are irreversible. Congress may believe corporate employees can always avoid securities fraud and antitrust violations but cannot always avoid spills. While some spills are unavoidable, larger incidents such *Exxon Valdez*¹⁵⁶ or the *BP Deepwater Horizon*¹⁵⁷ have both involved human errors. Criminal liability must enter the debate of environmental protection.

153. 15 U.S.C. §§ 1-7 (2004).

154. 15 U.S.C. § 1 (2004).

155. The insider trading laws themselves do allow for prison time. For instance, amongst others, the Securities Act, 15 U.S.C. § 78f(f) (2002) allows for up to twenty years imprisonment. Sarbanes-Oxley, 18 U.S.C. § 1348 (2009) allows for imprisonment up to twenty-five years. *See also* 18 U.S.C. § 1341 (2008) (allowing for imprisonment up to thirty years for mail fraud); 18 U.S.C. § 1343 (2008) (allowing for imprisonment up to thirty years for wire fraud); 18 U.S.C. § 1344 (1990) (allowing for imprisonment up to thirty years for bank fraud); 18 U.S.C. § 1001 (2006) (allowing for imprisonment up to eight years for false statements); 18 U.S.C. § 1621 (1994) (allowing for imprisonment up to five years for perjury); 18 U.S.C. § 371 (1994) (allowing for imprisonment up to five years for conspiracy).

156. “Witnesses testified that before the Valdez left port on the night of the disaster, [the captain] downed at least five double vodkas in the waterfront bars of Valdez, an intake of about 15 ounces of 80-proof alcohol, enough “that a non-alcoholic would have passed out.” Exxon Shipping, *supra* note 22 at 477. The captain of the Valdez still had a blood alcohol content of 0.06% 11 hours after the crash, which meant he had a blood alcohol content of over 0.2% at the time of the crash. Exxon Shipping, *supra* note 22, at 471.

157. BOEMRE report, *supra* note 50, at 191 (“The failure of the rig crew to stop work on the Deepwater Horizon after encountering multiple hazards and warnings was a contributing cause of the Macondo blowout.”).

Finally, Congress has two tools at its disposal when enforcing regulations: it can affect the severity of punishment, or it can affect the likelihood of enforcement.¹⁵⁸ Since the Coast Guard can hardly detect small spills, Congress ought to increase the proportionality of the punishment: prison deterrence or criminal charges can lead to more efficient outcomes.¹⁵⁹ In the car context, local governments impose criminal liability for a hit and run because of the difficulties associated with its enforcement.¹⁶⁰ Similarly, if Congress worries about over-deterrence, it should impose the criminal liability only when the polluter does not come forward. This level of criminal liability will greatly further the goals of efficiency.

V. CONCLUSION

The OPA has some room for improvement. First, the single-hull regulation poorly targets the problem like most command and control regulations. Second, the Fund, as a stand-alone regulation, can enable the Coast Guard to clean up and compensate victims. This fund-only solution has the benefit of avoiding the litigation costs, lengthy delays, etc. However, such a fund needs proper support, and this will be achieved through the implementation of a higher tax. Alternative market-based solutions, like permits, are not viable for this kind of problem. Cleanup will always require the existence of the Fund because of some of the inherent issues associated with the oil industry, such as identifying the origin of small spills.

Congress may attempt to deal with the double payment issue of having a tax on pollution and liability. However, the administrative cost may outweigh the benefits. On top of that, a fund may not work on its own because of the moral hazard problem. Thus, proper deterrence will require liability, but Congress should consider some adjustments. First, spills go uncompensated between one quarter and one third of the time. Therefore, the liability should be increased as a result of this difference

158. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1259 (2001).

159. Joshua Wright & Douglas Ginsburg, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3 (2010) (advocating for imprisonment of employee in cartel cases because imposing cost and fines on the corporation does not give them any incentive to not break the law because of the agency problem).

160. To reach a socially optimal level of care, enforcement and punishment must work together. Because of the lack of monitoring, enforcement may lapse; therefore, this lapse makes higher punishment necessary. Such higher punishment includes but is not limited to prison, punitive damages, and fines.

between pollution and compensation; Congress should create some punitive damage equal to a fourth to a third of the compensatory damages. Congress can also impose financial and criminal liability upon employees and managers who attempt to hide spills.

Some form of corporate liability may also solve some of the current loopholes. Holding the beneficiary of an action liable for his cost leads not only to fairness, but also to efficiency. Therefore, Congress should create a new two-part control test for imposing any kind of vicarious, corporate, or personal liability. First, does the entity or person benefit from the transaction? Second, does the entity or person have the capacity to exercise control? If the answer is yes to both questions, the oil company should be held financially and potentially criminally liable. In the unlikely event of over-deterrence, the employees' or shareholders' liability may require a third test: does the actor try to conceal its spill?

While this article has focused primarily on the OPA, some lessons are expandable to other environmental regulations. Congress passed the OPA after the *Exxon Valdez* incident. It remains to be seen what Congress will do after the *BP Deepwater Horizon* spill. However, fixing some of the issues within the OPA ought to be a starting point.