Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent

ANDREW B. DAVIS*

The Deepwater Horizon *Oil Spill in 2010 was a rude reminder of the potentially disastrous consequences of a large oil spill. Many residents and businesses throughout the Gulf Coast suffered financial losses without accompanying physical injury to their property. The common law would deny recovery for such claims on the grounds that physical injury to a proprietary interest must accompany any claim for economic losses. Under the Oil Pollution Act of 1990, however, a claimant need not prove proprietary harm to recover. Yet, because of vague statutory language and underdeveloped case law, precisely when a claimant may recover for a purely economic loss remains unclear. Both the courts and the Gulf Coast Claims Facility, which administers a fund for claims arising from the* Deepwater Horizon *Oil Spill, accept that proximate cause analysis should limit liability, but have not fleshed out the required nexus between the spill and the financial loss. This creates uncertainty and allows recovery in circumstances not clearly required by the Act's language, both of which impose unwarranted costs on the recovery scheme. To reduce these costs, courts could narrowly interpret the Act's pure economic loss provision to require what this Note calls direct economic injury. The first-best solution, however, is for Congress to delegate authority to the Environmental Protection Agency so that it may construct more informed, flexible, and politically accountable rules regarding recovery for pure economic losses.*

* Executive Editor, COLUM. J.L. & SOC. PROBS., 2011–2012. J.D. Candidate 2012, Columbia Law School. The author thanks Professor Thomas Merrill for his guidance, James Goldfeier for his insightful comments, and the *Journal's* entire editorial staff.

I. INTRODUCTION

On April 20, 2010, an explosion ripped through the BP *Deepwater Horizon*, a mobile offshore oil rig situated in 5000 feet of water approximately forty miles from the Louisiana coast.[1] The explosion ignited an uncontainable fire that burned for thirty-six hours before the rig sank.[2] Oil gushed from the well for a total of eighty-seven days before it was capped on July 15, 2010.[3] The result was a massive release of oil into the environment, resulting in oil washing ashore on the Louisiana, Mississippi, Alabama, and Florida coasts.[4] By the time the well was finally sealed, approximately four million barrels of oil had leaked into the environment.[5]

Although the spill's direct environmental impact may have been most apparent to the general public, the spill also created a burden on those who utilize the Gulf Coast for their economic livelihood. Approximately one-third of the United States territory in the Gulf was closed to commercial fishing, leaving many fishermen without gainful employment.[6] Fish that were caught in the Gulf both during and after the spill became commercially stigmatized.[7] This stigma reached beyond areas physically affected by the oil spill,[8] reducing tourism to the Gulf region and causing local businesses to lay off employees or cut their hours.[9]

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1. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT 1–3, 8–15 (2011) [hereinafter REPORT TO THE PRESIDENT], *available at* http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf.

2. *Id*. at 18, 55.

3. *Id.* at 129.

4. *Id*. at 198 (displaying map of areas affected by oil spill).

5. *Id*. at 1.

6. Brett Anderson, *Louisiana Seafood Shortage Lamented Far From the Gulf*, TIMES-PICAYUNE (New Orleans), Sept. 26, 2010, at A1; Justin Gillis & Campbell Robertson, *On the Surface, Oil Spill in Gulf is Vanishing Fast*, N.Y. TIMES, July 28, 2010, at A1.

7. Anderson, *supra* note 6; Gillis & Robertson, *supra* note 6.

8. *See, e.g.*, REPORT TO THE PRESIDENT, *supra* note 1 at 189.

9. *See, e.g., id.* (discussing the stigma attached to unoiled areas); Ed Anderson, *Oil Spill Remains a Problem with Tourists; State Still Battling to Change Perception*, TIMES-PICAYUNE (New Orleans), July 25, 2010, at E1 (noting that many people were still unsure whether it was safe to eat at local restaurants selling seafood from the gulf); Laura Figueroa, *Fla. Snaps to It in Bid to Attract Tourists*, WASH. POST, July 26, 2010, at A04 (discussing tourism industry's efforts to regain business lost from oil spill); Kari C. Barlow, *Top Stories of the Year: No. 1 — BP Oil Spill Spared Northwest Florida*, NW. FLA. DAILY NEWS

More indirectly, the federal moratorium on deep water drilling in the Gulf forced oil companies to abandon offshore drilling projects, and their oil rig employees had to find alternative employment.[10]

Recovery for these "pure economic losses," so termed because no physical proprietary harm accompanies the pecuniary injury, is barred at common law by the "economic loss rule." Under this rule, plaintiffs are unable to recover for economic losses even though they may be able to prove a reduction in profits resulting from a tortious act. Against this background, Congress responded to the Exxon *Valdez* spill and its economic impact by passing the Oil Pollution Act of 1990 ("OPA").[11] Amidst provisions detailing when the party responsible for the oil spill (the "responsible party") is liable for damages, the Act states that "any claimant" may recover for lost profits or impairment to earning capacity resulting from an oil spill.[12] Unfortunately, this economic loss provision does not make clear how strong the link must be between the spill and the loss, or how courts should limit recoverability for pure economic losses, causing multiple scholars to wonder exactly what this provision means.[13] Courts have addressed the issue in a limited number of circumstances, but have not settled on a conclusion other than that physical harm to a proprietary interest is not required and that proximate cause analysis should limit recovery.[14] Courts have not, however, established a

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(Dec. 31, 2010, 12:52 PM) (noting "lingering perception that the beaches aren't up to their pre-oil spill condition), http://www.nwfdailynews.com/news/oil-36191-northwest-spill.html.

10. Mark Guarino, *Gulf Oil Spill Aftermath: Will Region Regain Lost Jobs?*, CHRISTIAN SCI. MONITOR, Sept. 20, 2010, http://www.csmonitor.com/USA/2010/0920/Gulf-oil-spill-aftermath-Will-region-regain-lost-jobs.

11. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended in scattered sections of 33 U.S.C., 43 U.S.C., and 46 U.S.C.).

12. 33 U.S.C. § 2702(b)(2)(E) (2006).

13. REPORT TO THE PRESIDENT, *supra* note 1, at 186 ("[T]here is no easy legal answer to the question of how closely linked those lost profits or earnings must be to the spill before they should be deemed compensable. The search for such a rationale endpoint for liability has already stymied the Gulf Coast Claims Facility in its processing of claims. The absence of clear and fair procedures for systematically evaluating such claims deserves focused attention as the lessons from the *Deepwater Horizon* spill are learned.") (internal citation omitted). *See also* David P. Lewis, Note, *The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?*, 10 ALASKA L. REV. 87, 136–40 (1993); Thomas J. Wagner, *Recoverable Damages Under the Oil Pollution Act of 1990*, 5 U.S.F. MAR. L.J. 283, 297–98 (1993).

14. *See* discussion *infra* Part III.B.2.

coherent approach for deciding when an oil spill is the proximate cause of economic injury.[15]

The ambiguity of when someone may recover under the OPA's economic loss provision is problematic because there are significant costs to both uncertain and liberally granted recovery. Uncertainty prevents optimal settlements and encourages litigation, while liberally granted recovery creates problems of indeterminate liability and over-deterrence. Courts, therefore, should limit recovery to only those situations required by the OPA's text and legislative history; namely, they should limit recovery to economic losses directly resulting from physical harm caused by an oil spill. This judicial interpretation, however, is only the second-best solution. Determining the bounds of recovery is ultimately a policy decision that should be made by a more politically accountable and informed institution. To create the first-best system of recovery for economic loss, Congress should amend the OPA to delegate rulemaking authority to the EPA to make these decisions.

This Note proceeds as follows: Part II presents the background upon which this Note is predicated. Part III describes how pure economic losses are treated under the OPA and how the current approach imposes societal costs that are not necessary to Congress's goal of broadening recoverability. Part IV proposes two methods to decrease costs while still adhering to the Act's underlying goal of increasing recovery. Part V briefly concludes.

II. THE ECONOMIC LOSS RULE

Part II presents an overview of this Note's key concepts. Part II.A introduces the economic loss rule, provides a definition, and describes its development in American law. Part II.B identifies the theoretical underpinnings of the rule and explores critical academic commentary surrounding the rule's usefulness in modern tort law. Part II.C then briefly explores typical scenarios that implicate the economic loss rule in the oil spill context.

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15. *See* discussion *infra* Part III.B.2.

A. DEFINITION AND DEVELOPMENT

In its most basic form, the economic loss rule, also known as the exclusionary rule, states that a plaintiff may not recover for a pure economic loss, where pure economic loss is defined as "the financial harm arising out of wrongful interference with plaintiff's contractual relations or with his or her noncontractual prospective gain."[16] Recovery is permissible only when economic loss results from injury to plaintiff's own person or property,[17] and not from injury to a third party.[18] In one form or another, this general principle has pervaded American case law since the middle of the nineteenth century.[19] As early as 1846, one court held that increased monetary expenses resulting from injury to a third party were unrecoverable because the damages were "too remote and indirect."[20]

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16. Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 281 (1982). *See also* Mauro Bussani et al., *Liability for Pure Financial Loss in Europe: An Economic Restatement*, 51 AM. J. COMP. L. 113, 113 (2003). Other statements of the rule are similar. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 766C (1979) ("One is not liable to another for pecuniary harm not deriving from physical harm to the other. . . ."). The draft Restatement states that the economic loss rule means that "[i]n general, there is no liability in tort for pure economic loss caused unintentionally and without dishonesty or disloyalty . . . [where] [p]ure economic loss means pecuniary harm not resulting from an injury to the claimant's person or property." RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8(1), (2) (Council Draft No. 2, 2007).

17. Compensation is generally awarded when harm to the plaintiff's own person or property leads to the financial loss. *See* RESTATEMENT (SECOND) OF TORTS §§ 924(b), 924(d), 927(2), 928(b), 929(1)(b) (1979).

18. This situation is known as relational loss. *See* Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. ILL. L. REV. 1573, 1574 (2008) ("Relational economic loss is purely economic loss that stems from physical injury to the person or property of a third party, or to an ownerless resource."). While this category represents a subset of economic loss claims and encompasses most economic losses resulting from an oil spill, this Note does not treat it separately.

19. *See, e.g.*, Byrd v. English, 43 S.E. 419, 420 (Ga. 1903) (holding that lost profits resulting from a power outage are not recoverable); Stevenson v. E. Ohio Gas Co., 73 N.E.2d 200 (Ohio Ct. App. 1946) (refusing recovery for lost profits resulting from an explosion that caused physical harm to the surrounding area but not to plaintiff's person or property). The rule against recovery for pure economic loss is sometimes traced to Cattle v. Stockton Waterworks Co., (1875) L.R. 10 Q.B. 453 (Eng.). *See* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 628 (1st Cir. 1994); Rizzo, *supra* note 16, at 294.

The term "economic loss rule," however, is relatively new. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 cmt. a (Council Draft No. 2, 2007) ("[t]he first references in United States case law to an 'economic loss rule' appeared in the early 1980s.").

20. Anthony v. Slaid, 52 Mass. (11 Met.) 290, 291 (1846).

The leading authority for the economic loss rule is *Robins Dry Dock & Repair Co. v. Flint*.[21] In *Robins*, a ship was damaged by the shipyard's negligence, necessitating repairs that rendered the ship inoperable for a period during which a time charterer had contracted to use the ship.[22] In an opinion by Justice Holmes, the Supreme Court held that the time charterer who lost the use of the ship could not recover for the economic damages caused by the shipyard's negligence, stating that "a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong."[23]

Despite its role as the most prominent economic loss case, "*Robins* broke no new ground but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interference with 'contractual rights.'"[24] It is thus no surprise that courts applied *Robins*' general principle to situations outside the maritime context in which the physically injured party did not have a contractual obligation to the party seeking recovery for economic losses.[25] Today, both federal courts and the majority of state courts have generally accepted this broad application of *Robins*' "bright-line" rule.[26]

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21. 275 U.S. 303 (1927). This case has been discussed heavily in the literature. *See, e.g.*, Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock v. Flint, 20 J. LEGAL STUD. 249 (1991); David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under* Robins Dry Dock, 18 J. MAR. L. & COM. 157 (1987); Trey D. Tankersley, Comment, *The* Robins Dry Dock *Rule: The Tar Baby of Maritime Tort Law*, 25 TUL. MAR. L.J. 371 (2000).

22. *Robins*, 275 U.S. at 307.

23. *Id*. at 309. Holmes found this principle to be self-evident, remarking that "no authority need be cited" for this proposition. *Id*.

24. La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1022 (5th Cir.1985) (en banc).

25. *See, e.g.*, Redman v. John D. Brush & Co., 111 F.3d 1174, 1182 (4th Cir. 1997) (denying recovery for economic losses caused when plaintiff's valuable coins were stolen from a defective safe, remarking that "a plaintiff who is not in privity of contract with the defendant cannot maintain an action for negligence . . . based on purely economic losses"); Dundee Cement Co. v. Chem. Labs., Inc., 712 F.2d 1166, 1171–72 (7th Cir.1983) (denying recovery for lost profits caused when defendant's truck overturned and blocked access to plaintiff's business); Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 128 (Iowa 1984) (holding that businesses cannot recover economic losses from the builder of a bridge when negligent construction caused the bridge to be closed). *See also* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 628 (1st Cir. 1994) (noting that "the doctrine forbidding recovery of [purely economic] losses [has not] had 'exclusive' application in admiralty.").

26. Ronen Perry, *Economic Loss, Punitive Damages, and the* Exxon Valdez *Litigation*, 45 GA. L. REV. 409, 418–19 (2011) (noting that the federal courts only recognize "a few

Commercial fishermen, however, have been mostly exempt from this "bright line" rule when an oil spill damages natural fishing stock.[27] This exception originated in *Union Oil Co. v. Oppen*,[28] in which the Ninth Circuit held that the defendant oil company owed commercial fishermen a duty to refrain from negligent drilling operations because an oil spill could "reasonably and foreseeably" be anticipated to lead to a diminution of the fishing stock and cause the fishermen financial harm.[29] But, in creating this exception and allowing the fishermen to recover for their economic losses, the court emphasized that "[n]othing said in this opinion is intended to suggest . . . that every decline in the general commercial activity of every business . . . constitutes a legally cognizable injury for which the defendants may be responsible."[30]

The *Union Oil* decision soon led other courts to create the same exception for commercial fishermen,[31] and now the rule that commercial fishermen may recover economic damages absent direct injury to person or property is well-recognized among courts and legal scholars.[32] This is not to say, however, that all courts have embraced the exception. Some courts have expressly rejected the exception[33] or have limited its application,[34] and both

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narrow exceptions" and that a small minority of state courts have replaced the *Robins* rule with a "more generous approach.").

27. This is not the only exception to the general principal that a party may not recover for pure financial loss, but it is the only one pertinent to this Note. For a list of other exceptions, *see* Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 55–56 (1st Cir. 1985).

28. 501 F.2d 558 (9th Cir. 1974).

29. *Id*. at 568.

30. *Id.* at 570.

31. *See, e.g.*, La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1026–27 (5th Cir. 1985) (en banc) (following *Union Oil* and holding that although the economic loss rule remains intact, commercial fishermen could recover for lost profits caused by a chemical spill); Miller Indus. v. Caterpillar Tractor Co., 733 F.2d 813, 819 (11th Cir. 1984); Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973) (allowing commercial fishermen to sue for a tortious invasion of a public right to fish).

32. *See* Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon* Valdez *Oil Spill*, 23 J. LEGAL STUD. 1, 4–8 (1994) (discussing the development of the exception in a section focused on the favored status of seamen in maritime law); Lewis, *supra* note 13, at 97 (noting that courts have recognized "an exception to the [*Robins*] rule's application for commercial fishermen who suffer economic injury caused by maritime torts); Perry, *supra* note 26, at 455–56 (noting that recovery of lost fishing profits by "commercial fishermen, oystermen, crabbers, etc." is the "single well-defined exception" to *Robins* rule).

33. *See, e.g.*, Henderson v. Arundel Corp., 262 F. Supp. 152, 160 (D. Md. 1966) *aff'd*, 384 F.2d 998 (4th Cir. 1967) (considering Ninth Circuit decisions but agreeing with the reasoning of Casado v. Schooner Pilgrim, Inc., 171 F. Supp. 78, 80 (D. Mass. 1959), which rejects the idea that a "'special rule' obtains for fishermen").

courts and scholars have questioned the exception's reasoning, finding it unprincipled in allowing recovery for commercial fishermen but not for those to whom harm is equally foreseeable.[35] Thus, the commercial fisherman's exception is best characterized as a prominent but not entirely settled or fully theorized exception to the *Robins* rule.

B. THEORETICAL UNDERPINNINGS

The economic loss rule has often been critiqued as suffering from a "theoretical deficit."[36] This is unsurprising given that the rule itself is an exception to the general proposition that a defendant is responsible for the foreseeable harm that his negligence causes.[37] What makes the economic rule difficult is that neither ordinary tort principles (such as negligence, foreseeability, or causation) nor affirmative defenses, such as contributory negligence or assumption of risk, explain why courts deny recovery.[38] Without one clear principle to ground the economic loss rule, scholars have attempted to justify the rule on a variety of grounds.

There are three predominant justifications. First, there is the risk of unknown or incalculable losses that could lead to inefficient behavior and clog the judicial system. Second, some scholars worry that allowing broad economic recovery has the normative consequence of equating economic loss with physical harm or

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34. *See, e.g.*, Channel Star Excursions, Inc. v. S. Pac. Transp. Co., 77 F.3d 1135, 1138 (9th Cir. 1996) ("*Union Oil* is limited to the environmental sphere; if it is under admiralty law, it can only be said to have carved out a unique exception to the *Robins Dry Dock* rule by placing a duty on oil drillers to fish and the marine ecosystem."); Dempster v. Louis Eymard Towing Co., 503 So.2d 99, 101 (La. Ct. App. 1987) ("*Oppen* is distinguishable from the instant case since there is no allegation that the defendants fell into the category of 'oil spillers.'").

35. *See In re* Exxon Valdez, 767 F. Supp. 1509, 1518 (D. Alaska 1991) ("[T]his court does not understand how, as a matter of principle, the rule in *Robins Dry Dock* can have application for all claimants who suffer economic loss as a result of a marine tort except commercial fishermen."); Goldberg *supra* note 32, at 7 (arguing that the exception grew out of the historical rule of protecting maritime employees from their employers, but that "[w]hatever the actual merits of the fishermen's claims, it should be clear that admiralty law's historical soft spot for seamen and commercial fishermen provides a slender reed on which to base recovery.").

36. Robert J. Rhee, *A Production Theory of Pure Economic Loss*, 104 NW. U. L. REV. 49, 50–51 (2010).

37. Perry, *supra* note 26, at 413.

38. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1166 (8th ed. 2004).

harm to a proprietary interest. Lastly, many scholars worry that compensating pure economic losses will lead to overcompensation because not all losses to individuals (private losses) negatively affect the public's wealth; that is, private losses are often offset by private gains, and thus do not negatively affect society's total wealth. This section explores these justifications in order.[39]

1. *The Risk of Indeterminate Liability*

The first justification for the economic loss rule argues that if plaintiffs could recover for pure economic losses, then liability would extend ad infinitum.[40] As then-Judge Cardozo stated in *Ultramares Corp. v. Touche*, allowing recovery for economic loss would expose defendants "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[41] This indeterminacy stems from society's interconnectedness, which causes both physical and non-economic harms directly caused by a negligent act to ripple out and impose economic harm on a theoretically unbounded class of parties.[42]

Indeterminate liability is undesirable for two reasons. First, allowing recovery for all economic loss claims would open the liti-

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39. This is, of course, not to say that these are the only justifications offered in the literature. For other theories, *see, e.g.*, Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 793 (2006) (arguing, from a descriptive standpoint, that the rule exists because it is simple enough for jurors and average Americans both to understand and apply); Rhee, *supra* note 36, at 91–92 (arguing that society has a normative preference for production and thus protects the factors of production and assets integrated into the production function, and not the factors of outcome).

40. *See* Bernstein, *supra* note 39, at 803 (quoting Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931)); Fleming James, Jr., *Limitations on Liability for Economic Loss: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 45 (1972) ("The explanation . . . is a pragmatic one: the physical consequences of negligence usually have been limited, but the indirect economic repercussions may be far wider, indeed virtually open-ended.").

41. *Ultramares*, 174 N.E. at 444 (denying recovery of lost profits resulting from an accountant's mistake).

42. *See* Bussani et al., *supra* note 16, at 129 ("[I]n a complex economy, pure economic losses are likely to be serially linked to one another. The foregone production of a good, for example, often generates losses that affect several downstream individuals and firms who would have utilized the good as an input in their production process, and so on."); Perry, *supra* note 26, at 420–21. For example, when a person is physically injured, her "relatives, customers, creditors, suppliers, employers, and partners" may also suffer some level of financial loss, and that secondary loss may cause further loss to other parties. *Id.* at 21.

gation floodgates and severely burden the judicial system.[43] These burdens would cause even the most simple tort actions to become unsustainably expensive.[44] Arguably, there are procedural mechanisms that can reduce administrative costs by reducing the number of individual suits.[45] But because remote claims for pure economic loss often involve fact-specific inquiries into "the claimant's contributory negligence, the causal connection between [the] accident and a claimant's loss, and damages,"[46] the synergies that procedural mechanisms such as class actions typically create are unlikely to materialize in the economic loss context.[47]

Second, indeterminate liability may completely destroy companies without providing additional deterrence. Although liability may continue to increase indefinitely, at some point, further deterrence may become impossible, either because there are no additional methods to prevent the harm[48] or because "expected payment is limited by defendants' financial capacity or statutory

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43. *See* Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985) (noting that allowing pure economic loss claims would "draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases"); Dundee Cement Co. v. Chem. Labs., Inc., 712 F.2d 1166, 1172 (7th Cir. 1983) ("[T]here is a legitimate fear that a crushing burden of litigation would result from allowing recovery for economic damages . . . ."); Stevenson v. E. Ohio Gas Co., 73 N.E.2d 200, 203 (Ohio Ct. App. 1946) ("[T]o permit recovery of damages in such cases would open the door to a mass of litigation which might very well overwhelm the courts . . . .").

44. *Barber Lines*, 764 F.2d at 54 (1st Cir. 1985) (noting that the possibility of "a large number of different plaintiffs each with somewhat different claims . . . threatens to raise significantly the cost of even relatively simple tort actions."). *See also* Rizzo, *supra* note 16, at 283 ("The appearance of nonrecovery for negligently induced losses arises out of the desire to reduce litigation costs. When there is more than one possible plaintiff and when the appropriate contracting costs are low, the law seeks to channel economic loss through the party suffering harm to his person or property . . . .").

45. *See, e.g.*, FED. R. CIV. P. 23.

46. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 cmt. a, (Council Draft No. 2, 2007). To illustrate this point, the restatement uses the example of "[a] large fire and explosion at a gas plant caus[ing] widespread physical harm shutting businesses in the vicinity for days, putting many of the plant's employees out of work, and inconveniencing many of the plant's customers." *Id*. at illus. 2. Professor Goldberg argues that "[a]s the chain of causation lengthens, the difficulties with ascertaining the appropriate level of mitigation multiply." Goldberg, *supra* note 32, at 17. This could not only distort incentives, but also increase the cost of litigation.

47. Perry, *supra* note 26, at 422–23.

48. It is, of course, always an option to cease the action altogether, but in some cases, the activity is socially desirable.

caps."[49] By contrast, when the administrative costs associated with adjudicating a claim — that is, the costs of negotiating a settlement or litigating the claim — are higher than the cost associated with the claimant's injury, the defendant's actions will be over-deterred. These administrative costs may prove crushing to a company, causing them to eschew otherwise worthwhile activities or shut their doors.[50]

This indeterminate liability justification, however, has its critics. One of the biggest criticisms is that in some cases of pure economic loss, administrative costs are relatively unproblematic because the loss directly results from the defendant's negligence and is easily measured.[51] Thus, even when facing crippling liability, the previous arguments for limiting liability fall apart because an optimal level of liability would include all consequences of the responsible party's wrongdoing; anything less would distort incentives.[52] Similarly, some scholars argue that economic harm is at least as foreseeable as physical harm,[53] and "no *a priori* distinction can (or should) be made between economic and non-economic consequences of a tort."[54] The bright-line rule nevertheless has the benefit of deciding recoverability without the incon-

49. Perry, *supra* note 26, at 425 (citing La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985)).

50. *See* Perry *supra* note 26, at 426 (citing Dundee Cement Co. v. Chem. Labs., Inc., 712 F.2d 1166, 1171 (7th Cir. 1983); Leadfree Enters., Inc. v. U.S. Steel Corp., 711 F.2d 805, 808 (7th Cir. 1983)).

51. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 cmt. b (Council Draft No. 2, 2007). Indeed, under certain circumstances, economic damages are measured and compensated. *See* Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1525 (1985) ("Lost profits, wages, and other monetary expectancies involve assessments of tangible value that have been entertained on countless occasions in contract and property disputes."). *See, e.g.*, S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 66–68 (1st Cir. 2000) (allowing lost profit damages awarded by a jury that represented a loss of business at a marina because the marina was forced to delay a project after a gasoline spill destroyed parts of the marina, necessitating repair).

52. Bussani et al., *supra* note 16, at 129.

53. Francesco Parisi et. al., *The Comparative Law and Economics of Pure Economic Loss*, 27 INT'L REV. L. & ECON. 29, 31 (2007) ("[T]he likelihood and extent of economic loss have a degree of foreseeability that does not differ qualitatively from the foresight of other non-economic consequences of a typical tort situation."). For example, an oil spill will undoubtedly harm the interests of fishermen, as evidenced by the numerous claims by commercial fishermen and their subsequent carve-out from the *Robins* rule.

54. Bussani et al., *supra* note 16, at 125.

sistency of, and cost associated with, a case-by-case inquiry into foreseeability, causation, or damages.[55]

2. *Normative Consequences of Broad Recovery*

There are also normative reasons to preclude recovery for pure economic losses. Some scholars argue that harms can be organized into a moral hierarchy in which harm directly inflicted on a person is morally worse than harm to tangible property, which is in turn morally worse than harm to intangible wealth.[56] Accordingly, because the law "is supposed to reflect the proper values of society . . . [it] would be right to give greater protection" to property than wealth.[57] Therefore, assuming that the defendant's resources are limited, courts should not allow recovery for economic loss because it may prevent more morally worthy claimants from recovering.[58]

The literature provides two explanations for why harm to tangible property is morally worse than harm to intangible wealth: the inviolability of property[59] and the importance of property to people.[60] Not all scholars, however, are convinced that treating property differently from pecuniary interests is appro-

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55. *See* RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 cmt. b (Council Draft No. 2, 2007). Additionally, the cases with the least problems of proof are likely to be where the claimant had some type of contractual relationship with the party who was physically injured by the defendant's negligence. In this case, "[t]he ability of a claimant to secure protection from a loss through the claimant's contract with the property's owner is another reason not to impose liability . . . ." *Id*. *See also* Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986 (Wash. 1994) (holding that the court should intervene where there is the possibility of private ordering); Bily v. Arthur Young & Co., 834 P.2d 745, 769 (Cal. 1992) (same).

56. *See* BRUCE FELDTHUSEN, ECONOMIC NEGLIGENCE 12 (4th ed. 2000) ("there is an important qualitative difference between injury to a human being, and damage to property or economic expectations alone . . . . a human being is not a thing, and . . . a personal injury is not merely a special type of economic loss.")

57. TONY WEIR, A CASEBOOK ON TORT 6 (9th ed., London: Sweet & Maxwell 2000).

58. Bussani et al., *supra* note 16, at 127–28 (noting that the argument for protecting physical property over intangible wealth "rests on a silent premise . . . [that] the law cannot simultaneously protect all interests . . . .").

59. *See* Christian Witting, *Distinguishing Between Property Damage and Pure Economic Loss in Negligence: A Personality Thesis*, 21 LEGAL STUD. 481, 505–13 (2001) (arguing that "[t]he role of property is essential to self-constitution and in defining the limits of the individual *vis-à-vis* others in a way that purely abstract holdings of wealth cannot be.").

60. *See generally* Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247 (1992).

priate, because physical property is simply a form of wealth.[61] And further, even if this ordinal ranking is convincing, "there is no obvious reason to believe that, if pure economic loss was freely protected, other worthier claims would lose effective protection."[62] Thus, the law trades protection of intangible wealth — which is a societal good that is protected in many other circumstances — without the certainty that other claims would be compromised.

A second normative argument supporting the economic loss rule is grounded in retributive theory. According to this theory, allowing recovery for economic loss "may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong"[63] because a slight misstep may lead to ruinous liability.[64] Consequently, judges may use the exclusionary rule to avoid unjust awards of compensatory damages.[65] Yet it is not entirely clear why disproportionate consequences are of greater concern in the economic loss context than in other contexts that present the same problem.[66]

3. *Private Losses Do Not Equal Social Losses*

Some law and economics scholars argue that it would be socially inefficient for a plaintiff to recover for pure economic losses that represent private, and not social, losses.[67] When negligently caused private economic losses are partially offset by corresponding private gains, the social loss is equal not to those private economic losses, but to the private economic losses less the private

61. *See* Perry, *supra* note 26, at 423 ("[A]ny distinction between property damage and purely economic loss in terms of interest-hierarchy is hard to justify, [because] . . . property is a manifestation of wealth."); Bernstein, *supra* note 39, at 775 (calling the theory that property should have preference over pecuniary harm "overbroad, if not fatuous."). This is especially true for categories of property that can be readily liquidated.

62. Bussani et al., *supra* note 16, at 128.

63. Perry, *supra* note 26, at 424.

64. *Id.*

65. *See* Rabin, *supra* note 51, at 1534 (arguing that disproportionate penalties for wrongful behavior are a significant reason why judges have not allowed recovery for pure economic loss).

66. Bussani et al., *supra* note 16, at 130 ("The danger of disproportionate consequences resulting from minor blameworthiness is of course an issue of fairness no matter what kind of damages have been caused . . . .").

67. *See, e.g.*, *id.* at 132–34; W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 1 (1982).

economic gains.[68] In these situations, the sum of all private losses is greater than the social cost.[69] Yet economic theory holds that "efficient deterrence requires internalization of the *social* cost of every inefficient act by the actor."[70] Accordingly, requiring compensation for all purely economic losses, without further disaggregating these losses into private and social economic losses, could cause a tortfeasor to overcompensate the damaged party. Excluding liability for pure economic losses, therefore, prevents over-deterrence.[71]

Some scholars disagree with this line of argument and instead argue that economic losses are generally social losses. They argue that the social loss theory incorrectly assumes that competing firms will have the excess capacity to accommodate the demand that the injured firm would ordinarily have met.[72] One scholar in particular has argued that in typical economic loss situations, the financial injury results in "net reductions in the total social product."[73] Perhaps determining whether or not economic losses are social losses is fact-specific; if so, the bright-line *Robins* rule, by excluding recovery for all purely economic losses includ-

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68. Bussani et al., *supra* note 16, at 133 ("[T]he economic definition of social loss [is] the sum of all private losses and gains generated by a given action."). The formula provided in the text accompanying this footnote merely rearranges the terms.

69. Goldberg, *supra* note 32, at 20 (stating that "a failure to recognize the offsetting behavior of others would result in an overstatement of the social harm.").

70. Perry, *supra* note 26, at 428 (emphasis added).

71. *Id*. at 428 & n.78 (citing multiple sources for the proposition that "[t]his view is now firmly established in the academic literature."). Perhaps a more nuanced view is that "either ignoring the reliance losses or compensating them is likely to give the wrong result [in terms of deterrence, but] . . . . it is preferable to err on the side of ignoring the reliance losses." Goldberg, *supra* note 32, at 15. *See also* Bussani et al., *supra* note 16, at 138–43 (arguing for optimal liability rules depending on the theoretical relationship between private and public costs).

72. *See, e.g.*, Russell Brown, *Still Crazy After All These Years:* Anns, Cooper v. Hobart *and Pure Economic Loss*, 36 U. BRIT. COLUM. L. REV. 159, 161 n.8 (2003) (calling the assumption of excess capacity "dubious").

73. Rizzo, *supra* note 16, at 286 (arguing that economic losses resulting from "cutting off the supply of a vital input" or "the destruction of an output and the derivative effects on those who are part of the marketing process for that good" represent real social costs). *See also* Mario J. Rizzo, *The Economic Loss Problem: A Comment on Bishop*, 2 OXFORD J. LEGAL STUD. 197, 201–04 (1982). *Cf.* Bussani et al., *supra* note 16, at 149 ("In most real life cases [where production is shut down due to closure of public services or infrastructures, both of which are key inputs to production], the pure economic loss of the victims . . . constitutes a gross over-estimate of the true social loss, and the exclusionary rule is correctly applied to avoid excessive liability and over-deterrence.").

ing social losses, may prevent over-deterrence at the cost of undercompensating the injured party.

Assuming that economic losses are not true social losses, it is not apparent that they should remain un-remedied.[74] Economic losses may not decrease overall social wealth, but they do result in wealth transfers that alter the distribution of wealth within society because it is very difficult for society or a private plaintiff to use the legal system to capture unforeseen gains or economic windfalls.[75] One may expect, therefore, that a society that emphasizes fairness over deterrence will be less persuaded by the argument that not all private losses are social costs.

C. TYPICAL SCENARIOS

To better understand the economic loss rule, scholars have advanced various categorizations of the relevant case law.[76] This section does not attempt to present or create a comprehensive list of scenarios that implicate pure economic loss, but presents select categories from an existing categorization that are most pertinent to the oil spill context.[77] Although this is largely a descriptive task, categorization is theoretically important because certain justifications are more or less convincing when applied to differ-

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74. Bernstein, *supra* note 39, at 775.

75. *See generally*, Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1531 (1999) (describing how windfalls to large groups in society are difficult to capture through the judicial system in the current legal regime).

76. Scholars differ over what categorizations are appropriate, although the majority of the attempts focus on the same variables. This Note, however, has no intention of becoming involved in the debate over proper categorizations, and thus does not create a new taxonomy. For other taxonomies, *see, e.g.*, Giuseppe Dari-Mattiacci & Hans-Bernd Schäfer, *The Core of Pure Economic Loss*, 27 INT'L REV. L. & ECON. 8, 12–15 (2007) (containing 14 groups, one of which is "oil spills"); Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111, 113–25 (1998) (containing three groups: intellectual services, defective products, and interference with use of resources); William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347, 360–61 (1986) (containing eight groups); Bussani et al., *supra* note 16, at 117–20 (containing four groups: ricochet loss, transferred loss, closures of public service and infrastructures, and reliance upon flawed information or professional services).

77. For the comprehensive categorization, *see* Bernstein, *supra* note 39, at 782–93 (presenting four categories: cases involving a contract-like relationship between plaintiff and defendant, impediments to the plaintiff's regular business operations, emotions mixed with financial loss, and harm to intellectual property).

ent scenarios. Categorization also helps to conceptualize the typical scenarios that lead to claims for pure economic loss.

Economic losses to a claimant may result from physical injury to a third party's person or property. These instances, labeled "transferred loss[es],"[78] occur when "C causes physical damage to B's property or person, but a contract [frequently a lease, sale, or insurance agreement] between A and B (or the law itself) transfers a loss that would ordinarily be B's onto A."[79] The most famous example of this category is the *Robins* case,[80] where the time charterer could not recover lost profits caused by defendant's negligent ship repair.[81] Many courts and commentators agree that this type of loss should not be compensated because private ordering allows ex ante protection through contract.[82]

Pure pecuniary injury may also occur when the defendant's wrongful behavior inflicts "tangible, visible damage in a way that affects another's economic expectancy."[83] This is further divisible into two distinct sub-categories: physical harm to property that the plaintiff does not own, and evacuations and closures.

Physical harms to property that the plaintiff does not own includes harm to public environments or infrastructures upon which economically injured plaintiffs rely.[84] The Restatement (Second) of Torts lists damage to highways, bridges, and streams as examples of this type of harm,[85] and commercial fishermen serve as the prime example of claimants under this category.[86] But this category also includes situations where a plaintiff's alleged economic injury results from an inability to access its production platform, as in *Settoon Towing*, where an oil slick on the

78. Bernstein, *supra* note 39, at 783.

79. *Id*. (quoting Bussani et al., *supra* note 16, at 118 (internal citations and quotation marks omitted)).

80. *See supra* notes 21–26 and accompanying text.

81. Bernstein, *supra* note 39, at 783 & n.53 (placing *Robins* within this category).

82. *Id*. at 784 (noting that tort law generally "reject[s] negligent interference with contract" and that "[a] long history of case law rejects separate actions by insurance companies against tortfeasors for harm to the insured persons" (internal citations and quotation marks omitted)).

83. *Id*. at 788.

84. *Id*.

85. RESTATEMENT (SECOND) OF TORTS § 821C cmt. b, illus. 2; cmt. g, illus. 7, 8 (1979).

86. *Cf.* Goldberg, *supra* note 32, at 8–11 (recognizing that some have considered commercial fishermen to be surrogate owners of not-yet-caught fish).

ocean amounted to damage to a maritime highway.[87] Similarly, many claims under the Gulf Coast Claims Facility seek compensation for lost profits that are incurred when tourists, after seeing the damage to public and private beaches, decide not to travel to the Gulf.[88]

Evacuations and closures are considered a separate subcategory, but bear a striking similarity to the previous category of physical harm to property the plaintiff does not own.[89] The key distinction is that cases under this sub-category do not stem from tangible injuries to another party's property; rather, "the plaintiff loses money [because] carelessness by the defendant forces authorities to close or evacuate a discrete area that the plaintiff does not own."[90] Examples include a drilling moratorium, a fishing moratorium as in *Ballard*,[91] and any forced closings of shipping lanes.[92] These cases are likely to result in significant economic losses because individuals and companies will likely have lost complete use of a resource for a period of time, but by the same token, they are especially prone to concerns of indeterminate liability.[93]

III. THE OIL POLLUTION ACT'S APPROACH TO ECONOMIC LOSS

Part III presents the current state of economic loss recovery under the OPA and argues that the uncertainty surrounding these claims highlights the need for a more coherent approach. Part III.A describes the history and language of the OPA, arguing that although Congress intended to broaden recovery for pure economic losses, it did not define the scope of such recovery. Part III.B discusses the limited case law, concluding that while courts appear to agree that claims should be limited by proximate cause, they, like Congress, have failed to provide litigants with sufficient predictability. Part III.C examines the Gulf Coast Claims Facili-

87. *In re* Settoon Towing, No. 07-1263, 2009 WL 4730971, at *1, *4 (E.D. La. Dec. 4, 2009).
88. *See infra* notes 163–164 and accompanying text.
89. Bernstein, *supra* note 39, at 790.
90. *Id*. at 789.
91. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994).
92. Bernstein, *supra* note 39, at 789–90 (providing examples of evacuations and closures).
93. Bussani et al., *supra* note 16, at 119–20.

ty and argues that although it does not interpret the OPA, it is nonetheless useful because it provides insight into popular and political sentiment regarding economic loss compensation by applying a liberal proximate cause analysis. Finally, Part III.D argues that both the courts' current interpretation of the Act and the Gulf Coast Claim Facility's approach to economic loss impose costs that are unwarranted when considering the Act's language and goals.

A. THE OPA AND ITS TREATMENT OF ECONOMIC LOSS

This section provides the general background of the OPA and then analyzes the OPA's treatment of pure economic loss.

1. *Creating a Unified Approach to Oil Spills*

Prior to the OPA, federal statutes did not take a unified approach to oil releases. Rather, a mixture of general environmental legislation and source-specific legislation "established a patchwork scheme of liability limits, legal defenses, and compensation programs."[94] The Clean Water Act (CWA),[95] for example, established a national policy banning all discharges of oil into navigable waters[96] and "imposed a regime of civil penalties and strict liability for federal clean-up costs."[97] It did not, however, "deal with private claims, economic losses or expenditures by local governments."[98] Furthermore, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[99] perhaps the most stringent of the major federal environmental statutes, skirted the issue of oil spills by defining "hazardous substances" so as not to include petroleum products.[100]

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94. 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, 101 (2001).

95. 33 U.S.C. §§ 1251–1387 (2006).

96. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 150–51 (6th ed. 2009) (describing section 311 of the CWA, which helped establish a national policy banning discharges of oil into navigable waters, and subsequent interpretive tests created by the Department of the Interior and federal courts).

97. *See* Wagner, *supra* note 13, at 286.

98. *Id*.

99. 42 U.S.C. §§ 9601–9675.

100. *Id.* § 9601(14) ("The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof . . . [or] natural gas, natural gas liquids, liquefied

Source-specific legislation was similarly unable to provide a comprehensive treatment of losses from oil pollution. Each statute took a different approach to preventing and discouraging oil spills and each had a narrow focus that prevented a comprehensive treatment of oil pollution.[101] Because these statutes overlapped in jurisdiction and contained conflicting terms, any oil spill was likely to leave responsible parties confused and in search of the proper regime under which to resolve any issues of recovery.

In 1989, what was then the largest American oil spill on record occurred when the *Exxon Valdez*, a large oil tanker, ran aground on the Alaskan shore, releasing "an estimated eleven million gallons of crude oil."[102] Despite continuous cleanup efforts, the oil reached 1200 miles of shoreline, damaged much of the marine life and other natural resources in the area, and prompted the state of Alaska to cancel the fishing season for the Prince William Sound.[103] Perhaps more importantly, pictures and videos of oiled beaches and dead animals were broadcast across America, creating a public demand for something to be done to protect the nation's waters from future oil spills.[104]

Acting on America's newfound environmental awareness, Congress passed and President H.W. Bush signed into law the Oil Pollution Act of 1990, which was designed as comprehensive legislation to address liability resulting from oil spills.[105] The law was designed to remove the disparate treatment that occurred under the potpourri of earlier legislation. As one commentator has put it, the law was designed "to prevent oil spills and, in the case of spills that do occur, to provide quick compensation to those injured."[106]

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natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).").

101. *See* Deepwater Port Act of 1974, 33 U.S.C. §§ 1501–1524; Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331–1356; Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. §§ 1651–1656. For a detailed treatment of the history of oil spill legislation before the OPA, *see* Lewis, *supra* note 13, at 101–07.

102. REPORT TO THE PRESIDENT, *supra* note 1, at 70.

103. Lewis, *supra* note 94, at 108.

104. *Id*.

105. *See supra* notes 11–12.

106. Lewis, *supra* note 13, at 137.

2. *The OPA's Treatment of Pure Economic Loss*

Although the OPA focuses on improving safety and preventing future oil spills, the drafters also included specific language regarding liability.[107] These provisions allow claimants to recover from a "responsible party"[108] "removal costs and damages" that "result from" a discharge or "substantial threat of a discharge of oil[] into or upon the navigable waters."[109] Damages, which are subject to a statutory cap,[110] are further split into six different categories, each with its own provision.[111] The most important provision for this Note's purposes is subsection 2702(b)(2)(E) ("subsection (E)"), which allows recovery of "damages equal to the loss of profits or impairment of earning capacity due to the injury,

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107. *See generally* 33 U.S.C. § 2702 (2006). This section of the OPA, titled "Elements of Liability," contains the rules for various types of recovery applicable to various different entities. *Id.*

108. *See id.* § 2702(a) (stating that "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable"); *see also id.* § 2701(32) (defining the term "responsible party").

109. *Id.* § 2702(a), (b). The full language of the former provision is as follows:

> Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident.

Id. § 2702(a).

110. *Id.* § 2704(a) (among other caps, limiting liability "for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000" and "for any onshore facility and a deepwater port, $350,000,000"). *Id.* § 2704(a)(3), (4).

111. *Id.* § 2702(b) provides:

(2) Damages

The damages referred to in subsection (a) of this section are the following:

(A) Natural Resources . . . .

(B) Real or Personal Property

Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence Use . . . .

(D) Revenues . . . .

(E) Profits and Earning Capacity

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

(F) Public Services . . . .

destruction, or loss of real property, personal property, or natural resources . . . by any claimant."[112]

To understand the scope of this provision, one must first turn to the statutory text.[113] The language that "any claimant" may recover plainly decouples economic loss recovery from a proprietary interest in physically injured property. And, if this language were not clear enough, all doubt is removed when juxtaposed with subsection 2702(b)(2)(B)'s language that damages for real or personal property are only "recoverable by a claimant who owns or leases that property."[114] Yet this does not end the inquiry. Subsection (E) also includes a separate requirement conditioning recoverability: the loss of profits must be "due to" harm to physical property or natural resources.[115] Thus, while the Act does not require injury to the claimant's property, it nonetheless requires some physical injury. The fundamental problem is therefore defining the scope of the phrase "due to."

Unfortunately, the text provides little guidance for understanding when economic loss is "due to" injury to physical property. The text does not define "due to" and does not use the phrase in an analogous context that would shed light on its meaning.[116] At one extreme, one could read the statute not to require any nexus between the economic loss and the physical injury.[117] This approach is implausible, however, for two reasons. First, because the statute defines natural resources to include virtually everything — including land, air, and water[118] — there rarely will be a

112. *Id.*

113. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

114. 33 U.S.C. § 2702(b)(2)(B).

115. *See supra* note 112 and accompanying text.

116. The phrase is used elsewhere in the Act, but in unhelpful ways. Section 2702(b)(2)(D) uses the exact same language — "due to the injury, destruction, or loss of real property, personal property, or natural resources" — to define when the government may recover lost revenues, but this use suffers from the same problems as the language in subsection (E). The other uses of the phrase are divorced from the actual oil spill and instead involve provisions regarding administering the Act. *See, e.g.*, *id.* § 2705(b)(3) ("If in any period a claimant is not paid due to reasons beyond the control of the responsible party . . . .").

117. For a more in depth treatment of the consequences of not requiring a nexus between the physical injury and the economic loss, *see* JOHN C.P. GOLDBERG, LIABILITY FOR ECONOMIC LOSS IN CONNECTION WITH THE DEEPWATER HORIZON SPILL 18–24 (2010), *available at* http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438.

118. 33 U.S.C. § 2701(20).

case where some natural resource has not been damaged.[119] In fact, it seems impossible for an actual discharge to harm neither property nor a natural resource.[120] The only time when physical harm will not occur is when there is merely a threat of a discharge and not an actual discharge.[121] Had Congress intended this categorical separation, it had significantly easier ways of indicating as much.[122] Second, and a corollary to the first point, the statutory cap and $1 billion trust fund established by the OPA are woefully inadequate to compensate all claimants who may bring claims in the wake of a catastrophic spill, preserving the practical need for some other limit to the number of economic loss claims.[123] The "due to" language thus requires at least *some* nexus between economic loss and physical property damage.

At another extreme, perhaps the language merely codifies common law's economic loss rule. At first glance, this interpretation appears absurd in light of the aforementioned language that "any claimant" may recover for economic losses. However, this language would be entirely consistent with the common law approach as it stood when the OPA was enacted because commercial fishermen, who were not the owners of injured property, were able to recover.[124] Thus, the "any claimant" language could simply serve as a catchall to assure that persons eligible to recover at common law would be eligible to recover under the OPA, regardless of whether they suffered harm to a proprietary interest. While textually possible, this interpretation is certainly not the most natural reading of the text; it also works against the OPA's goal of providing compensation to those affected by an oil spill, and fails to recognize that Congress was legislating in the wake

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119. GOLDBERG, *supra* note 117, at 19 (finding that it is reasonable to conclude that "every discharge actionable under OPA is by definition a discharge that results in at least some natural resources damage or loss.").

120. 33 U.S.C. § 2702(a) requires that the discharge be into the navigable waters, which, by definition, is injury to a natural resource.

121. A substantial threat of a discharge may lead to other liability. *See supra* note 109.

122. Moreover, "it would be exceedingly odd to suppose that Congress meant to build the statute's liability provisions for economic loss around the theoretical but vanishingly small probability of a spill that causes economic loss while causing no harm to, or loss of, property or resources." GOLDBERG, *supra* note 117, at 19.

123. *Id*. at 23.

124. *See supra* notes 27–35 and accompanying text for more on the commercial fishermen exception to the *Robins* rule.

of a disaster that left many coastal businesses without the ability to recover their economic losses.[125]

At least on a purely textual level, then, the "due to" language is ambiguous: subsection (E) does not indicate when a claimant may recover for pure economic loss.[126] It is therefore appropriate to turn to legislative history. Three pieces of legislative history indicate that the OPA should be read to provide expansive recovery — that is, a weak nexus between the physical harm and the claimed economic loss. First, a section-by-section analysis of the Act placed into the Congressional Record by the sponsor of the House version of the bill stated "an employee at a coastal motel may have standing to make a claim for damages even though the employee owns no property which has been injured as a result of an oil spill."[127] Although this is the lone reference to such a situation in the record, the interpretation of a bill's sponsor is often accorded significant weight.[128]

Second, an older version of this House bill limited recovery of lost profits and earning capacity to those claimants who derived at least 25% of their earnings from the damaged property.[129] This qualifier was later omitted, perhaps due in part to criticism that it was an "unnecessary impediment[ ] to full recovery by those suffering economic loss as a result of an oil spill."[130] While techni-

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125. *See supra* notes 105–106 and accompanying text. This interpretation is also implausible because the Act already provides a provision allowing claimants who have suffered harm to a proprietary interest to recover economic losses. *See* 33 U.S.C. § 2702(b)(2)(B). Subsection (E) would therefore encompass so few claims as to hardly be worth its own section.

126. Others have reached the same conclusion on similar grounds. *See, e.g.*, Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 15 (1990) ("Although[] the Oil Pollution Act allows recovery for lost profits or impairment of earning capacity, the classes of claimants who may recover is unclear." (internal citation omitted)).

127. 135 CONG REC. H7898 (daily ed. Nov. 1, 1989) (statement of Rep. Jones). Another Congressman echoed this argument by stating: "Throughout development of H.R. 1465, bill sponsors and conferees have been concerned about . . . speculative damages. The conferees do not intend for such results to occur. Documentation of prior profits and earnings should be evidenced to support claims for lost profits and diminished earning capacity." 136 CONG REC. H6933 (daily ed. Aug. 3, 1990) (statement of Rep. Stangeland).

128. *See* James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV 1199, 1226 (2010).

129. H.R. 1465, 101st Cong. § 102(a)(2)(B)(v) (as reported by H. Comm. on Sci., Space, and Tech., Sep. 20, 1989) (allowing recovery of "[d]amages equal to the loss of profits or impairment of earning capacity . . . . by any claimant who derives at least 25 percent of his or her earnings from the activities which utilize such property or natural resources . . . .").

130. H.R. REP. NO. 101-242, pt. 2, at 151 (Report by the Committee on Merchant Marine and Fisheries, 1989). The committee listed part-time fishermen as an example of

cally not bearing on the nexus of causation, the reasoning for removing the limitation suggests that the provision's language should be read expansively.

Third, the House Committee on Public Works, one of the committees with jurisdiction over the bill, highlighted that, under the Act, "incentives exist to prevent spills on the part of industry through the imposition of strict liability and the *enormous economic* and ecological damages which could occur."[131] Although this by no means requires interpreting the economic provisions to allow recovery by everyone who has been financially harmed, the focus on creating incentives to prevent future spills by imposing *enormous* economic damages suggests that Congress intended to allow broad recovery.

But no foray into legislative history is one-sided, and the legislative history also gives reason to believe that Congress intended the Act to codify existing doctrine. First, it would be odd for a radical departure from the common law to be neither mentioned in the accompanying conference report nor made clear in the statutory language.[132] The conference report instead uses the statute's text to explain its meaning[133] and nowhere mentions the *Robins* rule.[134] Second, rather than illustrating the typical subsection (E) claimant by describing a hotel owner or a seafood restaurateur who lost profits as a result of an oil spill, the Confe-

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persons who should be able to recover for economic losses but would be unable to do so under the 25% qualifier. *Id*.

131. H.R. REP. NO.101-242, pt. 1, at 29 (emphasis added). The report also described the legislation as "a proper and balanced response to our Nation's needs both to increase preventative measures against oil spills and to respond to a spill should it occur." *Id*.

132. Statutes in derogation of the common law are narrowly read. *See, e.g.*, Shaw v. Railroad Co., 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.").

133. H.R. REP. NO. 101-653, at 4 (1990) (Conf. Rep.) [hereinafter Conference Report], *reprinted in* 1990 U.S.C.C.A.N. 779, 781. The Conference Report states: "Subsection [2702](b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income." *Id.*

134. *See* Lewis, *supra* note 13, at 139 (discussing the absence of evidence in the record as to whether Congress intended to abrogate the *Robins* rule with subsection (E)). Lewis further notes that "[e]ven Senate Majority Leader George Mitchell, a major proponent of OPA and a former federal district court judge, in an article discussing the impact of OPA, omits any mention of *Robins* or the dispute in the circuits regarding its continued viability." *Id*.

rence Committee Report provides the example of commercial fishermen — the very class of claimants already excepted by some courts from the economic loss rule.[135] If Congress intended to drastically change the rules of recovery by creating a broader class of claimants, it is odd that this intention was not more explicit.

But considering this history in light of the statute's text, it is apparent that Congress affirmatively intended to broaden recovery beyond that allowed at common law. Despite the fact that Congress did not explicitly state that it was removing the economic loss rule, the plain language of the text controls, stating that "any claimant" may recover. Moreover, the Act's historical context and the available legislative history reinforce a reading allowing more broad recovery. Yet these pieces of legislative history are few in number and do not indicate the nexus courts should require when interpreting the phrase "due to" physical injury. Although one congressman did provide the example of a motel employee,[136] there is no indication that Congress as a whole considered or accepted that such a person would be able to recover under subsection (E). Indeed, the more prominent example offered of a subsection (E) claimant was the commercial fisherman, a person who could already recover at common law.

The only clear import of the text and the legislative history — and thus the only requirement that any interpretation of "due to" must satisfy — is that there be *some* nexus between the physical injury and the claimed economic loss that will expand recovery beyond what was available at common law. Courts have thus been left with the task of fashioning some interpretation of "due to" that gives force to this minimal Congressional guidance.

B. JUDICIAL INTERPRETATIONS OF THE OPA'S LANGUAGE

Because the OPA creates a new cause of action, courts do not rely on general maritime law's *Robins* rule to dispose of pure eco-

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135. Conference Report, *supra* note 133, at 4. The Conference Committee Report states, "[f]or example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources." *Id.* *See supra* notes 27–35 and accompanying text for more about the commercial fishermen exception to the *Robins* rule.

136. *See supra* note 127 and accompanying text.

nomic loss claims under the OPA, and must instead interpret the OPA's language and history.[137] Thus, courts have asked two questions when considering such a claim: is it ever possible to recover for pure economic losses, and, if so, what rule or standard limits the class of claimants who may recover? This section explores the limited case law[138] and argues that courts have interpreted the OPA to allow recovery for pure economic losses, but will cabin liability by engaging in an as of yet undefined proximate cause analysis.

1. *Courts Allow Pure Economic Loss Claims*

With only one exception,[139] courts have made clear that pure economic loss claims are recoverable under subsection (E).[140] More importantly, they have not interpreted subsection (E) as merely codifying common law, but have instead allowed claims that would have been dismissed under the exclusionary rule.[141]

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137. *See* Tanguis v. M/V Westchester, 153 F. Supp. 2d 859, 867 (E.D. La. 2001) ("The Court finds that OPA establishes an entirely new, federal cause of action for oil spills."). Other courts have implicitly acknowledged this by holding that the Act preempts state maritime claims and supersedes other federal maritime claims. *See, e.g.*, Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 750 (E.D. La. 2009) (holding that the OPA preempts maritime law); Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1447 (E.D. Va. 1996) (same), *aff'd*, 122 F.3d 1062 (4th Cir. 1997).

138. The case law is limited because the OPA encourages settlement by requiring claimants to demand relief from the responsible party before suing in court. *See* 33 U.S.C. § 2713(a) (2006) ("[A]ll claims for removal costs or damages shall be presented first to the responsible party . . . .").

139. *In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 679 (E.D. Mich. 1992) ("The bright-line rule as set forth in [La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1040 (5th Cir. 1985)] applies to the claimants and serves to bar their economic loss claims because they have not alleged physical injury to a proprietary interest."). This interpretation occurred before other federal circuits held that pure economic loss claims are recoverable under the OPA and has not been revisited by that court.

140. *See, e.g.*, Taira Lynn Marine Ltd. No. 5, LLC v. Jays Seafood, Inc., 444 F.3d 371, 382 (5th Cir. 2006) ("[Section] 2702(b)(2)(E) allows a plaintiff to recover for economic losses resulting from damage to another's property."); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630 (1st Cir. 1994) (noting that the OPA "almost certainly provides for recovery of purely economic damages" as support for its holding that a state statute allowing pure economic recovery is not an excessive burden on maritime commerce); Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1015 (E.D. La. 1993) (holding that subsection (E) does not require physical injury to the plaintiff's property in order for the plaintiff to recover economic damages).

141. *See, e.g.*, *In re* Settoon Towing, No. 07-1263, 2009 WL 4730971, at *3 (E.D. La. Dec. 4, 2009) (allowing a claim for economic losses resulting from inability to access a drilling platform during an oil spill clean-up and noting that such claim would have been barred under federal maritime law); *Sekco Energy*, 820 F. Supp. at 1015 (holding that the

Procedurally, courts have found that a pure economic loss claim survives a motion for summary judgment if the claimant presents an issue of fact for two interconnected allegations: (1) that damage to "real property, personal property, or natural resources"[142] "result[ed] from" the release of oil,[143] and (2) that the alleged economic loss was "due to" that physical injury.[144]

If only considering but-for causation, however, these two requirements do not serve as a meaningful impediment to recovery because the Act defines "natural resources" to include "land, fish, wildlife, biota, air, water, ground water, [and] drinking water supplies."[145] Given this sweeping definition, geographically distant seafood restaurants could raise an issue of fact as to whether physical harm to the fishing stock lowered their profits by discouraging consumers from buying seafood, and hotels near unoiled beaches could raise an issue of fact as to whether physical damage to the ocean and beaches in other areas scared tourists away from their hotels. Without the *Robins* rule's proprietary harm requirement serving as a threshold screening mechanism, courts must find another way to cabin liability while giving full effect to the congressional policy choices codified in the OPA.

2. *Courts Apply an Undefined Proximate Cause Analysis*

There is very limited case law demonstrating how courts cabin liability, but the OPA's structure and the only case directly on point indicate that courts will do so by requiring physical harm to have proximately caused the claimed economic loss. The only case directly on point is *Sekco Energy, Inc. v. M/V Margaret Chouest*, in which a district court denied recovery for pure economic loss after a bench trial because the oil spill did not prox-

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loss of "[f]uture earnings derived from drilling on the Outer Continental Shelf" is a legitimate cause of action under the OPA).

142. 33 U.S.C. § 2702(b)(2)(E) (2006).

143. *Id.* § 2702(a).

144. *Id.* § 2702(b)(2)(E). *See Taira Lynn*, 444 F.3d at 383 (dismissing an economic loss claim because the claimant neither "raised an issue of fact as to whether any property damage was caused by the pollution incident" nor to whether "their economic losses [were] due to damage to property resulting from the discharge . . . .").

145. 33 U.S.C. § 2701(20). *See also* GOLDBERG, *supra* note 117, at 19 (finding that it is reasonable to conclude that "every discharge actionable under OPA is by definition a discharge that results in at least some natural resources damage or loss.").

imately cause the claimant's economic injury.[146] While not precedential, this holding is nonetheless persuasive for two reasons. First, a holding to the contrary would produce the odd result of requiring a nexus between the spill and traditionally recoverable physical damage,[147] but not between physical damage and traditionally unrecoverable pure economic loss. Second, courts addressing pure economic claims outside of the OPA context have consistently applied proximate cause analysis to cabin recovery when the *Robins* rule has been inapplicable.[148] Absent a reason to believe or evidence to suggest that courts interpreting the OPA will depart from this tradition, it is very likely that courts will read a proximate cause requirement into subsection (E).

Knowing that courts will apply proximate cause analysis is only the first step; determining precisely *how* courts will apply proximate cause analysis is the much more difficult question. Turning again to the only subsection (E) case that has explicitly applied proximate cause analysis, *Sekco Energy* provides neither clarity nor predictability through its articulation of proximate cause as "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[149] The facts of the case are similarly unhelpful for discerning a predictable rule because, unlike in typical cases, the spill did not prevent the claimant or any other party from using the injured resource.[150] Rather, the spill caused the government to

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146. No. 92-0420, 1993 WL 322942, at *3 (E.D. La. Aug. 13, 1993) ("Rather than first discussing causation in fact, or 'but for' causation, the Court proceeds to proximate cause, the principle upon which the outcome of this case turns.").

147. GOLDBERG, *supra* note 117, at 20–23 (arguing that the statutory language used in § 2702(b)(2)(B) is analogous to CERCLA and the OPA's predecessor, TAPAA, both of which have been interpreted to "encompass notions of both actual and proximate cause.").

148. *See* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630 (1st Cir. 1994) (assuming that a Rhode Island statute allowing pure economic recovery for harm caused by an oil spill "incorporates the familiar tort limitations of foreseeability and proximate cause. . . . [to] limit the burden imposed on maritime shipping"); La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1046 (5th Cir. 1985) (en banc) (Wisdom, J., dissenting) (arguing that the court should not apply the *Robins* rule to the case at hand, but should instead analyze the harm under the conventional tort principles of foreseeability and proximate cause); Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 824–25 (2d Cir. 1968) (using proximate cause analysis to deny recovery for economic losses incurred by the owners of boats or cargo that could not conduct business because an improperly moored ship had broken free, crashed into a bridge, and blocked the river).

149. *Sekco Energy*, No. 92-0420, 1993 WL 322942, at *4.

150. *See supra* Part II.C for a discussion of typical scenarios in which economic loss results from an oil spill.

notice a separate oil leak coming from the claimant's rig and to subsequently order the claimant to shut down its drilling platform.[151]

Although not explicitly invoking proximate cause, the Fourth and Fifth Circuits have given reason to infer that physical injury should directly cause economic harm. In one case, the Fifth Circuit addressed whether claimants had raised an issue of fact as to whether the release in question caused property damage.[152] To resolve this question, the court approvingly discussed *Gatlin Oil*,[153] a Fourth Circuit decision which held that property damage caused by a fire that was ignited by the fumes from an oil spill did not satisfy the statutory requirement that damages "result from" the oil spill.[154] Put differently, this holding suggests that the oil spill must *directly* cause the property damage in order for the claimant to recover. Although neither *Gatlin Oil* nor *Taira* directly addresses the required nexus between physical damage and economic loss under the OPA, the cases suggest that, because of judicial skepticism regarding economic loss,[155] this nexus will be at least as constrained as the nexus between the spill and physical damages.

Despite this hint of direct causation, the required nexus is far from clear. After *Taira*, two district courts have allowed subsection (E) claims to survive summary judgment without mentioning

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151. *Sekco Energy*, No. 92-0420, 1993 WL 322942, at *2.

152. Taira Lynn Marine Ltd. No. 5, LLC v. Jays Seafood, Inc., 444 F.3d 371, 382–83 (5th Cir. 2006).

153. Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999). Rather than recovering from a responsible party, this case centered on Gatlin's request for reimbursement of removal costs and damages from the Oil Spill Liability Trust Fund because an unknown third party caused the spill. *Id.* The Fifth Circuit in *Taira* found that the decision was nonetheless on-point for a subsection (E) analysis because both cases involved the more general definition of compensable damages under section 2702. *Taira*, 444 F.3d at 383.

154. The language in *Gatlin* is somewhat confusing on this point. The court holds that the "removal costs and damages specified in section 2702(b) are those that result from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or the adjacent shoreline." *Gatlin*, 169 F.3d at 211. The court then denies recovery "for fire damage because the evidence did not establish that the fire caused the discharge of oil into navigable waters or posed a substantial threat to do so." *Id.* at 212. Although this reasoning turns around the analysis, by preventing recovery for the fire damage, the court implicitly found that the fire damage was not the legal result of the oil spill.

155. *See supra* Part II.A for an overview of this history of skepticism that caused courts to adopt the bright-line *Robins* rule.

proximate cause analysis or a requirement of direct injury.[156] Without developed case law in this area delineating which claims will be considered too remote to merit recovery, claimants and responsible parties know only that the court will use proximate cause analysis to cabin liability; they do not know how courts will apply this doctrine. In sum, proximate cause analysis is applicable but currently undefined.

C. THE GULF COAST CLAIMS FACILITY

The 2010 Gulf spill, however, will not put the underdeveloped case law to the test because the Gulf Coast Claims Facility ("GCCF") will adjudicate the vast majority of claims arising from that spill.[157] The Obama Administration and British Petroleum (BP) created the GCCF to administer the $20 billion escrow fund established by BP in order to compensate those injured by the *Deepwater Horizon* spill.[158] The purpose of the GCCF is to remove claims from the court system and the provisions of the OPA, and instead use an "'Oil Spill Liability Trust Fund' to provide a faster and more fair way to pay damage claims for individuals and businesses harmed by the Gulf Oil Spill."[159] At first, Kenneth Feinberg, the administrator of the GCCF, said that the Facility would not consider claims of indirect harm both because "they would open a door that thousands of businesses across the country would try to walk through" and because, as described above in

156. *See* Dunham-Price Grp., LLC v. Citgo Petroleum Corp., No. 2:07 CV 1019, 2010 U.S. Dist. LEXIS 31901, at *2, *7–8 (W.D. La. Mar. 31, 2010) (allowing past summary judgment plaintiff's claim for economic losses suffered when the government responded to an oil spill in a river by temporarily suspending traffic until a cleanup was complete); *In re* Settoon Towing, No. 07-1263, 2009 WL 4730971, at *2–4 (E.D. La. Dec. 4, 2009) (allowing past summary judgment plaintiff's claim that an oil spill prevented it from accessing its production platform, leading to decreased profits).

157. Participation in the GCCF is voluntary. Any participant unwilling to participate may still use the normal OPA process to obtain a remedy. *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, § 5.53, http://gulfcoastclaimsfacility.com/faq (last visited Sept. 15, 2011).

158. *BP Claims: About the $20 Billion Dollar* [sic] *BP Claims Fund*, THE BP CLAIMS FUND, http://www.thebpclaimsfund.com (last visited Sept. 15, 2011) ("BP has agreed to contribute $5 Billion [sic] per year to the fund until the $20 billion dollars [sic] is depleted, including $5 billion in 2010.").

159. *Id.*

Part III.B, it is unclear how these claims would fare in court.[160] However, the GCCF partially reversed course in response to pressure from political officials such as former Florida Attorney General Bill McCollum.[161] The official website now states that the GCCF "will only pay for harm or damage that is proximately caused by the Spill," including lost profits and earnings.[162]

The GCCF has applied this proximate cause analysis quite liberally, granting recovery to claimants who were physically unaffected by the oil yet saw a reduction in business due to decreased tourism.[163] Many institutions claimed lost profits not because neighboring businesses and beaches were physically afflicted by oil, but because of a national perception that places hundreds of miles from the spill were polluted or about to be polluted.[164] As of September 14, 2011, the GCCF has paid over $3 billion to businesses for lost earnings and profits, including: $81 million to the tourism and recreation industry; over $1.1 billion to the retail, sales and service industry; and $486 million to the food, beverage, and lodging industry.[165] These numbers do not differentiate between claims that were accompanied by physical harm to the claimant and those based purely on economic harm, but the fact that a sizeable portion of the money has compensated businesses in unoiled counties as well as industries that were unlikely to have suffered physical harm to a proprietary interest

160. David Segal, *Should the Money Go Where the Oil Didn't?*, N.Y. TIMES, Oct. 24, 2010, at BU1.

161. Jim Snyder, *Feinberg Urges Denied Spill Claimants to File Fresh Applications*, BLOOMBERG (Jan. 19, 2011, 5:32 PM), http://www.bloomberg.com/news/2011-01-19/feinberg-urges-denied-spill-claimants-to-file-fresh-applications.html.

162. *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, §§ 7.74, 7.75, http://gulfcoastclaimsfacility.com/faq (last visited Sept. 15, 2011).

163. For example, a resort in Florida, despite not being physically impacted by the oil, estimated lost profits of $1 million. Segal, *supra* note 160. The resort received over $800,000 from the GCCF. Snyder, *supra* note 161.

164. Segal, *supra* note 160. *See also* REPORT TO THE PRESIDENT, *supra* note 1, at 189 (profiling Patricia Denny, a property manager in Destin, Florida, who claims that she was called a liar when she posted videos and photos showing that oil was not on the beaches).

165. GULF COAST CLAIMS FACILITY, OVERALL STATUS REPORT 8 (2011), *available at* http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf [hereinafter OVERALL STATUS REPORT]. Similarly, the fund has paid over $1.9 billion to individual lost profits and earnings. *Id*. at 7.

(e.g. retail and lodging)[166] suggests that the fund has been fairly liberal with its proximity determinations.[167]

Although not predicated on the OPA,[168] the GCCF's proximate cause analysis is important because, for better or worse, it sets expectations for recovery of losses caused by a future spill. This expectation of broad recovery, however, is only possible because of the GCCF's unique nature. Had political pressure not forced BP to set aside $20 billion to compensate victims, the company likely would have sought to apply a more restrictive proximate causation analysis. By establishing a fund and agreeing to turn claims over to an independent claims facility,[169] BP no longer has the incentive or the opportunity to advocate for cabined liability. Because most spills go politically unnoticed[170] and even large spills may not receive a political solution,[171] the lingering question

166. REPORT TO THE PRESIDENT, *supra* note 1, at 198, depicts the maximum extent of oil, including the areas where the shores received light, medium, or heavy tarballs. Matching this to the GCCF reported data on Florida is suggestive. A GCCF report lists by county the amount paid to those who claim a loss in that county, claim a loss and are residents of that county, or both. *See* GULF COAST CLAIMS FACILITY, FLORIDA PROGRAM STATISTICS (STATUS REPORT AS OF OCTOBER 10, 2011) (2011), *available at* http://www.gulfcoastclaimsfacility.com/GCCF_Florida_Status_Report.pdf. This includes claims from multiple counties that were far from the furthest reaches of the oil. *Id.* There were hundreds of claims from unoiled counties along the northwestern Gulf shore (e.g., Wakulla County, Taylor County, Levy County, Citrus County, and Hernando County) and the southern Gulf shore (e.g., Sarasota County, Collier County, and Monroe County). *Id*. For example, the GCCF has paid out over one hundred million dollars for loss claims in Collier County, and two million dollars for losses occurring in Polk County, which is land-locked. *Id*.

167. Unfortunately, the GCCF is not publishing opinions on individual cases, and there is no public record on what claims are denied. As a result, it is difficult to determine the exact criteria that the GCCF is using to determine whether to compensate a pure economic loss claim.

168. *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, § 1.1, http://gulfcoastclaimsfacility.com/faq (last visited Sept. 15, 2011) ("[T]he GCCF and Mr. Feinberg as Claims Administrator are acting for and on behalf of BP in order to fulfill BP's statutory obligations as a responsible party under OPA; however, the GCCF and Mr. Feinberg exercise their own judgment with respect to the evaluation and payment of claims.").

169. *Id.* at §§ 1.1, 1.2 (making clear that the GCCF makes its own judgments about compensation, independent of BP).

170. For example, until the Gulf spill it was politically insignificant that "[b]etween 1996 and 2009, in the U.S. Gulf of Mexico, there were 79 reported loss of well control accidents — when hydrocarbons flowed uncontrolled either underground or at the surface." REPORT TO THE PRESIDENT, *supra* note 1, at 226.

171. For instance, recovery for losses caused by the Exxon *Valdez* disaster occurred through the courts, even though the absence of comprehensive oil pollution legislation may suggest that a compensation fund would have been more necessary in that instance.

is whether courts, facing certain expectations by the public for oil spill recovery, should adopt this liberal proximate cause analysis when adjudicating claims under the OPA.

D. UNWARRANTED COSTS OF THE CURRENT RECOVERY REGIME

By allowing recovery for pure economic losses, subsection (E) undoubtedly creates some level of the social costs described above in Part II.B, but Congress is free to make a policy judgment that certain claimants should recover for pure economic losses despite the fact that such recovery may impose social costs. However, any social costs that result from implementing the policy in a way that provides more recovery than Congress contemplated are unwarranted.[172] This Note therefore uses the term "unwarranted costs" to refer to those costs that can be avoided by adopting an alternative, faithful interpretation of subsection (E). Accordingly, this section uses the framework from Part II.B and the statutory analysis from Part III.A.2 to argue that the judiciary's currently undefined proximate cause analysis ("undefined approach") and the GCCF's liberal proximate cause analysis ("liberal approach") both impose significant unwarranted costs.[173]

First, both the undefined approach and the liberal approach unnecessarily create problems associated with indeterminate liability. This is because proximate cause analysis, especially when left insufficiently defined in case law,[174] introduces uncertainty regarding both who may recover and the extent of liability. This uncertainty imposes costs on the parties and the courts by making litigation more likely and lengthy.[175] Although the lack of

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See, e.g., *In re* Exxon Valdez, 270 F.3d 1215, 1247 (9th Cir. 2001) (affirming a jury award of "compensatory damages of $22 million for chum salmon fishermen and of $30 million for setnetter fishermen").

172. The term "unwarranted" is not intended to convey a policy preference for interpreting the Act to prevent these costs.

173. Interpreting a Rhode Island statute, the *Ballard* court hints at this problem when it says, "[w]e cannot be sure how Rhode Island courts will develop these concepts [of foreseeability and proximate cause] in the context of oil pollution cases. Depending on Rhode Island's solutions, the burdens imposed by the Compensation Act, financial and administrative, may be substantial but they may also be tolerable." Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630 (1st Cir. 1994).

174. *See supra* Part III.B.2.

175. *See* Issac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 265–66 (1974) (arguing that rules lead to more certain outcomes and encourage settlement, and that uncertainty leads to more lengthy proceedings);

case law over the past twenty years suggests that a flood of litigation is unlikely, it is important to consider the litigation resulting from a rare but significant event such as the Gulf Coast spill.[176] That a political solution will settle many claims from this spill extra-judicially does not mean that a future spill will result in a similar resolution. Additionally, uncertainty may make it difficult for businesses to calculate correctly their socially optimal behavior[177] or obtain insurance.[178] Therefore, an interpretation of subsection (E) that reduces uncertainty and constrains liability to those cases addressed by Congress reduces unwarranted costs.

Second, a proximate cause analysis does not account for the possibility that allowing recovery for pure economic loss claims may prevent recovery by more morally worthy claims.[179] Given the liability cap on damages under the OPA, compensating pure economic loss claims could thwart recovery for claimants who have suffered personal or proprietary harm.[180] Even when the cap is not implicated, similar displacement will occur if the defendant is a smaller company without sufficient assets to satisfy all damages claims. Both a liberal approach and the undefined approach

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George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193, 200 (1987) (finding significant evidence that cases which go to trial are those where the outcome is most uncertain). *Cf.* R. Lisle Baker, *My Tree Versus Your Solar Collector or Your Well Versus My Septic System? — Exploring Responses to Beneficial but Conflicting Neighboring Uses of Land*, 37 B.C. ENVTL. AFF. L. REV. 1, 12 (2010) (arguing that "having standards which are unclear before a court applies them to specific facts is better than rules because the uncertainty encourages bargaining").

176. The GCCF has already received almost 500,000 claims. OVERALL STATUS REPORT, *supra* note 165, at 1. *See also Deepwater Horizon Oil Spill Litigation Database*, ENVIRONMENTAL LAW INSTITUTE, http://www.eli.org/Program_Areas/deepwater_horizon_oil_spill_litigation_database.cfm (last visited Sept. 15, 2011).

177. *See* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966 (1984) (arguing that parties will likely over-comply when a legal rule is unpredictable); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 299 (1986) ("Our analysis shows that if the uncertainty created by the legal system is distributed normally about the optimal level of compliance, and if the uncertainty is not too large — two seemingly plausible assumptions — then the result under normal damage rules will be too much deterrence rather than too little.").

178. *See* Perry, *supra* note 26, at 426 ("[A]s the extent of potential liability grows, insurance companies may refuse to cover liability, demand an unreasonable premium, or set an upper limit for the coverage. Even a large insurance company will not agree to insure potential injurers against potentially catastrophic liability or to set a reasonable premium for an immeasurable risk.").

179. *See supra* notes 56–62 and accompanying text.

180. *See* Perry, *supra* note 26, at 426.

exacerbate this problem by increasing the number of pure economic loss claims relative to other claims, thus making it more likely that more morally worthy claimants will not recover. A more restrained approach to liability can help alleviate this normative problem.

Third, when liability extends beyond what Congress envisioned, there is an increased risk that responsible parties will pay for purely private losses and be over-deterred from engaging in certain behavior.[181] Using the Gulf spill as an example, there is some evidence that private losses suffered by crab-fishermen who were unable to work were at least partially offset by gains to crab-fishermen on the Atlantic coast who were able to make up for the Gulf's shortfall.[182] More broadly, although no reports have studied the overall impact on nationwide tourism, common sense indicates that not all tourists who cancelled or decided not to book a Gulf Coast vacation decided to stay home; rather, many likely decided to vacation elsewhere.[183] Thus, any debate about offsetting private gains is only one of degree: how much of the decline in Gulf tourism was offset by tourism gains elsewhere? Without an answer to this empirical question, the only certainty is that compensating more pure economic loss claims will increase the risk that the total compensation paid will exceed the true social loss and over-deter potential responsible parties. Because the liberal approach and the undefined approach both compensate claimants that the Act's text does not require — either through litigation or settlement — they create unwarranted costs.

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181. *See supra* Part II.B.3 and its discussion of the theoretical argument differentiating private losses from social losses.

182. Timothy B. Wheeler, *Chesapeake's Crabs Offset Gulf Shortage*, BALT. SUN, Sep. 29, 2010, at A1 (describing how restaurants have not been affected by the lack of Gulf crabs because the local catch has fully met their demands).

183. The Gulf coast generates approximately $19.7 billion in tourism revenue annually, and the recent spill undoubtedly lowered this figure. REPORT TO THE PRESIDENT, *supra* note 1, at 191. A national poll found that "29[%] of respondents who were planning to visit [Louisiana] said they were actively canceling or postponing their visits because of the oil spill." *Id.* *See also* Press Release, U.S. Travel Ass'n, BP Oil Spill Impact on Gulf Likely to Last 3 Years and Cost 22.7 Billion (July 22, 2010), *available at* http://www.ustravel.org/news/press-releases/bp-oil-spill-impact-gulf-travel-likely-last-3-years-and-cost-227-billion.

IV. PREVENTING UNWARRANTED COSTS: A JUDICIAL AND A POLITICAL SOLUTION

Part IV proposes two ways to reduce the unwarranted costs of economic loss claims. Each solution gives force to Congressional intent by providing a nexus between physical injury and economic loss that allows for recovery beyond that available at common law, while also recognizing the policy underlying the economic loss rule. Part IV.A argues for an interpretation of the OPA that requires economic harm to directly result from physical injury, but concludes that a judicially crafted rule is a second-best solution. Part IV.B suggests the first-best solution: amending the OPA to delegate rule-making authority to the Environmental Protection Agency ("EPA"). This decision will enable a more well-defined, informed, and politically accountable determination of the scope of liability.

A. INTERPRETING THE OPA TO REQUIRE DIRECT ECONOMIC INJURY

Applying a proximate cause analysis to determine who may recover for pure economic loss creates costs that are not required to give force to the OPA's statutory language.[184] Requiring economic injury to satisfy a tight chain of causation will reduce these costs by providing greater certainty and preventing recovery in cases not within the Act's scope. Ultimately, however, an interpretation of subsection (E) is implicitly a policy choice because Congress left the scope of economic loss claims hopelessly undefined. A liberal approach that reaches beyond the clear statutory command decides implicitly that recovery is more important than the corresponding unwarranted costs; by contrast, an approach requiring a tight chain of causation decides implicitly that avoiding unwarranted costs is more important than recovery. This section argues for requiring a showing of direct economic injury in order to increase predictability and reduce unwarranted costs associated with recovery, but concludes that although this solution is more satisfying than either the GCCF's liberal approach or

184. *See supra* Part III.D.

the courts' undefined approach, an amendment to the OPA is the first-best solution.

Direct economic injury, as this Note uses the term, refers to pecuniary harm resulting from direct use of, or the inability to use directly, a physically injured resource or property, where direct use means that the resource is not or would not have been passed through a conduit before reaching the claimant.[185] Applying this rule to scenarios that may arise after an oil spill helps one to understand its application and recognize its shortcomings. First, when oil damages fish, fishermen should recover because they directly use the damaged fish. This is an uncontroversial conclusion and is required by the OPA.[186] Second, when oil on the water prevents a company from accessing their business, recovery should be permissible. For example, courts should allow recovery if, but for physical damage to the water,[187] the company would have directly used the water to access its drilling platform, and this lack of access caused economic losses.[188] The same logic applies to shipping or tourist trips that are cancelled or diverted because the company could not directly use the water for transport.[189] Indeed, this reasoning would allow commercial fishermen to recover if they could not access fishing areas, even if the fish themselves are uninjured.[190]

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185. This is different than "direct economic cause" standard used in other contexts. *See, e.g.*, Desiano v. Warner-Lambert Co., 326 F.3d 339 (2d Cir. 2003) (referring to "direct cause" in the fraud context); 5 Kathleen Flynn Peterson, LITIGATING TORT CASES § 61:75 (Roxanne Barton Colin & Gregory S. Cusimano, eds., 2010), *available at* Westlaw LITGTORT (claiming that a "'direct cause' is a cause that had a substantial part in bringing about" the harm or injury).

186. *See supra* Part III.B.2.

187. Note that water is a natural resource under the OPA. 33 U.S.C. § 2701(20) (2006).

188. This accords with the limited case law on this issue. *See In re* Settoon Towing, No. 07-1263, 2009 WL 4730971, at *2–4 (E.D. La. Dec. 4, 2009) (allowing past summary judgment a claim for lost profits resulting from inability to access its production platform).

189. *See* Dunham-Price Grp., LLC v. Citgo Petroleum Corp., No. 2:07 CV 1019, 2010 U.S. Dist. LEXIS 31901, at *2, *7–8 (W.D. La. Mar. 31, 2010) (allowing past summary judgment claims for lost profits resulting from inability to use the river for transport).

190. This raises another interesting question: would a moratorium on fishing result in "direct economic injury"? Unfortunately, there is no bright-line answer to this question, but the court should look to whether the moratorium is designed to respond to the current spill or to prevent a future incidents. It is noteworthy, however, that government action did not categorically bar claims made in previous cases. *See, e.g.*, *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1014–15 (E.D. La. 1993) (allowing a summary judgment claim for profits lost after the Minerals Management Service "shut-in" Sekco's production platform). *See also* discussion of *Dunham-Price*, *supra* note 189.

Third, and introducing complications, hotels should not recover in most circumstances because they do not directly use physically damaged property or resources. Hotels in coastal regions certainly rely on the water because tourists directly use the ocean for recreation, but rarely do hotels directly use a physically injured resource.[191] Fourth, restaurants and other food establishments such as grocery stores should not be able to recover for lost profits resulting from the inability to serve, or the increased cost of, certain seafood that is undersupplied as a result of an oil spill. This is because these businesses, although they use the fish after they are caught, are down the chain of usage. That is to say, the fishermen directly use the resource, but those who obtain the fish from the original fishermen do not. To conclude differently would tremendously extend liability and introduce an anomaly: by treating a restaurant's use of fish as a direct use, courts would allow recovery when the fishing stock is injured by the oil, but would not allow recovery if the fishing stock were merely inaccessible due to oil on the surface because the restaurant clearly does not directly use that resource. Further, liability could extend to losses suffered by remote businesses because fish can be transported throughout the country and are used by many different types of businesses.

There is no doubt that this analysis reaches what some may consider odd results,[192] but the direct economic injury requirement nevertheless satisfies the minimal constraints of the statute.[193] It allows recovery to all those who could have recovered under the *Robins* rule, including commercial fishermen, and re-

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191. The only case to raise an issue of compensation of a hotel under the OPA was dismissed because the claimant had not first brought the claim to the responsible party. *See* Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 844 F. Supp. 1512, 1514 (M.D. Fla. 1994). Hotel guests, of course, often use the natural resources as part of their vacation. Calling this direct use by the hotel, however, would defeat the rule's purpose by transforming the rule into an ordinary proximate cause analysis.

192. This is because there is at least some statutory history that would suggest not only that hotels should be able to recover, but also that employees of the hotels should be able to recover. *See supra* note 127 and accompanying text. Similarly, the GCCF's liberal approach starkly contrasts with the direct injury standard. Yet the GCCF approach is unique because instead of having each successful case reduce the assets of the responsible party, the GCCF is administering a $20 billion fund that is already been set aside. *See supra* notes 158–159 and accompanying text.

193. *See supra* Part III.A.2 (arguing that the Act merely requires that there be some nexus between the physical injury and the economic loss, and that this nexus allow recovery beyond that allowed under the *Robins* rule).

quires a nexus between the physical injury and the economic loss. In doing so, the direct economic injury rule reduces unwarranted costs by providing more certainty and less recovery than either the undefined or liberal approach. To be clear, the direct economic injury rule is not a bright-line rule and does not produce the level of certainty associated with one. In some cases, determining direct use may be difficult and raise the same problems as proximate cause analysis.[194] Yet, the rule provides some clarity without requiring the courts to build up case law, which is difficult in the oil spill context.[195] This additional clarity allows for better bargaining, fewer erroneous claims, quicker settlements, more predictable liability (which is beneficial for buying insurance), and cheaper litigation when parties do not settle.[196] Furthermore, interpreting the OPA to prevent liability for economic claims that are not directly tied to some physical injury reduces the total payout by a responsible party, and thus reduces the chance that pure economic loss claims will prevent recovery for more morally worthy claims or that responsible parties will pay more in compensation, bargaining costs, and litigation costs than the social cost of the spill.[197]

From a policy perspective, however, one may disagree with this section's proposal. Perhaps compensating any and all plaintiffs who have suffered some type of economic injury is worth the additional administrative costs and the risk of over-deterrence. This is a valid criticism that indicates a fundamental point of this Note: under the OPA's language, courts are forced to make policy choices about recovery. While this section argues for requiring direct economic injury, it recognizes that both this proposal and other interpretations, such as the GCCF's, are valid statutory interpretations, each with their own costs and benefits. Conse-

194. For example, a hotel with an ocean view may claim that the hotel directly uses the ocean as part of its hotel operation. But what about a hotel located five minutes away from the beach? One can see how this starts to look like ordinary proximate cause analysis.

195. *See supra* notes 138, 176 and accompanying text (discussing the OPA's provisions discouraging suits and the volume of claims resulting from the Gulf spill).

196. *See supra* notes 175–178 and accompanying text (discussing the benefits of legal certainty).

197. *See supra* notes 179–180 and accompanying text. For example, the purely private losses incurred by Gulf crab fishermen would not be recoverable under the proposed rule. *See supra* note 182 and accompanying text.

quently, the first-best solution is for Congress, the political branch most responsible to the people, to delegate this public policy decision to the EPA.

B. AMENDING THE OPA TO DELEGATE RULE-MAKING AUTHORITY TO THE ENVIRONMENTAL PROTECTION AGENCY

Congress should amend the OPA to delegate authority to the Environmental Protection Agency ("EPA") to create rules for recovery of pure economic losses. Although the public demand for legislation may be less after the Gulf spill relative to the Exxon spill,[198] this is in part because the GCCF has significantly lessened the need to address the OPA's shortcomings immediately.[199] But regardless of the public's demand, Congress has already introduced legislation intended to correct some of the problems illuminated by the Gulf spill, although the legislation does not address pure economic loss claims.[200] It is not feasible, however, for Congress to create rules defining which claimants may recover. There are many different types of claims arising from an oil spill, and Congress does not have the expertise to sort out the details of a recoverability scheme.[201]

Since it would be difficult for Congress to specifically tackle this issue, it could instead delegate authority to the EPA to engage in rulemaking to define when a claimant may recover in court for a pure economic loss is desirable for multiple reasons. First, given that determining recoverability is essentially a policy decision, agency rulemaking has more legitimacy than a court's

198. *See supra* Part III.A.1 (discussing the historical background to the OPA). Whereas amendments to the OPA will tweak the existing system, initial passage of the OPA responded to a lack of comprehensive legislation.

199. *See supra* Part III.C.

200. *See* Implementing the Recommendations of the BP Oil Spill Commission Act of 2011, H.R. 501, 112th Cong. (2011). As currently written, the bill does not address economic liabilities. *Id.* The Report to the President implies, however, that any legislation should address who may recover for pure economic losses. REPORT TO THE PRESIDENT, *supra* note 1, at 186 ("The absence of clear and fair procedures for systematically evaluating [pure economic loss] claims deserves focused attention as the lessons from the *Deepwater Horizon* oil spill are learned.").

201. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (suggesting that Congress delegates authority to agencies because of their "great expertise"); 33 U.S.C. § 2713(e) (2006) (delegating authority to promulgate "regulations for the presentation, filing, processing, settlement, and adjudication of claims . . . against the [Oil Spill Liability Trust] Fund").

decision. This legitimacy stems from three agency attributes: subject-matter expertise,[202] notice and comment procedures,[203] and accountability.[204] These attributes signal that an agency decision is likely more informed and responsive to those affected than a court's decision. As for which agency, while the Coast Guard, which sits within the Department of Homeland Security, currently possesses and has exercised limited authority to regulate claims under the OPA,[205] the EPA's experience administering CERCLA[206] and analyzing natural resource damages caused by oil spills[207] provides it with comparatively more expertise and legiti-

202. This expertise is a primary reason why courts give deference to duly enacted agency policy decisions. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517–18 (1989) (arguing that courts should defer to an agency's greater expertise and accountability).

203. *See* 5 U.S.C. § 553 (2006).

204. *See* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 312 (1986) (arguing that *Chevron* "returns the power to set policy to democratically accountable officials"). Justice Kagan has advanced the argument that relying on agencies that are controlled by the President creates accountability in two main ways. "First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001). Congress also has some control of agencies through investigatory oversight and appropriations committees. *See generally* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989). The courts keep agencies accountable by taking a hard look at agency decisions. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–44 (1983).

205. The OPA delegated authority to the President to promulgate procedures for claims against the Oil Spill Liability Trust Fund. 33 U.S.C. § 2713(e) (2006). The Coast Guard has instituted limited procedures. *See, e.g.*, 33 C.F.R. § 136.231 (defining the "authorized claimants"). However, there is no authority to promulgate regulations that would govern in a lawsuit between the claimant and responsible party. As a result, the actual consequences of these regulations are not readily apparent.

206. *See* Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/lawsregs/laws/cercla.html (last visited Sept. 15, 2011) ("Through CERCLA, EPA was given power to seek out those parties responsible for any release and assure their cooperation in the cleanup. EPA cleans up orphan sites when potentially responsible parties cannot be identified or located, or when they fail to act. Through various enforcement tools, EPA obtains private party cleanup through orders, consent decrees, and other small party settlements. EPA also recovers costs from financially viable individuals and companies once a response action has been completed.").

207. 33 U.S.C. § 2706(e)(1).

macy among agencies in calculating and assessing damages resulting from environmental harm.

Along with legitimacy, rules promulgated by the EPA would create predictability, lowering the cost of bargaining and court proceedings.[208] Indeterminate liability would thus be of less concern because claimants would have little incentive to bring meritless litigation. Furthermore, the agency would likely have access to a trove of data concerning pure economic loss claims resulting from the Gulf spill, and may investigate the total economic impact of the spill.[209] Using this data, the agency may determine which types of claims most likely represent instances of pure private loss rather than social loss, and create rules that help to foster optimal deterrence. The data may also inform decisions to limit or expand recovery based on worries about economic claims displacing more morally worthy claims or disproportionate liability. Finally, in contrast to developing recovery rules through the judiciary, which adheres to precedent, agencies retain the flexibility to alter the recovery regime if circumstances change or new information comes to light.[210]

If granted rulemaking authority, the EPA should consider the following factors when determining who may recover. First, any rule of recovery should take into account the total amount of money available for claimants. If the amount of money is limited because of a statutory cap or because the company that caused the oil spill is essentially judgment proof, then the rules should constrain recovery more than if all judgments could be paid. Incorporating this factor would prevent pure economic loss clai-

208. *See supra* notes 175–178 and accompanying text (discussing the benefits of legal certainty).

209. An agency would not have automatic access to data compiled by the GCCF because it is not a governmental organization. *See Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, § 1.1, http://gulfcoastclaimsfacility.com/faq (last visited Oct. 19, 2011). However, the GCCF has been relatively forthcoming with data, *see supra* Part III.C, and may provide even more specific data upon request. Regardless, an agency could conduct an independent inquiry, much as occurred with the REPORT TO THE PRESIDENT, *supra* note 1. *See About the Commission*, NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, http://www.oilspillcommission.gov/page/about-commission (last visited Oct. 19, 2011).

210. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *See also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (applying *Chevron* deference after courts had previously interpreted the statute at issue); United States v. Mead Corp., 533 U.S. 218 (2001) (considering when *Chevron* deference should apply).

mants from obtaining judgments that would preclude compensating more morally worthy claimants.[211] Second, rules of recovery should also consider physical proximity to damaged property or resources. This would prevent recovery by claimants for whom questions of causation and mitigation would be costly to answer.[212] Lastly, rules should consider the type of business affected. In analyzing data from the economic impact of the Gulf spill, there are likely some types of businesses that are more likely to suffer purely private losses, and accounting for these risks will help create optimal deterrence while still compensating many more claimants than the common-law rule would allow.[213] One may recognize that any specific rules are likely to be complicated and draw seemingly arbitrary lines between those who are compensated and those who are left to bear the burden of a loss; court decisions, however, would lead to the same problems without the legitimacy, flexibility, or predictability associated with agency rulemaking.

V. CONCLUSION

In passing the OPA, Congress intended to impose liability for pure economic loss claims, but did not define how courts should cabin liability. Given this silence, courts have attempted to create some limiting principles by applying proximate cause analysis to these claims, but the lack of case law has largely prevented any clear rule from emerging. Recently, the GCCF took a different approach to liability, allowing recovery for businesses that were not only physically unaffected by the Gulf spill, but were miles from the maximum reach of the spill. Both this liberal approach to recovery and the uncertainty of the case law impose costs that can be avoided by interpreting the OPA more narrowly to require direct economic injury. While this more narrow reading is an improvement over the status quo, like all other in-

211. *See supra* notes 56–62 and accompanying text (discussing the normative consequences of indeterminate liability).

212. *See supra* notes 43–47 and accompanying text (describing how difficult individual determinations of causation and mitigation may make litigation more costly and exacerbate the problems associated with indeterminate liability).

213. *See supra* Part II.B.3 (describing how optimal deterrence requires that defendants not pay for purely private losses).

terpretations of subsection (E)'s language, it essentially makes a policy decision by deciding implicitly whether unwarranted costs created by a more liberal interpretation are worth the benefits of providing additional recovery. For this reason, the first-best solution is for Congress to amend the OPA and delegate authority to the EPA to make rules defining when a claimant may recover for pure economic losses. By shifting the policy choice to the EPA and away from the courts, the rules limiting liability for pure economic losses will be more informed, more flexible, and more accountable.