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# Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability

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# CAPPING INCENTIVES, CAPPING INNOVATION, COURTING DISASTER: THE GULF OIL SPILL AND ARBITRARY LIMITS ON CIVIL LIABILITY

Andrew F. Popper\*

## INTRODUCTION

Limiting liability by establishing an arbitrary cap on civil damages is bad public policy. Caps are antithetical to the interests of consumers and at odds with the national interest in creating incentives for better and safer products. Whether the caps are on noneconomic loss, punitive damages, or set for specific activity, they undermine the civil justice system, deceiving juries and denying just and reasonable compensation for victims in a broad range of fields.

This Article postulates that capped liability on damages for offshore oil spills may well have been an instrumental factor contributing to the recent *Deepwater Horizon* catastrophe in the Gulf of Mexico. More broadly, it argues that caps on damages undermine the deterrent effect of tort liability and fail to achieve economically efficient and socially just results.

## II. FEDERAL AND STATE LIMITATIONS ON LIABILITY

### A. *The Presumptive Rationale for Caps*

At some point in the last few decades, the argument surfaced that the potential for tort liability does not have a meaningful effect on behavior.<sup>1</sup> Belief in this counterintuitive notion may explain the proliferation of tort reform measures, including caps on liability, in

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1. The premise is not subtle: "[T]he tort system produces low incentive[s] to engage in safe behavior." Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 476 (1990); see also Richard A. Epstein, *The Risks of Risk/Utility*, 48 *OHIO ST. L.J.* 469 (1987); David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 *CALIF. L. REV.* 665, 666-68 (1985); Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 *VAND. L. REV.* 1281, 1282 (1980); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *HARV. L. REV.* 869, 870 (1998) (arguing that punitive damages might not affect corporate behavior since they tend to punish shareholders, not individuals within the defendant corporation); John A. Siliciano, *Corporate Behavior*

the United States.<sup>2</sup> What is more difficult to explain is how one who thinks through the reality of civil litigation, adverse judgments, and punitive damages can accept as credible the idea that sanctioning misconduct has little or no effect on those who engage in misconduct or, more to the point, on others contemplating similar action.<sup>3</sup> To believe that civil liability is simply part of doing business, a cost bred into the price of goods and services, and not a factor influencing behavior, is to engage in the tort reform fantasy that caps on liability, whether for punitive damages or noneconomic losses, do not make accidents more likely, nor do they place the public at risk.<sup>4</sup> This Article rejects outright that perspective.<sup>5</sup> While recognizing the important and expan-

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and the Social Efficiency of Tort Law, 85 MICH. L. REV. 1820 (1987) (arguing that corporations are not deterred by the prospect of liability).

2. See George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 5 (1987); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 558 (1985); William H. Rodgers, Jr., *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1, 16-23 (1980) (claiming that individuals are not deterred by the prospect of liability); see generally THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991).

3. See Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 198 (1998) (“[A]ll cases present the potential that a liability determination will affect future cases . . . .”); Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L.J. 661, 685 (2008) (“Damage awards modify future behavior indirectly by providing disincentives for future conduct that is unduly risky.”); Jon D. Hanson & Douglas A. Kysar, *Taking Behaviorism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1512-14 (1999) (surveying and assessing behaviorism arguments); see generally George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970) (discussing the potential of sanction to increase the likelihood of lawful behavior); James Andreoni et al., *The Carrot or the Stick: Rewards, Punishments, and Cooperation*, 93 AM. ECON. REV. 893, 894 (2003) (asserting that the threat of a large sanction can be an economically efficient influence on behavior).

4. Perhaps this precept is founded on the idea that behaviorism is outright wrong. See PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 70-72, 224-27 (1988) (arguing that the tort system fails to achieve its objectives—with the exception of providing compensation for attorneys); Albert A. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 Nw. U. L. REV. 855, 865-66 (1953) (“[D]eterrence and reformation . . . serve only to conceal the truth, that the scheme of punishment is a barbaric system of revenge . . . .”); Paul Zador & Adrian Lund, *Re-Analysis of the Effects of No-Fault Auto Insurance on Fatal Crashes*, 53 J. RISK & INS. 226, 236-41 (1986) (asserting that fault-based liability does not promote safety). These works seemingly deny the force of behaviorism, a most fundamental notion regarding the regulation of conduct. For the opposite, see C.B. FERSTER & B.F. SKINNER, SCHEDULES OF REINFORCEMENT 7-11 (1957), and see generally B.F. SKINNER, ABOUT BEHAVIORISM (1974) (claiming that humans and other species act to avoid pain or punishment).

5. This Article focuses on caps on damages, both for noneconomic losses and punitive damages, and discusses both interchangeably. Both have the virtue of inexact prediction—namely, those producing goods and services cannot shift the cost of either type of damages into the price they charge. Accordingly, neither punitive nor noneconomic damages can be passed along fully to consumers, and so both must come from the defendant’s assets or the defendant’s insurance. In the parlance of tort reform, both are experienced by defendants as a sanction, notwithstanding the differences in standards of proof required for punitive damages as opposed to

sive discussion regarding the goals and purposes of tort law and the public effect of tort judgments, it is a fair assumption that behavior is affected by the realistic potential of civil liability, particularly when the precise quantum of damages is not precisely predictable.<sup>6</sup>

Presumably, one could ask if there are readily available data regarding standards of behavior, best practices, or criteria for acceptable conduct. In a common law country that permits courts to issue unpublished opinions and where many disputes are settled without disclosing the terms of the settlement, have the rules of behavior become inaccessible? Do companies and individuals engage in behavior found to be the basis for civil liability because they are innocently ignorant of the case law, regulations, statutes, and industry standards?<sup>7</sup> From

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noneconomic losses. While there is a debate about the ex ante deterrent effect of noneconomic damages, it is hard to take seriously the contention that punitive damages do not have an effect on similarly situated market participants. See *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006) (endorsing the notion that civil liability can be a deterrent to misconduct); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994) (“If [a prohibited act] is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available . . . . We should warn others to refrain from similar [unacceptable] conduct and an award of punitive damages will do just that.”); see also RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 647–48 (1980) (“Whenever a civil court resolves the conflicting claims [it] enforces standards of behavior. . . . [And] must achieve a result that protects the interest of society. . . . Inflicting punishment for past acts, however, tends also to control future behavior . . . [o]thers in a similar position will wish to avoid the unpleasant consequences of such acts in the future. Punishment, therefore, cannot be separated from deterrence.” (footnotes omitted)); Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CALIF. L. REV. 2033, 2053 (1986); (“Punitive damage awards . . . deter other potential offenders. . . . [D]eterrence brings about a positive gain to society through the reduction of future misconduct. Awards of punitive damages act to control future behavior—and thus to enforce desirable social norms—by raising the costs of such misconduct.”).

6. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 24–35 (1970) (discussing the deterrent effect of tort liability); George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279 (2002) (connecting Aristotle’s corrective justice theory and the stated goals of modern tort law with the scholarship and wisdom of Professor Gary Schwartz); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 544–53 (2003) (reviewing tort theory including the notion that economic deterrence is among the theoretical precepts used to explain tort law); Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959); Leon Green, *Tort Law Public Law in Disguise II*, 38 TEX. L. REV. 257 (1960) (arguing that deterrence of misconduct is a fair presumption when tort law is seen as public law); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 4–7, 58, 161–62 (1987) (tort judgments deter future misconduct); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1828 (1996) (characterizing tort law as a deterrent force as well as a mechanism for compensating those injured by acts that were not deterred).

7. At most, one could argue that the practice of designating a judicial opinion “unpublished” cuts into the anticipated ex ante consequences of opinions. For a discussion of the unpublished

the perspective of this Article, the answer is a resounding “no.” To the contrary, legal standards have never been more available.<sup>8</sup> Misconduct occurs not because the actors are unaware of standards—it occurs because all too often, the consequences of misconduct are known, predictable, and easily passed along to consumers, patients, and the public. Caps, in that sense, undercut the import of the common law, legislative enactments, regulatory pronouncements, and evolving industry standards.

The second half of this Article discusses directly the stark reality of artificial limitations on civil judgments: caps dilute the beneficial deterrent effect of tort law, produce discernible market inefficiency, and exact a disproportionate cost on vulnerable populations. The starting point, however, is to look at the caps landscape at the state and federal level and, thereafter, assess whether two well-known catastrophic events (the blowout of the Macondo well and resulting explosion of the *Deepwater Horizon* in the Gulf of Mexico and the *Exxon Valdez* oil spill in Prince William Sound) were made more likely by pre-existing limitations on liability.

### B. *The Caps Landscape*

For at least the last thirty-five years, both the states and the federal government have imposed caps on civil liability. At the state level, caps tend to be non-differentiated by activity (with the exception of medical malpractice) and are imposed across-the-board on classes of damages—for example, a cap on punitive damages or a cap on noneconomic loss.<sup>9</sup> At the federal level, caps tend to target a specific activity or a particular industry.

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opinion phenomenon, see Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003); David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685 (2009); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005). The dispute over the citation to unpublished opinions has been addressed in part by Federal Rule of Appellate Practice 32.1: “A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like . . . .” FED. R. APP. P. 32.1(a)(ii).

8. Since many judicial opinions, statutes, regulations, and industry standards are instantly available at no cost online as well as through numerous proprietary websites—for example, LexisNexis and Westlaw—there is little to the assertion that there are vast unknown segments of common law jurisprudence, legislative mandates, regulatory obligations, or industry standards.

9. E.g., CAL. CIV. CODE § 3333.2 (West 2010); IDAHO CODE ANN. § 6-1603 (2010); KAN. STAT. ANN. § 60-1902, -1903 (2005); LA. REV. STAT. ANN. § 40:1299.42 (2008); MONT. CODE ANN. § 25-9-411 (2009); N.D. CENT. CODE § 32-42-02 (2009); S.D. CODIFIED LAWS § 21-3-11

The \$75 million cap on damages set by the Oil Pollution Act of 1990 (OPA) (central to this Article), the Price Anderson Act (setting a \$500 million limit on liability for harms caused by nuclear power incidents), and the 1997 Amtrak Reform and Accountability Act (setting a \$200 million cap on liability for commuter rail incidents) are examples of industry-specific limitations on liability set by Congress.<sup>10</sup> Arbitrary limitations<sup>11</sup> of this type reduce accountability, undermine deterrence, and more often than not, fail to keep pace with actual costs, including inflation.<sup>12</sup>

The focal point for this Article is the April 20, 2010 rupture of the Macondo well and the resulting explosion of the rig platform *Deepwater Horizon* that killed eleven workers and resulted in the discharge of nearly 200 million gallons of oil into the Gulf of Mexico. The stupendous damage caused by the explosion and subsequent discharge of oil is covered by the federal Oil Pollution Act of 1990 (OPA).<sup>13</sup> OPA was supposed to lessen the risk of spills by creating strict liability for those spills<sup>14</sup> and mandated the creation of the Oil Spill Liability Trust Fund (OSLTF) to cover the costs of future spills (with the corpus to be paid by those in the petroleum industry).<sup>15</sup> OPA also mandated that those

(1987); UTAH CODE ANN. § 78B-3-410 (LexisNexis 2010). There are similar caps with differing liability limitations: for example, a \$400,000 cap, MO. REV. STAT. § 538.210 (2008), and a \$350,000 cap, W. VA. CODE ANN. § 55-7B (LexisNexis 2008).

10. See Amtrak Reform and Accountability Act of 1997, 49 U.S.C. § 24101 (2006); Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 (2006); Price Anderson Act, 42 U.S.C. § 2210 (2006).

11. Caps imposed by Congress go well beyond oil spills and nuclear power plants. Damages are capped for violations of civil rights, Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) (A)–(D), for so-called Y2K harms associated with the millennial change, 15 U.S.C. § 6604(b)(1) (2006), and for a host of other areas.

12. California's Medical Injury Compensation Reform Act of 1975 (MICRA), CAL. BUS. & PROF. CODE § 6146 (West 2005), is an example of a law that caps liability and limits severely the just recovery of patients harmed by medical malpractice. The non-indexed MICRA cap has not kept pace with inflation and has unfairly affected women and minorities. See Amanda Edwards, Comment, *Medical Malpractice Non-Economic Damages Caps*, 43 HARV. J. ON LEGIS. 213, 219 n.42 (2006) (claiming that the MICRA Deprives injured patients of full relief); but see Richard E. Anderson et al., *Effective Legal Reform and the Malpractice Insurance Crisis*, 5 YALE J. HEALTH POL'Y L. & ETHICS 343, 350 (2005) (stating that since it passed the MIRCA "California has had a stable insurance environment").

13. 33 U.S.C. §§ 2701–2762.

14. The most recent and most comprehensive article on litigation options following the Deepwater Horizon disaster is Stephen Gidiere, Mike Freeman & Mary Samuels, *The Coming Wave of Gulf Coast Oil Spill Litigation*, 71 ALA. LAW. 374 (2010).

15. For determining those to whom OPA applies, see The Outer Continental Shelf Lands Act, 33 U.S.C. § 2701(32). The Oil Spill Liability Trust Fund (OSLTF) provides resources for removal costs and some types of damages for spills covered under the Federal Water Pollution Control Act, 33 U.S.C. § 1321(c), and the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2761, 2702(a). The terms delineating the OSLTF are set out in § 9509 of the Internal Revenue Code at I.R.C. § 9509 (2006). For a detailed discussion of the use of the OSLTF for oil spills, see generally U.S. DEPT. OF HOMELAND SECURITY, OIL SPILL LIABILITY TRUST FUND (OSLTF) FUNDING

injured in a spill<sup>16</sup> seek redress through the polluters before accessing the fund.<sup>17</sup>

Individuals and governmental entities are covered under OPA— with the following fundamental and critical caveat: There is a \$75 million cap per incident, outside of willful or reckless behavior.<sup>18</sup> If the actions of the polluter turn out to be willful or grossly negligent,<sup>19</sup> the cap may not apply.<sup>20</sup> There is another scenario in which the cap would not apply: If a victim of the spill can fashion a state common law claim apart from OPA and fend off the predictable attack based on preemption, then state common law applies.

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FOR OIL SPILLS, available at [http://www.uscg.mil/npfc/docs/PDFs/OSLTF\\_Funding\\_for\\_Oil\\_Spills.pdf](http://www.uscg.mil/npfc/docs/PDFs/OSLTF_Funding_for_Oil_Spills.pdf). For a general discussion of the OSLTF, see *The Oil Spill Liability Trust Fund*, BUREAU OF OCEAN ENERGY MGMT., REGULATION & ENFORCEMENT, <http://www.gomr.boemre.gov/homepg/regulate/regs/laws/osltf.html> (last visited Apr. 18, 2011), and *The Oil Spill Liability Trust Fund (OSLTF)*, U.S. DEPT. OF HOMELAND SECURITY, [http://www.uscg.mil/npfc/About\\_NPFC/osltf.asp](http://www.uscg.mil/npfc/About_NPFC/osltf.asp) (last visited Feb. 7, 2011) (“The OSLTF has two major components. The Emergency Fund is available for Federal On-Scene Coordinators (FOSCs) to respond to discharges and for federal trustees to initiate natural resource damage assessments. The Emergency Fund is a recurring \$50 million available to the President annually. The remaining Principal Fund balance is used to pay claims and to fund appropriations by Congress to Federal agencies to administer the provisions of OPA and support research and development.”).

16. This applies to private claimants and establishes a jurisdictional base for governments to pursue those who cause damage to the natural environment. See 33 U.S.C. § 2702(b)(2).

17. 33 U.S.C. § 2713(c). As to the kinds of damages recoverable, see 33 U.S.C. § 2702(a). As to the sequencing of recovery, see § 2713(a)–(b)(2) on filing interim claims.

18. 33 U.S.C. § 2704(a)–(c)(1).

19. In this event, claimants could seek to get punitive damages, although they may be limited to damages that are on a 1:1 ratio with the actual losses or compensatory damages. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). If a basis for a claim is outside OPA, it would likely be governed by *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408 (2003), which suggests a limit on punitive damages of nine times compensatory damages and a norm of four times compensatory damages.

20. The applicability of the \$75 million cap to the *Deepwater Horizon* oil spill is currently in litigation. In a suit filed by the U.S. Justice Department on December 15, 2010, the government alleged that actions leading to the *Deepwater Horizon* disaster allow for the imposition of liability for damages under the Clean Water Act, “without limitation under the *Oil Pollution Act*.” Press Release, U.S. Dep’t of Justice, Attorney General Eric Holder Announces Civil Lawsuit Against Nine Defendants for *Deepwater Horizon* Oil Spill (Dec. 15, 2010) (emphasis added), available at <http://www.justice.gov/opa/pr/2010/December/10-ag-1442.html>. The suit alleges that those responsible for the operation of the Macondo Well and *Deepwater Horizon* rig failed to take necessary precautions to keep the Macondo Well under control . . . [failed] to use the best available and safest drilling technology to monitor the well’s conditions . . . [failed] to maintain continuous surveillance [and failed] to use and maintain equipment and material that were available and necessary to ensure the safety and protection of personnel, equipment, natural resources, and the environment.

*Id.* The complaint is captioned *United States v. BP Exploration & Production, Inc.* Complaint at 1, *United States v. BP Exploration & Prod., Inc.*, No. 2:10CV04536, 2010 WL 5094310 (E.D. La. Dec. 15, 2010) (No. 2:10CV04536). In addition to federal claims, OPA created the possibility for states to pass laws allowing relief beyond the federal statute, 33 U.S.C. § 2702(b)(1)(A) (“[O]r under State law . . .”), although *United States v. Locke*, 529 U.S. 89, 105 (2000) suggests that such statutes may well be preempted by OPA.

When an incident occurs in which the damages outstrip federally imposed liability limits, such as the *Deepwater Horizon* blowout in the Gulf of Mexico or the September 12, 2008 Metrolink crash in Chatsworth, California,<sup>21</sup> from a victim's perspective, the first impulse often is (and ought to be) to push for a proposal to increase the cap to cover the real losses. Such initiatives raise the issue of the efficacy and constitutionality of any amendment that retroactively changes the damage cap and permits a victim to be fully compensated for past harms at a level in excess of the cap.

Retroactive revision is certainly possible (and essential to protect those harmed and to allocate costs and responsibility in a fair and just manner), though it is far better public policy to avoid such arbitrary limitations altogether. Only if legislation is written to anticipate retroactive amendment will an amendment raising limits retroactively have a strong chance of being upheld.<sup>22</sup> Conversely, if there is nothing in legislation authorizing or anticipating future adjustments, the retroactive legislation needed to repair the injustice occasioned by a cap may fail. The fixed nature of most caps renders them inherently obsolete; unless Congress has anticipated the need for review and adjustment of the caps, they are ossified and almost instantly outdated.<sup>23</sup>

Even if one proceeds with a state common law claim<sup>24</sup> and avoids the federal limitation on liability, the state law on damage limitation may be far more restrictive than the caps under OPA.

21. See Joel Rubin, Ann M. Simmons & Mitchell Landsberg, "Total Destruction": *At Least 15 Dead in Metrolink Crash*, L.A. TIMES, Sept. 13, 2008, at A1.

22. In *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), the Court noted that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." The challenge of retroactivity has been considered by the Court on a number of occasions. See, e.g., *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Comm'r*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *Brimstone R.R. v. United States*, 276 U.S. 104, 122 (1928); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928).

23. E.g., MD. CODE ANN., CTS & JUD. PROC., §§ 11-108, 3-2A-09 (LexisNexis 2006) (including periodic increases to account for changes in costs and inflation). The legislation affecting rail disasters does not contemplate the inevitable changes in costs or inflation. In response to the Chatsworth rail disaster mentioned above, a bill was introduced to increase the limits on the Amtrak cap to \$500 million. See H.R. 6150, 111th Cong. (2010). The bill would "amend the limitation on liability for certain passenger rail accidents or incidents under section 28103 of title 49" retroactively, applying the new limits (should the bill become law) back from September 12, 2008. *Id.*

24. There is a provision in OPA that suggests the possibility of a state common law claim. See 33 U.S.C. § 2718(a)(2) (dealing with OPA's relation to other laws). Section 2718(a)(2) states, "Nothing in this Act or the Act of March 3, 1851 shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law." 33 U.S.C. § 2718(a)(2) (emphasis added).



The relentless push to cap damages at the state level has met considerable success if measured by the range and number of state laws that impose caps on liability. Perhaps it is a matter of sheer political force—and financial resources.<sup>25</sup> When well-financed manufacturing and retail interests, health care and pharmaceutical interests, and multinational energy and resource businesses demand caps from the legislators they support, the political system seems to stumble all over itself in a frenzied quest to limit civil liability.

Some states legislatures (for example, in Ohio) have passed damage-cap legislation only to have it found unconstitutional, then reinstated that legislation, only to have it found unconstitutional for a second time, and then reinstated it once again.<sup>26</sup> With several notable exceptions,<sup>27</sup> most states have considered or adopted a cap on civil liability on punitive damages, noneconomic damages, or both. These restrictions are defended on the ostensible premise that such limits on recovery “reform” the civil justice system.<sup>28</sup> Similarly, dozens of bills have been proposed in Congress designed to impose a national cap on

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25. The force of resources may become even more pronounced after the *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010) decision, which removes certain long-standing regulatory barriers on corporate political contributions.

26. *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991) found the Ohio law unconstitutional. The legislature passed a new version and in *Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999), the law was found unconstitutional once again. The current capping statute, OHIO REV. CODE ANN. § 2323.43 (LexisNexis 2010), has not yet been found unconstitutional, though it has been limited in *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 430 (Ohio 2007) (holding that the cap does not apply if the plaintiff suffered “[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system” (alteration in original) (quoting OHIO REV. CODE ANN. § 2315.18(B)(3)(a)–(b))).

27. Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 AKRON L. REV. 417, 432–58 (2004); see also Damian Stutz, Note, *Non-Economic-Damage Award Caps in Wisconsin: Why Ferdon Was (Almost) Right and the Law Is Wrong*, 2009 WIS. L. REV. 105, 124 nn.137–38.

28. Professor Ronen Avraham catalogued various tort reform initiatives at the state level in Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. 183 (2007). States are bombarded with proposals to limit liability on a regular basis, for example, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, and Virginia have all had repeated tort reform bills introduced into their legislatures. The following is a non-exhaustive list: H.B. 779, 2007 Reg. Sess. (Md. 2007); S.B. 508, 2007 Reg. Sess. (Md. 2007); H.B. 48, 2007 Leg., 422nd Gen. Assem. (Md. 2007); H.B. 816, 2006 Leg., 421st Gen. Assem. (Md. 2006). Massachusetts: S.B. 686, 185th Gen. Ct. (Mass. 2007); S.B. 955, 185th Gen. Ct. (Mass. 2007). New Jersey: S.B. 671, 212th Leg., 1st Sess. (N.J. 2006); Assem. B. 721, 212th Leg., 1st Sess. (N.J. 2006). New York: S.B. 4149, 2007–08 Leg., 230th Sess. (N.Y. 2007); Assem. B. 8066A, 2007–2008 Leg., 230th Sess. (N.Y. 2007). Oregon: S.B. 655, 74th Leg. Assem., Reg. Sess. (Or. 2007). Pennsylvania: S.B. 678, 2007 Gen. Assem., 2007 Sess. (Pa. 2007). Virginia: S.J. Res. 90, 2006 Reg. Sess. (Va. 2006); H.J. Res. 183, 2006 Reg. Sess. (Va. 2006).

civil liability.<sup>29</sup> These initiatives are transparent: They protect wrongdoers, profit insurance interests, and undermine public safety.

Tort reform has had many goals that involve the complete elimination of certain features of the civil justice system such as strict liability, joint and several liability, retailer liability, and punitive damages.<sup>30</sup> However, it is in the domain of punitive damages and limitations on recovery for noneconomic losses<sup>31</sup> where those seeking to limit accountability have had their most stunning successes. With the exception of a few states, caps of one type or another limit damages throughout the United States.<sup>32</sup>

Disputes regarding the constitutionality of caps that end up in court are common<sup>33</sup> and not surprising: There is fundamental disagreement

29. Paul J. Barringer, III, *A New Prescription for America's Medical Liability System*, 9 J. HEALTH CARE L. & POL'Y 235, 244-49 (2006). Looking at the ten years between 1996 and 2006, Congress made several attempts for tort reform on the federal level. The following federal tort reform proposals were among those considered: H.R. 3103, 104th Cong. (1996); H.R. 956, 104th Cong. (1996); H.R. 1091, 105th Cong. (1997); H.R. 2242, 106th Cong. (1999); H.R. 2563, 107th Cong. (2001); S. 812, 107th Cong. (2002); H.R. 4600, 107th Cong. (2002); H.R. 5, 108th Cong. (2003); S. 2061, 108th Cong. (2003); S. 11, 108th Cong. (2003); S. 2207, 108th Cong. (2004); H.R. 4280, 108th Cong. (2004); H.R. 534, 109th Cong. (2005); S. 366, 109th Cong. (2005); S. 367, 109th Cong. (2005); S. 354, 109th Cong. (2005); Fair and Reliable Medical Justice Act, S. 1337, 109th Cong. (2005); H.R. 5, 109th Cong. (2005); S. 22, 109th Cong. (2006). See also Avraham, *supra* note 28, at 183. Often discussions of federal caps are based on language in a 1993 report from the Office of Technology Assessment, U.S. CONGRESS OFFICE OF TECHNOLOGY, ASSESSMENT IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS (1993) ("[C]aps on damages are effective in lowering payment per paid claim and, hence, malpractice insurance premiums.").

30. John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2004).

In the 1970s insurance companies, tobacco interests, and large industry launched a political campaign . . . Unlike previous reform efforts that sought to change rules of law through case-by-case adjudication in the courts, the self-styled tort "reform" movement pursued a much grander vision: transforming the cultural understanding of civil litigation . . . by attacking the system itself. . . .

[A]dvocates seek to persuade the public through advertising and lobbying that the civil justice system is corrupted . . . .

*Id.* at 1021 (footnotes omitted).

31. A typical description of noneconomic damages, using Wisconsin as a guide, is as follows: "[N]on economic damage" means moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.

Wis. STAT. § 893.55(4)(a) (2009).

32. Only the following states do not cap damages: Arkansas, Connecticut, Delaware, Iowa, Minnesota, New York, Rhode Island, South Carolina, Tennessee, and Vermont. Glassman, *supra* note 27, at 432-58. One group of scholars classified caps based on the dollar-value of the ceiling on damages. See Charles R. Ellington et al., *State Tort Reforms and Hospital Malpractice Costs*, 38 J.L. MED. & ETHICS 127 (2010).

33. The following cases upheld caps. Fed. Express Corp. v. United States, 228 F. Supp. 2d 1267 (D.N.M. 2002); Evans v. State, 56 P.3d 1046 (Alaska 2002); Fein v. Permanente Med. Grp.,

on the value—or harm—of capping damages.<sup>34</sup> What is in play with capped damages is quite straightforward. In those states that have imposed a cap on noneconomic losses or punitive damages,<sup>35</sup> a plaintiff cannot recover in excess of the capped amount, regardless of the plaintiff's harms<sup>36</sup> and regardless of the fact that a jury has determined that the plaintiff has an entitlement to an amount in excess of the

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695 P.2d 665 (Cal. 1985); *Garhart v. Columbia/Healthone ex rel. Tinsman, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980); *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Pulliam v. Coastal Emergency Servs.*, 509 S.E.2d 307 (Va. 1999); *Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001).

The following cases overturned caps on state constitutional grounds. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); *LeBron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). This represents a very limited list that spans 1987 to 2007.

34. The literature in the field is expansive. The following is a short list focused just on punitive damages: Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 643–57 (2003); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1 (2004); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 961 (2007); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2085 (1997); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313 (2001).

35. For a summary of punitive damage caps, see Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 116 (2008), which provides a lucid summary of the common law landscape:

Nineteen states have enacted [punitive damage] caps of different forms, including statutes that cap punitive damages as a fixed dollar amount, as a fixed ratio to the amount of compensatory damages, as a fixed ratio subject to a dollar limit, and as a dollar limit based on the income, profit from misconduct, or net worth of the defendant.

*Id.* Naturally, all states are bound by *State Farm's* constitutionally imposed single-digit multiplier limits discussed in the previous section.

36. There are literally thousands of cases where a plaintiff's damages are capped. While there is nothing to be gained by listing them all, for further research, a few examples follow. *J.M. v. Hilldale Indep. Sch. Dist.*, No. 08-7104, 2010 WL 3516730, at \*1, \*16 (10th Cir. Sept. 10, 2010) (involving claims arising from sexual relationship between student and teacher; jury award reduced because of a cap); *Brown v. Crown Equip. Corp.*, 554 F.3d 34, 35 (1st Cir. 2009) (involving a fatal forklift accident for which the family was awarded \$4.2 million and the jury award was reduced by almost two-thirds because of a cap); *Paz v. Our Lady of Lourdes Reg'l Med. Ctr.*, 341 Fed. App'x 971, 972 (5th Cir. 2009) (involving a medical malpractice action against doctors and hospital and a jury award reduced because of a cap); *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439, 460–63 (Tex. Ct. App. 1996) (affirming the district court's reduction of a jury award because of a cap); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 752 (Tex. Ct. App. 1998) (same); *Potomac Elec. Power Co. v. Smith*, 558 A.2d 768, 790 (Md. Ct. Spec. App. 1989)

cap.<sup>37</sup> The consequences are blunt and troubling. First, caps deny just and fair recovery of legal claims. One author suggests that “[c]aps on non-economic damages reduce average awards by [65%] to [74%].”<sup>38</sup> Second—and a focus of the second half of this research—caps undermine deterrence.<sup>39</sup>

### III. LIMITS ON LIABILITY FOR OFFSHORE ACTIVITY: THE DEEPWATER HORIZON DISASTER AND THE EXXON VALDEZ SPILL

#### A. *The Deepwater Horizon Disaster*

Almost immediately after the blowout at the Macondo wellhead more than a mile beneath the *Deepwater Horizon* rig, two questions surfaced: Could this disaster have been avoided through the exercise of due care? Did the legal environment, and specifically the \$75 million cap on liability in OPA and the limits on punitive damages the Court imposed in *Exxon Shipping Co. v. Baker*<sup>40</sup> play a role in making this event more likely?<sup>41</sup>

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(involving a \$7.8 million jury award for electrocution of a teenage girl due to PEPCO's gross negligence that was reduced because of a cap from \$500,000 to \$350,000).

37. Jeffrey R. White, *State Farm and Punitive Damages: Call the Jury Back*, 5 J. HIGH TECH. L. 79 (2005) (“Nowhere does the civil jury speak louder than when it awards punitive damages against a defendant who has violated our common understanding of acceptable behavior. The jury verdict speaks as the conscience of the community.”).

38. Avraham, *supra* note 28, at 208.

39. See David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. LEGAL STUD. 143 (2007); Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 391 n.204 (1995); Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1318–19 (2005); see also Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 910 (2008); Brandon Van Grack, *The Medical Malpractice Liability Limitation Bill*, 42 HARV. J. ON LEGIS. 299, 310–11 (2005); Kathryn Zeiler, *Turning from Damage Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS 385, 389–90 (2005); Giana Ortiz, Comment, *Medical Malpractice Damage Caps—Constitutional Per Se in Texas, But at What Price? A Look at Alternative Patient Compensation Schemes*, 43 HOUS. L. REV. 1281 (2006).

40. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (deciding that in maritime cases, punitive damages must be assessed in relation to compensatory damages as opposed to the degree of wrongfulness of the defendant's action and that those damages can, in most instances, be no more than the amount of the compensatory damages; therefore, punitives and compensatory damages must be in no more than a 1:1 ratio).

41. These are the two questions relevant to this analysis. Naturally, there are other factors of great consequence that played a role in making this event more likely, not the least of which was the apparent failure of the Department of Interior and its sub-agency, Minerals Management Service (MMS), to demand compliance with all health and safety standards applicable to offshore drilling. See Juliet Eilperin, *U.S. Exempted BP's Gulf of Mexico Drilling from Environmental Impact Study*, WASH. POST ONLINE (May 5, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html>. MMS issued

The first major study by BP suggests that this accident was the result of actions that were preventable.

The cement and shoe track barriers—and in particular the cement slurry that was used . . . failed . . . . The results of the negative pressure test were incorrectly accepted . . . the Transocean rig crew failed to recogni[z]e and act on the influx of hydrocarbons into the well . . . . After the well-flow reached the rig it was routed to a mud-gas separator, causing gas to be vented directly on to the rig rather than being diverted overboard . . . [t]he flow of gas into the engine rooms through the ventilation system created a potential for ignition which the rig's fire and gas system did not prevent; . . . the rig's blow-out preventer . . . should have activated automatically to seal the well. But it failed to operate, probably because critical components were not working.<sup>42</sup>

Initial governmental reports drew the same conclusion. Congressman Edward J. Markey, senior member of the House Energy and Commerce Committee investigating the blowout, characterized BP's decision-making culture as follows: "When the culture of a company favors risk-taking and cutting corners above other concerns, systemic failures like this oil spill disaster result without direct decisions being made or tradeoffs being considered."<sup>43</sup>

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categorical exclusions to approve BP's initial and revised exploration plans and approvals for the application for a permit to drill the *Macondo* well. Which means that instead of completing a site-specific review of the environmental impacts as required by NEPA, MMS instead relied on the earlier NEPA documents that were wrought with inadequacies.

Jaclyn Lopez, *BP's Well Evaded Environmental Review: Categorical Exclusion Policy Remains Unchanged*, *ECOLOGY L. CURRENTS* (Nov. 2010), <http://elq.typepad.com/currents/2010/11/currents37-10-lopez-2010-1002.html#tp>. A report from the Council on Environmental Quality advocated rethinking the continued use of categorical exclusions. See EXEC. OFFICE OF THE PRESIDENT, REPORT REGARDING THE MINERALS MANAGEMENT SERVICE'S NATIONAL ENVIRONMENTAL POLICY ACT: POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT 4-5 (Aug. 16, 2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf>.

42. Press Release, BP, BP Releases Report on Causes of Gulf of Mexico Tragedy (Sept. 8, 2010), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064893>; Deepwater Horizon Accident Investigation Report (Sept. 8, 2010), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads\\_pdfs/Deepwater\\_Horizon\\_Accident\\_Investigation\\_Report.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf).

43. Steven Mufson, *Cost Didn't Drive Decisions on Oil Rig, Spill Panelist Says*, *WASH. POST*, Nov. 9, 2010, at A3. This statement is consistent with prior assessments of the disaster. Michael Greenstone, *A Built-in Incentive for Oil Spills*, *POLITICO* (June 3, 2010, 4:50 AM), <http://www.politico.com/news/stories/0610/38068.html#ixzz0pnVCnS4U>; John McQuaid, *The Gulf of Mexico Oil Spill: An Accident Waiting to Happen*, *YALE ENV'T* 360 (May 10, 2010), <http://e360.yale.edu/content/feature.msp?id=2272>; Lisa Myers & Rich Gardella, *Deepwater Horizon Rig: What Went Wrong?*, *MSNBC.COM* (May 21, 2010, 7:40 PM), <http://www.msnbc.com/clearprint/CleanPrintProxy.aspx?1297129421799>. The Washington Post article focused on Commission counsel, Fred H. Bartlit, who suggested that intentional "short-cuts" were not taken "for the sake of saving

In September 2010, the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling (the Commission) reported that there was knowledge of grave risk not addressed prior to the blowout.<sup>44</sup> After months of study, the co-chairman of the Commission, William K. Reilly, confirmed this assessment. Reilly characterized the events leading to the blowout of the Macondo well and the explosion of the *Deepwater Horizon* as “a suite of bad decisions. . . .” He noted there were “failed cement tests, premature removal of muds underbalancing the well, a negative pressure test that failed but was adjudged a success, apparent inattention, distraction or misreading of a key indicator that gas was rising toward the rig. . . . [T]he story they told is ghastly: one bad call after another.”<sup>45</sup> Reilly summarized the environment on the rig and the decisions leading to the blowout: “Whatever else we learned [there was] emphatically not a culture of safety on that rig. I referred to a culture of complacency and speaking for myself, all these companies we heard from displayed it.”<sup>46</sup>

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money.” The statements of Mr. Bartlit turned out not to represent the views of the Commission. The Post article sets out the background of Mr. Bartlit:

Bartlit, a litigator who has represented corporations on antitrust, patent infringement, false claims and other complex matters, also represented President George W. Bush in a Florida ballot case. . . . Bartlit defended General Motors’ Allison Gas Turbine unit against charges that its engines ignited a gas cloud that killed more than 160 people on board the Piper Alpha oil rig platform in 1988.

Mufson, *supra*, at A3.

44. *Deepwater Horizon Joint Investigation*, THE OFFICIAL SITE OF THE JOINT INVESTIGATION TEAM, <http://www.deepwaterinvestigation.com/go/site/3043> (last visited Feb. 7, 2011); John M. Broder, *Companies Knew of Cement Flaws Before Rig Blast*, N.Y. TIMES, Oct. 29, 2010, at A1.

45. Hearing of the Nat’l Comm’n on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling (Nov. 9, 2010) [hereinafter Nat’l Comm’n Hearing] (statement of the Honorable William K. Reilly, Co-Chairman), available at <http://www.oilspillcommission.gov/page/hon-reillys-opening-statement-nov-9-2010>.

46. *Id.* The final report of the Commission, issued on January 11, 2011, affirmed Reilly’s conclusions.

The explosive loss of the Macondo Well could have been prevented. The immediate causes of the Macondo Well blowout can be traced to a series of identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry. . . . *The Deepwater Horizon disaster exhibits the costs of a culture of complacency. . . . There are recurring themes of missed warning signals, failure to share information, and a general lack of appreciation for the risks involved.*

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 (Jan. 2011) (emphasis added), available at [https://s3.amazonaws.com/pdf\\_final/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](https://s3.amazonaws.com/pdf_final/DEEPWATER_ReporttothePresident_FINAL.pdf). One reporter who followed this disaster from its inception notes that the final report makes clear that the disaster was the consequence of “fateful decisions . . . mistakes and failures . . . until the blowout was inevitable.” Steven Mufson, *BP, Transocean, Halliburton Blamed by Presidential Gulf Oil Spill Commission*, WASH. POST ONLINE (Jan. 6, 2011, 12:01 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010504631.html>.

Concerning BP, its partners, and its subsidiaries, Reilly stated, “[E]ach company is responsible for one or more egregiously bad decision[s]. . . . We are aware of what appeared to be a rush to completion at *Macondo*. . . .”<sup>47</sup> There is far more to learn about the causes of this event and no doubt that data emerging from the litigation<sup>48</sup> surrounding this disaster will help pin down the root causes. However, the early assessments, taken as a whole, make clear that something other than optimal deterrence was operating before the wellhead blew. One summary of the disaster notes insufficiencies in design, questionable material selection, and failure to respond to early warning signs.<sup>49</sup> The same report includes the following exchange between reporter Lisa Myers and one of the country’s leading experts on offshore oil disasters, Dr. Robert Bea:

Dr. Robert Bea: There are time pressures that are extremely intense. And there are economic pressures that are extremely intense.

Lisa Myers: So you saw a lot of cutting corners.

Dr. Robert Bea: Sure.<sup>50</sup>

BP’s partner in the operation of the well was equally blunt. James Hackett, CEO of Anadarko Petroleum, issued a statement several months after the blowout asserting that BP’s actions were willful and grossly negligent and that BP “should pay the costs from the disaster because of the reckless and unsafe way it drilled at the site.”<sup>51</sup>

Within days of the Gulf disaster, anyone reading a newspaper, scanning news online, or listening to broadcast news understood that OPA

47. Nat’l Comm’n Hearing, *supra* note 45.

48. John M. Hynes & Paige M. Neel, *The Deepwater Horizon Blowout and Oil Spill—Who Is Suing and Being Sued, How, Where and Why?*, CLAUSEN MILLER (Aug. 10, 2010), [http://www.clausen.com/index.cfm/fa/firm\\_pub.article/article/41829cfc-724b-44f8-934d-e1bd9e1b59ef/The\\_DEEPWATER\\_HORIZON\\_Blowout\\_And\\_Oil\\_Spill\\_WhoIs\\_Suing\\_And\\_Being\\_Sued\\_How\\_Where\\_And\\_Why.cfm](http://www.clausen.com/index.cfm/fa/firm_pub.article/article/41829cfc-724b-44f8-934d-e1bd9e1b59ef/The_DEEPWATER_HORIZON_Blowout_And_Oil_Spill_WhoIs_Suing_And_Being_Sued_How_Where_And_Why.cfm) (“[T]here are lawsuits filed in Florida, Alabama, Texas, Mississippi, South Carolina, Kentucky, Tennessee, California, New York, Oklahoma and Georgia.”). Some of these cases have been consolidated before the Multidistrict Litigation Panel, Judge Carl Barbier. *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, *Montanga v. BP Prods.*, MDL-2179 (S.D. Ala. 2011) (No. 1:10-607), *availavle* at <http://www.jpml.uscourts.gov/>. There are also individual cases pending. *See, e.g.*, *Blue Water Yacht Sales & Serv., Inc. v. Transocean Holding Inc.*, No. 1:10-cv-0024-KD-N (S.D. Ala. 2010); *Moore v. BP PLC*, No. 1:2010-cv-00293 (S.D. Ala. 2010).

49. *See* Myers & Gardella, *supra* note 43.

50. *Id.*

51. Edward Klump, *Anadarko Says Well Operator BP Should Pay for Spill (Update2)*, BLOOMBERG BUSINESSWEEK (June 18, 2010, 8:17 PM), <http://www.businessweek.com/news/2010-06-18/anadarko-says-well-operator-bp-should-pay-for-spill-update2.html> (“BP’s behavior and actions likely represent gross negligence or willful misconduct and thus affect the obligations of the parties under the operating agreement . . . .” (quoting James Hackett, CEO of Anadarko Petroleum)).

imposes a cap on civil liability for offshore oil spills.<sup>52</sup> As noted in the previous section, the Act states, “[E]xcept as otherwise provided in this section, the total of the liability of a responsible party under § 7202 of this title . . . for an offshore facility except a deep water port [is] 75 million dollars.”<sup>53</sup> This sum is to cover all damages to natural resources, real property, personal property, subsistence (of obvious consequence for all commercial uses in the Gulf), revenues, profits, earning capacity, and public services. Along the same lines, everyone following the disaster knew that this sum had to be insufficient.<sup>54</sup> Unknown at the time was whether the limitation on liability was instrumental and affected the questionable decisions made by BP.

To be sure, offshore drilling is dangerous. Thus, liability is strict under OPA—and those injured in such disasters should be fully compensated. Although a public trust fund<sup>55</sup> establishes a secondary source for spills, it should be for those instances in which the defendant cannot cover its losses, not as a profit-protecting mechanism for a company engaged in highly risky behavior. The congressional testimony on the Deepwater Horizon disaster confirms these concerns. One witness (Kate Gordon from the Center for American Progress) testified that BP could have prevented this blowout by installing a \$500,000 “acoustic blow out preventer.”<sup>56</sup> Gordon testified that raising or eliminating the cap would have changed company behavior and would not have resulted in the end of offshore drilling. The testimony was supported throughout the hearing.<sup>57</sup>

Decisions regarding how and where to drill are and ought to be based on whether the expected benefits exceed the expected costs. The difference is that unlike other industries that do not have function-specific capped liability, excess liability costs do not have to be part of the equation for offshore drilling.<sup>58</sup> If an oil company knows

52. 33 U.S.C. § 2704(a)(3) (2006).

53. See Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701; Price Anderson Act, 42 U.S.C. § 2210 (2006).

54. In one of the first published studies of this disaster, the authors note that the “\$75 million dollar cap is not going to be nearly enough money to compensate for all the consequential damages that we are going to see.” Kim Hollaender, Harvey M. Sheldon & Scott Summy, *Understanding the BP Oil Spill and Resulting Litigation: An In Depth Look at the History of Oil Pollution and the Impact of the Gulf Coast Oil Disaster* (Aspatore Special Report 2010).

55. See 26 U.S.C. § 9503 (2006).

56. *Liability and Financial Responsibility for Oil Spills Under the Oil Pollution Act of 1990 and Related Statutes: Hearing Before the H. Comm. on Transp. & Infrastructure*, 111th Cong. (2010) [Hereinafter House Liability Hearing], available at <http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=1235>.

57. *Id.*

58. *Id.* (statement of Michael Greenstone, 3M Professor of Environmental Economics, Massachusetts Institute of Technology).



the maximum amount of damages it would have to pay for an oil spill, it will decide whether to engage in risky behavior based solely on profitability gains and risks.<sup>59</sup>

Companies participating in high-risk activities including offshore drilling should have every incentive to maximize safety. Statutorily capped liability has exactly the opposite effect. It is now fair to conclude that the cap on liability for offshore drilling played a meaningful role in the decisions that led to this disaster.<sup>60</sup> Oil spills are not completely preventable.<sup>61</sup> However, there are ways to lessen risk—and they can be costly. It is only logical that a company will not incur those costs if it already knows the limits of its liability and has already programmed those costs into its pricing structure.

As long as there are ships at sea, there will be accidents. We cannot alter that fact. What we can strive to do, what our goal should be, is to insure that these accidents are as infrequent as possible, and that their consequences, to the ship, the personnel onboard, and to the environment, are as harmless as possible.<sup>62</sup>

It is fair to say that in the case of this disaster, the actions of BP were not “as harmless as possible.”<sup>63</sup> If a cap is set below the amount of expected damage, this not only violates the victim’s right to compensation but also vitiates the full internalization of risks associated with an activity.<sup>64</sup> This phenomenon led to the following conclusion by Associate Attorney General Thomas J. Perrelli during a Senate Energy and Natural Resources Committee hearing: “I don’t think there should be an arbitrary cap on corporate responsibility . . . .”<sup>65</sup>

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59. *See id.*

60. *See* House Liability Hearing, *supra* note 56 (statement of Thomas J. Perrelli, Associate Attorney General).

61. Blair N.C. Wood, *The Oil Pollution Act of 1990: Improper Expenses to Include in Reaching the Limit on Liability*, 8 APPALACHIAN J.L. 179, 182 (2009) (“Oil spills are inevitable and result from equipment failure, human error, acts of God, and terrorism.”).

62. Tammy M. Alcock, Comment, “*Ecology Tankers*” and *The Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers*, 19 ECOLOGY L.Q. 97, 98 (1992).

63. *Id.*

64. *See* Michael Faure & Wang Hui, *Economic Analysis of Compensation for Oil Pollution Damage*, 37 J. MAR. L. & COM. 179, 185 (2006); *see also* House Liability Hearing, *supra* note 56 (statement of Rep. Oberstar, Chairman, House Transportation & Infrastructure) (stating that the cap effectively distributes the costs to taxpayers and away from those who caused the harm).

65. Joseph J. Schatz, *Senators Find It Difficult to Agree on How to Address Oil Spill Liability Cap*, CQ TODAY, May 25, 2010 (quoting Associate Attorney General Thomas J. Perrelli). For reasoning supporting this conclusion, *see* Matthew P. Harrington, *Necessary and Proper, But Still Unconstitutional: The Oil Pollution Act’s Delegation of Admiralty Power to the States*, 48 CASE W. RES. L. REV. 1 (1997), and Patrick F. Nash, Note, *The Adequacy of the Oil Pollution Act’s Compensation Scheme in the Case of a Catastrophic Oil Spill*, 7 MIN. L. & POL’Y 105 (1991).

In effect, the cap ensures an economic model that includes public subsidization of privately caused harms.<sup>66</sup> To an extent, because oil is currently an essential product, public involvement is not irrational. "Because it is funded by a tax on all imported and domestic oil, the OSLTF helps to ensure that the costs of oil spills are borne by 'all users of oil.'"<sup>67</sup> However, public assistance in clean-up and recovery is one thing—using public funds to "spare" oil companies from paying their share of a direct and personal harm they caused by virtue of their negligence is quite another. Companies should have to pay for damages they cause, just as individuals would.<sup>68</sup> This has been understood as a necessary feature of the tort scheme for the last quarter century. "The premise of an unlimited liability to the discharger is that the injured party should be reimbursed completely by the party ultimately responsible for the spill."<sup>69</sup> Removing the cap makes future disasters less likely. At a minimum, review of the cap seems an obvious choice.<sup>70</sup>

In 2006, Michael Faure and Wang Hui demonstrated that the compensation scheme for oil spills, and particularly the cap on liability, was inherently inefficient and undercut the necessary deterrent effect that full liability would provide. Writing purely from an economic perspective, Faure and Hui were blunt: "[A] cap probably has more negative effects (on the tortfeasor's incentives to take care) than benefits (of additional care from victims)."<sup>71</sup> "An obvious disadvantage of a system of financial caps is that this will seriously impair the victim's rights to full compensation."<sup>72</sup>

Notwithstanding the convincing work of Faure and Hui, there is a contrary view of caps. Speaking generally (and not about OPA), in his opinion in *Exxon Shipping v. Baker*,<sup>73</sup> Justice Souter wrote, "The real problem is the stark unpredictability of punitive awards." On this point, reasonable minds can and do differ. However, based on the findings regarding the Gulf spill and the other information discussed

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66. See Mark T. Peterson, Comment, *State Incentive Based Oil Tanker Regulation: An Alternative to Traditional Command-and-Control Regulation*, 4 OCEAN & COASTAL L.J. 271, 301-02 (1999).

67. Harrington, *supra* note 65, at 13 n.43 (quoting S. Rep. No. 101-94, at 6 (1989)).

68. See House Liability Hearing, *supra* note 56 (statement of Kate Gordon, Center for American Progress Action Fund).

69. Glen Fjermedal, Comment, *Federal Oil Spill Fund Legislation: A Future Standard*, 53 ALBANY L. REV. 161, 202 (1988).

70. See Gerald Karey & Herman Wang, *US Attorney General Eyes Liability Cap Hike*, PLATTS OILGRAM NEWS, June 10, 2010, at 9.

71. Faure & Hui, *supra* note 64, at 194.

72. *Id.* at 185, 194.

73. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 472 (2008).

above, it would seem clear that a certain level of unpredictability is essential. It is understandable that those who produce goods and services want to be freed of liability costs not covered up front by the prices charged for those goods and services. Who would not want to pass along all risks to consumers? However, it is precisely that uncertainty that pushes producers to improve the quality of their output.

### B. *The Exxon Valdez*

On March 24, 1989, the supertanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, spilling eleven million gallons of crude oil and causing one of the worst environmental disasters in U.S. history.<sup>74</sup> This event led to the Oil Pollution Act of 1990 discussed in the previous section and generated a Supreme Court decision that imposed a dramatic limitation on maritime cases, including oil spills, where punitive damages are sought.<sup>75</sup> The Court held that punitive damages must be assessed in relation to compensatory damages as opposed to the degree of wrongfulness of the defendant's action and that those damages can, in most instances, be no more than the amount of the compensatory damages (in other words, punitive and compensatory damages must be in no more than a 1:1 ratio).<sup>76</sup>

This decision makes more likely risk-taking behaviors that can and do lead to disaster. A recent article examining the *Exxon Valdez* spill and the decision of the Supreme Court to slash punitive damages from \$2.5 billion to \$500 million demonstrated the dangerous relationship between capped or fixed damages and deterrence. "*Exxon Shipping's*<sup>77</sup> one-to-one cap unduly fetters punitive damages and will interfere with deterrence and retributivist goals."<sup>78</sup> *Exxon Shipping* must be read in conjunction with *State Farm Mutual Automobile Insurance Co. v. Campbell*, which also required computation of punitive dam-

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74. Noël Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENV'T L.J. 283, 330 (2002) ("Congress swiftly enacted the Oil Pollution Act of 1990 in response to the massive spill of approximately eleven million gallons of oil into Alaska's Prince William Sound from the Exxon Valdez, which has been widely viewed as one of the worst environmental disasters in history."); see also Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1075 (2005) ("The Exxon Valdez oil spill in Prince William Sound in 1989 was one of the worst environmental disasters in American history, inciting a nationwide public protest, a massive volunteer effort to assist in clean up, and the passage of the Oil Pollution Act in August of 1990." (citing Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484)).

75. See *Exxon Shipping*, 554 U.S. at 471.

76. *Id.* at 514-15.

77. *Id.* at 514.

78. Jeff Kerr, *Exxon Shipping Co. v. Baker: The Perils of Judicial Punitive Damages Reform*, 59 EMORY L.J. 727, 756 (2010).

ages in relation to compensatory damages, using a substantive due process analysis, and finding that more than a single-digit ratio (no more than nine times compensatory damages) was inherently suspect.<sup>79</sup>

The notion that punitive damages should be capped in relation to compensatory damages is both irrational and at odds with 150-year-old Supreme Court jurisprudence: "It is a well established principle of the common law that . . . a jury may inflict . . . exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff."<sup>80</sup> This view is well expressed in the literature: "[T]he limits of punitive damages have to do entirely with the heinousness of the wrongful act; they have nothing to do with the size of compensatory awards. Thus, we oppose proposals to cap punitive damages at some small multiple of compensatory damages."<sup>81</sup> It only makes sense that "the heinousness of the offense . . . is not measured by the magnitude of harm."<sup>82</sup>

The Exxon spill was the result of actions that, by almost any measure and including the measure of the Supreme Court, were sufficiently reckless and grossly negligent to justify the imposition of punitive damages.<sup>83</sup> One law review note summed up the situation, including the actions of the captain, Joseph Hazelwood, thusly:

Having just guzzled ten shots of liquor, Joseph Hazelwood, a lifetime alcoholic . . . realized that the boat was on course to collide with an underwater coral reef. . . . Hazelwood sped up the boat . . . abandoned his . . . post . . . leaving two unlicensed crew members to navigate around the reef. The crew members failed to properly make a turn. . . . the ship ran aground on the reef, [and] [e]leven million gallons of crude oil gushed into Prince William Sound . . . . [It was] determined that . . . Hazelwood had a blood-alcohol content of approximately .241 . . . triple the legal limit . . . .<sup>84</sup>

Notwithstanding the abysmal record, the *Exxon* Court drastically limited (or imposed a cap) on maritime punitive damages, a decision

79. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425–26 (2003).

80. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

81. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1461 (1992).

82. *Id.* at 1432.

83. The findings in the Final Report of the Alaska Oil Spill Commission confirm that assessment. Exxon Valdez Oil Spill Trustee Council, Alaska Oil Spill Commission, Final Report: Details About the Accident 5–14 (Feb. 1990), available at <http://www.evostc.state.ak.us/facts/details.cfm>.

84. Ryan J. Strasser, Note, *Punitive Damages Caps: A Proposed Middle Ground After Exxon Shipping Co. v. Baker*, 19 CORNELL J. L. & PUB. POL'Y 773, 774 (2010) (footnotes omitted).

that could have far-reaching implications.<sup>85</sup> Noted one commentator, "The *Exxon* decision ostensibly affects only a narrow category of cases . . . [however, while] the precise holding in *Exxon* may be narrow, the case is likely to have a substantial impact on the constitutional dimension of punitive damages. . . ."<sup>86</sup> In *Hayduk v. City of Johnstown*,<sup>87</sup> a federal court read the *Exxon* case in precisely those terms: "Although *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application."<sup>88</sup>

Whether the *Exxon* 1:1 ratio is extended beyond maritime cases in the future is not yet clear. However, one thing is not a matter of speculation: in terms of damages, at the time of the Macondo well explosion a mile below the *Deepwater Horizon* rig (a maritime event ostensibly covered by *Exxon*), there was a 1:1 ratio on punitive damages and a \$75 million cap on civil tort liability. That meant BP could calculate immediately its total liability exposure and make critical choices commensurate with that liability, unconcerned about the effect of its actions or the outrage they engendered. It is fair and logical to assume that knowledge of these limits on liability affected the critical choices made by BP prior to the explosion that led to the worst environmental disaster in U.S. history.

#### IV. BEYOND OIL SPILLS: CAPPING DAMAGES AND DETERRENCE, SOCIAL JUSTICE, AND EFFICIENCY

##### A. Caps and Deterrence

While most of tort reform is predicated on the importance of open-market functions and accountability for those who engage in misconduct, when it comes to capping liability for certain privileged industries, open market theory vanishes. Instead of the normal pressures of competition ensuring accountability for wrongdoing, industry protection becomes the norm. This argument is usually coupled with a claim that if such unchecked liability exists, not only will participants in the

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85. See generally Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analysis Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 278 (2006), and Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 75 (1999).

86. Michael L. Brooks, Note, *Uncharted Waters: The Supreme Court Plots the Course to a Constitutional Bright-Line Restriction on Punitive Awards in Exxon Shipping Co. v. Baker*, 62 OKLA. L. REV. 497, 517-18 (2010).

87. *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429 (W.D. Pa. 2008).

88. *Id.* at 483-84 n.46.

industry be disinclined to operate in the United States, but insurance companies would be unwilling to accept the risk as well.

In field after field, this extortive rhetoric has become commonplace. The argument is always the same: the prospect of limitless liability is so grave and so real that unless Congress passes a law to limit or abolish civil tort liability, the benefits of the industry will not be provided to the citizens of the United States. The deterrent effect will have to be compromised for the greater good, or so goes the argument. The truth is, the greater good is compromised; victims are undercompensated, deterrence is greatly lessened, and those who engage in misconduct are rewarded. In the parlance of basic tort law, when an entity engages in behavior that reflects a lack of due care and produces a foreseeable harm, liability is imposed. This is a principle of historic consequence.<sup>89</sup> The notion that a statute would limit liability for those who engage in behavior that causes the precise accident foreseen is deeply troubling. Writing about employment discrimination, George Washington University Professor Michael Selmi wrote,

By their nature, damage caps are arbitrary and have no necessary relation to the damage a company's discrimination is likely to cause either to the immediate victims or to society at large, and as a result, the damage caps almost certainly pose an additional restriction on the law's deterrent effect.<sup>90</sup>

There is a simple truth with capped damages: They lessen the likelihood of optimal safety and efficiency. The idea that caps have no effect on the manner in which goods and services are provided is untrue. The presence of a cap will affect rational market actors with a perfectly predictable result: "Potential defendants may alter their behavior because they know that their liability is limited. . . ."<sup>91</sup> The tort system is, in fact, all about deterrence. "Deterrence is the function of tort law by which the law creates incentives that induce people to

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<sup>89</sup>. As every first-year law student will recite, this is the classical, basic, and conservative foundation for the imposition of full liability in the tort system. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation . . . . "It [is] not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye."

*Id.* (quoting *Munsey v. Webb*, 231 U.S. 150, 150 (1913)).

<sup>90</sup>. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 *TEX. L. REV.* 1249, 1315 (2003) (discussing caps on liability in employment discrimination cases).

<sup>91</sup>. Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 *TEX. L. REV.* 345, 391 n.205 (1995).

avoid inappropriately dangerous activities.”<sup>92</sup> It is about communicating to the public the standards with which individuals, business, and governments should conform. It is about communicating that there will be consequences that the actor, not the actor’s customers, will have to bear. This is perhaps the most basic tenet not just of tort law but of our entire legal system. Somehow, the principle seems to get lost when discussing caps. It is time to put the basic premise back on the table. The idea is simple: “Reduction of risk through deterrence of harm is the true purpose of liability today . . . .”<sup>93</sup> A cap that arbitrarily and artificially limits liability undermines that purpose. In health care, for example, it is simply naïve to believe that caps have no effect on the quality of the practice of medicine.

Discussing a proposal to cap damages in the medical malpractice area, one author noted that when “tortfeasors do not face liability for the total economic and noneconomic damages, underdeterrence occurs. By failing to internalize the full cost of harm, *future actors engage in unreasonably risky behavior, leading to an increase in negligent conduct . . . [a]ffect[ing] the deterrence capability of the tort system.*”<sup>94</sup> In fact, caps compromise public safety. “A damage cap may undermine the deterrence incentive provided by medical malpractice liability. If quality of care and medical errors are elastic with respect to the degree of liability, patients may be harmed by the introduction of a liability cap.”<sup>95</sup> A cap in the medical malpractice area makes it more profitable

to face potential liability for medical malpractice rather than provide costly treatment that complies with the legal standard of care. . . . [P]hysicians react to different sorts of financial incentives in this way. . . .

To summarize, if damage caps reduce exposure to liability, physicians (and MCOs), on average, may be less likely to provide compliant treatment. This will result in an increase in patient injuries . . . .<sup>96</sup>

The loss of deterrence is a real and dramatic consequence of a cap on damages across the board. Considering a cap on punitive damage liability in Alaska, a commentator noted,

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92. Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 910 (2008).

93. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 268 (2004).

94. Brandon Van Grack, *The Medical Malpractice Liability Limitation Bill*, 42 HARV. J. ON LEGIS. 299, 311 (2005) (emphasis added) (footnotes omitted).

95. David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. LEGAL STUD. 143, 176 (2007).

96. Kathryn Zeiler, *Turning from Damage Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL’Y L. & ETHICS 385, 389–90 (2005).

[C]apping punitive damages against employers who are found liable for discriminatory acts sends the wrong message to those responsible for making employment decisions in Alaska. *Managers and supervisors who may be inclined to hire white males over equally qualified African-American or Native-American females have been given the signal by the Legislature that, if you get caught, your punishment will be limited, regardless of your size.* Employers who may wish to avoid promoting minority employees in order to preserve a certain "corporate image" have been told that juries will be limited in their ability to punish for this behavior.<sup>97</sup>

Damages imposed for wrongdoing, particularly those that cannot be predicted in advance and passed along to consumers, *are* the deterrent force in the civil justice system. Writing about punitive damages more than a quarter century ago, the Colorado Supreme Court noted the obvious: "If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctible defect."<sup>98</sup>

Discussing predictability as it relates to punitive damages, Professor Michael Rustad wrote the following: "[C]aps . . . 'artificially and arbitrarily deflate punitive damages, no matter how egregious the defendant's disregard of health and safety.' The arbitrary limitation of punitive damages to the harm suffered by the plaintiff 'undermines deterrence because the sanction is then limited to a predictable amount of money.'"<sup>99</sup> This fact alone allows for profit-maximizing behavior without the risk and critical disciplining effect of unplanned exposure to liability. The risk of unplanned exposure provides a market force of great consequence. It forces actors to consider the possibility of harm and injury associated with product or service failure. It pushes companies to optimize safety, within reasonable limits. This pressure is absent with a cap on liability.<sup>100</sup>

Unless one wishes to ignore the literature, it is apparent that caps reduce the deterrent effect of the civil justice system, protect wrongdoers who cause harm, and transgress the most basic rights associated with civil justice, including the right to a jury trial. Professor Michael

97. Terry Venneberg, *Legislature Modifies Tort Reform Statute, Caps Damages*, ALASKA BAR RAG, May-June 2008, at 1 (emphasis added).

98. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984).

99. Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1318-19 (2005) (quoting *Products Liability Reform Act of 1997: Hearing Before the S. Comm. on Commerce, Sci., and Trans.*, 105th Cong. (1997) (statement of Lucinda M. Finley, Professor of Law, SUNY Buffalo Law School); see also Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 324-25 (1998).

100. See Galanter & Luban, *supra* note 81, at 1418-54 (arguing that caps undercut deterrence).



Rustad and Dr. Thomas Koenig state the problem succinctly: "Arbitrary caps limit the remedy's efficiency. Such caps permit a [corporation] to accurately predict its punishment in advance and to incorporate that cost into the cost of doing business. Thus, corporations spread the costs to consumers rather than avoiding negligent behavior."<sup>101</sup> In one student note, the author comes to the same conclusion: "Regardless of their constitutionality, statutory caps on non-economic damages do not comport with everything we know about our functioning tort system. . . . [L]egislators should find other mechanisms to achieve societal goals of reduced damages and health care costs."<sup>102</sup> Unless everything that has ever been written about sanctions for misconduct is wrong, caps undermine deterrence.

### B. Caps and Social Justice

The theme of arbitrariness and the lack of beneficial effects is everywhere you turn in the caps literature. While at Harvard's School of Public Health, Professor David Studdert came to the same conclusion: "Decisions to implement [damage caps] should be made with an awareness that they are likely to exacerbate existing problems of fairness in compensation."<sup>103</sup>

In terms of our belief in and entitlement to a trial by jury, caps are a corrupting element. Robert Peck notes that "a cap exercises judicial authority . . . rendering the jury's verdict advisory, rather than constitutionally secured."<sup>104</sup> A somewhat similar theme is echoed in a Utah Supreme Court opinion: "[I]t is self-evident that the cap on the quality of life damages, which does nothing more than reduce [plaintiff's] recovery, does not provide a substitute remedy substantially equal to that abrogated."<sup>105</sup> Caps, then, have the effect of diluting deterrence as well as invading a fundamental right to a meaningful process to recover for harms caused by the misconduct of another.<sup>106</sup> Caps also

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101. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 *BROOK. L. REV.* 1, 69 (2002).

102. Luke Ledbetter, "It's the [Tort System], Stupid": *Consumer Deductibles: How to More Equitably Distribute the Risks of Medical Malpractice and Adequately Compensate Victims Without Statutory Damage Caps*, 6 *APPALACHIAN J.L.* 51, 72 (2006).

103. David Studdert et al., *Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 *HEALTH AFFAIRS* 54, 65 (2004).

104. Robert S. Peck, *Violating the Inviolable: Caps on Damages and the Right to Trial by Jury*, 31 *U. DAYTON L. REV.* 307, 325 (2005); see also Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 *RUTGERS L.J.* 835, 851-56 (2002).

105. *Judd v. Drezga*, 103 P.3d 135, 139 (Utah 2004).

106. See David Randolph Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 *OKLA. L. REV.* 195, 205-06 (1985) (explaining that Arizona and Montana view recovery as a fundamental right).

have a disproportionate negative effect on some of the most vulnerable plaintiff populations.

[C]apping noneconomic damages not only undermines the deterrent effect of malpractice accountability, but also has a clear and decidedly adverse impact on minorities and their comparative recoveries for negligently received medical injuries.

Other segments of the population are also adversely affected . . . [including] the elderly . . . and children . . . .<sup>107</sup>

An article on corporate liability in sports litigation comes to the same conclusion: “[T]he most seriously injured are the ones who traditionally are the least adequately compensated. Thus, damages caps not only frustrate the compensation goal required by a system designed to make someone whole, but prevent[ ] the system’s equity goal.”<sup>108</sup>

Focusing on medical malpractice, one writer concluded, “Capping damages does not reduce malpractice premiums, decrease the filing of ‘frivolous’ lawsuits, lower healthcare costs, or increase patient access to health care. . . . [S]tatutes capping damages do not curb the medical malpractice crisis, but rather serve only to punish the blameless victims of malpractice.”<sup>109</sup> This conclusion was echoed ten years earlier in a piece by Dean Steven Salbu, who noted that statutory caps “make little sense,” because they are, by definition, arbitrary.<sup>110</sup>

In *Ferdon v. Wisconsin Patient Compensation Fund*,<sup>111</sup> the Wisconsin Supreme Court found that a cap on noneconomic damages in medical malpractice cases is unlikely to have any positive effect on consumers. While the court did not address other caps in Wisconsin,<sup>112</sup> it found that caps do not further legitimize state purposes, holding that they do little but deny plaintiffs those resources to which they are entitled and benefit those who have acted negligently.

[W]hen the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care prov-

107. Peck, *supra* note 104, at 340. For a similar perspective, see Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1264–66 (2004).

108. Gil B. Fried, *Punitive Damages and Corporate Liability Analysis in Sports Litigation*, 9 MARQ. SPORTS L. REV. 45, 62–63 (1998).

109. W. Taylor Hale, Comment, *A Critical Misdiagnosis: Re-Evaluating Louisiana’s Medical Malpractice Cap*, 53 LOY. L. REV. 463, 493–94 (2007).

110. Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 299–300 (1997).

111. *Ferdon ex rel. Petrucelli v. Wis. Patients Compensation Fund*, 701 N.W.2d 440, 489 (Wis. 2005).

112. The court held that the cap for medical malpractice, WIS. STAT. § 893.55(4)(d) (2006), was unconstitutional. *Ferdon*, 701 N.W.2d at 491. That holding did not apply to other caps in the Wisconsin statutory scheme. For example, WIS. STAT. §§ 655.017, 893.55(4)(f), applicable to wrongful death cases, was unaffected by the *Ferdon* decision.

iders to a small group of vulnerable, injured patients, the legislative action does not appear rational.

Therefore, even if the . . . cap on noneconomic damages would reduce medical malpractice insurance premiums, this reduction would have no effect on a consumer's health care costs. Accordingly, there is no objectively reasonable basis to conclude that the . . . cap justifies placing such a harsh burden on the most severely injured medical malpractice victims, many of whom are children.

We agree with those courts that have determined that the correlation between caps on noneconomic damages and the reduction of medical malpractice premiums or overall health care costs is at best indirect, weak, and remote . . . .<sup>113</sup>

*Ferdon* recognizes the reality of caps: they affect those who have been harmed and, in all likelihood, are in great need of the damages they seek. Accordingly, some courts have found these statutes unconstitutional because of equal protection problems, some because they are seen as a "taking," and some because, as a matter of substantive due process, a cap fails to advance a legitimate state interest.<sup>114</sup> For example, in *LeBron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court held that caps were facially unconstitutional.<sup>115</sup> The court found that automatic limits on liability are, by definition, arbitrary.<sup>116</sup> There have also been process-based challenges such as *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*<sup>117</sup> where the Georgia Supreme Court found that caps on noneconomic damages violate the constitutional right to a jury trial.<sup>118</sup>

113. *Ferdon*, 701 N.W.2d at 485, 466. The *Ferdon* court cited *Martin v. Richards*, 531 N.W.2d 70 (1995), and *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 168 (Ala. 1991). *Moore* stated, "We conclude that the correlation between the damages cap imposed by § 6-5-544(b) and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote." 592 So. 2d at 168. See also *Carson v. Maurer*, 424 A.2d 825, 836 (N.H. 1980) (holding that a damage cap violated the New Hampshire Constitution's equal protection clause saying, "We find that the necessary relationship between the legislative goal of rate reduction and the means chosen to attain that goal is weak . . . ."); *Judd v. Drezga*, 103 P.3d 135, 147 (Utah 2004) (Durham, J., dissenting) ("Discussing his landmark Harvard study on medical malpractice, Paul Weiler notes the critical limitations of available evidence in determining the relationship between medical malpractice litigation and insurance premiums and the inherent unfairness and high social cost of damage caps as a response in the absence of any showing of their effectiveness.").

114. See generally *Edwards*, *supra* note 12, at 213 (providing a solid and thoughtful review of select state cases assessing the constitutionality of caps); see also Joanne Doroshov & Amy Widman, *The Racial Implications of Tort Reform*, 25 WASH. U. J.L. & POL'Y 161, 162 (2007) (arguing that those least able to cover their losses are profoundly affected by artificial limits on damages).

115. *Lebron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895, 917 (Ill. 2010).

116. *Id.* at 905.

117. *Atlantic Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010).

118. *Id.* at 224. There are of course a number of cases in which a state statute was upheld as constitutional—but that does not address the question of whether caps are bad public policy.

In a nutshell, because caps place arbitrary recovery limits on innocent victims, a number of state courts have taken the difficult step of declaring these statutes unconstitutional. Such decisions are never made lightly—deference to legislative decisions embodied in statutes is the norm. It is only when a statute is genuinely in conflict with basic constitutional entitlements that such decisions are rendered. This exercise in judicial restraint and ultimately judicial action is reserved for truly unfair laws, and caps are truly unfair.

### C. Caps and Inefficiency

While those advocating for caps on civil liability argue that in the long run, tort reform generally and caps specifically stimulate competition and innovation, encourage invention and creativity, and generate savings in the economy by reducing the size and number of awards in tort cases,<sup>119</sup> there is little evidence to that effect.<sup>120</sup> In fact, there is a paucity of literature responding to the stark reality that caps undermine deterrence, encourage cost-cutting, reward shortcuts in safety and innovation, and under-compensate innocent, injured plaintiffs. Therefore, caps do not provide for an efficient economic result.

On reflection, it would seem that the only consistent effect of caps has been to reduce accountability of tortfeasors and increase profitability of insurance carriers. Further, caps can create perverse incentives in the settlement process for both under- and over-

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See Ortiz, *supra* note 39, at 1309 (proffering that damage caps have a negative effect on consumer well-being).

119. See, e.g., HUBER, *supra* note 4, at 202–04; Theresa M. Hottenroth, *Lessons from Canada: A Prescription for Medical Liability Reform*, 13 WIS. INT'L L.J. 285, 293 (1994); W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale*, 1 MICH. L. & POL'Y REV. 141, 165 (1996); Lee Harris & Jennifer Longo, *Flexible Tort Reform*, 29 HAMLINE J. PUB. L. & POL'Y 61 (2007) (providing a general discussion of the topic of tort reform); James F. Tiu, Comment, *Challenging Medical Malpractice Damage Award Caps on Seventh Amendment Grounds: Attacks in Search of a Rationale*, 59 U. CIN. L. REV. 213, 233–39 (1990) (arguing that liability caps are constitutionally sound); see also U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 14–16 (July 24, 2002), available at <http://www.aspe.dhhs.gov/daltcp/reports/litrefm.pdf>; *Assessing the Need to Enact Medical Liability Reform: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 108th Cong. 120–21 (2003) (statement of Donald J. Palmisano, President-elect, American Medical Association). President George W. Bush, Remarks at High Point University in High Point, North Carolina (July 25, 2002), available at <http://frwebgate4.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=865690235366+0+2+0&WAIAction=retrieve> (stating that there should be a \$250,000 cap on noneconomic damages as a matter of federal law).

120. "Although for the most part passing constitutional muster, these caps and multipliers, regardless of their form . . . exact enormous unwanted societal costs." Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN. ST. L. REV. 1077, 1107 (2004).

compensation. Jennifer K. Robbennolt assessed the psychological effect of caps and found that

caps may have the counterintuitive effects of increasing both the size and variability of punitive damage awards in some cases. Psychological theory suggests that caps on punitive damages may serve to anchor the decisions of jurors . . . . Thus, if jurors anchor on the value of the cap, awards could, paradoxically, be pulled higher in some cases.<sup>121</sup>

At best, there are raw savings in capping damages, but only if one excludes the true and full costs of misconduct. After all, caps introduce a predictable liability cost that defendants easily can shift into the price charged for their goods and services.<sup>122</sup> The question is whether such predictability, in the long run, produces higher levels of safety and efficiency for goods and services—to which the answer is clearly “no.” Unless we are to engage in the fantasy that behavior is not affected by the potential of accountability and punishment, there is really no other conclusion that makes sense. To state this another way, caps give primacy to profitability and limit the impact of risk assessment.<sup>123</sup> It is a dangerous calculus.

While this may seem harsh, in those jurisdictions that cap noneconomic damages, short cuts and other risk-taking are assessed based solely on fiscal reward for the tortfeasor. The reward has not come in the form of across-the-board reductions in malpractice premiums.<sup>124</sup> Physician and attorney Freeman L. Farrow assesses the situation as follows: “[A]lthough studies have shown a significant impact of caps on noneconomic damages on the size of damage awards in medical malpractice lawsuits, they have not shown a direct correlation be-

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121. Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 *BUFF. L. REV.* 103, 171 (2002).

122. See Andrew F. Popper, *A One-Term Tort Reform Tale: Victimized the Vulnerable*, 35 *HARV. J. ON LEGIS.* 123, 125 (1998) (“[T]ort reformers have tried to limit civil litigation options, reduce exposure to civil liability and enact legislation that allows industry to calculate its exposure in advance and pass the cost on to the consumer in the prices of goods and services.”).

123. See Faure & Hui, *supra* note 64, at 183, 205.

124. In some subsets of the practice of medicine in California, there is an argument that caps have led to lower premiums based on a state tort reform bill. Rebecca Porter, *The Truth About Med-Mal Premiums*, *TRIAL*, May 2004, at 41 (arguing that Proposition 103 was responsible for containing medical malpractice premiums, not the state tort reform legislation); Medical Injury Compensation Reform Act (MICRA) of 1975, *CAL. BUS. & PROF. CODE* § 6146 (West 2005). See also Patricia J. Chupkovich, Comment, *Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Health Care?*, 9 *J. CONTEMP. HEALTH L. & POL’Y* 337, 337 n.1 (1993). But see Jonathan J. Lewis, Comment, *Putting MICRA Under the Microscope: The Case for Repealing California Civil Code Section 3333.1*, 29 *W. ST. U. L. REV.* 173, 187–88 (2001).

tween such caps and the cost of medical malpractice insurance premiums or the cost of medical care in general.”<sup>125</sup>

Even if one were to buy into the cost-based argument for caps, these limitations on recovery are, at best, a short-term fix with long-term costs. A capped damages market is a less safe market—and that means significant long-term costs. “Cap-based tort reform is like stitching up a highly visible but innocuous scrape on a patient’s face while allowing a cancer to multiply and spread through the patient’s whole body.”<sup>126</sup> Moreover, to believe that market participants behave identically in settings where there are caps and those where there are none is folly.<sup>127</sup>

Scholars Janet Currie and W. Bentley McCloud took aim at caps in medical malpractice cases and found, not surprisingly, that caps not only have a negative effect on consumer interests but have also failed to produce efficiencies in the field of obstetrics.<sup>128</sup> Using physician response and behavior as a guide to determine the efficacy of caps in the health care fields, these reports conclude, quite bluntly, that “imposing caps on non-economic damages has negative effects.”<sup>129</sup>

The literature suggests that caps on civil liability, pertaining particularly to medical malpractice, present a grave risk to the patient community.<sup>130</sup> One author noted, “Striking empirical studies show the overall ineffectiveness of caps. Damage caps are largely based on the unsubstantiated belief that large awards for pain and suffering make a substantial contribution to insurance rates.”<sup>131</sup> This research analyzed, among other things, studies of the insurance industry which demonstrated that caps on noneconomic damages produced only marginal benefits to industry and “seem particularly cruel in that they pe-

125. Freeman L. Farrow, *The Anti-patient Psychology of Health Courts: Prescriptions from a Lawyer-Physician*, 36 AM. J.L. & MED. 188, 201 (2010). For similar views, see David Morrison, *In Search of Savings: Caps on Jury Verdicts Are Not a Solution to Health Care Crisis*, 7 LOY. CONSUMER L. REP. 141, 149 (1994) (showing that capping damages in Indiana failed to produce any savings for the patient population); Jacqueline Ross, Note, *Will States Protect Us, Equally, from Damage Caps in Medical Malpractice Legislation?*, 30 IND. L. REV. 575, 588 (1997).

126. Luke Ledbetter, *Consumer Deductibles: How to Distribute More Equitably the Risks of Medical Malpractice and Compensate Victims Adequately Without Statutory Damage Caps*, 41 TORT TRIAL & INS. PRAC. L.J. 1141, 1151 (2006).

127. See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 403 (2005).

128. Janet Currie & W. Bentley MacLeod, *First Do No Harm? Tort Reform and Birth Outcomes*, 123 Q.J. OF ECON. 795, 797, 810, 813 (2008).

129. *Id.* at 823.

130. *Id.*

131. Nevel M. Bilimoria, *New Medicine for Medical Malpractice: The Empirical Truth About Legislative Initiatives for Medical Malpractice Reform—Part II*, 27 J. HEALTH & HOSP. L. 306, 307 (1994).

nalize the plaintiffs who are the most severely injured patients, who truly need the largest awards."<sup>132</sup>

Unless one is unwilling to make the obvious assumption that there is a value in deterring misconduct, the economics of caps simply do not add up.<sup>133</sup> "[S]tatutory caps operate to distort the price tortfeasors must pay to engage in negligent conduct [and] such caps will result in inefficient judicial outcomes."<sup>134</sup> "The extent to which a firm is 'willing to pay' the punitive price for reprehensible production activities is a function of the firm's isoquant and isocost functions. To ignore these individual-specific functional relationships renders the stated purpose of punitive damages, i.e., punishment and deterrence, meaningless."<sup>135</sup> At best, "the effectiveness of medical malpractice caps is . . . in question."<sup>136</sup> Professor Edward Kionka,<sup>137</sup> a leading scholar in the tort law field, noted that caps have only a limited effect on insurance premiums and effectuate a definite deprivation for those injured by negligent defendants.<sup>138</sup>

Not a single juried empirical study supports the proposition that a cap on civil liability benefits consumers or increases the quality of goods and services. It is only logical to conclude that caps distribute losses away from wrongdoers, imposing on victims and taxpayers the costs of misconduct. In the presence of a cap, the incentive to innovate is based on profit, not safety and value and, in the long run, that is highly inefficient. To conclude otherwise makes little sense.

## V. CONCLUSION

A discussion about caps is, inevitably, a tort reform discussion.

For at least the last 25 years, tort reform has been front and center on the U.S. political stage—it has been an issue in every presidential election campaign since 1980 and a plank in every major party plat-

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132. *Id.*

133. Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT. 237, 255–56, 258 (2005).

134. *Id.* at 258.

135. *Id.* at 256.

136. Michael S. Kenitz, Comment, *Wisconsin's Caps on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (and Should Stand) on "Tort Reform,"* 89 MARQ. L. REV. 601, 624 (2006).

137. See Edward J. Kionka, *Things to Do (or Not) to Address the Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469, 479 (2006).

138. *Id.* at 493–95; see also Patrick A. Salvi, *Why Medical Malpractice Caps Are Wrong*, 26 N. ILL. U. L. REV. 553, 554 (2006).

form since 1984. Law review articles number in the thousands and newspaper pieces on the topic in the tens of thousands.<sup>139</sup>

Caps, like most aspects of tort reform, involve the very hard business of accountability, and are central to the emergence of a troubling culture of non-accountability.<sup>140</sup>

Limits on liability—or overt denials of responsibility when faced with overwhelming evidence to the contrary—have insinuated themselves into our discourse. Denial of responsibility should not be a legislatively imposed norm. Notwithstanding the obvious disincentives of liability caps and the literature regarding their negative effect on deterrence, they continue to be supported by policymakers, perhaps because the political consequences of taking on those who support caps is simply too great.

Caps on something as dangerous as an oil spill seem an obvious mistake. In fact, caps in most instances have been demonstrated to be a bad idea. They do nothing for consumers and create disincentives for safer and more efficient goods. It is simply an illusion that they improve the marketplace for goods and services or enhance public safety. The consequences of limiting liability can be devastating and deadly. While the data is not yet conclusive, a strong case can be made that a lack of due care, made more likely by capped liability and a 1:1 compensatory to punitive damage ratio, affected the choices made by BP leading to the *Deepwater Horizon* disaster.

It is time to think seriously about repealing caps on civil liability. It will take generations for the Gulf of Mexico to recover from the rupture of the Macondo well—the ecosystems in the Gulf and the commerce of the Gulf certainly will not survive another.

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139. ANDREW POPPER, *MATERIALS ON TORT REFORM* (2010).

140. Consider the statements of the president of Toyota of Japan, who appeared before the Committee on Oversight and Government Reform last year. He said he was “very sorry” that the company had not dealt with the serious and dangerous design failures in their vehicles and sorry it had not responded to customer complaints. What he did not say was “this is our fault and we are legally accountable.” *Toyota’s President Apologizes for Massive Global Recalls*, JAPAN TODAY (Feb. 6, 2010, 2:13 AM), <http://www.japantoday.com/category/business/view/toyotas-president-apologizes-for-massive-global-recalls>. On the “gentle” claim from Toyota that the thousands of incidents are actually the fault of consumers guilty of “pedal misapplication,” see Hiroko Tabuchi, *Gas-and-Brake Pedal Gets New Look After Recalls*, N.Y. TIMES ONLINE (Aug. 3, 2010), <http://www.nytimes.com/2010/08/04/business/global/04pedal.html>.



