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# CHOOSING A BETTER PATH: THE MISGUIDED APPEAL OF INCREASED CRIMINAL LIABILITY AFTER DEEPWATER HORIZON

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## INTRODUCTION

When the Deepwater Horizon oil rig exploded on April 20, 2010, eleven people died and the first of 4.9 billion gallons of oil started spilling into the Gulf of Mexico.<sup>1</sup> The result was “an unprecedented crisis and response”<sup>2</sup> and what has been dubbed “the worst environmental disaster in U.S. history.”<sup>3</sup> The blowout of the Macondo well<sup>4</sup> required “more than 47,000 personnel; 7,000 vessels; 120 aircraft; and the participation of scores of federal, state, and local agencies” to address the disaster.<sup>5</sup>

Blame for the explosion and its aftermath has been cast broadly, with BP, Transocean, and Halliburton listed as the primary culprits.<sup>6</sup> It has been said that these companies, through their executives, chose profits over worker safety and the environment.<sup>7</sup> While there may be some truth to that sentiment, it is not the full story. Without considering the externalities of the oil spill, such as the devastating harm to the environment and loss of

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<sup>1</sup> RAY MABUS, SEC’Y OF THE NAVY, AMERICA’S GULF COAST: A LONG TERM RECOVERY PLAN AFTER THE DEEPWATER HORIZON OIL SPILL 2 (Sept. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1413–14 (2011).

<sup>4</sup> NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT 1 (2011), available at [http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf) [hereinafter REPORT TO THE PRESIDENT].

<sup>5</sup> MABUS, *supra* note 1, at 2.

<sup>6</sup> See Brian Montopoli, *Obama Slams BP, Transocean, Halliburton Over Gulf Oil Spill*, CBS NEWS (May 14, 2010), [http://www.cbsnews.com/8301-503544\\_162-20005013-503544.html](http://www.cbsnews.com/8301-503544_162-20005013-503544.html).

<sup>7</sup> See Laurel Brubaker Calkins & Allen M. Johnson, Jr., *Mississippi AG Asks Judge to Oversee Feinberg*, PRESS-REGISTER (Mobile, AL), Jan. 26, 2011, at C8.

income and livelihood for those in the region,<sup>8</sup> the direct and immediate economic harm to BP should have led the company to enact policies to protect against such a disaster. At \$80.37 per barrel, the 4.9 million barrels of oil that polluted the Gulf of Mexico amounts to approximately \$393,813,000 in lost revenue.<sup>9</sup> As such, even if one were to believe that BP executives truly did not care about harm to people or the environment, their interest in money should have led to actions designed to protect against this kind of loss. Add in the costs of clean-up, which could cost BP approximately \$20 billion,<sup>10</sup> and pure financial self-interest should have been a strong motivator for safer drilling and operations. Unfortunately, it was not.

So what led to this failure? There is not a single cause, but there is little doubt that regulatory oversight failed and corporate oversight failed. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling called the blowout “a failure of management” and determined the “cumulative risk . . . large and avoidable.”<sup>11</sup> The Commission explained:

The blowout was not the product of a series of aberrational decisions made by rogue industry or government officials that could not have been anticipated or expected to occur again. Rather, the root causes are systemic and, absent significant reform in both industry practices and government policies, might well recur.<sup>12</sup>

In addition to calls for regulatory reform<sup>13</sup> and legislative repeal of liability caps in the Oil Pollution Act of 1990,<sup>14</sup> outrage over the spill

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<sup>8</sup> Elizabeth Weises & Doyle Rice, *How Bad Could BP Oil Spill Get for the Gulf and the Nation?*, USA TODAY (June 9, 2010), [http://www.usatoday.com/tech/science/environment/2010-06-09-1Aoilhowbad09\\_CV\\_N.htm](http://www.usatoday.com/tech/science/environment/2010-06-09-1Aoilhowbad09_CV_N.htm).

<sup>9</sup> See Joel Achenbach and David A. Farhenthold, *Oil Spill Dumped 4.9 Million Barrels into Gulf, Latest Measure Shows*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html>; BLOOMBERG, MARKETS, ENERGY & OIL PRICES (Sept. 28, 2011), <http://www.bloomberg.com/energy/>. Oil calculation provided is based on oil prices from September 28, 2011.

<sup>10</sup> See Calkins & Johnson, *supra* note 7, at C8.

<sup>11</sup> REPORT TO THE PRESIDENT, *supra* note 4, at 90, 115.

<sup>12</sup> *Id.* at 122.

<sup>13</sup> See Charles B. Anderson & Colin de la Rue, *The Role of P&I Clubs in Marine Pollution Incidents*, 85 TUL. L. REV. 1257, 1267–68 (2011).

<sup>14</sup> See, e.g., Consolidated Land, Energy, and Aquatic Resources (CLEAR) Act, H.R. 3534, 111th Cong. §§ 702–03 (2010) (proposing to remove the \$75 million cap for offshore drillers' liability).

has led some to call for broad and aggressive pursuit of criminal charges to punish those responsible for the spill and act as a prophylactic measure against future disasters.<sup>15</sup> Some have argued for laws that would make it easier to prosecute companies and their executives for environmental disasters, and others have even argued for the imposition of strict criminal liability to help ensure that such a disaster never happens again.<sup>16</sup>

Despite the potential appeal of dramatically increased liability and higher sentences, and perhaps even strict criminal liability (which means that no proof of intent is necessary to convict), this Article argues that more aggressive criminal provisions and enforcement related to environmental harms, up to and including strict criminal liability, are not likely to protect the environment better or lead to safer work environments. Part I of this Article will consider the history and legality of, and the rationale behind, policies designed to make it easier to convict allegedly responsible parties. This Part uses strict liability in U.S. criminal law to provide a framework for considering when and how aggressive increases in criminal liability have and could be used in environmental law, and the expected value from such efforts. This Part also discusses the pursuit of increased liability in relation to disaster-related and tragedy-related events in the financial and criminal sectors. Part II will discuss the use of reduced burdens and strict liability in environmental law in both civil and criminal contexts. Additionally, it will argue that the use of strict liability is less effective than a negligence standard because it tends to reduce penalties, which can limit the direct punishment to violators, as well as the prophylactic potential of the laws. Finally, this Article concludes that, rather than reducing mens rea standards and increasing criminal liability, U.S. energy and environmental law needs to focus on encouraging proper risk assessment

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<sup>15</sup> Uhlmann, *supra* note 3, at 1413 (“The Justice Department should bring criminal charges based on the Gulf oil spill, because a criminal prosecution will deter future spills better than civil penalties alone and will express societal condemnation of the negligence that caused the spill in ways that civil enforcement cannot.”).

<sup>16</sup> Rob Holtom, *Should Ecocide Be a Crime of Strict Liability?*, WILD LAW UK BLOG (May 25, 2011), <http://www.wildlawuk.org/1/post/2011/05/should-ecocide-be-a-crime-of-strict-liability.html> (“It was a fascinating and hard-hitting debate. As for the vote: Polly—approx 35, David—4. Clearly people agreed that Ecocide is just too devastating, too disastrous, too tragic, for it not to be a crime of strict liability.”); *cf.* Jane F. Barrett, Editorial, *BP Executives Should Go to Jail*, BALTIMORE SUN, July 1, 2010, at 19A (stating that current strict liability crimes are “only punishable by 12 months or less imprisonment per count, [but] a judge in [the BP] case might be convinced to impose consecutive rather than concurrent jail terms for each one”).

and risk management to promote safe and effective energy extraction and production while encouraging and protecting both the environment and the economy.

## I. HISTORICAL OVERVIEW OF REDUCED OR ELIMINATED MENS REA REQUIREMENT PENALTIES

When something terrible happens, the natural response is to seek the perpetrators and punish them to the greatest extent possible. This sometimes involves pursuing obscure, little-used, or tenuously connected laws to increase the likelihood of punishment.<sup>17</sup> When punishment is not available or deemed inadequate, the response is often to seek legislative or regulatory changes, or a combination of the two, to increase the likelihood that a future offender will be punished.<sup>18</sup> The response is to pursue options that reduce or eliminate the mens rea requirement (the requisite state of mind the prosecution must prove to convict);<sup>19</sup> the broadest such option is strict liability.<sup>20</sup>

### A. *The Nuclear Option: Strict Liability*

Strict liability is often considered a modern concept that was historically unknown in criminal situations.<sup>21</sup> While the seemingly prevailing opinion is that strict liability first began to appear in the last half of the nineteenth century, commentators have noted that the felony murder

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<sup>17</sup> See Barrett, *supra* note 16, at 19A (“[The government] must do nothing less than pursue criminal prosecutions of responsible individuals under every supportable theory.”).

<sup>18</sup> See Katherine H. Setness, *Statutory Interpretation of Clean Water Act Section 1319(C)(2)(A)’s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law*, 23 *ECOLOGY L.Q.* 447, 460 (1996).

<sup>19</sup> See *id.* at 449 (“Many courts and commentators . . . worry that the pursuit of environmental goals threatens to override the criminal law’s traditional requirement that criminal punishment be predicated on a showing of *mens rea*.”).

<sup>20</sup> See Uhlmann, *supra* note 3, at 1461 (“Except under strict liability schemes, conduct is not culpable simply because harm occurs.” (footnotes omitted)).

<sup>21</sup> See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 *CORNELL L. REV.* 401, 436 (1993) (stating that common law required mens rea for crimes until the mid-nineteenth century).

rule,<sup>22</sup> which developed via the common law,<sup>23</sup> is hundreds of years old.<sup>24</sup> These apparently divergent views are not surprising given that defining what constitutes a strict liability offense is controversial.

Legal scholars generally agree that strict liability crimes lack a mens rea requirement.<sup>25</sup> Yet even this apparent agreement leads to vastly differing opinions. Professor Joshua Dressler describes two meanings of mens rea: “culpability” mens rea and “elemental” mens rea.<sup>26</sup> Traditionally, culpability refers to a “felonious intent” or “guilty knowledge.”<sup>27</sup> In contrast, elemental mens rea “refers to the particular mental state or states provided in the definition of a particular crime.”<sup>28</sup> The elemental mens rea concept allows for two types of analysis: “offense analysis”—where offenses have one mens rea requirement—and “element analysis”—where every offense element may have its own, differing mens rea requirement.<sup>29</sup> These different methods of analysis can lead to different determinations as to whether a crime is a strict liability offense at all.<sup>30</sup> For instance, under both offense analysis or culpability mens rea, it can be argued that the felony murder rule is *not* strict liability because the mens rea can be traced to the intent

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<sup>22</sup> “[A]t common law[,] an unintentional homicide was murder if committed in the perpetration of a felony.” *State v. Glover*, 50 S.W.2d 1049, 1052 (Ma. 1932). Even though the felony was not dangerous and the “killing of another” an accident, the felony murder rule made the accidental death a murder. *See id.*

Similarly, the State of New York finds a defendant has committed a felony murder if a homicide occurs when, “[a]cting either alone or with . . . other persons, he commits or attempts to commit [various enumerated crimes] and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant . . . causes the death of a person other than one of the participants. . . .” N.Y. PENAL LAW § 125.25(3) (Consol. 2001).

<sup>23</sup> Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 838 (1999).

<sup>24</sup> *See* Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 449 (1985) (noting that, despite its age, it is not clear when courts first began imposing the felony murder rule).

<sup>25</sup> Michaels, *supra* note 23, at 830; *see also* JAMES MARSHALL, INTENTION—IN LAW AND SOCIETY 138 (1968) (describing the difference between tort liability, which questions only whether the actor caused the harm, and criminal responsibility, which requires mens rea).

<sup>26</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, 102–03 (2d ed. 1995).

<sup>27</sup> *See Morissette v. United States*, 342 U.S. 246, 251–52 (1952) (explaining that common law had required a “vicious will” for criminal culpability).

<sup>28</sup> Michaels, *supra* note 23, at 839.

<sup>29</sup> *Id.*; *see also* Paul Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983) (commenting that the Model Penal Code’s general culpability provisions allow for an offense to have different mens rea requirements for “each objective element of [that] offense”).

<sup>30</sup> Michaels, *supra* note 23, at 839.

to commit the felony.<sup>31</sup> By contrast, under the “element analysis” approach, the felony murder rule imposes a measure of strict liability because there is no requisite intent with respect to the “killing of another”<sup>32</sup> element of the offense.<sup>33</sup>

While there are numerous varieties of “strict liability” definitions, for the purpose of this Article, the definition of strict liability will be that utilized by Professor Alan Michaels: those offenses that lack a mens rea requirement for one or more material elements.<sup>34</sup> This definition provides Professor Michaels with the starting point for his article discussing the concept of “constitutional innocence.”<sup>35</sup> This concept provides one framework for considering the constitutionality and usefulness of strict criminal liability in environmental law, particularly as it relates to oil spills.

The principle of constitutional innocence provides that strict liability is only constitutional when the intentional conduct covered by the statute could legislatively be made criminal.<sup>36</sup> Consequently, strict liability is permissible if the Constitution would allow the state to impose criminal liability under an identical statute without the strict liability element.<sup>37</sup> For instance, felony murder has two elements: (1) the killing of another during (2) the commission of a crime.<sup>38</sup> Following the principle of constitutional

<sup>31</sup> *Id.*

<sup>32</sup> *See supra* note 22 and accompanying text (explaining the contour of the felony murder rule).

<sup>33</sup> *See Michaels, supra* note 23, at 840 (stating that under elemental analysis, the felony murder rule “impose[s] strict liability, because the defendant may be convicted regardless of his or her mental state with respect to a material element of the offense”).

<sup>34</sup> *See Michaels, supra* note 23, at 830; *see also* JOHN S. BAKER, JR. ET AL., HALL’S CRIMINAL LAW 691 (5th ed. 1993) (stating that “strict liability offenses requir[e] no specific intent . . . render[ing] immaterial claims that defendants lacked intent or knowledge”); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987) (“Strict liability imposes guilt without regard to whether the defendant knew or reasonably could have known some relevant feature of the situation.”).

<sup>35</sup> *See Michaels, supra* note 23, at 834.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* at 835.

<sup>38</sup> *See, e.g.*, LA. REV. STAT. ANN. § 14:31 (1977). In pertinent part stating:

A. Manslaughter is:

. . .

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in [the first degree murder statute], or of any intentional misdemeanor directly affecting the person.

*Id.*

innocence, felony-murder statutes should be constitutional because, in certain circumstances, the state can make it illegal to ever kill another person.<sup>39</sup> Professor Michaels uses bigamy, which requires the marrying of another when already married, as an example of a law that probably cannot, following the principle of constitutional innocence, hold offenders strictly liable.<sup>40</sup> “Because the fundamental right to marry prohibits the state from” criminalizing all marriages, strict liability with respect to the “element of already being married” should not be constitutional.<sup>41</sup>

Though strict liability crimes remain relatively rare, the United States Supreme Court has allowed strict liability in a number of settings, and while others have reviewed these cases,<sup>42</sup> a little background is helpful. A key early decision was *United States v. Balint*, in which the defendants were charged with failing to record their sales of heroin and other drugs on a requisite Internal Revenue Service form.<sup>43</sup> The Narcotic Act of December 14, 1914, required that sales of all drugs listed in the act be recorded on a specific form and that the seller keep that completed form for two years.<sup>44</sup> The defendants argued that they had not committed the crime because “the indictment . . . failed to charge that they had sold the inhibited drugs knowing them to be such.”<sup>45</sup> The Court held that the statute did not require knowledge that the seller knew that the drugs sold required compliance with the Act.<sup>46</sup> The seller needed only to know that the items sold were drugs—such sellers of drugs acted at their “peril” if they sold an “inhibited drug in ignorance of its character.”<sup>47</sup> The seller did not need to know that the drugs were covered by the statute; the sale itself could lead to punishment.<sup>48</sup> The court stated that “Congress weighed

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<sup>39</sup> See *United States v. Howard*, 449 F.2d 1086, 1093 (D.C. Cir. 1971) (Even, “[i]f by pure accident a death occurred in the course of [a] robbery the result in law is to make the offender guilty of first degree felony murder.”); see also Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 150 (2001) (“In the felony murder case, evidence of accident, mistake and mental state is excluded.”). In fact, most states provide for some exceptions to the rule, recognizing that the felony-murder concept can be unduly harsh. See N.Y. PENAL LAW § 125.25 (McKinney, 2009) (listing exceptions to the rule).

<sup>40</sup> See Michaels, *supra* note 23, at 835.

<sup>41</sup> See *id.*

<sup>42</sup> See, e.g., *id.* at 842–59.

<sup>43</sup> 258 U.S. 250, 251 (1922).

<sup>44</sup> See *id.* at 253 n.1.

<sup>45</sup> *Id.* at 251.

<sup>46</sup> See *id.* at 253–54.

<sup>47</sup> See *id.* at 254.

<sup>48</sup> See *id.*

the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.”<sup>49</sup> Thus, such strict liability crimes were deemed to be constitutionally permissible.<sup>50</sup>

The next key strict liability case, *United States v. Dotterweich*,<sup>51</sup> involved the interpretation of a vicarious liability provision of the Federal Food, Drug, and Cosmetic Act (“FFDC Act”).<sup>52</sup> The Supreme Court determined that the Act provided for both vicarious liability and strict liability:

The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.<sup>53</sup>

This case is especially noteworthy because both the dissent and the majority seem to agree that strict liability crimes are constitutionally

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<sup>49</sup> *Balint*, 258 U.S. at 254.

<sup>50</sup> *See id.* In reaching its decision, the *Balint* Court relied on a case decided twelve years earlier. *See id.* at 252. This decision, *Shevlin-Carpenter Co. v. Minnesota*, stated that, under the police power granted the states by the Constitution, “it may be provided that he who shall do [certain acts] shall do them at his peril, and will not be heard to plead in defense good faith or ignorance.” 218 U.S. 57, 70 (1910). While the *Shevlin-Carpenter* decision required only that the court decide whether civil strict liability penalties were constitutionally permissible (it did not involve criminal sanctions), the Court, in dicta, implied that strict liability was permissible in certain situations for both civil *and* criminal statutes. *See id.* at 67–68 (“[I]n a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor’s intent.”). The *Balint* court found this persuasive and adopted it in the criminal context. *Balint*, 258 U.S. at 254.

<sup>51</sup> 320 U.S. 277, 278–80 (1943).

<sup>52</sup> 21 U.S.C. § 301 (1938).

<sup>53</sup> *Dotterweich*, 320 U.S. at 284–85.

permissible,<sup>54</sup> though they disagree with respect to whether or not the FFDC Act did in fact impose such liability.<sup>55</sup>

The subsequent case of *Morrisette v. United States*<sup>56</sup> is the consummate strict liability case, found in casebooks read by a predominance of first-year law students.<sup>57</sup> The *Morrisette* court interpreted the statute at issue to require intent by the alleged violator, even though the statute did not expressly state such a requirement.<sup>58</sup> While this case is often referenced as providing a requirement of intent in criminal cases,<sup>59</sup> the opinion states that prior Supreme Court cases upholding criminal strict liability had the Court's "approval and adherence for the circumstances to which it was there applied."<sup>60</sup> *Morrisette*, more accurately, provides that strict liability has some role in criminal situations, depending upon the crime in question.<sup>61</sup> Because the statute in question adopted common law terms of art, *Morrisette* stands for the proposition that, absent contrary direction, it is to be presumed that Congress intended to retain common law elements of a crime.<sup>62</sup> Justice Jackson described situations in which strict liability crimes were likely appropriate, stating that

whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as

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<sup>54</sup> Justice Murphy, in his dissent, stated that "in the absence of *clear statutory authorization* it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge." *Id.* at 286 (Murphy, J., dissenting) (emphasis added). Justice Frankfurter, writing for the majority, noted that with respect to strict liability statutes, "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted." *Id.* at 285.

<sup>55</sup> Compare *id.* at 281 (finding that the FFDC Act did not require awareness of some wrongdoing in order to impose criminal sanctions), with *id.* at 292 ("[T]o apply the sanctions of this Act to the respondent would be contrary to the intent of Congress as expressed in the statutory language and in the legislative history.").

<sup>56</sup> 342 U.S. 246 (1952).

<sup>57</sup> See, e.g., BAKER ET AL., *supra* note 34, at 703 (providing an example of one such casebook).

<sup>58</sup> *Morrisette*, 342 U.S. at 263 ("We hold that the mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced.").

<sup>59</sup> See, e.g., MARSHALL, *supra* note 25, at 101 (stating that Justice Jackson's opinion in *Morrisette* "defined the element of intent in our criminal law").

<sup>60</sup> *Morrisette*, 342 U.S. at 260.

<sup>61</sup> See *id.* at 260 ("[The Supreme Court has not] undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not.").

<sup>62</sup> See *id.* at 250.

a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. . . . Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime.<sup>63</sup>

Thus, while approving the concept of strict liability crimes, Justice Jackson's opinion provides evidence that there are some limitations on how and when they could be used.<sup>64</sup>

Similarly, in *United States v. Freed*, the Court found that strict liability was permissible with respect to the portion of the National Firearms Act that made it illegal for a person "to receive or possess a firearm which is not registered to him."<sup>65</sup> The Court noted that while some crimes have a mens rea requirement, the National Firearms Act "is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act."<sup>66</sup> Thus, as to the failure to register the hand-grenades element of the crime,<sup>67</sup> strict liability was appropriate.<sup>68</sup>

The "high water mark"<sup>69</sup> for strict liability cases in the Supreme Court was a bigamy case, *Williams v. North Carolina*.<sup>70</sup> The *Williams* defendants went to Nevada so that they could divorce their spouses, then married each other and returned to North Carolina.<sup>71</sup> They were

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<sup>63</sup> *Id.* at 256.

<sup>64</sup> See Michaels, *supra* note 23, at 852 (stating that *Morrisette* suggests the constitutional limit on strict liability statutes, requiring that "there must be culpability regarding elements that the legislature has the power to punish independently").

<sup>65</sup> 401 U.S. 601, 607 (1971) (quoting 26 U.S.C. § 5861(d) (1964 ed., Supp. V)).

<sup>66</sup> *Id.* at 609.

<sup>67</sup> See *id.* at 614 (Brennan, J., concurring) (stating that the crime at issue was comprised of three elements: (1) possessing items that (2) were hand grenades, (3) that were unregistered).

<sup>68</sup> See Michaels, *supra* note 23, at 852 ("The legislature's power to attach strict liability to [the 'failure to register' element of the crime] is consistent with the principle of constitutional innocence because the legislature could have punished the knowing possession of all hand grenades.").

<sup>69</sup> See *id.* at 853.

<sup>70</sup> 325 U.S. 226 (1945).

<sup>71</sup> *Id.* at 235.

subsequently charged with, and convicted for, “bigamous cohabitation.”<sup>72</sup> The North Carolina statute, under which the defendants were charged, “imposed strict liability as to the element of ‘being married’ to the first spouse.”<sup>73</sup> The issue in the case was whether North Carolina’s failure to recognize the Nevada divorces as valid violated the full faith and credit clause of the Constitution.<sup>74</sup> However, in dicta, the Supreme Court stated that there was no merit to a failure of due process claim based upon the strict liability component of the statute.<sup>75</sup> On its face, this case seems to violate the principle of constitutional innocence. But since the strict liability issue was not directly raised, the defendants fraudulently obtained Nevada domicile to get their divorces, and the Supreme Court had not yet established “the constitutional right to marry,” it would be unfounded to take *Williams* as a “tacit rejection of constitutional innocence.”<sup>76</sup>

Next, in *Lambert v. California*, the Supreme Court overturned a conviction based upon a Los Angeles statute that required convicted felons that were going to be in Los Angeles for more than five days to register with the Chief of Police.<sup>77</sup> The defendant had been convicted of forgery and wished to offer her lack of actual knowledge of the registration requirement as a defense.<sup>78</sup> The court held that

[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.<sup>79</sup>

Considered from a constitutional innocence perspective, Professor Michaels argues that *Lambert* should be viewed as a “right to travel” case.<sup>80</sup> He

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<sup>72</sup> *Id.*

<sup>73</sup> See Michaels, *supra* note 23, at 853.

<sup>74</sup> *Williams*, 325 U.S. at 227.

<sup>75</sup> See *id.* at 238 (“Mistaken notions about one’s legal rights are not sufficient to bar prosecution for crime.”).

<sup>76</sup> See Michaels, *supra* note 23, at 855–56 (explaining that the constitutional right to marry was established more than twenty years after the *Williams* decision); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 644 (1997) (citing *Loving v. Virginia*, 388 U.S. 1 (1967), as the Supreme Court’s first recognition of “the right to marry as a fundamental right”).

<sup>77</sup> 355 U.S. 225, 226–27 (1957).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 229–30.

<sup>80</sup> See Michaels, *supra* note 23, at 862.

states that the intentional conduct to which the statute attached strict liability in *Lambert* was not punishable by the legislature because of Lambert's constitutional right to travel.<sup>81</sup> This distinguishes *Lambert* from *Balint* and *Dotterweich*, where strict liability was constitutionally permissible because the legislature had the power to punish the intentional conduct, such as selling drugs, as proscribed by the applicable statutes.<sup>82</sup> This concept of constitutional innocence has been upheld in a variety of settings—including freedom of speech,<sup>83</sup> freedom of association,<sup>84</sup> and abortion<sup>85</sup>—leading to findings that strict liability was unconstitutional where “the other elements of the statute at issue [were] beyond the legislative power to punish because of a fundamental right.”<sup>86</sup>

More recently, in *Dean v. United States*, the Supreme Court upheld a provision in the U.S. Code that requires an increase in the mandatory minimum sentence when a gun is discharged during a violent or drug trafficking crime, regardless of whether the discharge was intentional or accidental.<sup>87</sup> Seven Justices supported the outcome of the case, with Justice Stevens and Justice Breyer each issuing a dissent.<sup>88</sup> For the majority, Justice Roberts explained that, like the felony-murder rule, intent was not a concern: “Here the defendant is already guilty of unlawful conduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense. That unlawful conduct was not an accident.”<sup>89</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See Smith v. California*, 361 U.S. 147, 150–52 (1959) (holding that a bookseller could not be held criminally liable for possessing an obscene book without knowledge that the book was obscene). The *Smith* Court stated that “the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing [strict liability components like those that were upheld in *Balint* and *Dotterweich*] on the bookseller.” *Id.* at 152–53.

<sup>84</sup> *See Dennis v. United States*, 341 U.S. 494, 498–99 (1951) (holding mere membership in the Communist Party was not enough to establish criminal culpability and that conviction would “require[] as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence”).

<sup>85</sup> *See Colautti v. Franklin*, 439 U.S. 379, 396 (1979), *overruled in part on other grounds* by *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (stating in dicta that a statute imposing strict liability for inaccurately determining fetus viability could have a “chilling effect” on doctors’ willingness to perform abortions); *see also Planned Parenthood v. Miller*, 63 F.3d 1452, 1464–65 (8th Cir. 1995) (striking down a statute that required compliance with parental notice and informed consent laws prior to abortions because the law applied strict liability on doctors with respect to compliance).

<sup>86</sup> Michaels, *supra* note 23, at 866–76.

<sup>87</sup> 129 S. Ct. 1849, 1852, 1856 (2009).

<sup>88</sup> *See id.* at 1851.

<sup>89</sup> *Id.* at 1855.

There was no argument from any of the Justices that the sentencing increase could not stand without an intent requirement. Instead, Justice Stevens argued simply that unless Congress shows clear intent to make the provision a strict liability provision, the intent should be assumed as an element of the offense.<sup>90</sup> Similarly, Justice Breyer would have required intent to discharge the weapon because, despite strong arguments from the majority, “the ‘rule of lenity’ tips the balance against the majority’s position.”<sup>91</sup> The rule of lenity, he explained, requires that a criminal statute provide “fair warning” of how the law will operate if a specific line is crossed.<sup>92</sup>

The United States Constitution thus provides limits on when strict liability offenses are permissible, but the option of strict criminal liability plainly remains an option for responding to environmental and other disasters.<sup>93</sup> As noted above, strict liability is not the norm, and often the option is not to eliminate the mens rea requirement, per se, but to increase liability by reducing the prosecutions burden of proof.

## *B. Disaster- and Tragedy-Related Increases in Liability*

### 1. The Financial Sector

Seeking additional ways to punish perceived wrongdoers is a common disaster response, especially when there is a public perception that those responsible for the harm went unpunished. This is not solely an environmental law phenomenon. Aggressive responses have been commonplace in the relatively recent past in the financial sector. In 2002, following corporate scandals at Enron, Arthur Andersen, Tyco, Global Crossing, and WorldCom, the Sarbanes-Oxley Act<sup>94</sup> was signed into law.<sup>95</sup> Many less

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<sup>90</sup> *Id.* at 1858–59 (Stevens, J., dissenting) (“Absent a clear indication that Congress intended to create a strict liability enhancement, courts should presume that a provision that mandates enhanced criminal penalties requires proof of intent.”).

<sup>91</sup> *Id.* at 1860 (Breyer, J., dissenting).

<sup>92</sup> *Id.* (Breyer, J., dissenting) (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)).

<sup>93</sup> See *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 479 (8th Cir. 1992) (discussing strict liability under CERCLA).

<sup>94</sup> 15 U.S.C. § 7201 (2002).

<sup>95</sup> Catherine S. Neal, *The Role of the Judiciary in Advancing Public Policy to Promote Ethical Business Practices: Comparing Gray Market Tires to Tiffany Silver Jewelry*, 19 KAN. J.L. & PUB. POL’Y 171, 175 (2010).

than glowing reviews of the Act have followed,<sup>96</sup> and the response apparently did little to nothing to help avoid the financial collapse of 2008.<sup>97</sup>

Then, in response to the financial failures of 2008, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, H.R. 4173) was signed into law in 2010.<sup>98</sup> This law, too, represented an aggressive move in response to the financial collapse, but there are serious questions as to whether Dodd-Frank addresses the root causes of the collapse, and whether the law is capable of addressing the concerns that led to its creation.<sup>99</sup> Some have argued that statutes like this are necessary when the financial sector has run amok, as was done with the New Deal legislation that led to the Securities Act of 1933 and the Securities and Exchange Act of 1934.<sup>100</sup> But, notwithstanding the longevity and prominence of these two acts, there are still those who question whether fraud prevention was achieved by these actions.<sup>101</sup> Most certainly, fraud is far from eradicated.

## 2. The (Traditional) Criminal World

Such responses follow in more traditional criminal law settings, as well. The recent high-profile acquittal of Casey Anthony provides a good example. In 2008, Casey Anthony reported that her two-year-old daughter,

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<sup>96</sup> See, e.g., Craig S. Lerner & Moin A. Yahya, *'Left Behind' After Sarbanes-Oxley*, REGULATION, Fall 2007, at 44, 49 ("Sarbanes-Oxley has caused some ideal entrepreneurs to flee American publicly traded corporations, either for the greener pastures of Europe or private equity.").

<sup>97</sup> Amy Deen Westbrook, *Sunlight on Iran: How Reductive Standards of Materiality Excuse Incomplete Disclosure Under the Securities Laws*, 7 HASTINGS BUS. L. J. 13, 72 (2011) ("Despite these measures [including the Sarbanes-Oxley Act], accounting practices have again come under fire with the recent financial crisis.").

<sup>98</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>99</sup> See Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431, 1436 (2011) ("[T]he Dodd-Frank Act is largely a twentieth century approach to regulating twenty-first century financial markets because it fails to adequately address the globalization of financial markets that has occurred within the past few decades.").

<sup>100</sup> See George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132, 132 (1973) (explaining that the stock market crash was the primary motivation for the Securities Exchange Act of 1934).

<sup>101</sup> See, e.g., Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 3-4.

Caylee, was missing and had been missing for thirty-one days, when in fact it was later revealed that the child was dead.<sup>102</sup> Several stories were put forth as to what happened and how it might have happened.<sup>103</sup> Ms. Anthony was charged with murder for killing her daughter.<sup>104</sup> Due to apparent evidentiary concerns, the jury acquitted Ms. Anthony of those charges.<sup>105</sup>

In response to the verdict, a massive Internet campaign led to more than 700,000 signatures in support of Caylee's Law, a law that would make it a felony if a parent or guardian failed to notify authorities within twenty-four hours of a child's death.<sup>106</sup> Several states started drafting such a law, with as many as sixteen others considering such legislation.<sup>107</sup> The problem is that Caylee's Law would have limited to no effect on protecting children.<sup>108</sup> There is no compelling argument that a felony failure-to-report law would have any deterrent effect; after all, if a potential death sentence for murder is not a deterrent, it makes little sense to expect that a lesser jail sentence would have much impact.<sup>109</sup> Further, such a law is in response to an isolated occurrence and set of circumstances that is not likely to be exactly replicated.<sup>110</sup> That is, Caylee's Law is designed to punish Casey Anthony for what she did to Caylee. Of course, it will never serve that purpose, thus creating a legislative version of "bad facts make bad law."<sup>111</sup>

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<sup>102</sup> Bianca Prieto, *Out But Not Free Anthony into Hiding*, DAILY TELEGRAPH (Sydney, Austl.), July 18, 2011, at 17.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See, e.g.*, Regina Brett, *Jurors Do Thankless—and Vital—Work*, PLAIN DEALER (Clev.), July 14, 2011, at B1 ("Juror No. 11, the foreman who still wants to be anonymous, told the media he wasn't even sure a murder was committed.")

<sup>106</sup> *See 'Caylee's Laws' Are Proposed Across U.S.*, L.A. TIMES, July 10, 2011, at 17; *see also* Jared Hunt, *Lawmakers Consider 'Caylee's Law'*, CHARLESTON DAILY MAIL (W.V.) (Sept. 13), 2011, <http://www.dailymail.com/News/statehouse/201109121878>.

<sup>107</sup> *See 'Caylee's Laws' Are Proposed*, *supra* note 106.

<sup>108</sup> *Cf. id.*

<sup>109</sup> *See* Ring v. Arizona, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring) (noting that it is unclear if death sentences are, in fact, a deterrent).

<sup>110</sup> *See Missing Child Law Finds Big Support*, THE GREENVILLE NEWS (Greenville, S.C.) July 28, 2011 (discussing how legislative acts such as "Caylee's Law" can be responses to tragedies that "may or may not end up not being used").

<sup>111</sup> Doggett v. United States, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting); Haig v. Agee, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting); *see also* Wyeth v. Levine, 129 S.Ct. 1187, 1217 (2009) (Alito, J., dissenting) ("[T]ragic facts make bad law."); Joshua Dunn, Note, *Justice for All (The Wrong Reasons): The Flaws and Fallout of Berman v. Sitrin*, 16 ROGER WILLIAMS U. L. REV. 305, 305 (2011) (quoting the previous cases).

## II. THE MIXED RESULTS OF INCREASED LIABILITY IN ENVIRONMENTAL LAW

*Laws too gentle are seldom obeyed; too severe, seldom executed.*<sup>112</sup>

As noted above, the use of strict liability in criminal law is not the norm.<sup>113</sup> Most statutes require some level of affirmative intent, recklessness, or negligence before criminal liability attaches.<sup>114</sup> As discussed above, when disastrous or tragic events occur, legislators and regulators (usually at the behest of the public) often pursue options to increase potential liability through regulation of an offense somehow connected to the event.<sup>115</sup> And where such crimes already exist, the likelihood that law enforcement will seek to prosecute using a strict liability crime increases in the aftermath of a major disaster.<sup>116</sup>

Case in point: in the wake of the Exxon Valdez, the largest U.S. oil spill prior to Deepwater Horizon,<sup>117</sup> prosecutors pursued defendants under two environmental laws that had been rarely, if ever, used in the context of a marine oil spill.<sup>118</sup> Prosecutors sought to use the strict criminal liability provisions of the Refuse Act<sup>119</sup> and the Migratory Bird Treaty Act<sup>120</sup> in their pursuit of convictions.<sup>121</sup> These provisions were only misdemeanors,

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<sup>112</sup> BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK 546 (J. A. Leo Lemay ed., Library Classics of the United States 1997) (1756).

<sup>113</sup> Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 147 (2005) ("Strict liability, where the defendant need have no particularly blameworthy mental state, is rare and disfavored in criminal law.").

<sup>114</sup> See *id.*

<sup>115</sup> See Adam Matthew Kay, *Boardroom Roulette—A Reflective Look at International Goals, Failures, Crises and Remedies in the Field of Corporate Governance*, 19 MICH. ST. J. INT'L L. 449, 470 (2011) ("In the United States each crisis has been followed almost immediately with some form of regulation.").

<sup>116</sup> Eric A. DeGroff, *The Application of Strict Criminal Liability to Maritime Oil Pollution Incidents: Is There OPA for the Accidental Spiller?*, 50 LOY. L. REV. 827, 832 (2004) (explaining that the government used aggressive and unique tactics to pursue Exxon after the crash of the Valdez).

<sup>117</sup> See Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 3 (2011).

<sup>118</sup> DeGroff, *supra* note 116, at 830 (stating that the government used "two environmental statutes of questionable relevance to marine oil pollution," the Refuse Act and the Migratory Bird Treaty Act).

<sup>119</sup> Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (2006).

<sup>120</sup> Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12 (2000 & Supp. III 2004).

<sup>121</sup> DeGroff, *supra* note 116, at 830.

as opposed to other felony charges, but the strict liability provisions were instrumental in leading to a settlement with the government.<sup>122</sup>

Pursuing strict liability offenses or using tenuously connected offenses to pursue convictions is creative law enforcement, and it may increase punishment on wrongdoers, but it is not without risk. In 1996, Professor Richard J. Lazarus explained, “Absent effective sanctions for their violation, noncompliance with environmental requirements is reduced to merely a cost of doing business.”<sup>123</sup> Adding a criminal component to environmental law, he argued, can be used to help reinforce the importance of environmental protection and help promote changes in “social attitudes.”<sup>124</sup> The threat of incarceration, he further noted, “can prompt far greater compliance by industry than mere civil sanctions.”<sup>125</sup> This can have a strong deterrent function, which is often a key component in environmental law.<sup>126</sup> This deterrent function is certainly one of the arguments for strict liability against those responsible for disasters like the Deepwater Horizon blowout.<sup>127</sup>

Still, Professor Lazarus warned that in pursuing strict criminal liability (or highly relaxed mens rea requirements) for violations of environmental law, the rationale behind such law could be at risk.<sup>128</sup> He explains, “By failing to respect or even appearing to neglect [the legitimate scope of environmental law], we risk no less than the erosion of the underlying substantive environmental protection standards themselves.”<sup>129</sup> Thus, even if strict criminal liability is permissible, there are substantial reasons to tread lightly.

Furthermore, diluting mens rea requirements could have the effect of increasing risk-taking by those charged with oversight of the very

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<sup>122</sup> *Id.* (“Though less serious in theory than the felony charges, the misdemeanor counts under the Refuse Act and the MBTA greatly strengthened the government’s bargaining position.”).

<sup>123</sup> Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 *FORDHAM ENVTL. L.J.* 861, 865–66 (1996).

<sup>124</sup> *Id.* at 865.

<sup>125</sup> *Id.* at 866.

<sup>126</sup> *Id.* at 866–67 (“Deterrence, therefore, can be essential to the achievement of the preventive objective of environmental law to prevent such harms, rather than merely to redress harms once they have occurred.”).

<sup>127</sup> See Uhlmann, *supra* note 3, at 1450; Stephen Raucher, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 *ECOLOGYL.Q.* 147, 181 (1992).

<sup>128</sup> See Lazarus, *supra* note 123, at 880.

<sup>129</sup> *Id.*

activities that the laws were designed to make safer.<sup>130</sup> The issue is that those who are more likely to be risk averse to criminal sanctions will leave the field altogether (to work in other less risky arenas), while leaving those who are undeterred by the risk of jail time in positions of power (and potentially greater positions of power).<sup>131</sup> In fact, there may be some indication this is happening right now.

In July 2011, ConocoPhillips announced that it would be splitting its company into two separate entities, one that explores for and produces oil, and another that refines the oil.<sup>132</sup> This followed the January 2011 move by Marathon Oil to do the same thing.<sup>133</sup> Marathon's spin-off, Marathon Petroleum Corp., which is the refining company, started trading July 1, 2011.<sup>134</sup> On the one hand, separating these operations into separate companies could be a good thing. The executives of these entities will now have a more focused business model, and the concerns of each part of the business are now less likely to compete with one another.<sup>135</sup> Further, the companies may be better focused on their own expertise.

One might speculate that these companies are splitting to isolate the risk of the extraction process; at least, that is part of the equation. On the one hand, splitting the entity in two may be reasonable and sensible business planning and risk management.<sup>136</sup> By spinning off the exploration company, the resulting refining company is giving up the opportunity to participate in the upside of the spun off company, and is eliminating the related risk. If the entity's decision makers believe that is best, there is little reason to question the decision on that basis.<sup>137</sup>

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<sup>130</sup> Cf. Lerner & Yahya, *supra* note 96, at 47 (stating that strict liability penalties could increase risky behavior of executives for whom "criminal laws are just another cost of doing business.").

<sup>131</sup> *See id.*

<sup>132</sup> See Chris Kahn, *Oil Giant ConocoPhillips To Split into 2 Companies*, THE DENVER POST, July 15, 2011 (quoting Oppenheimer & Co. analyst Fadel Gheit), available at [http://www.denverpost.com/business/ci\\_18480692](http://www.denverpost.com/business/ci_18480692) ("This is so positive for [ConocoPhillips]. Everyone should stick to one business.").

<sup>133</sup> *See id.*

<sup>134</sup> *Id.*

<sup>135</sup> See Isabel Ordonez & Daniel Gilbert, *ConocoPhillips Split in Two*, WALL ST. J., (July 15, 2011), <http://online.wsj.com/article/SB10001424052702303406104576445540310224276.html> (quoting chief executive of ConocoPhillips, James Mulva, as stating the split would help each branch of the company compete with more ease).

<sup>136</sup> *See* Kahn, *supra* note 132.

<sup>137</sup> *See, e.g.*, Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1812 (2011) ("There is no more basic question in corporate governance than 'who decides.' . . . Corporate law generally adopts what I have called

An inherent risk of this division, though, is that the resulting exploration-and-extraction entity will take along with it executives and other leaders who are not appropriately risk averse, and thus increase the likelihood of disaster.<sup>138</sup> This is not because executives or employees who are in the exploration and extraction industry are generally unlawful or poor risk assessors. But, as the risk of punishment increases (and inappropriately aggressive pursuit of criminal penalties increases) in the industry, there is a parallel risk that executives who are appropriately mindful of the law will be inclined to work in industries where an executive's actions more likely control how and whether an executive will face criminal sanctions.<sup>139</sup>

#### CONCLUSION: RISK ASSESSMENT AND MANAGEMENT AS ENVIRONMENTAL AND ECONOMIC PROTECTION

The relentless pursuit of those who have caused pain and suffering has real value, but the blind pursuit of laws that would have punished those who are perceived to have done wrong in the past is a fundamentally flawed pursuit. Of course, there are times when new laws and regulations are necessary to handle new ways of perpetrating a fraud or to address new information about what was previously viewed as acceptable conduct.<sup>140</sup> But often, new laws and regulations are not a reaction to new information or technology; they are a reaction to a unique and unfortunate set of facts that is more likely related to timing or circumstances than an emerging trend.<sup>141</sup> Other times, it is a lack of enforcement of existing protections, meaning the problem is not the law itself; it is the enforcement of the law that is the problem.<sup>142</sup>

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'director primacy.' It assigns decisionmaking to the board of directors or the managers to whom the board has properly delegated authority." (footnotes omitted)).

<sup>138</sup> See Lerner & Yahya, *supra* note 96, at 47.

<sup>139</sup> See *id.* at 48–49 (utilizing two case studies where individuals, despite lack of involvement and best efforts at compliance were still strapped with prison sentences, begging the question of whether executives truly have great control over criminal environmental law violations).

<sup>140</sup> The development of cybercrime laws is one example. See, e.g., MONIQUE HEBERT & MARILYN PILON, LAW & GOV'T DIV., COMPUTER CRIME, DEPOSITORY SERVS. PROGRAM, GOVERNMENT OF CANADA, <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp87-e.htm> (last updated Oct. 24, 2002).

<sup>141</sup> See, e.g., DeGroff, *supra* note 116, at 882 (noting that the Oil Pollution Act was a direct result of the Exxon-Valdez spill).

<sup>142</sup> Oliver A. Houck, *Worst Case and the Deepwater Horizon Blowout: There Ought to Be a Law*, 24 TUL. ENVTL. L.J. 1, 16 (2010) ("Without the backup of NEPA, there was little

A. *Understanding and Embracing Inherent Risk*

As such, rather than pursuing laws that reduce the mens rea requirements, increase fines, or lengthen prison sentences, legislators and regulators should be facilitating laws and rules that either directly increase safety or that help entities (as well as their executives and shareholders) assess their risk assessments. The first part of this involves a process that requires the government and those advising the government to do a better job of explaining and understanding risk.<sup>143</sup> Energy exploration and extraction is inherently risky.<sup>144</sup> There is no way to completely avoid risk in the same way that no surgery is without risk.<sup>145</sup> There are ways to reduce risk, but not ways to avoid it completely.

Unfortunately, this is not always appreciated by even those closest to reviewing environmental disasters. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling's co-chair, Bob Graham, said, "The Commission's findings only compound our sense of tragedy because we know now that the blowout of the Macondo well was avoidable. This disaster likely would not have happened had the companies involved been guided by an unrelenting commitment to safety first."<sup>146</sup> It is almost certainly true that BP could have done much to help reduce the risk of the blowout, and they did not.<sup>147</sup> But to say that it was avoidable overstates the ability of all involved to protect against accidents 5,000 feet below the water.<sup>148</sup> If those charged with reviewing how the disaster occurred, and

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examination of the industry's worst-case claims or the government approvals for deepwater drilling.").

<sup>143</sup> See *id.* at 2, 12 (stating that the government and its advisors did not ever consider the risk or possibility of a blowout when making their approvals).

<sup>144</sup> See *id.* at 2.

<sup>145</sup> See Hamish Stewart, *The Limits of Consent and the Law of Assault*, 24 CAN. J.L. & JURIS. 205, 216 (2011) ("[I]n consenting to surgery for a therapeutic purpose, one consents to an intentional wounding, with a consequent risk of death.").

<sup>146</sup> Press Release, Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Commission Releases Chapter on BP Well Blowout Investigation in Advance of Full Report (Jan. 5, 2011), <http://www.oilspillcommission.gov/document/commission-releases-chapter-bp-well-blowout-investigation-advance-full-report> (follow "Download" hyperlink).

<sup>147</sup> See, e.g., Russell Gold et al., *Leaking Oil Well Lacked Safeguard Device*, WALL ST. J. (Apr. 28, 2010), <http://online.wsj.com/article/SB10001424052748704423504575212031417936798.html>; Ayesha Rascoe, *BP Workers Could Have Prevented Rig Accident: Report*, REUTERS (Feb. 17, 2011), <http://www.reuters.com/article/2011/02/17/us-oil-spill-causes-idUSTRE71G5NN20110217>.

<sup>148</sup> Houck, *supra* note 142, at 2–3 ("Sea floor responses, when things go wrong, are described as 'open heart surgery at 5,000 feet in the dark.'") (quoting Mike Soraghan, *Industry Claims*

highly critical of BP, are missing that point, it is hardly shocking that BP missed it, too.<sup>149</sup>

Quite simply, the financial incentives to put BP on a risk mitigation path were already in place, even if the regulatory oversight was lax. As noted above, the Deepwater Horizon disaster in the Gulf of Mexico released 4.9 million barrels (205.8 million gallons) of oil into the Gulf.<sup>150</sup> In addition to approximately \$20 billion in cleanup and spill-related claims, BP lost nearly half a trillion dollars in oil into the Gulf.<sup>151</sup> And BP is not the only company to suffer a big spill-related oil loss. A second, smaller spill occurred in 2010 when Enbridge Inc.'s oil pipeline dumped more than 800,000 gallons of oil into the state of Michigan's Kalamazoo River.<sup>152</sup> That is more than 19,000 barrels of oil, a loss of about \$2 million in oil.<sup>153</sup> Shortly after the spill, Enbridge announced that the cleanup would cost about \$550 million.<sup>154</sup>

It is hard to imagine that anyone at these companies wanted anything like this to happen, but the spills still occurred. The lost oil, plus the necessary (and far more expensive) costs of remediation, should have led companies to work diligently for safer and more reliable operation, but other pressures got in the way. As it turns out, people are generally very bad risk assessors and risk managers, even when they are highly educated and highly sophisticated.<sup>155</sup> This is true far beyond the oil industry.

For example, almost every spring, the flood waters rise in the Northern Plains, yet major areas lack significant and permanent flood-avoidance measures.<sup>156</sup> Fargo, North Dakota and the rest of the area work

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of 'Proven' Technology Went Unchallenged at MMS, GREENWIRE, June 2, 2010, <http://www.eenews.net/public/Greenwire/2010/06/02/1>.

<sup>149</sup> Cf. Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077 (2011) ("[T]he cleanup, like the regulatory process that preceded the spill, was complicated by blurry public-private relationships that constrained the government's ability to minimize risk and respond.").

<sup>150</sup> See MABUS, *supra* note 1, at 2.

<sup>151</sup> See Ken Wells, *The Tort Lawyer and the BP Oil Disaster*, BUSINESSWEEK, May 27, 2010, [http://www.businessweek.com/magazine/content/10\\_23/b4181066654108.htm](http://www.businessweek.com/magazine/content/10_23/b4181066654108.htm).

<sup>152</sup> *Oil Spill Cleanup Continues a Year Later*, DET. NEWS, July 23, 2011, at A1.

<sup>153</sup> See *id.*; see also *What's in a Barrel of Oil?*, CAL. ENERGY COMM'N, [http://energyalmanac.ca.gov/gasoline/whats\\_in\\_barrel\\_oil.html](http://energyalmanac.ca.gov/gasoline/whats_in_barrel_oil.html) (last updated Sept. 28, 2011) (noting that there are 42 gallons of oil in one barrel).

<sup>154</sup> *Id.*

<sup>155</sup> See Krista Boryskavich, *The Role of Consumer Preference in the Regulation of Genetically Modified Organisms*, 5 ASPER REV. INT'L BUS. & TRADE L. 1, 15 (2005) (considering risk assessment in the context of genetically modified organisms).

<sup>156</sup> See U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, *A HISTORY OF FLOODING IN THE RED RIVER BASIN* (2007), available at <http://pubs.usgs.gov/gip/2007/55/pdf/finalWeb>

diligently each year to prepare for potentially disastrous flooding by sand-bagging the area.<sup>157</sup> Until recently, a dike system was not seriously part of the discussion, even though the potential risk of loss is well known.<sup>158</sup>

Citizens of Fargo areas have seen the dangers of such floods when a city lacks adequate protection. In 1997, in Grand Forks, North Dakota (eighty miles to the north), flooding and a related fire led to \$4 billion in losses and a \$400 million dike system to protect the city from similar future events.<sup>159</sup> More recently, the entire nation witnessed the impact of Hurricane Katrina, and the resulting flooding, on New Orleans, which was even larger: \$100 billion lost (\$40 billion of which was private).<sup>160</sup> Arguably, the present value cost of flood protection in New Orleans was about \$1.5 billion.<sup>161</sup> Thus, in both circumstances, the cost of prevention was far cheaper than the cost of repair. And in both cases, the cost of prevention was incurred (or should be) along with the costs of rebuilding and repairing the area.<sup>162</sup>

Risk management, obviously, can be done well. For example, in Winnipeg, Canada, a floodway was completed in 1968 to protect the city from flooding of the Red River, which is the same north-running river that flooded Grand Forks and threatens Fargo each spring.<sup>163</sup> Known as Duff's Ditch and Duff's Folly, after its chief proponent, Manitoba Premier Duff Roblin, the diversion system cost \$63 million, approximately \$300–\$900 million today.<sup>164</sup> In the years since its construction, "Duff's Folly" has saved billions of dollars, not to mention the human and social costs that attach to such traumatic events.<sup>165</sup>

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GIP55.pdf (providing a time line of major floods in the northern plains up until 2006); *A River Runs Through It, Again*, ECONOMIST, Apr. 4, 2009, at 39.

<sup>157</sup> *Id.*

<sup>158</sup> See Ken Thomas, *North Dakota and Minnesota Officials Discuss Flood Preparations*, BISMARCK TRIB. (May 5, 2009), [http://www.bismarcktribune.com/news/state-andregional/article\\_eee242a1-2f61-5c39-acac-01cf88684065.html](http://www.bismarcktribune.com/news/state-andregional/article_eee242a1-2f61-5c39-acac-01cf88684065.html) (discussing a new flood defense system for the Red River Basin).

<sup>159</sup> See Joshua P. Fershee, *The Rising Tide of Climate Change: What America's Flood Cities Can Teach Us About Energy Policy and Why We Should Be Worried*, 39 ENVTL. L. 1109, 1117, 1122 (2009).

<sup>160</sup> *Id.* at 1125.

<sup>161</sup> *Id.* at 1126.

<sup>162</sup> See *id.* at 1131 (explaining what can be learned from Grand Forks).

<sup>163</sup> *Id.* at 1121.

<sup>164</sup> *Id.*

<sup>165</sup> See Fershee, *supra* note 159, at 1121.

*B. A Modest Beginning: Next Steps to Safer Energy Policy*

So what can be done to help companies do a better job of risk assessment and risk management? There are myriad options, and books and dissertations on the subject only graze the surface of the possibilities. A full assessment of the options and the likelihood of success are well beyond the scope of this Article. However, there are three comparatively modest suggestions that could help in the process. First, legislators and regulators can craft laws and rules in ways that better explain the legal landscape, which will, in turn, help those managers explain the need to take steps (and spend money) to their boards of directors, shareholders, and other stakeholders. Second, we all need to be more pragmatic. We need to acknowledge the risks of fulfilling our need for oil, and we need to focus more on options that lead directly to safer operations rather than increase penalties. Finally, lawyers, as advisors to companies, can do a better job of assessing and explaining risk to help companies pursue their bottom-line goals effectively.

1. Sending the Right Messages

Legislators and regulators can help send companies the right message by crafting laws and rules in ways that explain clearly what is expected of those companies and how potential liability will be assessed. Norway is often held out as an example of a country that has stronger environmental laws in place for its massive oil program.<sup>166</sup> It may seem like an unfair comparison, because Norway's government is socialist,<sup>167</sup> but in the offshore drilling context, the relationship between government and the oil company is substantially similar in the United States and Norway.

In Norway, the state owns all the offshore mineral rights: "The Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management."<sup>168</sup> In contrast to most

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<sup>166</sup> See UNITED NATIONS ENVTL. PROGRAMME, *Environmental Regulations for Norwegian Offshore Oil & Gas Industry*, OFFSHORE OIL AND GAS ENVIRONMENT FORUM, <http://www.oilandgasforum.net/management/regula/norwayprof.htm> (last visited Oct. 13, 2011).

<sup>167</sup> See Landon Thomas Jr., *Thriving Norway Provides Economic Lesson*, N.Y. TIMES, May 13, 2009, [http://www.nytimes.com/2009/05/14/business/global/14frugal.html?\\_r=2&em](http://www.nytimes.com/2009/05/14/business/global/14frugal.html?_r=2&em); Bureau of European & Eurasian Affairs, *Background Note: Norway*, U.S. DEPT OF STATE (July 18, 2011), <http://www.state.gov/r/pa/ei/bgn/3421.htm> (discussing the coalition between the socialist left party and labor party in the 2005 election).

<sup>168</sup> Petroleum Activities Act (1996) § 1-1 (Nor.).

of the world, privately owned land means privately owned mineral rights in the United States.<sup>169</sup> Deepwater drilling, however, is on the Outer Continental Shelf, which means the right to drill is leased by companies from the federal government, with the companies paying the U.S. government a royalty.<sup>170</sup> Thus, the relationship between the government and the oil company is functionally similar in these cases for the United States and Norway.

A comparison of the U.S. Oil Pollution Act of 1990 (“OPA ’90”) and Norway’s Petroleum Activities Act is thus helpful to illustrate how proper framing of liability could assist company managers. OPA ’90, as was widely publicized at the time of the Deepwater Horizon disaster, starts with a small amount of liability: the “general rule” provides for a \$75 million liability limit.<sup>171</sup> However, despite this seemingly minuscule liability cap, OPA ’90 also includes an enormous exception. Specifically, the liability limit

does not apply if the incident was proximately caused by—  
 (A) gross negligence or willful misconduct of, or  
 (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).<sup>172</sup>

In contrast, Norway’s liability law begins large, then tapers under appropriate circumstances. The Petroleum Activities Act provides: “The licensee is liable for pollution damage without regard to fault.”<sup>173</sup> Norway’s law begins with vast, unlimited liability, and then narrows.<sup>174</sup> The Petroleum Activities Act continues:

If it is demonstrated that an inevitable event of nature, act of war, exercise of public authority or a similar force majeure event has contributed to a considerable degree to the

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<sup>169</sup> See Victor B. Flatt, *Paving the Legal Path for Carbon Sequestration from Coal*, 19 DUKE ENVTL. L. & POL’Y F. 211, 230 (2009).

<sup>170</sup> See LITA EPSTEIN ET AL., *THE COMPLETE IDIOT’S GUIDE TO THE POLITICS OF OIL* 199–201 (2003).

<sup>171</sup> Oil Pollution Act of 1990, 33 U.S.C. § 2704 (2006).

<sup>172</sup> *Id.*

<sup>173</sup> Petroleum Activities Act (1996) § 7-3 (Nor.).

<sup>174</sup> See *id.*

damage or its extent under circumstances which are beyond the control of the liable party, the liability may be reduced to the extent it is reasonable, with particular consideration to the scope of the activity, the situation of the party that has sustained damage and the opportunity for taking out insurance on both sides.<sup>175</sup>

Admittedly, the structure of this law grants Norway the power to enforce strict civil liability in any case, then allows the company to demonstrate why that should not be the case.<sup>176</sup> Functionally, though, where a company covered by OPA '90 violates, for example, a safety regulation, the result is the same, unlimited liability.<sup>177</sup> The overall structure of Norway's law is preferable to its U.S. counterpart, even if the U.S. law were to retain a cap in some circumstances, because beginning with an expectation of unlimited liability helps people understand the full scope of the potential risk.<sup>178</sup> It grabs their attention, and may help them focus on what can be done to reduce that risk. It may be small, but low-cost framing mechanisms that focus attention on ways to reduce the risk of harm are an improvement.

## 2. The Link Between Pragmatism and Safety

*[P]ragmatism has the potential to furnish a durable and useful set of intellectual tools for analyzing knotty environmental policy issues.*<sup>179</sup>

Lawmakers and regulators need to embrace a pragmatic view of oil industry oversight. This means enacting laws that work to maximize safety and recognize that sometimes simple gestures can facilitate improved company policies.<sup>180</sup> For example, when oil was spilling into the Gulf from the Macondo well, there was some question about the potential liability that

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<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

<sup>177</sup> *See* Oil Pollution Act of 1990 § 2704.

<sup>178</sup> *See Key Senators Call for Lifting of Oil Liability Caps*, CNN (June 8, 2010), [http://articles.cnn.com/2010-06-08/politics/oil.spill.liability\\_1\\_gulf-spill-oil-pollution-act/2?\\_s=PM:POLITICS](http://articles.cnn.com/2010-06-08/politics/oil.spill.liability_1_gulf-spill-oil-pollution-act/2?_s=PM:POLITICS) (quoting White House Spokesman Ben Labolt) (“Oil companies should have every incentive to maximize safety, and arbitrary caps on liability create a disincentive to achieve that goal.”).

<sup>179</sup> Joel A. Mintz, *Some Thoughts on the Merits of Pragmatism as a Guide to Environmental Protection*, 31 B. C. ENVTL. AFF. L. REV. 1, 25–26 (2004).

<sup>180</sup> *See Key Senators*, *supra* note 178.

might be incurred by other oil companies if they came to assist in the mitigation efforts.<sup>181</sup> Norway, in comparison, protects Good Samaritans in some circumstances. Section 7-4 of the Petroleum Activities Act states:

Liability for pollution damage cannot be claimed against: . . .  
 c) anyone who undertakes measures to avert or limit pollution damage, or to save life or rescue values which have been endangered in connection with the petroleum activities, unless the measures are performed in conflict with prohibitions imposed by public authorities or are performed by someone other than public authorities in spite of express prohibition by the operator or the owner of the values threatened.<sup>182</sup>

Similarly, Norway requires that all who work on an oil drilling project “shall at all times maintain efficient emergency preparedness with a view to dealing with accidents and emergencies which may lead to loss of lives or personal injuries, pollution or major damage to property.”<sup>183</sup> Although emergency preparedness may seem obvious, there were serious questions about BP’s preparation and analysis of the potential for a blowout.<sup>184</sup> There are some requirements in U.S. regulations that demand analysis of a possible blowout, but these regulations have not been effectively implemented.<sup>185</sup>

Lastly, Norway provides that all facilities must have an “emergency shutdown system” capable of preventing hazard development, “accident situations and limit[ing] the consequences of accidents.”<sup>186</sup> The law also

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<sup>181</sup> Joel Kurtzman, *Viewpoint: The Oil Spill: Where Are the Good Samaritans?*, BLOOMBERG BUSINESSWEEK (June 22, 2010), [http://www.businessweek.com/managing/content/jun2010/ca20100621\\_358809.htm](http://www.businessweek.com/managing/content/jun2010/ca20100621_358809.htm) (“Liability issues surrounding the spill are affecting the cleanup [because] . . . companies and nonprofits with technical expertise, which might be able to help, lack legal resources or protection and are wary of wandering into what is sure to be a legal equivalent of a 100-mile slick.”).

<sup>182</sup> Petroleum Activities Act (1996) § 7-4 (Nor.).

<sup>183</sup> *Id.* at § 9-2. The law also provides: “The licensee shall see to it that necessary measures are taken to prevent or reduce harmful effects, including the measures required in order, to the extent possible, to return the environment to the condition it had before the accident occurred.” *Id.*

<sup>184</sup> *See* Houck, *supra* note 142, at 9–11.

<sup>185</sup> *See id.* (demonstrating how the enforcement of such regulations was inadequate in the case of BP and other Western Gulf explorations).

<sup>186</sup> PETROLEUM SAFETY AUTH., GUIDELINES REGARDING THE FACILITIES REGULATIONS, REGULATIONS RELATING TO TECHNICAL AND OPERATIONAL MATTERS AT OFFSHORE

requires: "It shall be possible to manually activate functions from the central control room that bring the onshore facility to a safe condition in the event of a fault in the parts of the system that can be programmed."<sup>187</sup> Norway and Brazil both require the use of acoustic switches that can activate a blowout preventer remotely.<sup>188</sup> The United States and the United Kingdom do not.<sup>189</sup>

Although it is not clear that such a device would have worked to avoid the Deepwater Horizon disaster, it would have provided another option to try.<sup>190</sup> Rather than adding criminal penalties for executives and other company employees without regard to intent, lawmakers and regulators would be better served focusing on efforts that have at least the potential to directly address or avert the disaster.

### 3. Lawyers Can Do Better

Lawyers, especially in a non-litigation context, need to help their clients assess risk and solve problems. That means lawyers cannot spend all their time saying no. Instead, it means lawyers must spend time learning their clients' businesses and understanding what their clients need. Only then can an effective lawyer begin providing effective options and solutions. Of course, some things are simply illegal or unsafe; that is when a lawyer should and must say no. But, for the most part, it is not a question of whether the clients can do something. It is whether it is worth the risk, financial or otherwise.

Managers must deal with risks in a variety of ways. As Robert Eli Rosen explained in his dissertation, *Lawyers in Corporate Decision-Making*: a manager's job is "balancing risks, developing a risk-portfolio, [and] securing support from others to minimize risks."<sup>191</sup> Part of the problem may be that lawyers are failing their client managers. As Rosen explains:

The lesson to be learned in the risk analysis approach is that the lawyer must approach managers in a constructive fashion to effectively serve the corporation. The lawyer must

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FACILITIES IN THE PETROLEUM ACTIVITIES, ETC. § 33 (Nor.), available at [http://www.ptil.no/facilities/category400.html#\\_Toc280616950](http://www.ptil.no/facilities/category400.html#_Toc280616950).

<sup>187</sup> *Id.*

<sup>188</sup> Russell Gold et al., *supra* note 147.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> ROBERT ELI ROSEN, *LAWYERS IN CORPORATE DECISION-MAKING* 96 (2010).

approach the manager from the position of helping the manager realize his objectives. If the lawyer doesn't adopt this stance, the client will not consult him and will find ways to circumvent him.<sup>192</sup>

It is the lawyer's job to help the manager, and if lawyers are not pursuing solutions for their clients and presenting the options in useful ways, the manager will work around their counsel. When something bad happens, the initial fault resides with the manager making poor choices. However, lawyers must take their charge seriously, or they must share some of the responsibility.

### C. *A Shared Responsibility*

As energy prices remain high, the U.S. economy benefits from its energy-related industries. States like North Dakota<sup>193</sup> and West Virginia<sup>194</sup> have remained financially healthier than much of the country, in large part because of their energy resources. Across much of the country, energy industries have helped mitigate the difficult financial times.<sup>195</sup> As Louisiana and Texas experienced after the blowout of the Macondo well, an environmental disaster can have long-lasting effects that are broader than the disaster itself.<sup>196</sup> The lingering moratorium on drilling in the Gulf in the wake of the accident has had additional severe consequences.<sup>197</sup>

One of the greatest risks to the continued economic success of energy-related activities is an environmental disaster. As such, disaster avoidance is a benefit to all stakeholders: lawmakers, regulators, oil

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<sup>192</sup> *Id.* at 115.

<sup>193</sup> See Amy Merrick, *In North Dakota, the Good Times Roll*, WALL ST. J., June 5, 2009, at A4.

<sup>194</sup> See AMY HIGGINBOTHAM ET AL., W. VA. UNIV., *THE ECONOMIC IMPACT OF THE NATURAL GAS INDUSTRY AND THE MARCELLUS SHALE DEVELOPMENT IN WEST VIRGINIA IN 2009*, 1 (2010) ("The economic impact of the Marcellus Shale development in the state in 2009 was calculated to be \$2.35 billion of business volume and accounted for the generation of 7,600 jobs.").

<sup>195</sup> See *id.*; Merrick, *supra* note 193, at A4.

<sup>196</sup> See David Biello, *One Year After BP Oil Spill, At least 1.1 Million Barrels Still Missing*, SCIENTIFIC AMERICAN (Apr. 25, 2011), <http://www.scientificamerican.com/article.cfm?id=one-year-after-bp-oil-spill-millions-of-barrels-oil-missing>; Melissa Gaskill, Editorial, *The Pain of the Spill*, TEX. PARKS & WILDLIFE (Dec. 2010), [http://www.tpwmagazine.com/archive/2010/dec/ed\\_1/](http://www.tpwmagazine.com/archive/2010/dec/ed_1/).

<sup>197</sup> See Maria Recio, *Pressure Builds to Expand Drilling A Year After BP Oil Spill*, PITT. POST-GAZETTE, Apr. 24, 2011, at A11.

companies, and people generally have reason to support a safer energy industry. The first step, then, is to adopt a proper mindset to help avoid disasters. Rather than pursuing with vigor penalties to punish a future perpetrator or seeking creative ways to use obscure laws that have a slight chance of success, efforts should look to ways to prevent the next disaster.

This means carefully assessing risk, then developing plans and programs to minimize that risk. This is not something that can happen in a vacuum. It requires coordinated efforts from industry, government, and the public. We all must understand and appreciate the risks before us, then be prepared to accept the costs of our decisions.