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INTRODUCTION

The blowout of the Macondo well on April 20, 2010 and the resulting escape of oil into the waters of the Gulf of Mexico and onto the shores of coastal states set in motion numerous lawsuits that will take years to resolve. A significant amount of the liability and penalties arising from the Gulf oil spill will turn on the treatment given to the terms “gross negligence” and “willful misconduct.” Should the United States decide to bring a criminal complaint for manslaughter for the lives lost in the accident, “gross negligence” may also be an element in defining the crime. The terms involve interpretation as statutory, contractual, and common law standards. The undertaking is more complex than it might first appear; it will involve courts, arbitrators, and federal agencies. Because of the complexity, some framework for interpretation of the terms may be useful. The aspiration of this Article is to provide a framework for the interpretative process without analysis or application of facts within the framework. No attempt will be made to assess whether the facts establish “gross negligence” or “willful misconduct” by any party, defendant or plaintiff. As will be seen, under the Oil Pollution Act (OPA) as well as other statutes and common law doctrines, the determination that an injured party’s own “gross negligence” or “willful misconduct” contributed to the injury may be used to defeat liability to that party.

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1. In full disclosure, the author has been employed for some aspects of work concerning contract issues in the matter of the BP oil spill. This engagement was done after the bulk of the work was completed on this Article. This Article arose from the author’s years of teaching in interpretive technique in legal philosophy, in contract law, and in administrative law. Parts of this Article are derived from the author’s work-in-progress on cognitive aspects in interpretation of language, particularly legal usages. This Article does not attempt to cover interpretation of “gross negligence” and “willful misconduct” in contracts.

With respect to the OPA and the Clean Water Act, the terms "gross negligence" and "willful misconduct" are very old terms in a new context. Their usage and adoption by Congress carry with them their uses from the past. As said by John L. Austin, the Oxford philosopher of language, words come to us "trailing clouds of etymology." In one sense, this Article is a "grammatical investigation," a phrase used by one well-known linguist, and it is in keeping with the recognition by many linguists that "words do not have meanings, they invite them." This "investigation" involves both cognitive linguistics or neurolinguistics (how language operates) and historical inquiry. Most meanings of terms are characterized by family resemblances rather than a precise categorical identity. The meaning of a word or term is its use. Use necessarily involves purpose and context.

Congress has chosen to link substantial levels of liability to inquiries and determinations of "gross negligence." It may be thought of as a striking choice in light of recent treatment of "gross negligence" by courts and scholars. Reflective of skepticism about "gross negligence" are the observations of Prosser and Keeton, a standard text on tort law:

Although the idea of "degrees of negligence" has not been without its advocates, it has been condemned by most writers, and, except in bailment cases, rejected at common law by most courts, as a distinction "vague and impracticable in [its] nature, so unfounded in principle," that it adds only difficulty and confusion to the already nebulous and uncertain standards which must be given to the jury. The prevailing rule in most situations is that there are no "degrees" of care or negligence, as a matter of law; there are only different amounts of care, as a matter of fact. . . . [T]he difficulty of classification, because of the very real difficulty of drawing satisfactory lines of demarcation, together with the unhappy history, justifies the rejection of the distinctions in most situations.

The skepticism of Prosser and Keeton about the ability of judges, juries, and commentators to intelligibly apply different

degrees of negligence was preceded a century and a half ago by the United States Supreme Court. In the 1853 admiralty personal injury case (arising from an exploding boiler on a vessel) The Steamboat New World v. King, the Court complained about the distinctions claimed for classifying negligence into categories:

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation.7

The Court commented that if the law furnished no practically applicable definition of the terms “gross negligence” or “ordinary negligence,” but left it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, “it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned.” Whatever test might be used, the Court said there was gross negligence in the failure to use proper skill in the management of the boilers on the vessel.8

Despite the long history of judicial and scholarly dissatisfaction with distinguishing between types of negligence, Congress has chosen to make such a distinction and has required decisionmakers to attempt to draw “satisfactory lines of demarcation.”9 The congressional choice of terms and the terms themselves are instances of the qualities of “linguistic density” and “resonance.” With the former, a multiplicity of ideas are expressed in a single word or phrase, and with the latter, a verbal theme or image is echoed from one text to another, so that meaning is enriched when the texts (such as judicial opinions and statutes) are understood together.10

As will be developed, gross negligence and willful misconduct are concepts that derive from tort law (including its intersection

8. Id. at 476.
with contract law) and criminal law. Although the two terms can be treated distinctively (and have been by some courts and writers), in general legal usage they merge at their margins. Necessarily and historically a finding of gross negligence or willful misconduct has been a fault-based moral judgment. And the use of the terms in several areas of tort law has blurred them into the concept of "causation."

I. THE OPA OF 1990, INCLUDING THE FWPCA

The Oil Pollution Act of 1990 was the congressional response to oil spills in the 1980s and was immediately prompted by the Exxon Valdez spill in Alaskan waters in 1989. The reach of the OPA extends both onshore and offshore, i.e., anywhere oil may be discharged into or upon navigable waters or adjoining shorelines. As it amended and supplemented several federal statutes, the OPA also modified, supplemented, or displaced state and maritime tort law. It is in significant part a federal tort statute and incorporates a mixture of tort concepts from the Anglo-American legal system.

A. Pertinent Provisions

The OPA establishes multiple categories of liability for "responsible parties." The extent of liability (and penalties) for a responsible party is based only in part on the culpability (moral fault) of the party. That is to say, the OPA imposes strict liability (liability without fault) on a responsible party for certain injuries caused by the acts leading to an incident of oil pollution. The OPA also provides statutory immunity from further liability for a responsible party once a specific level of liability has been reached for certain injuries identified by the statute.

"Responsible parties" include any person owning, operating, or demise chartering a vessel; the owner or operator of an onshore facility; the lessee or permittee of the area on which is located an offshore facility; the owner or operator of a pipeline; and the licensee of a deep water port. Such parties are liable (1) for removal costs and (2) for damages for injury to natural resources, injury to real or personal property (including economic losses resulting from that injury), loss of subsistence use of natural resources, loss of revenues (including taxes), loss of profits and impairment of earning capacity resulting from such property loss or natural resource injury, and the costs of providing additional public services during or after removal response.11 As to this

second category, a responsible party is limited in liability to the statutory maximum (in the case of a lessee of the area on which is located an offshore facility, $75,000,000). But the limitation does not apply if the incident was proximately caused by the responsible party's "gross negligence or willful misconduct" or the violation of an applicable federal safety, construction, or operating regulation.\textsuperscript{12} The congressional grant of limited liability reflects a fault-based theory of tort liability and a policy decision to encourage continued oil production and transportation activities; it also discourages (punishes) certain conduct in carrying out those activities. The application of limited immunity to a responsible party does not mean that damages under "(2)" above are not recoverable by an injured party; rather, they will be recovered from an Oil Spill Liability Trust Fund ("the Fund"), administered by the U.S. Coast Guard, that is generated from a levy on oil industry revenues.\textsuperscript{13}

The OPA amended the Federal Water Pollution Control Act (FWPCA) to provide parallel or symmetrical treatment to penalties for oil spills. That is to say, the OPA is essentially a tort statute, and it also amends the civil penalty provisions of a statute that covers other aspects of the same event as the tort aspect. Thus the two statutes complement one another and use a common terminology. The OPA amended the FWPCA to provide two levels of civil penalties for a prohibited discharge—a standard level (now about $1,100 per barrel) and an enhanced level (now about $4,300 per barrel).\textsuperscript{14} A finding that "a violation of paragraph (3) was the result of gross negligence or willful misconduct of a person described in subparagraph (A)" will trigger the enhanced civil penalty.'\textsuperscript{15} Because the two statutes were enacted and amended together, respectively, and in application relate to the same event(s), identical terms should presumptively be interpreted identically.\textsuperscript{16} When, for example, Congress has employed and

\begin{itemize}
  \item \textsuperscript{12} Id. § 2704(c)(1)(A).
  \item \textsuperscript{13} 26 U.S.C. § 9509; 33 U.S.C. § 2712(a). This feature of the OPA appears to follow an economic theory of strict liability on the ground that "tort costs should be borne by the activity which causes them." Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 533 (1961). Calabresi refers to the "basic economic structure which requires prices of goods to reflect all the costs which producing or using them entail." Id. Thus the oil industry itself is to bear a portion of the costs of oil spills under the OPA in specified circumstances.
  \item \textsuperscript{14} 33 U.S.C. § 1321(b)(7)(A)-(D).
  \item \textsuperscript{15} Id. § 1321(b)(7)(D).
  \item \textsuperscript{16} Smith v. City of Jackson, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); Nat'l
defined the term “navigable waters” in the FWPCA and OPA, the term should be interpreted as having the same meaning in both acts. Where Congress and the federal courts have used the same terms in other statutes and in the application of federal law in cases, the same presumption should be followed unless context and precedent mandate a contrary approach. This presumption is in keeping with Ronald Dworkin’s notion of “law as integrity”: “The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.”

B. Legislative History

The terms “gross negligence” and “willful misconduct” came into the OPA via its predecessor and related statutes, which dealt with water obstruction and pollution. Their wording, application, and interpretation will bear upon the meaning of the OPA.

Treasury Emps. Union v. Chertoff, 452 F.3d 839, 857 (D.C. Cir. 2006) (“There is a presumption that Congress uses the same term consistently in different statutes.”).
18. RONALD DWORKIN, LAW’S EMPIRE 225 (1986).
The Rivers and Harbours Appropriations Act of 1899 (Refuse Act) provided for the imposition of a criminal fine of $2,500 for violations. The statute was used years later as a basis for judicial inference of a civil cause of action to recover removal or cleanup costs of obstructions or refuse.

Congress first passed an Oil Pollution Act in 1924. It made unlawful any unpermitted discharges of any oil by any method into or upon the coastal navigable waters of the United States. Violation could lead to a misdemeanor fine of $500 to $2,500 and/or imprisonment for up to a year. Because this was a criminal statute, it would have required due process, including a requisite finding of an intentional act. It made no mention of negligent discharges.

The 1924 OPA was amended in 1966 along with the Federal Water Pollution Control Act of 1948 (WPCA) in a statute to be called the “Clean Water Restoration Act of 1966.” The amended 1924 OPA provided for a civil cause of action by the government against a discharger in addition to criminal penalties. The OPA brought the concept of gross negligence into the law of oil spills through its definition of “discharge”: “(3) ‘discharge’ means any grossly negligent, or willful spilling, leaking, pumping, pouring, emitting, or emptying of oil.” Because the same discharge might lead to civil or criminal proceedings, perhaps the “grossly negligent” standard was brought in so that due process might be satisfied; as will be developed below, in criminal law acts that are characterized as merely negligent are generally thought not to be subject to criminal prosecution because of a lack of the requisite intent or “mens rea.”

The WPCA declared that the pollution of interstate waters occurring in or adjacent to any state or states and endangering the health or welfare of persons in a state (other than that in which the discharge originated), was a public nuisance and was subject to

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24. *Id.* sec. 211(a), § 2(3), 80 Stat. at 1253.
abatement as provided by the WPCA. Its goal was more to foster interstate cooperation on water pollution than to punish acts of pollution or impose liability for cleanup.

With the Water Quality Improvement Act of 1970 (WQIA) legislation began to come to a form recognizable as that which was drawn upon for the OPA of 1990. The WQIA significantly amended the 1948 WPCA. Section 11 of the redesignated provisions was headed "Control of Pollution by Oil." This amendment includes, for the first time, the distinctions made among the potential dischargers of oil: vessels, onshore facilities, and offshore facilities, with liabilities and responsibilities tailored to each. The WQIA provided for limited liability without fault for government cleanup costs. Liability for such costs was unlimited, however, "where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner." Recognizing that the same actions might be governed by the Outer Continental Shelf Lands Act (OCSLA), the 1970 WQIA provided that "(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act."

The FWPCA of 1972 superseded the WQIA. With the FWPCA, Congress reorganized the water pollution laws. The 1972 amendments brought hazardous substances under the same regulatory regime as for oil spills. The FWPCA retained the structure and language of the 1970 WQIA with its separate treatment of vessels, onshore facilities, and offshore facilities. Retained also were the features of limited liability subject to the exception where the United States could show that an unlawful discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner.

27. Id. sec. 102, § 11, 84 Stat. at 91.
28. Id. § 11(f)(1), 84 Stat. at 94.
29. Id. § 11(i)(2), 84 Stat. at 96.
31. On the shift in language in the 1990 OPA (which omits "privity"), see Frank Anders, Comment, OPA 90: Is United States Government Sole-Fault Negligence, Gross Negligence, or Willful Misconduct a Defense Against Responsible Party Liability?, 15 U.S.F. MAR. L.J. 223, 245 (2002) ("Congress removed the 'privity and knowledge' clause because . . . Congress believed that the 'privity' defense allowed tanker owners to immunize themselves by claiming they had no knowledge of the negligence of their crews."). The legislative
The Trans-Alaska Pipeline Authorization Act of 1973 established a compensation fund in an amount of $100,000,000, based on a five-cents-per-barrel tax on all oil passing through the Trans-Alaska Pipeline. The fund was to cover "vessel-source" spills, that is, damage caused by vessels operating between the pipeline terminals and United States ports. Although it imposed strict liability on the owner and operator of the vessel, the statute provided for a cap of $14,000,000, beyond which the compensation fund would cover liability. Damages resulting from activities along the Trans-Alaska Pipeline right-of-way were to be compensated by the holders of the right-of-way; they were strictly liable to all damaged parties, public or private, without regard to fault for such damages. However, liability under this provision was limited to $50,000,000 for any one incident, and the holders of the right-of-way or permit were to be liable for any claim allowed in proportion to their ownership interest in the right-of-way or permit. The Trans-Alaska Pipeline Authorization Act provided that liability of such holders for damages in excess of $50,000,000 was to be in accord with ordinary rules of negligence. Thus the Trans-Alaska Pipeline Authorization Act combined features of capped strict liability, with further damages governed by negligence standards.

The Deepwater Port Act of 1974 prohibited oil discharges into the sea from any of the facilities of a port or from any vessel operating to or from the port or in surrounding safety zones. It established strict liability for cleanup costs and damages that result from a discharge of oil. As with the FWPCA, it provided for limitations on liability for spills, "except that if it can be shown that such discharge was the result of gross negligence or willful misconduct within the privity and knowledge of the owner or operator, such owner and operator shall be jointly and severally liable for the full amount of all cleanup costs and damages." Enacted in 1953, the Outer Continental Shelf Lands Act governs the development of federally owned offshore oil and gas

history on "willful negligence" in the FWPCA is the basis of the decision in Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979). The court found negligence but not "willful negligence." Id. at 614.

34. Id. § 18(d), 88 Stat. at 2142 (emphasis added).
resources. In 1978 amendments to the OCSLA imposed a strict liability regime for cleanup and damages on owners and operators of any Outer Continental Shelf (OCS) facility and on vessels operating in adjacent waters that carry oil from the OCS. It established an offshore oil pollution fund, authorized at a $200 million level, that was financed by a three-cent-per-barrel fee on all OCS oil. The strict liability was capped at $250,000 or $300 per gross ton, whichever was greater, in the case of a vessel; and in the case of an offshore facility, the total of removal and cleanup costs and an amount limited to $35,000,000 for all damages. However, the caps did not apply if:

the incident is caused primarily by willful misconduct or gross negligence, within the privity or knowledge of the owner or operator, or is caused primarily by a violation, within the privity or knowledge of the owner or operator, of applicable safety, construction, or operating standards or regulations of the Federal Government.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) contains provisions for liability, provisions for discharge response management, and funding provisions similar to those for oil spills and distinguishes among vessels, onshore facilities, and offshore facilities. CERCLA covers responses and liability for hazardous substances (not covered by FWPCA or OPA), which can occur in connection with an oil spill. As enacted in 1980, the CERCLA capped liability for facilities at $50,000,000, but the wording of the section that excepted an actor from the cap was “willful misconduct or willful negligence” rather than “willful misconduct or gross negligence.” It did, however, parallel the “privity” provision of the FWPCA. Despite being amended in 1986, 1994, 1996, and 2002, this aspect of limiting the liability was left unchanged, so that the present wording of the relevant subsection is:

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other

37. Id. § 304(b), 92 Stat. at 675–76 (emphasis added).
responsible person under this section shall be the full and
total costs of response and damages, if (A)(i) the release or
threat of release of a hazardous substance was the result of
willful misconduct or willful negligence within the privity
or knowledge of such person, or (ii) the primary cause of
the release was a violation (within the privity or knowledge
of such person) of applicable safety, construction, or
operating standards or regulations . . . .

It did, however, also have a provision respecting gross
negligence. This was in connection with encouraging parties to
take steps to render care, assistance, or advice in accordance with
the national contingency plan or at the direction of an on-scene
coordinator appointed under such plan, with respect to hazardous
incidents. It provided immunity “under this title” for damages
arising out of such actions taken or omitted in the course of
providing such assistance. But the immunity provision would not
preclude liability for such damages “as the result of gross
negligence or intentional misconduct on the part of such person.”

The provision stated: “For the purposes of the preceding sentence,
reckless, willful, or wanton misconduct shall constitute gross
negligence.”

II. COMPOUND TERMS, FACTS AND NORMS, AND TORT LAW

A. Compound Term

How does the human mind use language? Oral language begins
with individual sounds and written language begins with individual
markings. We focus here on the written language. Individual letters
(26 in English plus markings of punctuation plus the absence of
marking, to denote termination of units) are aggregated into basic
units referred to as morphemes (the smallest functioning units in

40. Id.
41. Comprehensive Environmental Response, Compensation, and Liability
Act of 1980, § 107(d), 94 Stat. at 2783. The Act was subsequently amended in
negligent acts undertaken by those rendering assistance, 42 U.S.C. § 9607(d)(1),
but continuing the heightened immunity for “state and local governments”: 
“This paragraph shall not preclude liability for costs or damages as a result of
gross negligence or intentional misconduct by the State or local government. For
the purpose of the preceding sentence, reckless, willful, or wanton misconduct
shall constitute gross negligence.” 42 U.S.C. § 9607(d)(2). The indication here is
that Congress equates “gross negligence” with “reckless, willful, or wanton
misconduct,” in contrast to “negligence.”
the composition of words) that may be words themselves or are the basis for words. Words are aggregated into sentences and sentences into paragraphs and so forth. Because we hear linearly and we see writing linearly, we tend to think that linearity is a characteristic of thought. This, however, is not how language and thought relate.

Imagine a line strung between two points. Markings (meaningless graphemes) are hung one by one onto the line until a thought is invoked (or evoked). "T" followed by "h" followed by "e" followed by a space (which is the absence of a mark). We will now see the definite article "The," which brings nothing in itself to mind. Next follows "c," then "a," then "t," and a space. We now have "The cat." Does this evoke an image of the head of a four-legged creature with short ears, fur, and a tail? Does the cat have any coloration to its fur, any height or weight? Next on the string appearing seriatim are "s," "a," and "t." This forms "sat," which the mind says is the morpheme "sit" modified by a rule of morphology to create "sit—past form—sat." Does the previous image of a tailed, four-legged creature dissolve into one recumbent, with no legs or tail visible? Does the mind conjure a place where the cat sat or is it just an essence in the mind? Does "sat" convey the notion of the movement of sitting or does it convey a notion of the cat in a stationary position? Next on the string appear the markings "on the mat." Does the mind form a moving scene in which a cat reclines itself onto a mat? Does the mat have any characteristics, such as material (cloth, paper, vinyl, rubber), form (rectangle, square, oval), color, weight, and so forth?

The short answer to the above questions is that the mind operates very rapidly and aggregates all the markings into a single unit or structure: "The cat sat on the mat."42 Within the rules of syntax and grammar, the same unit might be expressed in a different order: "On the mat sat the cat." Either of these aggregations of markings can produce a single image of multiple parts in the human mind. If numerous persons were asked to paint a picture based on the sentence, their pictures would have some features in common but necessarily many variations as well, reflecting the unexpressed but necessary characteristics. A colorless cat and a formless mat cannot be painted. Identical words

42. The example used here is derived from ROY HARRIS, THE LANGUAGE MACHINE 67–68 (1987). Discussing Sassure's notion of linearity, Harris observes: "[T]rue though it is that The cat sat on the mat is a sentence which takes a finite length of time to utter, that fact itself does not impose linearity of structure any more than the fact that it takes the painter a finite length of time to execute brush strokes on the canvas imposes a linearity of structure upon the painting." Id.
GROSS NEGLIGENCE AND THE OPA will have many different representations for various individuals, because use of language draws upon many past associations. The words individuals use might be identical, but the thoughts and images evoked might be quite different without the persons even being aware of their differences. In fact, the mind probably does not produce a complete image with the quoted sentence. Instead, the sentence is just the beginning of filling in additional detail already in the mind or provided later as needed. If part of an ongoing communication, many elements of detail outside the sentence will have been supplied already.

What sort of task would we be imposing if we asked the same persons to depict, define, or explain “gross negligence” or “willful misconduct” rather than a cat? The burdens of words and the mental processes would be rather different, especially because these terms are not part of common English conversational usage and because these are compound terms relating purely to concepts rather than things. But as before, the depiction or explanation will generally arise within a context, with many details already supplied or subject to further development.

B. Things and Non-Things—Facts and Norms

A fundamental distinction is made in philosophy, especially in legal philosophy, between fact and norm. A fact relates to a thing experienced by the senses. A norm is a judgment about human actions. Generally, a norm is a standard of conduct, and that standard is expected to guide choices and judgments of humans. Machines, other inanimate objects, and all living things that lack reason have behavior determined by laws, but these are laws of nature rather than human laws. Although we will treat specific instances of gross negligence or willful misconduct as involving a question of “fact” for a fact finder, we must not lose sight that here “fact” is a judgment (indeed, a moral judgment) about interrelated facts; “gross negligence” is not an empirical fact—not a thing.

We distinguish between things and non-things. Our language is such that nouns can name both things and non-things, and thus we can believe that both have an existence that is not dissimilar. By “things” we mean physical entities that have characteristics that are the subject of sensory experience. This “chair” is a thing. The word “chair” is used to name a category of things sharing characteristics that are the subject of sensory experience. A “nominalist” would say that “chair” exists only as a convenient collective name for shared characteristics of many individual chairs. The chairs all have empirical, i.e., physical, existence, though “chair” is merely a
name. A particular chair is a thing, a particular desk is a thing, and a particular drilling rig is a thing.

We give names to “non-things” that are not the subject of sensory experience but whose names may still be used to attribute characteristics to things (or as we shall see, even conduct). There are Kantian “categories” that the mind perceives as qualities of things but are actually not things in themselves. A rock may have weight and mass as physical characteristics, but weight and mass are “non-things.” And when we describe the weight or mass of a thing as “heavy” or “large,” we are using these terms as comparatives: we may say a rock is “heavy,” but “heavy” must always be in reference to a human-imposed standard of comparison to some other thing. A 50-pound weight is very heavy if we are describing a desk object to hold down papers but very light if we are describing an object used in a contest of lifting strength. Thus we see “weight” may be a physical attribute of a thing, but “heavy” is always a comparison that has no meaning outside of a given context. An object is “near” or “far” always in relation to a reference point and to context. One town is “far” from another if walking is our means of transport but very “near” if by plane. So it is with description of human actions. When we attribute qualities to human actions we are always doing so in relation to a standard (a norm) and within a context. So too with an action being “very negligent”: this judgment can only be made by reference to a standard and within a context. Deviation by an inch from a margin in painting a house may be slight negligence, but deviating by an inch in heart surgery will be fatal negligence.

Now, a norm is not a fact or thing, just as “heavy” is not a fact or thing. Vessel A collided with dock B. Was this act or event “negligent”? Was it “willful”? The collision itself is merely fact, neither negligent nor willful. It is not a proper use of language to describe a collision as a “negligent collision.” More properly, one could say, “This collision resulted from negligence (or from a willful act).” In so speaking we recognize that we are attributing characteristics (1) to human actions in the manner of operation of the vessel by comparison to a norm of operation from some source and (2) to the state of mind of the vessel’s operator by comparison to a norm from some source. In other words, “negligence” is a characteristic of the manner of operation and the state of mind of the operator.

Another feature of language with significance for law must next be observed. The human mind viewing a sentence (such as “The cat is on the mat”) would nearly always ask, “What is the purpose of this sentence?” Is it part of a story? Is it an attempt to locate a cat within a room in relation to other creatures, some of
which might be in a chair or on a floor? Are we informing a reader that the cat "sat" rather than "stood" on the mat? Why do we want to know that a cat sat on a mat? Human minds associate communication between persons through language as having purpose. Legal language serves purposes in specific contexts in law, and this fact must affect our interpretation of those terms. If we wish to describe an act or series of acts as "grossly negligent," why are we doing so? What is our purpose for the characterization, i.e., the judgment on the quality (culpability) of a human act?

Gross negligence and willful misconduct perhaps can be thought of as special instances of "negligence" and "misconduct." Like the word "cat" or "bird" (to shift from a feline to an avian metaphor), the terms "negligence" and "misconduct" name categories that consist of members with differing characteristics. We think of a prototype of a bird—such as a blue jay or sparrow—and we think of an atypical bird, such as an emu. We find that the boundaries of the characteristics of the members of the family or category of birds are fuzzy.

We can identify subfamilies of birds by purpose or function, such as flying or non-flying. Even here, the boundaries are very imprecise. Is a chicken a flying bird? It cannot soar like the eagle, and its primary method of locomotion is by its feet. Reasonable people might differ as to whether a chicken should be labeled a flying bird. We could identify swimming birds and non-swimming birds. The penguin surely is an example of the former, but is a duck or a flamingo (a water-bird, but one that only stands or walks in water)? Classifying negligence as slight, ordinary, or gross is similarly imprecise and is related to the function or purpose of the classification. As suggested earlier, courts in a number of states have found the classification so imprecise that they have abandoned the effort.

Gross negligence and willful misconduct may both be considered compounds. A compound is a "linguistic unit which is composed of elements that function independently in other circumstances."43 Compound words consist of two or more free morphemes (or lexemes—units of semantic value)—as in compound nouns like "washing machine." Compound terms are a lexeme made up of a sequence of two or more lexemes that may have properties that differ from the properties of the individual lexemes, such as "kick the bucket" meaning "die." Another example of a compound that shows the two elements meaning

43. STEVEN PINKER, WORDS AND RULES 270–75 (1999).
44. DAVID CRYSTAL, DICTIONARY OF LINGUISTICS AND PHONETICS 78 (4th ed. 1997).
something quite different when joined from when separate is “pink slip.” This compound unit has a well-known meaning as a letter or other communication terminating employment. One might receive a “pink slip” that is neither pink nor a slip. It would not be incoherent to refer to a “green pink slip,” for “pink” no longer has any reference to color when joined with “slip” in the context of employment. The term now describes a specific function or purpose of the communication, not the form, nor the quality of color. The etymology of “pink slip” may have been with a termination notice that was a “pink” “slip,” but the meaning is now divorced from its origin. In the context of employment, “pink slip” has a clear meaning as a single unit of speech, writing, or thought. This does not mean there cannot be continuing uses of the separate elements (as in a pink ribbon or a small slip of paper). In a context other than employment, the two together will not constitute a compound, such as speaking of a pink slip to be found in the lingerie department of a store. Nor does the fact that a compound term exists mean that it is the sole method for expressing a particular concept. “Termination notice” may mean the same thing as “pink slip.” Numerous compound terms have lost identification with one or more of the words that make them up, such as “Labrador retriever” or “purple prose” or “silk stocking firm.”

“Navigable waters” and “responsible party” are examples of defined compound terms of the OPA, while “gross negligence” and “willful misconduct” are undefined compound terms of the OPA.

“Gross negligence” and “willful misconduct” are within categories found in the law of “negligence” and “misconduct,” but they are special members of each. Although they consist of words found in common English (and some judges have regarded such terms as “ordinary English”), they have almost exclusive use in legal applications. A close relative of theirs in the legal lexicon is “proximate cause”; it, too, is a compound term, largely incomprehensible or incoherent to those untrained in law, as are “minimum contacts” or “primary jurisdiction.” Despite the best efforts to formulate a consistent rule to define each of these, the boundaries separating them from other members of the “negligence” and “misconduct” families are fuzzy at the margins. And unlike the terms “cat” and “bird” (or “fault” in tennis or geology), physical features cannot be used in defining members of the family to which the terms apply. As Frederick Schauer has said of “liberty” and “equality,” the terms “gross negligence” and “willful misconduct” (as well as their close associate “proximate cause”) “are pervasively indeterminate. It is not that such terms have no content whatsoever; it is that every application, every concretization, every instantiation requires the addition of
supplementary premises to apply the general term to specific cases." Pervasive indeterminacy has not deterred courts and others from giving content to such terms and juries from applying them, even with the only requirement being "a mere gleam, glimmer, spark, the least particle, the smallest trace, a scintilla, in support of the theory of the complaint." Because Congress has chosen to include these terms as part of the OPA, a court (or perhaps a jury) cannot avoid giving or finding their content.

An examination of the characteristics and usages of gross negligence and willful misconduct gives some guidance to what courts and statutes have treated as "gross negligence" and "willful misconduct" over centuries for several purposes and thus illuminates what Congress, state legislatures, and courts likely intend when they employ the terms. The focus here will be on "gross negligence," but it is often treated as indistinct from or identical with "willful misconduct." "Gross negligence" is a compound, with ancient roots, that developed as a legal term in common law torts but has become significant in contract law and in a variety of statutes.

A determination of "gross negligence" is to serve a specific purpose or function, not merely to describe negligence by an adjective for which another adjective could function. Contrary to the quip of Baron Rolfe who said he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet," to judge that a party has been "very negligent" is not a very good substitute for judging the party as "grossly negligent." This can be seen by substituting others synonyms for "gross"—such as "arrant negligence," "immoderate negligence," "inordinate negligence," or "manifest negligence." An individual might use such a term with the same intent, but these variants would find no common usage in case law or statutes and would serve no apparent purpose (other than vituperation). Terms like "gross negligence," "willful misconduct," and "proximate cause" are examples of what Frederick Schauer has called "lawspeak," a word that "can be viewed as a language for a subcommunity in the community of English speakers, capable of doing within the subcommunity what ordinary language does within the larger community of English speakers."  

46. Lankford v. Mong, 214 So. 2d 301, 302 (Ala. 1968).
48. Schauer, supra note 45, at 528.
The meaning of “gross negligence,” then, is tied to the function to which the label may be subservient. As with many other legal determinations, it may be a fine point to say that the category determination or the consequence came first. To return to the metaphor of the line on which markings are strung, “gross negligence” has no significance until further markings are strung on the line, including “exemplary/punitive damages,” “contributory negligence,” or “immunity from liability.” Once the string of words is complete, the words form a single unit of thought. We shall return to this in the discussion of function below.

C. Tort Law

Concepts of tort, contract, property, and crime are social phenomena in most cultures and have a long history in Western political and legal systems. These legal categories probably correspond to categories in the human mind about relations of individuals to one another as a means of organizing facts about relationships, just as “family” and “family law” arise from facts arising from biological relationships. Thus property concerns one’s relations to particular things (corporeal, incorporeal, realty, personality, etc.); contract pertains to voluntary associations; tort relates to duties owed to other persons generally; and crime pertains to actions toward others that threaten a social order more seriously than torts. These categories overlap because relationships overlap. The acts toward one individual can constitute a tort (intentional or negligent) and also appear as a threat to the community at large, thus a crime.

In tort law (whether common law or statutory) we are concerned with bilateral relations, persons to other persons (or their property). What one person does with regard to his or her person or property has largely been beyond the reckoning of jural relations. A person may be “negligent” in his or her actions, even recklessly so, and that is of no concern to law or society until that conduct injures or threatens to injure another. A man may drive his own car in a drunken stupor on his own property while firing a gun into his own trees, and he is not “negligent” if his conduct does not have the potential to injure others. The negligence is not a characteristic of behavior but a reference to the potential consequences of the behavior.

49. Of course his insurer may decline to cover damage to his car or trees or person, but that involves the actor’s relations with a third party. They may have allocated responsibility by contract.
Our concept of “negligence” thus necessarily involves both other persons and a context of one’s actions. Second, a degree of negligence pertains not to the act under consideration in isolation. A third point is that until an injury by another person is experienced, there is no occasion to make a judgment about the quality of conduct of the actor. Although it is true that the state may be concerned from a criminal perspective whether a person has driven negligently, that is a different inquiry from tort. Inevitably, then, in tort the determinations of negligence and injury to another arise simultaneously, and the jural relation of the two persons focuses upon both parties, actor and injured.

In the mind, the degree of negligence is linked to the magnitude of the injury. A negligent extinguishment of a campfire or shooting of fireworks will be deemed minor when the injury is limited to a few feet of brush next to the fire. The same act of shooting a firework is more likely to be characterized as “gross negligence” when it takes place on a dry day and the resulting fire destroys several thousand acres of property.

A reading of even a small number of the thousands of cases that take up and apply gross negligence as a standard readily confirms that “gross negligence” is not so much a description as it is a conclusion, one that merges the actor’s act(s), the actor’s state of mind, and the injured’s injury. The term “gross negligence” in these cases identifies both the action of the wrongdoer and the effects of that action. Thus the degree of negligence and magnitude of risk are closely connected. In the 1822 case of Tracy v. Wood, Supreme Court Justice Story, sitting as circuit justice, noted:

If a bag of apples were left in a street for a short time without a person to guard it, it would most certainly not be more than ordinary neglect. But if the bag were of jewels or of gold, such conduct would be gross negligence. In short care and diligence are to be proportioned to the value of the goods, and the temptation and facility of stealing them and the danger of losing them.

To paraphrase: the greater the degree of potential (or actual) harm, the greater the degree of negligence.

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51. See Cecil A. Wright, Gross Negligence, 33 U. TORONTO L.J. 184, 201 (1983) (“Once establish[ed] that the risk to which the plaintiff or his property is exposed is of unusually high magnitude and that as opposed to that the utility of the act or omission causing the risk is of little or no social value, liability follows as a matter of course.”).
52. Tracy v. Wood, 24 F. Cas. 117 (Story, Circuit Justice, C.C.D.R.I. 1822).
III. SOURCES OF NORMS AND THEIR INTERPRETATION

A norm of behavior is a construct of social reality. For present purposes, i.e., human law, a norm exists only in the minds of human beings. A norm has content only as human minds give it content. The question to be addressed, then, is not, "What is ‘gross negligence’ or ‘willful misconduct’?", for they are not things that have empirical existence. They are always human judgments. Rather, we must ask, "What do relevant persons say ‘gross negligence’ or ‘willful misconduct’ is?" The nature and quality of a norm depends upon its source. For purposes of the work of law courts which will apply norms, the source of a norm may be another court (i.e., common law), a legislative body or an agency of the government authorized to specify norms, or the parties to an agreement.

A. Common Law, Judically Created Norms

Common law courts generally have power to specify and apply norms because the legislature (sovereign) has authorized the courts to do so, often without providing the content of the norm. Because much of tort law in the United States came from an original common source, the common law of England, we often operate from an assumption that tort law is the same from state to state. This is an illusion, albeit an occasionally attractive one. In reality, each state has its own law of torts. If the supreme court of one state looks to precedent in another state it is by grace and not by the authority of the other state. Thus the standard of “negligence” in one state is a different standard of “negligence” from that in another state even if the content and phrasing of the standard is


54. New states often explicitly adopt the law of the prior sovereign, providing it with fresh authority. In the states of the United States, these adoptions have been called “reception statutes,” expressly “receiving” the common law of England as of a specific date. See generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1780–1860), at 4 (1977); Joseph Fred Benson, Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri, 67 Mo. L. Rev. 595, 605–06 (2002). In contrast, the constitution of the Republic of Texas incorporated the law of a different sovereignty from its predecessor, Mexico: “The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases, the common law shall be the rule of decision.” REPUBLIC OF TEX. CONST. of 1836, art. IV, § 13.
identical in both; this is because its source is from a different sovereign.

By and large it has been acceptable for state and federal lawmakers to leave substantial areas of private law—tort, contract, and property law—for development by common law courts. A part of this acceptance has been the understanding that the function of the courts is to administer rectificatory, or restorative or corrective, justice. Tort law (or the law of delict) has ancient roots in human thought about natural justice, whether one posits the existence of a natural moral order or accepts the modern theory that a sense of justice arises from a Darwinian, evolution-based, sociobiological, epigenetic imperative of reciprocity conducive to species survival. A concept of natural justice is that the courts should restore to the persons injured the amount by which they were injured. Redress of private grievance through an award of damages has been a feature of European law for several thousand years. Although disputed by some scholars in the late nineteenth century and much of the twentieth century, other scholars have reclaimed the ancient roots of tort law as a fault-based system.

The development of tort law by a judiciary has an ancient basis in the concept of natural justice—from the time of the ancient Greeks, if not earlier. The Code of Hammurabi contained elements of restoration to a victim of goods wrongfully appropriated or damaged by neglect and also recognized the importance of intention in determining the penalty for wrongdoing. Roman law divided negligence into three degrees: lata culpa (gross negligence), levis culpa (ordinary neglect), and levissima culpa

55. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 106 (7th ed. 1775) (“[T]t is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.”).


As with modern Anglo-American law, Roman law distinguished civil tort actions from alternative criminal proceedings.

Rather than recount the academic controversies of recent years, we can provide the expression of natural justice given anciently by Aristotle:

"The justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality; not according to that kind of proportion, however, but according to arithmetical proportion." For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being

60. Id. at 40.
61. Id. at 41.

The problem of "rectificatory justice" has nothing to do with punishment proper but is only that of rectifying a wrong that has been done, by awarding damages; i.e., rectificatory justice is that of the civil, not that of the criminal courts. The parties are treated by the court as equal (since a law court is not a court of morals), and the wrongful act is reckoned as having brought equal gain to the wrong-doer and loss to his victim; it brings A to the position A + C, and B to the position B - C. The judge's task is to find the arithmetical mean between these, and this he does by transferring C from A to B. Thus (A being treated as = B) we get the arithmetical "proportion"

\[(A + C) - (A + C - C) = (A + C - C) - (B - C)\]

or

\[(A + C) - (B - C + C) = (B - C + C) - (B - C).\]

63. The Supreme Court has echoed Aristotle in establishing (or finding) constitutional limitations on the evidence that may be considered in an award of punitive damages. Speaking for the Court, Justice Kennedy wrote:

The courts awarded punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .

wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it; for in the case also in which one has received and the other has inflicted a wound, or one has slain and the other been slain, the suffering and the action have been unequally distributed; but the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant. For the term "gain" is applied generally to such cases, even if it be not a term appropriate to certain cases, e.g.[,] to the person who inflicts a wound—and "loss" to the sufferer; at all events when the suffering has been estimated, the one is called loss and the other gain. Therefore the equal is intermediate between the greater and the less, but the gain and the loss are respectively greater and less in contrary ways; more of the good and less of the evil are gain, and the contrary is loss; intermediate between them is, as we saw, the equal, which we say is just; therefore corrective justice will be the intermediate between loss and gain. This is why when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice; and they seek the judge as an intermediate, and in some states they call judges mediators, on the assumption that if they get what is intermediate they will get what is just. The just, then, is an intermediate, since the judge is so. Now the judge restores equality; it is as though there were a line divided into unequal parts, and he took away that by which the greater segment exceeds the half, and added it to the smaller segment. And when the whole has been equally divided, then they say they have "their own"—[i.e.,] when they have got what is equal.64

As suggested from the Aristotle quote, in tort and property law, injury has generally been measured by direct damages—a difference in value before and after the injury—and by the expectation interest in contracts. As the law has developed in each of these three categories, the foreseeability of injury to the actor has been a limitation on recovery by an injured person. With limited exceptions, it has not been thought the role of the common law courts to punish behavior in tort, except in the category of

64. ARISTOTLE, supra note 62, at 99–100. The author does not read Aristotle as advancing a pure restitution approach. See Perry, supra note 57, at 455.
intentional torts, such as battery, assault, and intentional infliction of mental distress. Instead, the legislatures have been the source of standards for which punishment of the individual is appropriate, with punishment exacted by the state through incarceration, criminal fines, or civil penalties collected by the state and retained by the state. Generally people have expected the state to give fair warning of what behavior was expected of individuals so that they could guide their choices of action accordingly. Because the state deprives people/wrongdoers of liberty and/or property, and because the state directly benefits by taking of the property, interpretive standards have developed that disfavor the state. Penal statutes are generally read strictly, following a common law principle of lenity.6

An exception to the default rule of compensation has developed in tort law concerning punishment. Certain torts have been regarded as giving rise to punitive or exemplary damages. The rationale is that penalties should be imposed to deter conduct by others in similar situations. The expansive imposition of punitive damages has given rise to concerns about due process on multiple grounds. Should common law courts and juries both define forbidden conduct and determine the level of punishment? Do actors have fair warning of what behavior may lead to what consequences?

For many years, legal authorities have sought to bring about some uniformity in areas of private law and public law among the states, because we are also part of one larger legal entity and share similar concerns from state to state. National legislation has been considered in some areas but has generally been rejected as an approach in the fundamental categories described earlier, that is tort, contract, property, criminal, and family law. Another

65. See generally Lawrence M. Solan, Law, Language, and Lenity, 40 WM. & MARY L. REV. 57, 58 (1998). Lenity is the common law principle that “penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.” Id. (quoting NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.03 (5th ed. 1992)) (internal quotation marks omitted).

approach has been to have each sovereign (state) adopt identically worded statutes so that at least the words will be identical, if not the source. The paradigm of this approach is the Uniform Commercial Code, all or most of which has been adopted by legislation in all states. Even here, uniformity of norms is not achieved: the state courts have not embraced uniform interpretation of the identical language,\(^6\) and some states try to achieve favor for their own residents by adopting non-uniform provisions.\(^6\) A third attempt at regularity of private law across state lines has been the creation of Restatements of the Law in various subjects, such as the *Restatement of Torts* and the *Restatement of Contracts*. These have been promulgated by the American Law Institute, which is not a legislative body with authority to make binding rules of behavior. The norms expressed have no more authority than the author of a learned treatise who describes the practices of courts or who expresses an opinion of what the law generally has been or ought to be when applied by a court in the future. A court may accept or reject the norm expressed by the Restatement (or even a learned author).

The term "gross negligence" and words of similar import are common in common law tort cases, and may be found in state statutes as well as the federal statutes under consideration. Certain contracts in the oil and gas industry and insurance contracts may also employ the same term. Separate interpretation of common law

\(^6\) A notorious example is that of U.C.C. section 2-207, which has spawned competing interpretations of identical language. See Northrop Corp. v. Litronic Indus., 29 F.3d 1173 (7th Cir. 1994); Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); Constr. Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505 (5th Cir. 1968); Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982); see also ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). In some areas, such as the overlap between tort and contract law in warranty matters, the American Law Institute has given states a menu of approaches to choose from, thereby emphasizing the local character of nominally uniform laws. See, e.g., U.C.C. § 2-318 (2003).

\(^6\) Terry I. Cross, *Oil and Gas Product Liens—Statutory Security Interests for Producers and Royalty Owners Under the Statutes of Kansas, New Mexico, Oklahoma, Texas and Wyoming*, 50 CONSUMER FIN. L. Q. REP. 418, 418 (1996). Because Texas, Wyoming, and Kansas have all designated their products lien statutes as section 9.319 (or 9-319) of their respective versions of the Uniform Commercial Code, the statutes for these three states cross-refer to these non-uniform enactments as the “section 9.319 statutes.” On the treatment of these non-uniform statutes, see *In re SemCrude, L.P.*, 407 B.R. 82 (Bankr. D. Del. 2009) (Kansas), and *In re SemCrude, L.P.*, 407 B.R. 112 (Bankr. D. Del. 2009) (Texas).
tort terminology, statutes, and contracts each requires some differences in interpretive factors. It is certainly true that the standards of tort doctrines or property or contract doctrines and rulings from state to state may be very similar, but they may also be very different. So when one seeks to give content to “gross negligence” or “willful misconduct” one may have to ask first, “In which state?”; “Under which state statute?”; “Which federal case or statute?”; or “Under federal admiralty/maritime law?”

Courts and scholars have often rejected the notion of degrees of negligence. One early work on tort law noted:

I confess myself careless, ignorant, and indifferent upon this whole subject of the degrees of negligence. It is plain that such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases in admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements. . . . No effort can extract from the current American decisions the conclusion that there are three degrees of culpable negligence—slight, ordinary, and gross.

Thompson’s skepticism about degrees of negligence was shared by the Illinois Supreme Court. The case of Chicago, Rock Island & Pacific Railway Co. v. Hamler held valid a contract exempting a railroad from liability to a Pullman porter for negligent injury, even though the negligence was characterized as gross.

We are of the opinion that no distinction as to the rights of the parties can be founded upon speculation as to different degrees of mere negligence, and that the trial court erred in instructing the jury to find for the plaintiff if they concluded that the defendant was guilty of gross negligence. Formerly, this court, in expounding the doctrine of comparative negligence, classified negligence into three degrees, as slight, ordinary, and gross; but that doctrine was long ago abolished, and, while negligence

70. 1 SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS § 18 (1902).
71. 74 N.E. 705 (Ill. 1905).
may since that time have been alluded to in opinions as gross or slight, no weight has been given to the question, and no liability has been based on any distinction in degrees unless the negligence was willful or intentional, where it assumes an entirely different character from that of negligence in its ordinary meaning. In negligence, merely, there is no intention to do a wrongful act or omit the performance of a duty.\textsuperscript{72}

Other judges have found “gross negligence” to be part of ordinary language and understanding and easily applied by a jury of citizens. Under Nebraska’s comparative negligence statute\textsuperscript{73} the contributory negligence of a plaintiff would not defeat recovery where the defendant’s negligence was gross and the plaintiff’s negligence was slight in comparison.\textsuperscript{74} In a car crash case, the defendant appealed a judgment for the plaintiff, contending that the trial judge had not given a proper instruction on the meaning of “gross negligence” and “slight negligence.”\textsuperscript{75} The court said that no instruction was necessary:

The complaint relates to the fact that the court did not give the requested definition of slight negligence and gross negligence. The court did, however, properly define negligence, but did not undertake to define the terms “gross” and “slight” and we think it was not incumbent upon it so to do. The words “slight” and “gross” are words of common use which are understood by every one of ordinary intelligence. An attempt to define these words would have been superfluous. Any one of common sense knows that slight negligence actually means small or little negligence, and that gross negligence means just what it indicates, gross or great negligence. No error was committed in the refusal to define words of ordinary meaning which are in common, every-day use.\textsuperscript{76}

\textbf{B. Statutory Norms}

Where a norm of human conduct is the product of state or federal legislation, one must ask, “What did the legislature

\textsuperscript{72} Id. at 707–08.
\textsuperscript{73} NEB. REV. STAT. § 25-21,185 (West, Westlaw through 2010 2d Reg. Sess.).
\textsuperscript{74} Monasmith v. Cosden Oil Co., 246 N.W. 623, 624 (Neb. 1933).
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 625.
intend?" If government is demanding certain conduct and punishing misconduct, citizens and other subjects should be able to know what conduct is expected of them. How can a person conform to a standard that cannot be known or understood? Did the legislators intend a particular content to a norm of conduct? Often a legislature will define a term explicitly. In other instances, a legislature will leave it to an administrative agency to furnish the content of a norm. In a great many cases it will be the task of a court to supply the content of a norm, where inferable from the words of the statute or the purposes to be served by the statute. Citizens do not have the resources of a court to inquire into the meaning of the words of a statute, yet they must conform at peril to their liberty and their property. The concept of fair warning is deeply rooted in the federal and state constitutions and finds expression in Locke's *Second Treatise* that was the basis for such constitutions:

> [W]hoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution of such laws . . . .

The problems of interpreting a congressional statute are exacerbated in our federal system where Congress may have used terminology that may have different significance from state to state. Did Congress intend to have varying interpretations? Did Congress intend to adopt one meaning from among the different treatments? Did Congress intend some general meaning, like that emerging from a statement of principle in the *Restatement of Torts* or *Restatement of Contracts*? Or did Congress have its own unique meaning, inferable from the purpose and context of the statute? Perhaps Congress intended to confer on an agency or the courts a broad authority to develop a meaning on an ad hoc basis. Are the words of a statute to constrain a court (or agency) or to empower it?

**C. Interpretation of Statutory Terms**

The problems of interpretation of a congressional statute that employs terminology found in common law cases is illustrated by the process of interpretation of the word "employee" in *NLRB v.*

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Hearst Publications, Inc. The National Labor Relations Act (the Wagner Act) provides that employees have a right to bargain collectively with their employers. Certain newspaper carriers sought to bargain collectively with publishers of four Los Angeles California daily newspapers; the latter refused, asserting the carriers were independent contractors rather than employees. The statute gave little guidance as to the meaning of "employee."

Speaking for the Court, Justice Rutledge observed that there was no simple, uniform, and easily applicable test. He noted that within a single jurisdiction a person who is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. The problem was even more difficult when one had to consider a term used in many states with varying import. What alternatives might be considered? One approach, he indicated, was to refer the decision of who are employees to local state law. Surely Congress did not intend this: "It would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions make in applying the distinction for wholly different purposes." A second possibility was to import wholesale the traditional common law conceptions or "some distilled essence of their local variations" as exclusively controlling limitations upon the scope of the statute's effectiveness. The problem with this alternative was that it "would be merely to select some of the local, hairline variations for nationwide application." Congress surely intended national uniformity, so the term "employee" had to be answered "primarily from the history, terms and purposes of the legislation." Rather than have the federal courts attempt this, the task had been assigned primarily to the National Labor Relations Board, the agency created by Congress to administer the National Labor Relations Act.

Justice Roberts, dissenting, thought that the federal courts should supply the meaning to the term "employees." This he said was something the federal courts had long done in similar circumstances:

78. 322 U.S. 111 (1944).
79. Id. at 123.
80. Id. at 122.
81. Id. at 123.
82. Id.
83. Id. at 124.
84. Id. at 136 (Roberts, J., dissenting).
As a result of common law development, many prescriptions of federal statutes take on meaning which is uniformly ascribed to them by the federal courts, irrespective of local variance. . . . [It was to a] common, general, and prevailing understanding [of "employee"] that Congress referred in the statute . . . .

Is the Hearst approach available for interpretation of gross negligence and willful misconduct under the OPA? To apply Hearst, it would be necessary for the courts to look to a federal administrative agency with the authority and expertise to interpret and develop the statutory term in question. Although the United States Coast Guard has several roles under the OPA, such as designating a responsible party or administering Oil Spill Trust Funds, neither it nor any other agency has a pervasive function under the OPA comparable to the National Labor Relations Board’s role under the National Labor Relations Act in applying the term “employee.”

D. Cluster of Ideas

Because the agency expertise approach of Hearst is not available, the courts will probably turn to the second methodology suggested by Justice Rutledge in Hearst, finding a “distilled essence” of the variations on gross negligence and willful

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85. Id.
86. The Coast Guard has, however, defined “gross negligence” and “willful misconduct”:

Gross Negligence. Negligence is a failure to exercise the degree of care, which a person of ordinary caution and prudence would exercise under the circumstances. A greater degree of care is required when the circumstances present a greater apparent risk. Negligence is “gross” when there is an extreme departure from the care required under the circumstances or a failure to exercise even slight care.

Willful Misconduct. An act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences.


The National Pollution Funds Center (NPFC) has interpreted and applied the gross negligence standard of the OPA in one case, and its interpretation was upheld in Water Quality Insurance Syndicate v. United States, 632 F. Supp. 2d 108 (D. Mass. 2009). The NPFC has interpreted and applied the willful misconduct standard of the OPA in another case, and its interpretation was rejected in Water Quality Insurance Syndicate v. United States, 522 F. Supp. 2d 220 (D.D.C. 2007). Both cases are discussed at length below.
misconduct in common law cases. The Supreme Court has employed such an approach to common law usage under the rubric of a “cluster of ideas” interpretive technique. As framed by Justice Jackson in Morissette v. United States,

where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.\(^{87}\)

Morissette interpreted a criminal statute that did not mention intent, and the Court found that it should not be construed as eliminating that element from the crimes denounced. The same approach was followed in the interpretation of “punitive damages” under the Federal Tort Claims Act. In Molzof v. United States the court relied on the “cluster of ideas” approach of Morissette to give meaning to “punitive damages” within the federal statute: “We agree with petitioner’s interpretation of the term ‘punitive damages,’ and conclude that the Government’s reading of [section] 2674 is contrary to the statutory language. Section 2674 prohibits awards of ‘punitive damages,’ not ‘damages awards that may have a punitive effect.’”\(^{88}\) The Court said that there was no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946.\(^{89}\) At that time “punitive damages” was already a legal term of art that had a widely accepted common law meaning.

With the “cluster of ideas” approach in mind, we can identify certain salient or common features found in cases and statutes using “gross negligence” and “willful misconduct.”


\(^{89}\) Molzof, 502 U.S. at 307–08.
IV. THE USAGES OF GROSS NEGLIGENCE AND WILLFUL MISCONDUCT

A general treatment of gross negligence and willful misconduct in tort law will look to the usages of these terms that long preceded the enactment of the OPA. As suggested, Congress will be presumed to have such usages in the minds of its members when they have spoken collectively as an organ of law. A distinction between gross negligence and willful misconduct can be made in a general way by a specific illustration, while recognizing that the two will overlap or merge at their margins. With the appropriate perspective, they become indistinguishable.

Under the “Rule of Capture,” a principle of oil and gas law found in all producing states, a landowner or mineral interest owner is allowed to produce oil and gas from under his or her property even if this drains oil or gas from the property of a neighbor.

However, the owner may not negligently or intentionally harm a neighbor’s right likewise to produce. Production for one’s own beneficial use is not “misconduct” under this rule. A well blowout resulting from an operator’s inadequate drilling mud is the result of negligence (or perhaps gross negligence), and the operator will be liable to the neighbor to the extent of the injury. The injury in such an instance has occurred while the operator was doing something it had a right to do but performed negligently.\(^{90}\)

Suppose that the operator of the well has no market for his oil or natural gas and to spite his neighbor opens up valves on his own well to discharge the oil or natural gas uselessly. This is not an example of negligence but of willful misconduct.\(^{91}\) For this, the operator will be subject to an injunction and/or liable in tort.

As indicated in the previous paragraph, a distinction can be made ordinarily between gross negligence and willful misconduct, but that does not mean that Congress intended a distinction be made between the two for most purposes.\(^{92}\) By specifying both,

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90. Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948).
91. See Higgins Oil & Fuel Co. v. Guaranty Oil Co., 82 So. 206 (La. 1919), in which a landowner left a well uncapped to decrease the pumping efficiency of his neighbor’s well. See also Louisville Gas Co. v. Ky. Heating Co., 77 S.W. 368 (Ky. 1903) (enjoining the operation of a lampblack factory on the ground that it was operated only to waste the gas and thus destroy the plaintiff).
92. The OPA in one provision, section 2716(f), does treat willful misconduct differently from gross negligence for purposes of the liability of a guarantor of a responsible party. The one case that has arisen under this provision illustrates vividly how gross negligence and willful misconduct melt into one another. See infra notes 225–32 and accompanying text (discussion of
Congress has indicated perhaps that no distinction need be made as either gross negligence or willful misconduct can be the basis for the loss of limitation on liability. Indeed, Congress in CERCLA has run the two together in providing that for the purpose therein, "reckless, willful, or wanton misconduct shall constitute gross negligence." It is very common in the gross negligence cases to equate gross negligence with willful misconduct, though some courts would say this confuses two distinct concepts.

The transition of an act from a negligent act to an instance of gross negligence that should be treated in the same way an intentional act is treated occurs when the negligent act is accompanied with or followed by a state of awareness of the injury that may flow as a consequence of the act, especially a continuation of a course of conduct. The negligence of the actor becomes willful misconduct because the actor has willfully and knowingly chosen to act in a manner he knows may bring harm to others. It is this state of mind and element of choice that separates gross negligence from ordinary negligence. Just as Congress in CERCLA has identified "gross negligence" with "reckless, willful, or wanton misconduct," so, too, have courts and commentators made the same linkage. The Louisiana Civil Law Treatise identifies "gross fault" in nearly identical terms:

Elaborating on the meaning of the words willful, wanton, and reckless, Louisiana courts have stated that these terms apply to conduct that is still merely negligent, rather than intended to harm, but which stems from a state of mind so far from the proper one that it is treated in many respects as if harm were intended, in that it usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.

The facts of Elliff v. Texon Drilling Co. could be varied in a hypothetical case to raise the action to one of gross negligence. In Elliff the jury found that respondents were negligent in failing to use drilling mud of sufficient weight in drilling their well and that such negligence was the proximate cause of the well blowout. Nothing in the case suggests that the drilling company was aware...

94. SAUL LITVINOFF, OBLIGATIONS § 11.12, in 6 LOUISIANA CIVIL LAW TREATISE (Westlaw through 2010–2011 update).
95. 210 S.W.2d 558 (Tex. 1948).
of the insufficient weight of the drilling mud. However, had the company been conscious of the insufficiency and proceeded nevertheless, this probably would have supplied the element of awareness necessary for gross negligence. Thus one case involving damage from a bad well completion or blowout may involve only ordinary negligence, while another may rise to the level of gross fault or gross negligence upon a proper showing of facts.

A. Function of “Gross Negligence”

When we describe “gross negligence” or “willful misconduct” as an operative of a formula, we are stating its function. As the British philosopher Gilbert Ryle once wrote, “[T]o know what an expression means is to know how it may and may not be employed.” The use of “gross negligence” as an operative developed in two formulae of tort law and in grants or recognitions of immunity from tort liability both in statute and in common law. Similar functions for an equivalent concept are found in Roman law and civil law in the doctrine of *culpa lata dolo aequiparatur*—signifying that gross negligence is equal to fraud or intentional tort.

Does consequence follow operative or does operative follow consequence? Characterizing conduct of a party as constituting “gross negligence” is to serve a function: it is to control or to justify the imposition of liability of a certain sort. Judges or juries who believe that tort law should be punitive or that the rule of “comparative negligence” comports more closely with natural justice than the doctrine of “contributory negligence” are likely to

96. See Mobil Exploration & Producing U.S. Inc. v. Certain Underwriters Subscribing to Cover Note 95-3317(A), 837 So. 2d 11 (La. Ct. App. 2002). In the case, Cliffs' pulling drill pipe out too quickly caused a well to blow out; the loss of hydrocarbons and/or damage to a reservoir arose from the simple negligence of Cliffs in causing the well blowout and failing to properly control same. There was no factually supportable allegation that this negligence rose to the level of gross negligence.


99. “The Roman law recognized at least two grades of [culpa], namely *culpa lata*, corresponding in a general sense to the term ‘gross negligence’ of the Anglo-American law, and *culpa levis*, which consisted in the absence of such conduct or care as is observed by a good father of a family . . . .” Charles Summer Lobinger, *Culpa*, in *17 CORPUS JURIS* 393, 393 (1919) (footnotes omitted).
find more readily that the actions of a defendant should be
categorized as "gross negligence" or "willful misconduct" in
order to justify a departure from the default rule. They will be
reluctant to separate the category determination from the
consequence no matter how hard an earlier court or a legislature
has tried to confine the scope of these terms by a verbal formula.

The concept of "gross negligence" developed as a means of
imposing more severe consequences for a party causing injury than
would ensue from tort rules applicable to "negligence." The
concept of "gross negligence" carries with it, then, a judgment that
the conduct of the injury-causing party is more blameworthy than
"negligence" itself would suggest. Here it is useful to consider the
Aristotelian notions of virtue and justice. For Aristotle, virtue and
justice necessarily involve choice rather than merely looking to the
consequences of a person’s actions:

Of voluntary acts we do some by choice, others not by
choice; by choice those which we do after deliberation, not
by choice those which we do without previous deliberation.
Thus there are three kinds of injury in transactions between
man and man; those done in ignorance are mistakes when
the person acted on, the act, the instrument, or the end that
will be attained is other than the agent supposed; the agent
thought either that he was not hitting any one or that he was
not hitting with this missile or not hitting this person or to
this end, but a result followed other than that which he
thought likely (e.g.[,] he threw not with intent to wound but
only to prick), or the person hit or the missile was other
than he supposed. Now when (1) the injury takes place
contrary to reasonable expectation, it is a misadventure.
When (2) it is not contrary to reasonable expectation, but
does not imply vice, it is a mistake (for a man makes a
mistake when the fault originates in him, but is the victim
of accident when the origin lies outside him). When (3) he
acts with knowledge but not after deliberation, it is an act
of injustice—e.g.[,] the acts due to anger or to other
passions necessary or natural to man; for when men do
such harmful and mistaken acts they act unjustly, and the
acts are acts of injustice, but this does not imply that the
doers are unjust or wicked; for the injury is not due to vice.
But when (4) a man acts from choice, he is an unjust man
and a vicious man.\footnote{ARISTOTLE, supra note 62, at 107.}
Injury-producing actions that are made with knowledge of risk of injury to others and with choice of the risk are more blameworthy than mere mistakes. That element of choice is important for another reason: attaching more severe consequences to injury-causing conduct can serve as a deterrent to behavior when behavior involves choice and a weighing of consequences. Hence the application of “gross negligence” as an operative in a tort formula has generally involved conduct that reflects choice or conscious decisionmaking by a defendant. As an example outside of the “gross negligence” realm, among the factors to be considered in awarding punitive damages in Alabama law are the degree of reprehensibility of the defendant's conduct, the defendant’s awareness, and whether the wrongful conduct was profitable to the defendant.101 An exhaustive study of the meaning of “gross negligence” in 1927 observed:

[T]he whole basis both of our own law of negligence and the Roman theory of culpa finds its origin essentially in an idea of morals. What we have come to regard as one of the leading principles of tort liability is worked out in a period when “equity,” “good faith” and “good conscience” are the battle cries; when under the natural law influence, men's conduct is measured by viewing it as attaining or failing to attain the idea—the natural standard.102

By choosing to attach consequences for actions that are determined to be gross negligence and willful misconduct, Congress has invoked standards that require moral judgment about conduct.

B. Gross Negligence and Punitive Damages

One of the occasions for characterizing conduct as “gross negligence or willful misconduct” is the application of punitive damages to injury-causing conduct that a judge or jury believes is deserving of punishment beyond compensatory redress of injury. The theory behind punitive damages is that conduct of a party can affect both the private and public interest; punitive or exemplary damages will deter such future conduct. The United States Supreme Court noted that “the consensus today is that punitives

102. Wright, supra note 51, at 187.
are aimed not at compensation but principally at retribution and
deterring harmful conduct.”

As long ago as 1847 this rationale was put forth in a treatise by
Theodore Sedgwick (1811–1859) on damages in which “gross
negligence” was among the types of conduct calling for punitive
damages:

Thus far we have been speaking of the great class of cases
where no question of fraud, malice, gross negligence, or
oppression intervenes. Where either of these mingle in the
controversy, the law instead of adhering to the system or
even the language of compensation, adopts a wholly
different rule. It permits the jury to give what it terms
punitory, vindictive, or exemplary damages; in other words,
bloods together the interest of society and of the aggrieved
individual, and gives damages not only to recompense the
sufferer, but to punish the offender.

The basic formula for tort liability is, “If A has injured B
through [operative] then A is liable to B for [consequence].” When
the consequence to ensue is either compensatory damages or
punitive damages, the formulae are expressed thusly:

If A has injured B through X [negligence] then A is liable
to B for #1 [compensatory damages];
however,
if A has injured B through Y [gross negligence] then A is
also liable to B for #2 [punitive damages].

The consequence follows the determination of the operative,
just as the operative will follow a determination of the
consequence. That is, in the application of either of the two
formulae, deciding one side or the other is enough because one
presupposes the other. As put by J.L. Austin, the statement “‘All
Jack’s children are bald’ presupposes that Jack has some children.
We cannot say ‘All Jack’s children are bald but Jack has no
children.’”105 One could hardly say with fidelity to the formula, “I
find that punitive damages should be awarded in this case and that
defendant was not grossly negligent.”

The states are divided about the availability of punitive
damages for injuries resulting from “gross negligence.” A few

103. Baker, 554 U.S. at 492.
104. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 38–39 (1847).
states do not allow punitive damages for tort in almost all cases. However, a majority of states allows an award of punitive damages upon a finding of negligence beyond ordinary negligence or for negligence that is tantamount to an intentional wrong. A standard treatise on tort law observes that "[s]omething more than the mere commission of a tort is always required for punitive damages." Prosser and Keeton goes on to note that:

There is general agreement that . . . mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," a term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.

Typical of the torts for which such damages may be awarded are assault and battery, libel and slander, deceit, seduction, alienation of affections, malicious prosecution, and intentional interferences with property such as trespass, private nuisance, and conversion. But it is not so much the particular tort committed as the defendant’s motives and conduct in committing it which will be important as the basis of the award.

The Restatement (Second) of Torts approves of the award of punitive damages. Section 908 states in part: “Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.” Reporter’s note (b) to this section states: “Gross negligence, in the sense merely of an extreme departure from

107. 1 SCHLUETER, supra note 106, at 634–35 (listing 25 states as included in this description).
108. Id. at 635.
109. KEETON ET AL., supra note 6, § 2, at 9.
110. Id. at 10–11.
111. RESTATEMENT (SECOND) OF TORTS § 908 (1979).
ordinary care, is not enough [to support punitive damages].”112 Nevertheless, a significant number of states have allowed the award of punitive damages when the negligence can be characterized as “gross negligence.”113 It is apparent from the language employed by the courts that many judges have believed that there is a point at which the degree of culpability of negligent or careless conduct becomes so great that it is the equivalent of intentional conduct that causes injury and accordingly should create the same liability as would intentional conduct.

The Seventh Circuit in a 1905 case speculated that the concept of “gross negligence” was created to justify the use of punitive damages in negligence cases.114 In Kelly v. Malott, Judge Brown suggested that the adjective “gross” was attached to negligence to convert negligence into the equivalent of a “willful” tort; but this was, then, he said, an oxymoron:

The division of negligence into slight, ordinary, and gross may have originated in an endeavor, unconscious, perhaps, to justify exemplary damages where only compensative should be allowed. One who unintentionally fails in his duty, and thereby causes an injury, should make complete compensation. But to warrant punishment, there must be actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. “Willful negligence” is as self-contradictory as “guilty innocence.”115

He added, “The substantive remains the same substantive, whatever the adjective.”116 The Seventh Circuit was saying that courts were using “gross negligence” to award punitive damages when, under a proper application of tort law, they should not.

Judge Butzner of the Fourth Circuit reflected on the self-contradiction of the term “willful negligence” (Judge Brown’s very point) in the FWPCA in an oil spill cleanup in which the defendant sought the protection of the immunity provisions of the FWPCA.117 He commented: “Although the term ‘willful negligence’ has been called a self-contradiction, it has a recognized meaning. The term refers to reckless disregard for the probable

112. Id. reporter’s note (b).
113. The cases are collected and discussed in Annotation, Test or Criterion of Gross Negligence or Other Misconduct That Will Support Recovery of Exemplary Damages for Bodily Injury or Death Unintentionally Inflicted, 98 A.L.R. 267 (1935).
114. Kelly v. Malott, 135 F. 74 (7th Cir. 1905).
115. Id. at 76.
116. Id.
consequences of a voluntary act or omission.” Judge Butzner’s definition of “willful negligence” under the FWPCA is identical to the definition given for “gross negligence” in many cases. The court ruled that the United States was not entitled to recover its full recovery costs on the ground that the owner of the barge was guilty of willful negligence.

The difference in view between the courts that will award punitive damages for gross negligence and those that will not is that the former find an “intentional tort” in the intent to do a risky act while the latter require the intent to be to cause the injury. This becomes apparent in examples from several states of the criteria for gross negligence to justify punitive damages. They indicate that the moral culpability arises from a subjective consciousness of the risk involved in the tortious conduct. In Mobil Oil Corp. v. Ellender—a Texas case in which surviving family members and the administrator of the estate of a contractor who died of leukemia brought an action against a chemical company, alleging that exposure to benzene at the company’s facility caused the contractor’s death—the court upheld an award of punitive damages on a finding of gross negligence.

The court defined “gross negligence” as follows:

Gross negligence includes two elements: (1) viewed objectively from the actor’s standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. Evidence of simple negligence is not enough to prove either the objective or subjective elements of gross negligence. Under the first element, “extreme risk” is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff. Under the second element, actual awareness means that the defendant knew about the peril, but its acts or omissions demonstrated that it did not care.

Similarly, in Bennett v. Reynolds, a case involving sale of cattle that the seller should have known belonged to another, the court ruled that the “actual awareness” requirement of the subjective element of gross negligence, in connection with a punitive

118. Id. at 614 (emphasis added).
119. 968 S.W.2d 917, 921 (Tex. 1998).
120. Id. (citations omitted).
damages award, means that the defendant knew about the risk, but the defendant’s acts or omissions demonstrated that it did not care.\textsuperscript{121} In another case arising in Texas, \textit{Barber v. Texaco, Inc.}, the Fifth Circuit said that “[g]ross negligence is differentiated from simple negligence by the mental attitude of the defendant: a plaintiff must show that the defendant knew about the danger, but demonstrated by his acts or omissions that he didn’t care.”\textsuperscript{122}

Gross negligence can be found in a series of acts. A Texas oil well blowout case illustrates how negligence is transformed into gross negligence by the taking of actions while the actor is aware of the risk.\textsuperscript{123} In \textit{Apache Corp. v. Moore}, during the drilling of a well, a company found metal shavings in the drilling mud.\textsuperscript{124} Such shavings are often indicative of worn out casings or tubing allowing the metal of the drilling pipe to rub and shave off, thereby weakening the equipment in the hole. The company ran no logs or tests to determine the origin or cause of the shavings.\textsuperscript{125} Later the well experienced a “kick”; the well began to flow, causing cement, which had been placed to secure the liner at the bottom of the hole, to back up through the hole into the intermediate casing, where it hardened.\textsuperscript{126} The cement was drilled out of the casing, but no tests were conducted to determine whether the casing had been damaged.\textsuperscript{127} Thereafter the well was completed, and a pressure leak occurred at the surface, denoting pressure on the backside of the well, which placed the intermediate casing under stress.\textsuperscript{128} The drilling superintendent recommended pulling the tubing and repairing the leak, but the company conducted a single test to determine the source of the leak and did not find it.\textsuperscript{129} To relieve pressure on the well due to the leak, the company installed a casing relief valve on the well.\textsuperscript{130} The valve depended on a flow of nitrogen to function.\textsuperscript{131} The valve failed to function, and the well blew out.\textsuperscript{132} Based on this series of events, the court upheld a finding of gross negligence that supported the award of punitive

\begin{footnotesize}
\textsuperscript{121} 242 S.W.3d 866 (Tex. Ct. App. 2007), rev’d, 315 S.W.3d 867 (Tex. 2010).
\textsuperscript{122} 720 F.2d 381, 384 (5th Cir. 1983).
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 674.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 675.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\end{footnotesize}
damages. Rejecting the defendant’s plea that the blowout was the result of ordinary negligence, the court said: “Ordinary negligence is raised to the level of gross negligence by the mental attitude, i.e., the conscious indifference, of the defendant to the rights, welfare and safety of others. The distinguishing factor between negligence and gross negligence is the degree of risk of which the defendant was, or should have been, aware.”

Apache management decided not to run logs or tests to determine whether the casings had been worn or damaged by the drilling out of cement following the kick. Apache knew the Key 1-11 well had a leak and, despite contrary recommendations, decided to shut in the well without fixing the leak. Apache had actual knowledge that the relief valve needed a steady flow of nitrogen to operate properly and prevent the blowout; yet, Apache did not adequately monitor the flow to the system. Moreover, Apache put Clower in charge of the well despite knowledge of his alcohol abuse and other problems related to kickbacks, and allowed the kickback scheme to continue despite knowing, by its own admission, that such activities affected the quality of its employees’ work. This evinces that Apache consciously disregarded the risks associated with the kick and the ensuing leak, circumstances which it knew were capable of causing a blowout.

The existence of gross negligence need not rest upon a single act or omission, but may result from a combination of negligent acts or omissions, and many circumstances and elements may be considered in determining whether an act constitutes gross negligence.

In North Carolina, a punitive damages award similarly must be based on the defendant’s subjective awareness of the risk. In a wrongful death case against the driver involved in the accident, the following trial court jury instruction was upheld as properly stating state law on gross negligence:

In a case of alleged negligence, punitive damages may be awarded upon the showing that the negligence was gross, willful or wanton. Negligence is gross, willful or wanton when the wrongdoer acts with a conscious and intentional

133. Id. at 681 (citations omitted).
134. Id. at 682; see also Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981); Granite Constr. Co. v. Mendoza, 816 S.W.2d 756 (Tex. Ct. App. 1991).
disregard of and indifference to the rights and safety of others.\textsuperscript{135}

Some courts have indicated that “gross negligence” is confusing and a misnomer as the term insufficiently indicates the notion of intent. This is seen in the Wisconsin case of \textit{Rideout v. Winnebago Traction Co.}\textsuperscript{136} In \textit{Rideout}, the driver of an electric street railway in Oshkosh ran into marchers in a parade of the Milwaukee Uniformed Rank Knights of Pythias, killing one of them.\textsuperscript{137} The trial court submitted the cause to the jury for specific findings covering the subject of liability for ordinary negligence, and for gross negligence as well.\textsuperscript{138} Wisconsin did not follow the doctrine of comparative negligence, and the court reversed the judgment for the defendant because the trial court had not sufficiently appreciated “the broad distinction between ordinary negligence and intentional wrongdoing, the former being characterized by inadvertence and the latter by advertence, the one requiring intent, actual or constructive to injure, and the other being inconsistent therewith.”\textsuperscript{139} In part quoting another Wisconsin opinion, the court said that “gross negligence” is equivalent to intentional wrongdoing:

\begin{quote}
It is obvious that no degree of mere carelessness or inadvertence, however remote from the care customarily used either by the ordinary careful man or by the exceptionally careless one, constitutes gross negligence. The latter suggests necessarily intent, either actual or constructive, to cause injury, or conduct evincing a total disregard for the safety of persons or property.\textsuperscript{140}
\end{quote}

The court further stated: “It were better if the term ‘gross negligence’ as suggesting inadvertence had never been used in speaking of a wrong, having the element of intent, actual or constructive, to injure.”\textsuperscript{141} The court said there was evidence to support a verdict based on intent by the defendant’s motorman: “A jury might well find under such circumstances conscious disregard of human life, rendering the wrongdoer in case of a destruction

\begin{itemize}
\item \textsuperscript{135} Berrier v. Thrift, 420 S.E.2d 206, 208 (N.C. Ct. App. 1992).
\item \textsuperscript{136} 101 N.W. 672 (Wis. 1904).
\item \textsuperscript{137} Id. at 673.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id. at 674.
\item \textsuperscript{140} Id. (internal quotation marks omitted).
\item \textsuperscript{141} Id.
\end{itemize}
thereof guilty of manslaughter in a criminal action, and of willful misconduct in a civil action."\footnote{142}

In some other states, even a finding of gross negligence will be insufficient to support punitive damages. To justify punitive damages, the actions must be characterized as willful or wanton misconduct. For example, Virginia employs a stringent punitive damages standard such that gross negligence will not justify punitive damages. In \textit{Philip Morris, Inc. v. Emerson}, the Virginia Supreme Court reversed a punitive damages award, holding that Texaco was not liable for punitive damages for burying pentaborane gas (more lethal than cyanide) and refusing to tell Philip Morris the contents of unlabelled corroded gas tanks once they were uncovered.\footnote{143}

The evidence is sufficient to prove something more than ordinary negligence and, perhaps, gross negligence, on the part of Texaco and Philip Morris. Yet, we hold, as a matter of law, that the evidence fails to prove that their acts and omissions constitute willful and wanton negligence as we have defined and applied that term.\footnote{144}

The court, however, upheld an award of punitive damages against the chemical disposal company hired to remove and test the waste, the president of which died from inhaling the gas.\footnote{145} The president knew of the immediate and grave danger and released the gas into the air without making his staff wear protective inhalers.\footnote{146}

The U.S. Supreme Court, as seen in \textit{Exxon v. Baker}, has not only approved the application of punitive damages under state law for torts involving gross negligence but has itself awarded (more strictly, approved of a lower federal court awarding) punitive damages for reckless conduct.\footnote{147} Exxon had stipulated to its negligence in the \textit{Exxon Valdez} oil spill but challenged an award by the jury of punitive damages in the amount of $5 billion. The first phase of the trial led to a finding that Exxon was "reckless" and that its recklessness was "a legal cause of the grounding of the \textit{Exxon Valdez}."\footnote{148} This was the basis for the award of punitive damages. The term "reckless" is found in many specifications of the elements of both gross negligence and willful misconduct. In \textit{Baker}, the Supreme Court said of Exxon's wrongdoing that "the

\begin{itemize}
\item \textit{Id.} at 676.
\item 368 S.E.2d 268 (Va. 1988).
\item \textit{Id.} at 284.
\item \textit{Id.} at 279.
\item \textit{Id.}
\item \textit{In re Exxon Valdez}, 270 F.3d 1215, 1232 (9th Cir. 2001).
\end{itemize}
Tortious action was worse than negligent but less than malicious" and noted that it was "a case of reckless action, profitless to the tortfeasor." Prior cases in which the Supreme Court had taken up punitive damages involved the review of state awards of punitive or exemplary damages that had been challenged on due process grounds. But in Baker, the review considered not the intersection between the Constitution and punitive damages under due process but the desirability of regulating them as a common law remedy for which responsibility lies with the Court as a source of judge-made law in the absence of a statute. The Court’s role in the award of punitive damages, then, was on the same basis that common law state courts had historically awarded punitive damages for gross negligence or willful misconduct. The elements looked to by the Court in Baker will surely be relevant to any court giving content to the meaning of "gross negligence or willful misconduct" in the OPA. The Court made reference to several states as supplying these elements:

Maryland, for example, has set forth a nonexclusive list of nine review factors under state common law that include "degree of heinousness," "the deterrence value of [the award]," and "[w]hether [the punitive award] bears a reasonable relationship to the compensatory damages awarded." Alabama has seven general criteria, such as "actual or likely harm [from the defendant’s conduct]," "degree of reprehensibility," and "[i]f the wrongful conduct was profitable to the defendant."

Similarly, the Supreme Court in an earlier case where it had engaged in due process review of a state award, had said: "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s

149. Id. at 510–11. In a footnote, the Court said, “We thus treat this case categorically as one of recklessness, for that was the jury’s finding. But by making a point of its contrast with cases falling within categories of even greater fault we do not mean to suggest that Exxon’s and Hazelwood’s failings were less than reprehensible.” Id. at 510 n.23. The Court implicitly treated "recklessness" as intermediate between "avarice" and "gross negligence" when it stated: "These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions." Id. at 512. It did so in indicating that any of these would support punitive damages.
150. Id. at 501–03.
151. Id. at 492.
152. Id. at 503 (alterations in original) (citations omitted) (quoting Green Oil Co. v. Hornsby, 539 So. 2d 218, 223–24 (Ala. 1989); Bowden v. Caldor, Inc., 710 A.2d 267, 277–84 (Md. 1998)).
Such factors appear to show concern for the state of mind or intent of the defendant and to pass judgment on the "heinousness" of the act or the "degree of reprehensibility" in the choice of conduct made by the defendant.

In the OPA, Congress has chosen to punish "gross negligence" and "willful misconduct" in the form of treble penalties in section 1321 of the FWPCA and has also attached an essentially punitive consequence to such conduct in section 2704 by taking away an immunity in specified circumstances.\textsuperscript{154}

\section*{C. Gross Negligence and the Doctrine of Contributory Negligence}

A second function of "gross negligence" in tort law was developed by the courts to overcome another formula (or rule) of tort law, the doctrine of contributory negligence. This rule or doctrine is expressed in the following formula:

\begin{quote}
Rule \#1 - If A has injured B through X [negligence] and if B's injury is partially due to B's own X [negligence], then consequence \#1 [A is not liable to B for damages].
\end{quote}

As brought out earlier, the concept of tort law involves both actor and injured. If both the actor and the injured share responsibility for the injury, then both are to blame for the injury; hence, the reasoning would go, no liability of defendant to plaintiff, as one cannot recover for a tort by himself against himself.

Courts dissatisfied with the "contributory negligence" rule they have inherited can do one of several things. They can abolish "contributory negligence" and say henceforth they will follow a rule of "comparative negligence." This is a radical step, for it makes clear that a court is effectively a legislature rather than an organ of natural justice. A milder approach is to adhere ostensibly to the "contributory negligence" rule by saying there is a second formula with a different operative and consequence:

\begin{quote}
Rule \#2 - If A has injured B through Y [gross negligence] and if B's injury is partially due to B's own X [negligence], then consequence \#2 [A is liable to B for damages].
\end{quote}

Thus formulated, a court can say that both rules can exist without contradiction. For most cases, Rule \#1 will apply, but for blameworthy negligence, Rule \#2 can be invoked.

\textsuperscript{154} 33 U.S.C. § 1321(b)(7)(A)-(D) (2006); id. § 2704(c).
An early example of this strategy is seen in *Galena & C.U.R. Co. v. Jacobs*, which moves to a comparative negligence approach by referring to gross negligence: "[I]n this, as in all like cases, the degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action." Noting that "the strict doctrine of contributory negligence is much criticized," a 1928 law review comment observed that "[t]o the doctrine of contributory negligence, there have arisen several limitations or exceptions. The two now quite generally recognized are the so-called last clear chance doctrine and the rule that contributory negligence on the part of the plaintiff is no defense if the defendant's negligence was willful or wanton."

This strategy of saying in effect that there is a rule and then an exception that incorporates another rule is an example of the recursive nature of legal rules. That is, linguists recognize that statements can be infinitely expanded by addition of clause upon clause to a sentence with conjunctions and disjunctions; thus a basic rule such as "contributory negligence" may be stated with an exception for "gross negligence," followed by an exception for "willful misconduct" or "gross negligence" on the part of the plaintiff, and so forth. The very long formula then can appear to be a single rule rather than a series of separate rules.

The mind can conceive of the matter in a different way when it is reluctant to accept the vagueness of defining "gross negligence" so as to compare the negligence of the plaintiff with that of the defendant. The gross negligence exception to the rule of contributory negligence is really a matter of dividing the accident or event into two stages or discrete events. If both parties are concurrently negligent, then the plaintiff's negligence (contributory negligence) bars recovery. But if the plaintiff's negligence precedes the action of the defendant and the defendant is aware of the plaintiff's negligence, then the defendant is independently negligent for not taking appropriate account of the plaintiff's situation. The plaintiff's negligence, then, is not a "cause" of the injury. Thus defendant's negligence need not be characterized as "gross" at all. The "gross negligence" rule can then be called "discovered negligence, subsequent negligence, wanton or willful or reckless negligence, discovered peril, the last

155. 20 Ill. 478, 497 (1858).
clear chance doctrine, and the humanitarian rule." This was the characterization or conceptualization of the Michigan Supreme Court in *Gibbard v. Cursan.* The court analyzed the "gross negligence" rule as follows, thus turning the question from comparison of relative fault to a question of causation:

The theory of gross negligence is that the antecedent negligence of plaintiff only put him in a position of danger, and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause. . . . If the negligence of a plaintiff is concurrent with the negligence of a defendant, the rule as to antecedent negligence of plaintiff and subsequent negligence of defendant does not apply.

With this analytical strategy, the court was able to reaffirm that the rule of comparative negligence did not obtain in Michigan. Even those judges and juries who believe that the contributory negligence rule is unfair (for failing to account for the greater moral culpability of one negligent party over another) and should be superseded by a gross negligence exception or a last clear chance approach might conclude that if the plaintiff and the defendant are both guilty of gross negligence (i.e., of equal moral fault or reprehensible conduct), the recovery should be barred to the plaintiff. We can call this the "gross contributory negligence rule."

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158. *Id.*
159. *Id.*
160. *Gibbard* is given the following gloss in *Burnett v. City of Adrian,* involving a recreational use statute that brings out the state-of-awareness focus of *Gibbard:*

[The rule of the case is that willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does. Willful and wanton misconduct is not, as the *Gibbard* Court observed, a high degree of carelessness. The poorly phrased three-prong test for willful and wanton misconduct in *Gibbard* is cast entirely in language of ordinary negligence until, in the third element, it is said that it must be shown that an injury "is likely." It is in that concept—the notion that in the circumstances of a given case the injury is probable, or to be expected, or likely—that is found the requisite indifference to harm tantamount to a willingness that it occur, if not a specific intent that it does, which distinguishes willful and wanton misconduct from ordinary negligence.

326 N.W.2d 810, 812 (Mich. 1982).
Rule #3 - If A has injured B through Y [gross negligence] and if B’s injury is partially due to B’s own Y [gross negligence], then consequence #1 [A is not liable to B for damages].

Examples of this exception to an exception can readily be found in case law, and the OPA itself incorporates the concept. For example, there is the faux-snake case of Griffin v. Shively.161 The plaintiff-administratrix sued for the wrongful death of Albert Clinton Sutherland, who was shot to death by defendant Garland Shively. The latter was the operator of a restaurant, and he was deathly afraid of snakes. Pale and fearful on the fateful day in question, he informed a fellow employee that he had just seen some snakes in the well house. Sutherland was aware of Shively’s fear of snakes and teasingly threatened to “put snakes on” Shively. Sutherland continued to taunt Shively later in the day, returning to the restaurant and throwing a snake-like belt around the defendant’s neck. Knowing that Shively had a gun and had threatened to use it, Sutherland would not stop his snake antics. Sutherland flung the door open and threw a long, black object into the restaurant toward Shively.162 Believing the object was a snake, Shively shot at it (in reality another belt), but the shot killed Sutherland.

Was Shively grossly negligent or willfully and wantonly negligent in shooting at a belt posing as a snake but thereby killing the plaintiff’s decedent? Such negligence would ordinarily overcome the contributory negligence of the plaintiff under Virginia law. But here was not the plaintiff’s decedent also grossly negligent or guilty of willful misconduct in repeatedly teasing and taunting a man he knew to be fearful of snakes? The court announced what has been described above as Rules 2 and 3, while merging with them the concept of “proximate cause”:

[Rule #2] The plaintiff correctly states the general rule that a defendant who is guilty of willful and wanton negligence cannot rely upon contributory negligence as a defense. . . .

[Rule #3] However, as Shively asserts, the rule is subject to the exception that when the plaintiff’s contributory negligence, itself, amounts to willful and wanton conduct, recovery is barred. . . . In other words, while contributory negligence, in the sense of failing to exercise ordinary care for one’s safety, is not a defense to a defendant’s willful and wanton negligence, a plaintiff’s wanton and reckless disregard for his own safety bars recovery even against a

162. Id. at 212.
defendant whose conduct also amounts to willful and wanton negligence. The reason for this exception is that, when two persons are equally at fault in producing the injury, neither's negligence is the proximate cause of the injury. Consequently, the law leaves both parties where it finds them.

The court ruled that the case presented a jury issue that should be resolved on remand in one of three ways, reflecting the three rules that are present in the court’s analysis:

Therefore, on remand the following possibilities exist: first, the jury could find both Sutherland and Shively guilty of willful and wanton negligence, in which case, there can be no recovery; or, secondly, the jury could find that Shively's conduct was willful and wanton negligence but Sutherland's negligence was not willful and wanton, in which event Sutherland is entitled to recover; or, finally, the jury could conclude that Shively's conduct did not rise to that degree of culpability amounting to willful and wanton negligence, in which case, Sutherland's contributory negligence bars recovery.

The OPA counterpart of this exception to an exception, which has been described as Rule #3, is found in section 2703(b). Under the heading of “Defenses to Liability,” it provides that as to particular claimants: “A responsible party is not liable under section 2702 of this title to a claimant, to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant.”

From the foregoing it is evident that in using “gross negligence” and “willful misconduct,” Congress was probably drawing upon the common law background of contributory negligence in tort, however divided the courts of the various states have been in formulating gross negligence.

D. Gross Negligence and Immunity (Including Gratuitous Bailment)

A third significance that developed for the terms “gross negligence” and “willful misconduct” in tort law came about through both common law and statutory means. Gratuitous bailment, one of the earliest of these means, is an ancient

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163. Id. at 213.
164. Id. at 213–14.
166. Id. (emphasis added).
description of the relationship between bailor and bailee when one party has been given control over the property of another. This relationship may arise from contract or by operation of law. If injury or loss occurs to the property while it is in the possession of the bailee, should the bailee be liable? Originating in Roman law and brought into English law in *Coggs v. Bernard,* it was generally accepted that the gratuitous bailee was immune from liability unless she was grossly negligent. The doctrine was imported into the United States by Justice Story in *Tracy v. Wood.*

The raising of "gross negligence" as an exception to an immunity doctrine or immunity statute is best seen as an "escape route" allowing a court or jury to hold bad actors liable for blameworthy or reprehensible conduct where application of the immunity rule would lead to injustice. Legal systems often create rule-avoiding norms that accompany the rules themselves, as brought out by Frederick Schauer. He has observed:

Legal systems must provide some escape route from the occasional absurdity generated by literal application because applying the literal meaning of a rule can at times produce a result which is plainly silly, clearly at odds with the purpose behind the regulation, or clearly inconsistent with any conception of wise policy. Specifying that an actor's grossly negligent conduct will invalidate an immunity is just such an escape route, albeit an imprecise one.

Often legislatures have wished to encourage certain activities, and they have sought to protect the actors from liability. Hence, they have provided an express immunity from tort liability sounding in negligence. There are a variety of such statutes: among them are the automotive guest statute, the recreational activity statute, and Good Samaritan legislation. The ability of a legislature to do this as a matter of constitutional law has been challenged as a violation of natural justice (denying a natural right of compensation for injury) or as intruding into a function allocated to the courts by a state constitution (separation of powers). In enacting such immunity statutes, the legislatures have limited the immunity to "ordinary negligence" and have denied immunity where the actions of an actor are characterized as "gross negligence" or "willful misconduct," thereby establishing an "escape route."

168. 24 F. Cas. 117 (Story, Circuit Justice, C.C.D.R.I. 1822).
The following formula expresses the effect of these statutes:

Rule #1: If A has injured B through X [negligence] then consequence #1 [A is not liable to B for damages];

however

Rule #2: If A has injured B through Y [gross negligence or willful misconduct] then consequence #2 [A is liable to B for damages].

As indicated above, legal statements can be recursive, so the formula may be expanded. Some statutes (including the OPA) expressly expand the rule, demonstrating the three rule formulations of contributory negligence discussed above:

Rule #1: If A has injured B through X [negligence] then consequence #1 [A is not liable to B for damages];

however

Rule #2: If A has injured B through Y [gross negligence or willful misconduct] then consequence #2 [A is liable to B for damages];

subject to the exception that

Rule #3: If A has injured B through Y [gross negligence or willful misconduct] and if B’s injury is partially due to B’s own Y [gross negligence or willful misconduct], then consequence #1 [A is not liable to B for damages].

A common type of such immunity-from-negligence statute is the recreational use statute. About 40 states adopted statutes following a common pattern to relieve landowners of negligence liability.170 An example can be taken from a Michigan statute that provided:

No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other person a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use, with or without permission, against the owner, tenant, or lessee of said premises unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.171

170. KEETON ET AL., supra note 6, § 34, at 211 n.36.
171. Burnett v. City of Adrian, 326 N.W.2d 810, 813 (Mich. 1982) (quoting MICH. COMP. LAWS. § 300.201 (repealed 1994)) (internal quotation marks omitted); see also TENN. CODE ANN. § 70-7-104 (West, Westlaw through 2010 Reg. Sess.) (“This part does not limit the liability that otherwise exists for: (1)
Such a statute is designed to protect a landowner from suits by non-business guests and by trespassers. Legislators in enacting these statutes are responding to citizen-landowners’ concerns that they will be sued for their hospitality in letting friends come onto their property. Such statutes reflect a conviction that trespassers ought not benefit from their wrongdoing in entering another’s property without consent and then filing claims that the property was not made safe for their enjoyment. The well-founded fears of such suits make owners less likely to share their property with friends and acquaintances and diminish friendship and community.

For similar reasons, many legislatures enacted “automobile guest statutes” to protect vehicle owner-drivers from liability for injuries suffered by passengers. A person’s automobile has been seen as similar to his or her home or real property. The rationale for limiting liability is given as hospitality protection (reflecting a duty of gratitude in some legal systems) and as collusion prevention (looking to the interests of insurers). An example of a typical statute is the Montana Automobile Guest Act of 1931:

Section 1. The owner or operator of a motor vehicle shall not be liable for any damages or injuries to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, nor for any damages to such passenger’s or person’s parent or guardian, unless damage or injury is caused directly and proximately by the grossly negligent and reckless operation by him of such motor vehicle.  

_Prosser and Keeton_ comments that the definition of the proscribed misconduct varies from state to state, according to the fancy of the legislature and compromises in drawing the particular act. . . . There is so much individual variation in the statutes, and in their interpretation, that it may safely be said that there are as many different guest laws as there are acts.

Despite the variation in the words of such statutes, courts and juries seem in fact to make fine distinctions. A legislature may pass

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Gross negligence, willful or wanton conduct that results in a failure to guard or warn against a dangerous condition, use, structure or activity . . . .”).

172. Dozens of statutes and hundreds of cases touching on gross negligence in relation to automobile guest statutes are taken up in the annotations in 74 A.L.R. 1198 (1931); 86 A.L.R. 1145 (1933); 96 A.L.R. 1479 (1935); and 136 A.L.R. 1270 (1942).


174. _KEETON ET AL._, _supra_ note 6, § 34, at 215.
a statute providing a driver a qualified immunity from claims of negligent injury yet give a jury a means of holding the driver liable if the jury makes the requisite finding of gross negligence or wanton misconduct. Such a case was *Glaab v. Caudill*, a Florida guest passenger statute application. Two couples were riding in a car when a bag containing cups of iced tea spilled on the driver. She then took her eyes off the road and both hands off the wheel for the space of a few seconds to retrieve the iced tea. The car swerved, jumped a curb, and then struck a utility pole, injuring the plaintiff passenger. To recover, plaintiff had to establish gross negligence on the part of the driver. The Florida court found that a requisite element of gross negligence was plaintiff's "conscious disregard of consequences." The court said it equated "'conscious disregard of consequences' with a voluntary act or omission in the face of conditions toward which reasonable prudence requires a particularly keen alertness or caution when such act or omission is dangerous and well-calculated to result in grave injury." This "conscious disregard of consequences" was distinct from a "careless" disregard of consequences (as in simple negligence) or from the more extreme "willful or wanton" disregard thereof (as in culpable or criminal negligence).

The readiness of courts and juries to find gross negligence or gross fault to render these statutes ineffective to immunize drivers from liability can be seen in numerous cases. They use the same verbal standards of gross negligence but then apply them in circumstances that many people would probably regard as merely negligent. Such a case was *Neuman v. Eddy*, arising under a Louisiana guest passenger statute. The defendant was driving on a highway and attempted to pass around some cows that were walking in the road. He increased his speed to get past a cow that was alongside the vehicle. The cow collided with the rear end of the car, which caused the car to skid and overturn. The court concluded that this was clearly an instance of gross fault:

It seems a necessary conclusion that defendant's act in increasing his speed to as fast as he could go when he saw the cow increase her speed, with the view of beating her in a race and passing ahead of her in the road on the side on which he was driving, must be accounted, an act on his part in driving, as a gross fault, within the meaning of the law,

176. Id. at 182.
177. Id. at 185.
178. Id.
and negligence and imprudence for which he cannot be excused.\textsuperscript{180}

Is falling asleep while driving a willful action? Several juries have found that falling asleep can be the equivalent of an intentional tort in order to award damages, even though the driver would be immune if only negligent.\textsuperscript{781} Such was the case of \textit{Lankford v. Mong}.\textsuperscript{182} Under the Alabama guest passenger statute, the operator or owner of a vehicle in which a guest is injured is liable only if the injury was caused by the willful or wanton misconduct of the owner or operator.\textsuperscript{183} The \textit{Lankford} court defined "wantonness":

Wantonness is the conscious doing of some act or omission of some duty under knowledge of the existing conditions and conscious that from the doing of such act or omission of such duty injury will likely or probably result. Before a party can be said to be guilty of wanton conduct, it must be shown that with reckless indifference to the consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.\textsuperscript{184}

The Court expressed the basis upon which an issue such as "wantonness" should be submitted to a jury: "If the evidence or the reasonable inferences arising therefrom furnish a mere gleam, glimmer, spark, the least particle, the smallest trace, a scintilla, in support of the theory of the complaint."\textsuperscript{185} The small trace, the particle, the scintilla in support of plaintiff's claim so as to find defendant's liability through reckless indifference was that defendant knew he was sleepy and yet chose to continue to drive; thus it was a question for the jury as to whether he had knowledge of facts that would disclose the danger of going to sleep to any reasonable man. The "willful misconduct" here was not the intent

\textsuperscript{180} \textit{Id.} at 250 (citations omitted).
\textsuperscript{182} \textit{Lankford}, 214 So. 2d 301.
\textsuperscript{183} \textit{Id.} at 303.
\textsuperscript{184} \textit{Id.} at 302.
\textsuperscript{185} \textit{Id.}
to cause a particular injury but instead the misconduct of driving while sleepy, knowing that injury to another might result. The awareness of sleepiness followed by the choice to continue to drive was the intentional misconduct; in itself, falling asleep while driving might be mere negligence.

Yet another popular type of limited liability or immunity statute is the “Good Samaritan” statute. The first Good Samaritan statute appears to have been passed in 1959, and since then all states have enacted some form of the legislation. These statutes seek to relieve health care workers from negligence liability for providing gratuitous, voluntary care to nonpatients. They aim to increase the likelihood of rescue by reducing its potential liability costs. In certain respects they are similar to the “recreational use” and “automobile guest” statutes in that they seem prompted by the sense that a non-paying patient ought to be grateful for receiving care. They also reflect a policy of encouraging people to provide emergency care. As with the other types of immunity statutes, the legislatures do not want to shelter really bad emergency treatment, so they provide that the caregiver can still be liable for care that is grossly negligent or rises to the level of willful misconduct. This is the legislative “escape route.” Here, too, the specifics of culpable care vary from state to state. An example of such a statute is one enacted in Alaska:

(a) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid. . . .

(d) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct.

Many other immunity statutes have been passed in state after state, often reflecting particular interests within a state. Louisiana,

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186. Id. at 302–03.


188. ALASKA STAT. ANN. § 09.65.090 (West 2007). For an example of a narrowly focused act of this type, see Maryland’s Emergency Medical Services—Automated External Defibrillator Program Act, MD. CODE ANN., EDUC. § 13-517 (West, Westlaw through 2010 Reg. Sess.).
for example, has a special statute that groups together legislative protection of owners of farm, forest, and mineral properties. As to the latter of the three, it provides in relevant part:

An owner of oil, gas, or mineral property shall not be liable to any person who unlawfully enters upon his oil, gas, or mineral property, for damages for any injury, death, or loss which occurs while on the oil, gas, or mineral property of the owner, unless such damage, injury, or death was caused by the intentional act or gross negligence of the owner.\textsuperscript{8}

For purposes of this provision, gross negligence has been defined in \textit{Wall v. Kelly Oil \& Gas Co.} as the “want of even slight care and diligence” and the “want of that diligence which even careless men are accustomed to exercise.”\textsuperscript{9} It has also been defined as the “entire absence of care” and the “utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others.”\textsuperscript{10} Additionally, gross negligence has been described as an “extreme departure from ordinary care or the want of even scant care.”\textsuperscript{11}

Related conceptually to the legislative provision of immunity is legislative or judicial preclusion of immunity-by-contract. There are statutes and common law decisions to the effect that while there can be an assumption of the risk and express waiver of liability in appropriate circumstances, it is against law or public policy to waive liability in advance for gross negligence or willful misconduct.\textsuperscript{12} This appears to be the rule in maritime law.\textsuperscript{13} Article 2004 of the Louisiana Civil Code is to the same effect.\textsuperscript{14} In \textit{City of Santa Barbara v. Superior Court}, a developmentally
disabled 14 year old drowned when the city-appointed counselor supervising the swimmer turned her attention away from the child for no more than 15 seconds.\(^{196}\) Although the child’s mother had signed a form releasing the city from liability for any negligent act, the California Supreme Court ruled that there could be no advance waiver for gross negligence. The court concluded: “[C]onsistent with dicta in California cases and with the vast majority of out-of-state cases and other authority, that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy.”\(^{197}\) The court said that gross negligence long “has been defined in California and other jurisdictions as either a ‘want of even scant care’ or ‘an extreme departure from the ordinary standard of conduct.’”\(^{198}\) The court did not disturb the finding below that the less than 15 seconds of inattention presented a material triable issue regarding gross negligence.\(^{199}\)

E. Gross Negligence and Manslaughter—Federal Law

Gross negligence has come into federal criminal law in a series of cases that have ruled that ordinary negligence cannot be the basis of a conviction for manslaughter. The relevant statute provides: “(a) Manslaughter is the unlawful killing of a human being without malice; (b) Within the special maritime and territorial jurisdiction of the United States.”\(^{200}\) In United States v. Pardee, the defendant was convicted of involuntary manslaughter in driving an automobile on the wrong side of the road, where he struck an automobile coming in the opposite direction.\(^{201}\) The court held that the jury instructions concerning an alleged section 1112 offense were insufficient because they failed to advise that the Government must prove: (1) that the defendant acted with “gross negligence,” defined as “wanton or reckless disregard for human life,” and (2) that the defendant had actual knowledge that his conduct was a threat to the lives of others, or had knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others.

\(^{196}\) 161 P.3d 1095 (Cal. 2007).
\(^{197}\) Id. at 1097.
\(^{198}\) Id. at 1099.
\(^{199}\) Id. at 1118 n.61.
\(^{201}\) 368 F.2d 368, 371 (4th Cir. 1966).
Other cases arising under the federal statute have followed Pardee. Where did the Pardee court get its gross negligence requirement from? It seems likely that the court drew upon the same sense that has driven the development of tort law. Many people have thought ordinary negligence should not be the object of punishment in tort law. Similarly, one would conclude that a person should not be imprisoned or fined for ordinary negligence. Thus is given birth the concept of "gross negligence" in the judicial lexicon to describe reprehensible conduct that ought to be punishable.

The step from "gross negligence" in tort law to "gross negligence" in criminal law is made explicit in tracing the relationship of Louisiana tort law and Louisiana criminal law. Section 12 of Title 14 of the Louisiana Revised Statutes delineates "Criminal Negligence" as follows:

Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

The Reporter's Comments state directly that this standard is taken from the law of torts:

[N]egligence is defined as a combination of action or nonaction plus a certain state of mind. Unlike the situation where intent, or adversion to consequences, is involved, here the state of mind is rather negative, and consists in a disregard of consequences. As a result, the offender falls far below a certain standard of care which is defined in this section in the traditional fashion. Criminal negligence, in

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fact, corresponds to the concept of "gross negligence" in tort law.204

Additional light on this conceptualization of "gross negligence" is shed in the Reporter's Comments to the linked statute, Section 8 of Title 14, where the Reporter sets forth the relationship between intentional action and negligent action:

With reference to intentional crimes, it is well accepted that they consist of two elements, a physical one, known as an "act," and a mental one, known as "intent." With reference to "negligent" crimes, there is considerable confusion as to their elements. The section proceeds upon the theory that in what we call "negligence," both human acts or failures to act and some state of mind are inextricably bound together, as appears in one of the following sections defining "criminal negligence."205

Thus gross negligence can be found when an action is bound together with a certain state of mind; this is true whether it is in a criminal context or a tort context.

F. Application of Gross Negligence and Willful Misconduct Under the OPA in Administrative Review Cases

One case has taken up the meaning of "gross negligence" under the OPA in the review of an administrative finding of gross negligence in an oil spill. Another administrative review case has interpreted the meaning of "willful misconduct" in the OPA.

The more recent of these was Water Quality Insurance Syndicate v. United States.206 The case arose from an incident in which a tug boat (the Victoria Rose Hunt) capsized in the Massachusetts Bay three nautical miles off the coast of Massachusetts. It sank during an attempt to move an anchor belonging to a dredge barge.207 The tug contained around 8,000 gallons of fuel oil and an unknown quantity of other pollutants. Some of the oil escaped but a large portion remained aboard.208 Six weeks later the tug was salvaged. The tug's insurer, plaintiff Water Quality Insurance Syndicate, paid for the cleanup of the oil spill and the salvage. It filed a claim for partial reimbursement pursuant

204. Id. reporter's comment (citing RESTATEMENT (FIRST) OF TORTS §§ 282-84, 500 (1934)).
205. LA. REV. STAT. ANN. § 14:8.
207. Id. at 110.
208. Id. at 111.
to section 2708(a)(2) of the OPA with the U.S. Coast Guard’s National Pollution Funds Center (NPFC) for $492,233.68. This was the amount it expended above the $500,000 limitation of liability amount set out in section 2704(a)(2) for a vessel of the size of the tug.

The NPFC denied the insurer’s claim on two grounds: (1) that the captain violated a federal safety regulation that required ship personnel to be familiar with the characteristics of the vessel prior to assuming duties, and (2) that the capsizing of the tug was caused by the captain’s gross negligence. The insurer and the Coast Guard did not disagree on the standard for gross negligence, which, they concluded, was set forth in *Kuroshima Shipping S.A. Act of God Defense & Limit of Liability Analysis*.

The decision in *Kuroshima Shipping* was nothing more than the decision of a claims manager for the NPFC. The standard he applied was drawn solely from the NPFC’s own definition, which seems to have been promulgated without any sort of rulemaking:

The NPFC has defined gross negligence as follows:

Gross negligence: Negligence is a failure to exercise the degree of care, which a person of ordinary caution and prudence would exercise under the circumstances. A greater degree of care is required when the circumstances present a greater apparent risk. Negligence is “gross” when there is an extreme departure from the care required under the circumstances or a failure to exercise even slight care.

The NPFC has defined willful misconduct as follows:

Willful misconduct: An act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences.

The claims manager evidently examined no cases and no legislative history of the OPA. After reviewing the facts of the oil spill in *Kuroshima Shipping*, the claims manager concluded that a series of mistakes were made, and negligence was present. However, he could not conclude that gross negligence or willful misconduct caused the incident. There was no extreme departure from reasonable care or any absence of care. There also was no reckless disregard for the consequences. The incident was also not

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209. *Id.* at 112.
211. *Id.* at 1701.
the result of an intentional act where the grounding and spill were known and intended consequences. Moreover, the grounding was not proximately caused by the responsible party’s violation of a federal regulation. Therefore, the responsible party in Kuroshima Shipping was entitled to limit its liability pursuant to the OPA.

In Water Quality Insurance Syndicate, the NPFC concluded that the tug captain was grossly negligent, and the insurer, Water Quality, was therefore not entitled to the limitation of liability. The district court upheld the administrative agency’s decision. It agreed with the agency that plaintiff, not the United States, bears the burden of proving its entitlement to a limitation of liability, in order to recover from the Fund under section 2708(a)(2) (Recovery by Responsible Party) of the OPA. This raises an issue of who would bear the burden of proof on gross negligence where a responsible party is not seeking recovery from the Fund.

The court also upheld the agency’s finding of the tug captain’s gross negligence. The gross negligence arose from a series of acts, as stated by the court:

The NPFC identified the following facts, which are supported by the record: Captain Toolis had not worked at sea during the three years prior to the day the Tug capsized; he had been hired the night before and had never been on the Tug prior to that day; he had no previous experience or familiarity with the “cage design” of the roller guide prior to that day and failed to appreciate its effect on the Tug’s stability; he was unaware of both the weight of the Anchor and the Tug’s capabilities; he failed to contact the SEI O3’s winch operator to insure its brake was released; he nonetheless persisted in his efforts to raise the Anchor in the face of repeated failures and dangerous listing of the Tug; and he left the winch and Tug throttles engaged despite the Tug’s stern becoming submerged.212

The agency and the court also identified a violation of a regulation: under the facts most favorable to the claimant, the captain had worked 12.5 hours in a 24-hour period in violation of the regulation.213 The court felt compelled to uphold the agency’s decision under the standard of review of agency action.214 There was, the court said, a rational connection between the facts and the NPFC’s conclusion that the captain acted with gross negligence.

213. Id. at 115.
214. Id.
The court ruled that "the conclusion is 'supported by a rational basis,' and therefore must be affirmed."^{215}

Although the parties had agreed that the *Kuroshima Shipping* decision controlled on the legal standard for gross negligence, the court also took into account two pre-OPA cases, *In re Oil Transport Co.*^{216} and *Harcon Barge Co. v. M/V J.B. Chauvin.*^{217} These were maritime gross negligence cases, of which the court noted, "[T]he standard of gross negligence is not widely discussed in maritime jurisprudence . . . ."^{218} Having considered them, the court stood by its deference to the agency: "It is not this court's role to substitute its judgment for that of the NPFC."^{219} The role of finding "gross negligence" in both of these cases seems to have been unnecessary.

In the earlier case, *In re Oil Transport Co.*, the court made a finding of gross negligence where a tugboat, after two attempts to pass under a bridge before the drawspan was opened, made a third attempt.^{220} It was trying to enter the draw at a 45-degree angle and collided with the bridge. The vessel sank, killing one of the two captains and four other crew members. Among the claimants were representatives of the crew and the surviving captain. The court found both captains grossly negligent (each at 50%) for allowing the tow to continue to drift toward the drawbridge despite failure to receive a response from a drawbridge operator. The court based its finding on a presumption of fault that arises when navigators bring a vessel in collision with a stationary object; nothing in the record brought that presumption into question. The purpose of the proceeding before the judge was to get a ruling of limitation of liability by the bareboat charterers and owner of the vessel; the request for the ruling was denied for failure to comply with the limitations statute.^{221} The effect of finding gross negligence may have been to defeat claims by the representative of the deceased captain and by the surviving captain, but this is by no means clear from the opinion.

In *Harcon Barge Co.*, the court—ruling on an admiralty, or maritime, claim—made a finding of major statutory fault and gross negligence in the navigational maneuvers of the pilot of an upstream-bound vessel in proceeding full speed ahead with the certain knowledge of the proximity of the downbound vessel with

215. *Id.*
219. *Id.*
221. *Id.* at 51 n.6 (citing 46 U.S.C. § 185 (2006)).
which the upstream-bound vessel collided. The plaintiff was the owner and operator of the downstream-bound vessel and barges, and the defendant was the owner and operator of the upbound barge and vessel. The court found as a fact that “the sole proximate cause of the involved casualty was the gross negligence of the [upbound] pilot in allowing the head of his tow to leave slack water and get caught by the current, causing it to sheer and move outriver, into the tow of the downbound” vessel. This decision was made in 1979, after the United States Supreme Court had abolished the divided damages rule whereby in cases of both-to-blame collisions the resulting damages were divided among the parties.

Since the Court’s 1975 decision in United States v. Reliable Transfer Co., admiralty decisions apply the doctrine of “pure” comparative negligence, whereby damages are apportioned according to the negligence or fault of each party. The purpose and effect of the “gross negligence” finding in Harcon Barge Co. was to cast all of the fault upon the upbound vessel. The gross negligence of the pilot of the upbound vessel was the “sole proximate cause” of the collision, and “any ‘fault’ on the part of the [downbound vessel] did not cause or contribute to this casualty.” Hence, all loss was to be borne by the defendant. Because admiralty/maritime law had moved to comparative negligence, there was no need for the court to make a finding of “gross negligence.” It seems merely to have been for the purpose of saying all negligence was upon the defendant and none upon the plaintiff.

The case taking up “willful misconduct” under the OPA had the same name as the case involving “gross negligence” but involved an entirely different incident and invoked a different provision of the OPA from section 2708(a)(2). This was Water Quality Insurance Syndicate v. United States. Here the guarantor of a responsible party filed under section 2716(f) of the OPA for reimbursement of funds expended. This section of the OPA allows a guarantor to invoke against its own liability “the defense that the incident was caused by the willful misconduct of the responsible party.” That is, under this provision of the OPA, a guarantor will be held liable to the extent of its guarantee for any liability of its responsible party for gross negligence but not for the willful misconduct of the responsible party. It gets recovery of all its

222. 487 F. Supp. at 191.
224. Schoenbaum, supra note 194, § 5-4.
expenditures from the Fund if it can establish the willful misconduct of the party for which it has given guarantee.

This Water Quality Insurance Syndicate case arose from a 1994 tow job in which a tug towed a tank barge that was half-loaded with fuel oil from Puerto Rico. The towline parted, and the crew repaired the tow wire with an emergency “soft eye” to connect the tug and barge. The wire parted again, and the barge ran onto a Puerto Rican beach reef spilling 798,000 gallons of fuel oil. The NPFC, on behalf of the Oil Spill Liability Trust Fund, invoiced Water Quality Insurance Syndicate (WQIS) for oil removal expenses incurred by the Fund as a result of the oil spill. WQIS paid $4,506,550 to the NPFC. In 1998, WQIS submitted a claim to the NPFC for $9,558,376.98 against the Fund, representing the $4,506,550 previously paid to the NPFC and $5,051,826.90 paid directly to contractors for oil removal expenses. Upon the failure of the NPFC to honor the claim, WQIS filed suit for reimbursement from the Fund. By the time of trial, NPFC formally denied the claim. The district court reversed, remanding for further consideration by the agency.

The federal district court reversed the NPFC’s decision on two critical interpretations of OPA statutory terms. First, the agency erred when it focused on the “oil spill” or the “discharge,” rather than on the broader meaning of the statutory term “incident." The question for the case was not whether the willful misconduct was the “proximate cause” of the oil spill but rather, whether the “incident was caused by the willful misconduct of the responsible party.” The “incident,” said the court, was not the oil spill itself but what caused the spill; indeed, the “incident” may be a “series of occurrences” resulting in the oil spill. Second, the agency erred in concluding that “willful misconduct” must be a single act “intentionally done” and that a series of negligent acts can never constitute willful misconduct. The agency used the following definition of “willful misconduct”: “Willful misconduct is an act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of reckless disregard of the probable consequences. A series of negligent acts does not constitute willful misconduct.”

226. Id. at 228–29.
227. Id. at 226.
228. Id. at 229.
229. Id.
230. Id. at 228.
The court instead applied a definition of willful misconduct formulated by the Second Circuit in Tug Ocean Prince, Inc. v. United States:

[T]his circuit has established the following criteria for a finding of willful misconduct: an act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences. If the harm results from an omission, the omission must be intentional, and the actor must either know the omission will result in damage or the circumstances surrounding the failure to act must allow an implication of a reckless disregard of the probable consequences. The knowledge required for a finding of willful misconduct is that there must be either actual knowledge that the act, or the failure to act, is necessary in order to avoid danger, or if there is no actual knowledge, then the probability of harm must be so great that failure to take the required action constitutes recklessness.\(^{231}\)

Presumably, the Water Quality Insurance Syndicate court would find that gross negligence could be found in a series of negligent acts. Just what, then, was the "willful misconduct"? It was the responsible parties' sending an unseaworthy vessel to sea:

[T]he decision of the responsible parties in this case knowingly to send an unseaworthy vessel to sea, along with the accumulation of other acts that resulted in the oil spill, constitutes reckless disregard and willful misconduct, and... the agency therefore erred when it concluded that the OPA defense of willful misconduct did not apply.\(^{232}\)

In other words, the willful misconduct was not intent to cause a particular injury or outcome but an intent to embark on a risky course of action. To this writer, this seems identical to the analysis for gross negligence in the multitude of gross negligence cases discussed above. However, a finding of gross negligence rather than willful misconduct would have defeated the claim under section 2716(f) of the OPA.

It is submitted that neither of the cases involving the NPFC has much precedential value for interpreting gross negligence and willful misconduct under the OPA.

\(^{231}\) 584 F.2d 1151, 1162–63 (2d Cir. 1978) (citations omitted).
A case of special interest in defining gross negligence for the multidistrict litigation related to the Deepwater Horizon incident is a non-OPA well blowout case litigated in the Eastern District of Louisiana, Houston Exploration Co. v. Halliburton Energy Services, Inc.\textsuperscript{233} At issue was the enforceability of an indemnity agreement under Louisiana or maritime law.\textsuperscript{234} An oil and gas producer held a lease on the Outer Continental Shelf. It sued Halliburton Energy Services, Inc. ("Halliburton") for damages after plaintiff's gas well blew out as Halliburton conducted drill stem testing on the well. Halliburton contended that negligence by the plaintiff and the vessel owners contributed to the failure of the well and precluded recovery under Louisiana's comparative negligence standard. The district judge found that Halliburton's negligence in failing to check that an adequate number of shear pins were in place in an Internal Pressure Operating valve on two separate occasions was the proximate cause of the blowout.\textsuperscript{235} Halliburton further asserted that it was shielded from liability under the indemnity agreement between Halliburton and plaintiff, which required plaintiff to release and indemnify Halliburton. Plaintiff responded that a Louisiana Civil Code article rendered the indemnity agreement null. The district court ruled that the indemnity provisions "cannot be enforced because of the Court's finding that Halliburton's gross negligence caused the blowout."\textsuperscript{236} Bound by the \textit{Erie} doctrine and the OCSLA to apply Louisiana law, the court looked to Louisiana cases defining gross negligence. The court looked to definitions under both Louisiana law and maritime law:

Gross negligence has been defined as the want of that diligence which even careless men are accustomed to exercise. Gross negligence has also been termed the entire absence of care and the utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others. Additionally, gross negligence has been described as an extreme departure from ordinary care or the want of even scant care.\textsuperscript{237}

\begin{itemize}
    \item \textsuperscript{233} 269 F.3d 528 (5th Cir. 2001).
    \item \textsuperscript{234} \textit{Id.} at 531.
    \item \textsuperscript{236} \textit{Id.} at *6.
    \item \textsuperscript{237} \textit{Id.} at *7 (quoting Ambrose v. New Orleans Police Dep't Ambulance Serv., 639 So. 2d 216, 219–20 (La. 1994)) (internal quotation marks omitted).
\end{itemize}
The concept of gross negligence is essentially the same under maritime law: “Gross negligence is defined as harm wilfully inflicted or caused by gross or wanton negligence.”

The Civil Code article applied by the district court does not actually use the term “gross negligence.” Instead, the provision reads: “Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.” Thus the district court (and evidently the parties to the suit) saw no reason to differentiate between “gross

238. Id. (quoting Coastal Iron Works, Inc. v. Petty Ray Geophysics, 783 F.2d 577, 582 (5th Cir. 1986)) (citing BLACK’S LAW DICTIONARY 1057 (7th ed. 1999) (defining “gross negligence” as “[a] lack of slight diligence or care” and “[a] conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party”)).

239. LA. CIV. CODE ANN. art. 2004 (2008) (emphasis added). On the correspondence of gross fault to gross negligence and a variety of other formulations of the degrees of fault, see generally Edwin H. Byrd, III, Reflections on Willful, Wanton, Reckless, and Gross Negligence, 48 LA. L. REV. 1383 (1988). Byrd notes that the Louisiana Legislature has “used various combinations of the terms ‘willful,’ ‘wanton,’ ‘reckless,’ and ‘gross negligence’ to define standards applicable to exceptions to tort immunity statutes, to solidary liability, and to the award of exemplary damages.” Id. at 1383 (footnotes omitted). He suggests that perhaps the legislature “employed these terms in the various statutes somewhat indiscriminately and without careful consideration of their meaning or of the ambiguities to which they inevitably give rise.” Id. at 1384. He identifies the following variants that run together or overlap: “conspires . . . to commit an intentional or willful act”; “intentional act or gross negligence”; “deliberate and willful or malicious injury”; “willful or malicious failure to warn”; “deliberate and wanton act or gross negligence”; “willful or wanton misconduct”; “wanton or reckless disregard”; “reckless disregard”; “gross negligence”; and “criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.” Id. at 1386–87. On these he comments: “Linguistically, each of the eleven adjectives used in these statutes appears to describe a distinct standard of conduct. By using every combination of the words, fifty-five different standards could be defined, and by using conjunctives and disjunctives the legislature could provide even more.” Id. at 1387. For the manner in which these standards are run together by the courts, Byrd cites Sullivan v. Hartford Accident & Indemnity Co., 155 So. 2d 432 (La. Ct. App. 1963). That court made reference to “gross fault” when defining the “reckless disregard for the safety of others” standard utilized in the emergency vehicle immunity statute. With language typical of the confusion that accompanies these terms, the second circuit in Sullivan used “gross fault” to describe “reckless disregard,” and then clarified what “gross fault” involves with the statement that it “undoubtedly implies wanton or willful negligence.”

Byrd, supra, at 1392–93.
fault” and “gross negligence.” Moreover, the court saw no reason not to draw its definition of gross negligence from the decision in a Louisiana Supreme Court case involving an entirely different statute. In *Ambrose v. New Orleans Police Department Ambulance Service*, the plaintiffs were required to prove gross negligence, not negligence alone, because of the qualified statutory immunity afforded emergency medical technicians by Louisiana Revised Statutes section 40:1235. After quoting the standards under Louisiana law, maritime law, and Black’s Law Dictionary, the district court in *Houston Exploration Co.* seemed to find gross negligence simply in the actions of the Halliburton personnel, without linking the actions to their awareness of the potential consequences:

> [T]he Court finds the actions and inactions of Halliburton employees Lemaire and Costlow—in failing to inspect and pin the IPO valve properly on two separate occasions—were so wanting in care and diligence as to rise to the level of gross negligence, for which Halliburton is accountable regardless of the release and indemnity terms and conditions printed on the reverse of Halliburton’s printed form work ticket. Their actions were a clear violation of Halliburton’s established policies and procedures, and endangered not only the well and the rig, but the lives of all personnel on the rig. Accordingly, the release and indemnity clause involved in this case is utterly invalid and of no effect whatsoever.

The Fifth Circuit reversed the district court’s application of the gross negligence standard on appeal. The court did not differ on the enunciation of the standard; rather, the appeals court found that the district court failed to adequately consider the knowledge of risk reasonably in the mind of the defendant’s employees. The Fifth Circuit agreed that Halliburton’s employee Lemaire was

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240. At one time, the Louisiana Civil Code defined “gross fault.” This was in article 3556(13), which defined it as conduct that “[p]roceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud.” The article identifies three degrees of fault: the gross, the slight, and the very slight fault. These correspond to the three degrees of negligence identified in the common law, and both the civil law and the common law systems come from the Roman law. The Civil Code was revised in 1991 so that article 3556 was redesignated as article 3506, and the definition of “gross fault” was repealed in 1999. Act No. 503, 1999 La. Acts 1714.

241. 639 So. 2d 216, 220 (La. 1994).

negligent in failing to devise a method of distinguishing between the dressed (supplied with pins) and undressed (not supplied with pins) tools. \(^{243}\) But it was not an instance of gross negligence:

A tool operator would reasonably expect that an improperly pinned valve would result only in a botched drill stem test, requiring the drill stem to be removed from the well in order to replace the IPO valve. The record does not support a conclusion that an operator, such as Lemaire, would anticipate that an improperly pinned valve would contribute to a well blow-out. \(^{244}\)

In the court’s treatment, gross negligence requires that the negligence of the actor be coupled with a conscious awareness of the risk of harm. The court indicates this state-of-mind element by quoting from another Louisiana case defining the standard of gross negligence:

> At least one Louisiana court stated that one is grossly negligent when he “has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.” \(^ {245}\)

The court’s choice of reliance on this case, *Cates v. Beauregard Electric Cooperative, Inc.*, \(^{246}\) is worthy of a comment. That case did not in fact use the term “grossly negligent” at all. Rather, its inquiry of a standard arose in the context of a defendant’s contention that it was not liable for injuries sustained by a youth when he came in contact with an energized electric wire on a power company’s utility pole, which was situated on property of the defendant landowner. \(^ {247}\)

To defendant’s plea that liability was barred by plaintiff’s contributory negligence, the plaintiff apparently asserted that contributory negligence was inapplicable when the injuries were the result of the defendant’s breach of a duty “not to willfully or wantonly injure him.” \(^ {248}\) Relying on *Prosser on the Law of Torts*, the court in *Cates* stated:

\(^{243}\) Hous. Exploration Co. v. Halliburton Energy Servs., Inc., 269 F.3d 528, 532 (5th Cir. 2001).

\(^{244}\) *Id.*

\(^{245}\) *Id.* (emphasis added) (quoting *Cates v. Beauregard Elec. Coop., Inc.*, 316 So. 2d 907, 916 (La. Ct. App. 1975), aff’d, 328 So. 2d 367 (La. 1976)).

\(^{246}\) 316 So. 2d 907.

\(^{247}\) *Id.* at 910–11.

\(^{248}\) *Id.* at 916.
The terms “willful”, “wanton”, and “reckless” have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended. The usual meaning assigned to . . . the terms is that the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.249

To plainly summarize, the Fifth Circuit treated the statutory term “gross fault” as interchangeable with “gross negligence” and with “willful,” “wanton,” and “reckless” conduct. And in each of these, the court looked to a state of mind that involves an element of intent. Because the Fifth Circuit will likely be the circuit in which the meaning of gross negligence and willful misconduct under the OPA will be applied for the BP Oil Spill, one suspects that the district court and the Court of Appeals will consider the Halliburton case as very relevant not only for Louisiana law and maritime law but also for interpreting the OPA.

CONCLUSION

“Gross negligence” and “willful misconduct,” or words of similar import, operate as a threshold. On one side is lesser or no liability (or penalty or punishment), and on the other is greater liability, penalty, or punishment. A judge or jury is the guard at the threshold who has been empowered or instructed to make a moral judgment about the conduct of the party at that threshold. Placing the party on one side or the other requires a moral judgment about the nature and quality of an act or omission of the party in its choice of conduct. As reflected in more recent usage, the judgment is about the reprehensibility—the moral blameworthiness—of the choice of the party in question. The usage of “gross negligence” and “willful misconduct,” or words of similar import, merges together with concepts of causation: the human mind in making such a judgment generally requires that to cross that threshold of blameworthiness the

249. Id.
act constituting the gross negligence and willful misconduct must have been the principal reason for the injury. Despite efforts of some writers and courts to separate law and liability from concepts of morality, the human mind is evidently designed to make such judgments. Congress in the OPA and FWPCA and similar statutes has invited, authorized, or mandated such moral judgments in placing parties on one side or the other of the liability threshold. Stephen Perry may have been speaking to those who have complained about the uncertainty of the application of degrees of negligence or reprehensibility when he wrote:

A theory of strict liability that redistributed loss from the person who suffered it to whomever else happened to be causally involved in its production would avoid the indeterminacy problem, but it would also be morally indefensible. Once again we seem to be naturally driven towards normative criteria, such as notions of fault, for determining who among the persons causally contributing to a loss should ultimately be required to bear it.250

In giving meaning to gross negligence and willful misconduct in the OPA, the courts are called upon to make moral judgments for which precise criteria cannot be given. Because Congress has used these two terms, their interpretation must turn on the two elements that clearly arise from the “cluster of ideas” that surround their common usage in statutes and case law in the United States. One is that the conduct in question must reflect a departure or deviation from ordinary care of prudent persons in like circumstances (an objective element). The second is that there must be present in the actions under question a state of mind, an awareness that one is acting in a manner that threatens injury to others (a subjective element).251 It is this latter element that transforms negligence into gross negligence and renders it indistinguishable from willful misconduct under most circumstances.

250. Perry, supra note 57, at 465.
251. Professor Schoenbaum appears to have come to the same reading of “gross negligence” under the OPA, for he has commented on certain cases in relation to section 2704 as follows:
Guidance to the standard for breaking the limitations under OPA may be gained from prior case law under the FWPCA. [Compare Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978), with Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1979).] These cases show that the standard of willful misconduct or gross negligence requires more than mere negligence but reckless disregard for the probable consequences of a voluntary act or omission.
SCHOENBAUM, supra note 194, § 18-2 n.19.