

# REVERSING COASTAL LAND LOSS: ECONOMIC, LEGAL, AND POLICY CONSIDERATIONS

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## ABSTRACT

*This Article focuses on two lawsuits that challenged the major contributors to the coastal land loss that caused Hurricane Katrina to trigger widespread destruction of property, lives, and neighborhoods. At the heart of the Article is a critique of *In re Katrina Canal Breaches Consolidated Litigation* and *Barasich v. Columbia Gulf Transmission Co. Canal Breaches* highlights the danger of hobbling tort law's ability to safeguard citizens and property by rendering unnecessary the insertion of numbers for liability risk into budget calculations. A hard-look deference and failure-to-warn test is proposed for future public-safety cases brought under the Federal Torts Claim Act. Because the *Barasich* court justified its dismissal of the oil, gas, and pipeline defendants by its interpretation of *Terrebonne Parish School Board v. Castex Energy, Inc.*, this Article places *Castex* in its historical and jurisprudential context to prevent future courts from making analogous mistakes when grappling with Louisiana law. Specifically, this Article identifies the factual circumstances that would trigger an exploration and production company defendant's*

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*duty to backfill a canal under the Louisiana Civil Code's good-administrator standard. Since Hurricane Katrina, the Louisiana Supreme Court has made significant rulings and the Louisiana legislature has enacted important legislation that, collectively, has modernized and made more consistent legal doctrine in the field of implied restoration duties. The Article concludes with a suggestion: if exploration and production company defendants are going to continue to benefit from a form of quasi-immunity, then they should be held accountable under the law of takings.*

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## I. INTRODUCTION

*Environmental issues often get framed as a choice between economic prosperity and environmental protection. Hurricane Katrina demonstrates the fallacy of that view. Wetlands on the Gulf Coast once served as a natural buffer against hurricanes. Had we invested in protecting them, they could have significantly lessened Katrina’s damage, now estimated at more than \$100 billion.*<sup>1</sup>

—Dennis Hirsch

*[Louisiana’s wetlands] resemble[] a warzone with prime marsh torn to rags, acres of no land at all, and a wide sweep of water spotted with remnant strips of grass. No quadrant is spared. A horizon of eroding pipelines and canals.*<sup>2</sup>

—Professor Oliver Houck

In August 2010 Mildred Alcorn and I sat on her red couch in a small rental unit on Royal Street in the Lower Ninth Ward, only blocks from her pre-Katrina home. Before the storm, the fifty-eight-year-old homeowner<sup>3</sup> worked as the director of a

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1. Dennis Hirsch, *Wetlands’ Importance Now Made Clear*, INTERSTATE WATER REP. (New England Interstate Water Pollution Control Comm’n, Lowell, Mass.), Spring 2006, at 7, [https://www.neiwpcc.org/neiwpcc\\_docs/iwrspring2006.pdf](https://www.neiwpcc.org/neiwpcc_docs/iwrspring2006.pdf); see generally IVOR VAN HEERDEN & MIKE BRYAN, THE STORM: WHAT WENT WRONG AND WHY DURING HURRICANE KATRINA—THE INSIDE STORY FROM ONE LOUISIANA SCIENTIST 73–249 (2006) (explaining how wetland destruction contributed to the levee failures that flooded New Orleans and the surrounding area after Hurricane Katrina).

2. Oliver A. Houck, *The Reckoning: Oil and Gas Development in the Louisiana Coastal Zone*, 28 TUL. ENVTL. L.J. 185, 195 (2015) [hereinafter Houck, *Reckoning*].

3. As a pre-storm homeowner, Mildred Alcorn is representative of the Lower

program of last resort for unemployed, homeless women. “Failure was not an option,” she recalled. As Alcorn reflected on the fates of the significant people in her pre-storm social network: the sisters, nephews, godchildren, friends, and church members, mainly homeowners, who all lived within a six-block radius, she admitted that she still tears up every few days as she worries about how they are coping, alone, in distant cities. “Some losses can’t be overcome,” she concluded.<sup>4</sup>

### A. THE PROBLEM

A year after Mildred Alcorn and other residents of the Lower Ninth Ward and St. Bernard Parish rebuilt their homes following Hurricane Betsy in 1965,<sup>5</sup> the United States Army Corps of Engineers (the Corps) used “rudimentary [scientific] modeling” to investigate “whether there was indeed a funnel effect created by the Mississippi River Gulf Outlet [MR-GO].”<sup>6</sup> Its conclusion was that “no additional surge was created by the [MR-GO] funnel.”<sup>7</sup> Instead of critically testing its own assumptions by using “improved modeling techniques for storm surge[,]”<sup>8</sup> the Corps chose to ignore scientific evidence presented by outsiders using modern scientific tools and, instead, did nothing to safeguard the people or the property in the pathway of future storm surges.

The flooding caused by Hurricane Katrina’s storm surge funneled through the MR-GO—unabated by the fifty miles of missing marshes and cypress swamps<sup>9</sup>—devastated entire

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Ninth Ward, where 62% of the residents were homeowners. See Susan Buchanan, *Post-Katrina Struggles Continue in the Lower Ninth Ward and Parts of West Bank New Orleans*, HUFFINGTON POST (Aug. 14, 2015), [http://www.huffingtonpost.com/susan-buchanan/post-katrina-struggles-co\\_b\\_7989194.html](http://www.huffingtonpost.com/susan-buchanan/post-katrina-struggles-co_b_7989194.html).

4. Interview with Mildred Alcorn (August 8, 2010) (on file with the author); see also D’ANN R. PENNER & KEITH C. FERDINAND, *OVERCOMING KATRINA: AFRICAN-AMERICAN VOICES FROM THE CRESCENT CITY AND BEYOND* (2009).

5. Oliver A. Houck, *The Three Katrinas: Hard Cases Make New Law*, NAT’L WETLANDS NEWSL. (Env’tl. L. Inst., Wash., D.C.), July-Aug. 2010, at 8, 8 (describing Hurricane Betsy as “an early-warning hurricane”) [hereinafter Houck, *Three Katrinas*].

6. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 677 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

7. *Id.*

8. *Id.* at 678.

9. See Houck, *Reckoning*, *supra* note 2, at 186. At the time of this writing, 1,900 (and counting) square miles of wetlands have been destroyed since the 1930s. See Devin Lowell, Comment, *Ensuring Consistency: Louisiana Coastal Restoration Through the Lens of the RAM Terminal and the Mid-Barataria Sediment Diversion*, 27 TUL. ENVTL. L.J. 299, 301 (2014) (citing Mark Schleichstein, *Louisiana is Losing a*

neighborhoods in St. Bernard, Orleans, and Plaquemines Parishes.<sup>10</sup> Ultimately, these and other factors<sup>11</sup> caused over \$125 billion in total damages<sup>12</sup> and at least 1,800 deaths across the Gulf Coast.<sup>13</sup>

Both the destruction of the wetlands and the Corps's negligent maintenance of the MR-GO displaced 400,000 southern Louisianans<sup>14</sup> without the usual warning that accompanies eminent domain seizures, evictions, or the bulldozing of

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*Football Field of Wetlands an Hour, New U.S. Geological Survey Says*, NOLA.COM/TIMES-PICAYUNE (June 2, 2011, 1:00 PM), [http://www.nola.com/environment/index.ssf/2011/06/louisiana\\_is\\_losing\\_a\\_football.html](http://www.nola.com/environment/index.ssf/2011/06/louisiana_is_losing_a_football.html)); Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 B.Y.U. L. REV. 1783, 1800 (“For every 2.7 miles of wetlands, storm surges are reduced one foot.”) (citations omitted); Oliver A. Houck, *Retaking the Exam: How Environmental Law Failed New Orleans and the Gulf Coast South and How It Might Yet Succeed*, 81 TUL. L. REV. 1059, 1060 (2007) [hereinafter, Houck, *Retaking*] (“[H]ad these [environmental] programs [designed to protect the wetlands from deleterious use by industry] been wisely used . . . the 2005 hurricane season would by now be an obscure footnote in the records of the National Weather Service.”); Houck, *Three Katrinas*, *supra* note 5, at 9 (noting that by 2005, MR-GO had destroyed approximately 60,000 acres of forested wetlands); *see also Wetland Importance*, GULF RESTORATION NETWORK, <http://www.healthygulf.org/our-work/wetlands/wetland-importance> (last visited Sept. 25, 2015); Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post-Katrina and Rita Imperatives*, 51 LOY. L. REV. 861, 865 (2005) (“The barrier and filtering effect of Louisiana’s coastal wetlands has been substantially reduced by a century or more of activities by mineral production companies . . . and through the massive civil works projects by entities such as the United States Army Corps of Engineers . . .”).

10. U.S. SENATE COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, S. REPT. 109-322, HURRICANE KATRINA: A NATION STILL UNPREPARED 53–56 (2006), <https://www.gpo.gov/fdsys/pkg/CRPT-109srpt322/pdf/CRPT-109srpt322.pdf>.

11. John P. Manard, Jr., Patrick O'Hara, & Kelly R. Blackwood, *Katrina's Tort Litigation: An Imperfect Storm*, ABA SEC. NAT. RESOURCES & ENV'T NEWSL., Spring 2006, at 31, 31 (highlighting the fact that, in Mississippi, where the coastal counties never had the protection of wetlands or barrier islands, the litigation was restricted to contract disputes over insurance coverage of an act of nature, unlike in Louisiana).

12. FED. EMERGENCY MGMT. AGENCY, FEMA 549, HURRICANE KATRINA IN THE GULF COAST: MITIGATION ASSESSMENT TEAM REPORT 1–5 (2006), [http://www.fema.gov/media-library-data/20130726-1520-20490-8446/549\\_ch1.pdf](http://www.fema.gov/media-library-data/20130726-1520-20490-8446/549_ch1.pdf).

13. Campbell Robertson, *Racially Disparate Views of New Orleans' Recovery after Hurricane Katrina*, N.Y. TIMES (Aug. 24, 2015), <https://www.nytimes.com/2015/08/25/us/hurricane-katrina-new-orleans-recovery-ten-years-opinion.html>.

14. Maria Gallucci, *Closer Than Ever to the Water's Edge*, INT'L BUS. TIMES (Aug. 24, 2015, 7:27AM), <http://www.ibtimes.com/closer-ever-waters-edge-2061910>. For discussions of the displacement of people caused by Hurricane Katrina, see generally Peter Grier, *The Great Katrina Migration*, CHRISTIAN SCI. MONITOR (Sept. 12, 2005), <http://www.csmonitor.com/2005/0912/p01s01-ussc.htm>; Robertson, *supra* note 13; Jonathan Tilove, *Five Years after Hurricane Katrina, 100,000 New Orleanians Have Yet to Return*, TIMES-PICAYUNE (New Orleans) (Aug. 24, 2010, 9:45 PM), [http://www.nola.com/katrina/index.ssf/2010/08/five\\_years\\_after\\_hurricane\\_kat.html](http://www.nola.com/katrina/index.ssf/2010/08/five_years_after_hurricane_kat.html).

property—in short, without the due process of law. The displacement itself led to devalued property, abandoned neighborhoods, and the emotional distress that accompanies the unplanned scattering of entire neighborhoods.<sup>15</sup> To lose one's social network, job, home, church, and community simultaneously is the equivalent of a boxer's punch to the liver.<sup>16</sup> And, to add further injury, courts have wrongly rendered the law toothless as advocates seek redress and prevention of further destruction of Louisiana's wetlands.

In this Article, I focus on two Katrina lawsuits that challenged the major contributors to the events leading to coastal land loss that caused a Category 3 hurricane to trigger such widespread destruction of property, lives, and neighborhoods. St. Bernard and the Lower Ninth Ward plaintiffs sued the Corps for its negligent maintenance of the MR-GO. This negligence led to the widening of the navigational canal and surrounding land loss, which caused the MR-GO to act as a funnel during the storm surge accompanying Hurricane Katrina, raised the storm surge's height and velocity, and led to the inundation of St. Bernard Parish and the Lower Ninth Ward.<sup>17</sup> The Corps defended itself against this class-action lawsuit, primarily asserting the affirmative defense of sovereign immunity to avoid defending their actions (or inactions).<sup>18</sup> Although scientists generally agree that exploration and production (E&P) companies and pipeline companies are responsible for anywhere from thirty-five to

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15. On the effects of post-Katrina displacement, see, for example, *DISPLACED: LIFE IN THE KATRINA DIASPORA* (Lynn Weber & Lori Peek, eds., 2012) (collecting essays relating the perspectives of displaced communities and of the communities that received evacuees); D'Ann Penner, *Overcoming: The Hidden Fury of Hurricane Katrina's Aftermath and Implications for the Future of New Orleans* (2010), <http://www.memphis.edu/benhooks/creative-works/pdfs/pennerovercominghurricanekatrinasaftermath.pdf> (examining the emotional impact of displacement on New Orleanians five years after the storm).

16. On the personal, social, and economic effects of community displacement, see generally KAI ERIKSON, *EVERYTHING IN ITS PATH* (1978) (analyzing the emotional difficulties suffered by mountain people torn away from their tight-knit communities because of a coal company's negligent disposal of waste leading to unprecedented flooding and devastation); MINDY FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (2005) (documenting the negative health effects on entire communities of African-American homeowners in the wake of serial uprootedness after waves of urban renewal).

17. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 677 (E.D. La. 2009), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

18. See Stanwood R. Duval, *Sovereign Immunity, Anachronistic or Inherent: A Sword or a Shield?*, 84 TUL. L. REV. 1471, 1487–88 (2010).

eighty-nine percent of the destruction of Louisiana's wetlands,<sup>19</sup> the industry's lawyers have been successful to date at using the legal system to defeat liability.<sup>20</sup> In both instances, plaintiffs have been denied justice for their claims sounding in tort and contract.

In the public sphere, the Corps narrowly escaped liability after lengthy discovery and a bench trial by seeking relief as a government agency. In the private sphere, the oil and gas industry has not yet been forced to engage in discovery for the damage caused by Hurricane Katrina for the industry's role in shredding Louisiana's wetlands.

### B. STANCE, APPROACH, AND AUDIENCE

Although I am no longer a practicing historian, I believe it is useful to disclose the experiences that shape my approach to this topic.<sup>21</sup> First, my years as an historian have left their mark on

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19. For an early, conservative estimate of 36.06% of the total loss of coastal acreage, see Shea Penland et al., *Process Classification of Coastal Land Loss between 1932 and 1990 in the Mississippi River Delta Plain, Southeastern Louisiana*, U.S. GEOLOGICAL SURV. (2000), <http://pubs.usgs.gov/of/2000/of00-418/ofr00-418.pdf> [<http://perma.cc/ACZ5-BMTL>]. For less conservative estimates of 69% and 89%, see William W. Scaife et al., *Coastal Louisiana: Recent Land Loss and Canal Impacts*, 7 ENVTL. MGMT. 433, 433, 440 (1983). See also Houck, *Reckoning*, *supra* note 2, at 205 (collecting these studies).

20. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 879–80 (5th Cir. 2009) (overruling the district court's dismissal of the case based on an incorrect interpretation of Mississippi tort law), *reh'g en banc granted*, 598 F.3d 208, *and appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc). The *Comer* plaintiffs sought to hold oil and gas companies liable for their role in causing global warming, which has led to a rise in sea level that multiplied coastal erosion and added to the strength of Hurricane Katrina, which in turn destroyed plaintiffs' property. *Id.*; see also *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 465 (5th Cir. 2013) (describing the case's tortured procedural history, wherein the Fifth Circuit's panel decision was vacated prior to an *en banc* hearing, which was subsequently rendered impossible because of a lack of a quorum created by too many recusals by judges with conflicts of interest, thereby reinstating the district court's dismissal of the plaintiffs' claims). Because the Fifth Circuit panel properly applied Mississippi law on negligence, nuisance, and trespass, this Article will not discuss *Comer*. See also *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, No. 13-5410, 2015 WL 631348 (E.D. La. Feb. 13, 2015) (dismissing plaintiffs' claims based on interpretations of complicated Louisiana law), *appeal docketed*, No. 15-30162 (5th Cir. Feb. 24, 2015). *Tennessee Gas Pipeline* is beyond the scope of this Article because the Southeast Louisiana Flood Protection Authority is a political subdivision, not an individual, a business, or a municipality. I have worked at firms with lawyers participating on both sides of the case, but have not been assigned to a team of lawyers handling the issues on either side.

21. See generally ROBERT F. BERKHOFFER, JR., *BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE* (1995) (arguing that, because all knowledge is situational, the historian should disclose his stance forthrightly in the front matter of

my thinking. In particular, my five-year qualitative study of the impact of the involuntary displacement on families scattered to distant states after Hurricane Katrina<sup>22</sup> motivated me to exchange the tranquility of academia for the drama of high stakes litigation. Second, I approach these issues as a former judicial law clerk of four Louisiana court judges.<sup>23</sup> My practice is to examine the evolution of the various trajectories of tort and contract law as they normally operate in the historical context of sovereign immunity and oil and gas environmental litigation. Lastly, I also analyze these issues as a litigator. My first stint was at a boutique defense firm dedicated to defending independent upstream oil and gas operators under the direction of Loulan Pitre, Jr., whose law review article was cited by the Louisiana Supreme Court at the beginning of a prominent oilfield contamination case, thereby solidifying his reputation as the most prominent defense attorney in “legacy lawsuits.”<sup>24</sup> Currently, I am a litigator at a predominantly plaintiffs’ firm headed by J. Michael Veron, the lead litigator in *Corbello v. Iowa Production*.<sup>25</sup> These experiences inform my understanding of how creative lawyering can convince judges to deviate from *jurisprudence constante*.<sup>26</sup>

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an article or book).

22. D’Ann R. Penner, *Assault Rifles, Separated Families, and Murder in Their Eyes: Unasked Questions After Hurricane Katrina*, 44 J. AM. STUD. 573, 580–83 (2010) (describing my methodology of conducting at least one (and as many as seven follow-up) interviews with a total of 290 Katrina survivors from a wide variety of educational, socioeconomic, religious, and family backgrounds). For a sample of the interview narratives, see PENNER & FERDINAND, *supra* note 4.

23. See D’Ann R. Penner, *The Value of a State Court Clerkship*, SEASONING (La. St. Bar Ass’n Senior Lawyers Div., New Orleans, La.), Jan. 2014, <http://files.lsba.org/documents/SL/JanuarySpicy.pdf> (describing my experiences clerking for retired Judge Michael Bagneris, Judge Paulette Irons (a former state representative), *pro tempore* Judge Val P. Exnicios, and *pro tempore* Judge Lynn Luker from 2012–2014).

24. See *Marin v. Exxon Mobil Corp.*, 2009-2368, p. 1 n.1 (La. 10/19/10); 48 So. 3d 234, 238 n.1 (citing Loulan Pitre, Jr., “*Legacy Litigation*” and *Act 312 of 2006*, 20 TUL. ENVTL. L.J. 347, 348 (2007)).

25. *Corbello v. Iowa Prod.*, 2002-0826, p. 9 (La. 2/25/03); 850 So. 2d 686, 695 (ruling that “in cases of breach of a contractual obligation of restoration in a lease,” damages need not be “tethered to the market value of the property” because doing so would allow an E&P operator to “perform its operations in any manner, with indifference as to the aftermath of its operations because of the assurance that it would not be responsible for the full cost of restoration”), *superseded by statute in part*, Act of July 2, 2003, No. 1166, 2003 La. Acts 3511 and Act of July 8, 2006, No. 312, 2006 La. Acts 1472, *as recognized in State v. La. Land & Expl. Co.*, 2012-0884 (La. 1/30/13); 110 So. 3d 1038.

26. See, e.g., *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1334 (La. 1978) (explaining the primacy of the Civil Code and statutes enacted by the



According to Judge Richard Posner, the divide between academia and the judiciary is wider today than ever before.<sup>27</sup> One way of improving the lines of dialogue between the two branches of law, Posner suggests, would be for academics to help generalist judges to “dig below the semantic surface” to understand “the real stakes in a case.”<sup>28</sup> In this Article, I consider what coastal scientists, oral historians, political scientists, social scientists, and sociologists have unearthed about “the real stakes” for Louisiana—and beyond—when scientific malpractice is immunized in the public sphere and when the misinterpretation of Louisiana law by a federal district court sitting in diversity untethers liability from business decisions in the private sphere.

### C. ROADMAP

This Article advances in two major parts. Part II tackles the fate of *In re Katrina Canal Breaches Consolidated Litigation (Robinson v. United States)*<sup>29</sup> (hereinafter *Canal Breaches* and *Robinson* plaintiffs) between the district court’s judgment and the Fifth Circuit Court of Appeal’s second panel’s reversal on September 10, 2012. It is divided into five subsections: (1) a description of Congress’s purpose in waiving sovereign immunity for government liability in tort in the Federal Tort Claims Act (FTCA) in 1946;<sup>30</sup> (2) a short history of the Discretionary Function Exception (DFE), which ultimately defeated *Canal Breaches*;<sup>31</sup> (3) a discussion of the divergences of opinion between the district court, the first appellate panel, and the second appellate panel on whether the DFE applied to what was concluded to be scientific malpractice;<sup>32</sup> (4) an examination of the most fiercely contested DFE immunity issues in the mirror of a fully litigated lawsuit with implications for property rights, public safety, and government accountability;<sup>33</sup> and (5) a proposal advocating DFE immunity in public-safety cases *only* if a hard-

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legislature over judicial opinions in Louisiana); see WILLIAM E. CRAWFORD, TORT LAW § 1:15 (West, La. Civil Law Treatise No. 12, 2d ed. 2009) (explicating how *jurisprudence constante* differs from *stare decisis*).

27. RICHARD POSNER, HOW JUDGES THINK 206–16 (2008).

28. *Id.* at 228.

29. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

30. *See infra* Part II, Section A.

31. *See infra* Part II, Section B.

32. *See infra* Part II, Section C.

33. *See infra* Part II, Section D.

look policy analysis was conducted and disclosures were made to the appropriate funding bodies and in-danger communities, or secrecy about the public-safety threat is mandated by the nature of the experiment.<sup>34</sup>

Part III uses an Eastern District of Louisiana case, *Barasich v. Columbia Gulf Transmission Co.*,<sup>35</sup> to examine how the oil and gas industry has avoided paying for any of the Katrina-triggered damages caused by its contribution to the destruction of Louisiana's wetlands. Subsection A identifies the three primary mistakes made by the *Barasich* court. The central case the *Barasich* court relied upon, *Terrebonne Parish School Board v. Castex Energy, Inc.*,<sup>36</sup> is placed in its jurisprudential context in Subsection B. Subsection C explains Louisiana's test for unreasonable and excessive damage to a lessor's property as it existed in 2006, concluding that even by the pre-2010 reasonable-man standard of contract the *Barasich* court was wrong to dismiss plaintiffs' claims without allowing discovery.<sup>37</sup> In Louisiana, the judiciary has taken the lead in modernizing contract law by increasingly considering the landowner's perspective rather than assuming that industry custom and practice is the only viewpoint that matters. In 2014, the Louisiana legislature enacted Act No. 400, which dictates that reasonableness is now determined from the "time of the activity complained of."<sup>38</sup> The journey from *Castex* to Act No. 400 is described in Subsection D.<sup>39</sup> Subsection E applies the current state of Louisiana law to the question of when and under what circumstances an operator's decision to dredge a canal and not backfill would be covered by the "ordinary-wear-and-tear" exception to a lessee's general duty to return a thing to its owner in the same condition it was in at the time it was leased.<sup>40</sup>

The Conclusion brings together the insights gleaned by examining these two cases in tandem in one article.<sup>41</sup> To date the

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34. See *infra* Part II, Section E.

35. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006).

36. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 04-0968 (La. 1/19/05); 893 So. 2d 789.

37. See *infra* Part III, Section C.

38. Act of June 2, 2014, No. 400, § 1, 2014 La. Sess. Law Serv. 1350, 1352 (codified at LA. STAT. ANN. § 30:29(M) (Supp. 2015)) (formalizing *Louisiana Land's* result); see *State v. La. Land & Expl. Co.*, No. 12-0884 (La. 1/30/13); 110 So. 3d 1038.

39. See *infra* Part III, Section D.

40. See *infra* Part III, Section E.

41. See *infra* Part IV.

citizens of coastal Louisiana have shouldered the lion's share of the burden of paying for the property damage caused by the oil and gas industry's blatant disregard of the warnings produced by their own scientists.<sup>42</sup> Coastal Louisianans continue to live with the stress and instability of an eroding shoreline with no end in sight.<sup>43</sup> Both *Canal Breaches* and *Barasich* demonstrate why untethering liability from a costs-benefit analysis sets a dangerous precedent. While United States citizens are responsible for the politicians they elect, they are not responsible for the choices made by private industry, nor do they share in the profits maximized for shareholders by economizing on wetland-protecting technology and damage-mitigating techniques. Without the imposition of accountability for the harm caused to other people's property, there is no incentive for oil companies to use less-damaging technology or to mitigate the damage at operation's end.

**II. THE "TWILIGHT ZONE"<sup>44</sup> OF THE FEDERAL TORTS CLAIM ACT<sup>45</sup> FOR THE ARMY CORPS OF ENGINEERS' GROSSLY NEGLIGENT MAINTENANCE OF THE MISSISSIPPI RIVER-GULF OUTLET**

*A bar patron who restrains from physically retaliating for a perceived insult, a publisher who decides to omit names from a story rather than risk defaming others, a motorist who drives carefully, a manufacturer's adoption of quality control measures—each of these can be and often is a testament to the degree to which the norms of conduct embedded in tort law are routinely heeded because they have been marked out as obligatory and because committing them renders one vulnerable to suit by the victim.*<sup>46</sup>

—Professors John Goldberg & Benjamin Zipursky

The Discretionary Function Exception (DFE)<sup>47</sup> has been

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42. Post-Katrina federal relief did compensate, albeit very unevenly, some Louisiana citizens for a nominal percentage of their property damage. See *infra* Part II, Section D, Subsection 2.

43. See generally DAVID M. BURLEY, *LOSING GROUND: IDENTITY AND LAND LOSS IN COASTAL LOUISIANA* (2010).

44. Hugh C. Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U. INTRAMURAL L. REV. 41, 42 (1955).

45. The FTCA became law as Title IV of the Legislative Reorganization Act of 1946, §§ 401–424, Pub. L. No. 79-601, 60 Stat. 812, 842–47 (codified as amended in scattered sections of 28 U.S.C. (2012)).

46. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *TORTS* 27 n.1 (2010).

47. 28 U.S.C. § 2680(a) (2012) (excluding from the FTCA “[a]ny claim . . . based

described as “an anachronism sandwiched into an ideal.”<sup>48</sup> The Federal Tort Claims Act (FTCA) model is the “landmark governmental acceptance of responsibility and effort[] to reduce injustice.”<sup>49</sup> Nonetheless, the DFE lurks like an unexploded landmine under the liberated territory of the FTCA.<sup>50</sup> It is a backward-looking product of the New Deal era,<sup>51</sup> when belief in impartial, scientifically guided, administrative experts had not been tarnished by events like the Vietnam War.<sup>52</sup>

*Canal Breaches*, with its initial focus on property damage,<sup>53</sup> fits squarely within “the categories of claims recognized by the jurisdictional grant of the [FTCA].”<sup>54</sup> But the DFE defeated the

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upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused”).

48. William G. Weaver & Thomas Longoria, *Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exception*, 96 AM. POL. SCI. REV. 335, 337 (2002).

49. *Id.*

50. *See generally id.*

51. Frederick F. Blachly & Miriam Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213 (1946) (describing the legislators’ fear of potential judicial “sabotage” of the administrative process and illustrating the authors’ mainstream belief that government agents were specialists whose judgment should be trusted, not scrutinized, by generalist judges). On “High Modernism,” see generally JAMES SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 89 (1999) (defining high modernism as “a . . . muscle-bound . . . version of the beliefs in scientific and technical progress . . . . At its center was a supreme self-confidence about continued linear progress, the development of scientific and technical knowledge, the expansion of production, the rational design of social order, the growing satisfaction of human needs, and not, least, an increasing control over nature . . . .”).

52. *See generally* DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1993) (arguing that Vietnam was a watershed event, during which highly trained, Ivy-League presidential advisors entangled the country in a lengthy, unpopular war that defied textbook expectations).

53. *In re Katrina Canal Breaches* Consol. Litig., 647 F. Supp. 2d 644, 734–37 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches* Litig., 696 F.3d 436 (5th Cir. 2012). While none of the bellwether plaintiffs had wrongful death claims, some of the other plaintiffs did. Interview with Joseph Bruno (December 6, 2012) (on file with author). Although a Supreme Court majority in *James v. United States*, 478 U.S. 597 (1986), “glossed over the distinction between *damage* (harm to property) and *damages* (money awarded in a court judgment) and used them interchangeably,” a proper textualist analysis of FCA immunity, according to Justice Antonin Scalia and Professor Bryan Garner, would reveal that the FCA was meant to shield claims for property damage, not wrongful death. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 45 (2012); *see also* BRIAN A. GARNER, *GARNER’S DICTIONARY OF LEGAL USAGE* 242 (3d ed. 2011) (defining “damage” and “damages”).

54. Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365,

plaintiffs just as it does in the majority of cases, most of which do not reach trial.<sup>55</sup> In pursuit of an answer to the riddle of how a straightforward exception like the DFE threatens to eclipse an entire rule,<sup>56</sup> scholars have conducted statistical analyses. Quantitative analysis by Dr. Stephen Nelson has shown that federal district court judges granted government motions to dismiss for lack of subject-matter jurisdiction based on the DFE exception in 563 of the 760 cases identified through LexisNexis between 1946 and 2007, or roughly seventy-four percent of the time.<sup>57</sup> By successfully pleading a jurisdictional bar to litigation, the government not only deprives the public of a chance to weigh the evidence in a directly adversarial context; it also frequently eliminates discovery, “the most efficient means to unearth information about government practices.”<sup>58</sup>

In *Canal Breaches*, however, full-blown discovery was conducted for three years.<sup>59</sup> The nineteen-day bench trial featured several dozen witnesses—fifteen of whom were experts—and over 3,200 exhibits, including many internal, official records of the Corps.<sup>60</sup> Witnesses were cross examined and, under oath, government agents answered questions about their awareness of the risks associated with their activities. Because of the fact-intensive nature of *Canal Breaches*, hypothetical arguments about the usefulness of the DFE can be considered in the light of specific facts.

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376 (1995).

55. Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 282 & n.24 (2009). This trend is even more pronounced than the general federal docket of “vanishing trials.” See generally Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

56. See, e.g., *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting) (“Our Court’s decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act.”).

57. Nelson, *supra* note 55, at 290 (tracing the historical development of jurisprudential interpretation of the DFE by focusing descriptively and quantitatively on all federal district court opinions on government motions under Rule 12(b)(1) or Rule 56 of the FRCP [Federal Rules of Civil Procedure] that were reported for publication between the year the FTCA became law (1946) and 2007).

58. Weaver & Longoria, *supra* note 48, at 346.

59. Brief for Plaintiffs-Appellees/Cross-Appellants at 10, *In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012) (No. 10-30249), 2011 WL 990297 at \*10.

60. *Id.* at 10–11.

### A. THE FEDERAL TORT CLAIMS ACT: ANIMATING PURPOSES

From 1792 to 1946, individuals wronged by United States government agents had only a single forum in which to bring their claims: Congress.<sup>61</sup> Necessitated by the Appropriations Clause of the United States Constitution,<sup>62</sup> which authorizes only Congress to disburse money from the Treasury,<sup>63</sup> the process for seeking compensation was acknowledged to be arbitrary for tort victims<sup>64</sup> and time-consuming for senators and representatives.<sup>65</sup> After decades of debating a general tort claims act, Congress enacted the FTCA in 1946 as Title IV of the Legislative Reorganization Act.<sup>66</sup>

The FTCA waives the federal government's sovereign immunity. Moreover, the FTCA was not the first instance when Congress waived the federal government's immunity. For example, Justice Scalia noted with approval Congress's passage of the Tucker Act in 1887,<sup>67</sup> which in his view corrected "the area in which the doctrine of federal sovereign immunity made its most blatant affront to the basic precepts of justice," namely

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61. On private bills, see generally James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1866 (2010) (defining private bills as "the submission of a petition to Congress for the adoption of private legislation" to address government wrongdoing against a private citizen). An early example of such a private bill compensated private citizens for property damage to a school caused by soldiers. Act of Apr. 13, 1792, ch. 21, 6 Stat. 8.

62. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

63. See generally Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1248–58 (2009) (detailing the relationship between the Appropriations Clause and the development of sovereign immunity in the United States); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 527, 545 (2003) (pointing out that while the Appropriations Clause "lends force to the argument that money judgments against the United States cannot be paid without an appropriation from Congress," sovereign immunity has never prevented "all remedies for governmental wrongs, even some remedies that could affect the treasury or government property").

64. See, e.g., *Tort Claims: Hearings Before the H. Comm. on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong. 54 (1942) [hereinafter *Tort Claims Hearings*] (statements of Reps. John Martin Vorys and John M. Robsion).

65. See *id.* at 49–55 (collecting complaints of Representatives about inefficiencies and inequities in the private bill system).

66. Legislative Reorganization Act of 1946, §§ 401–424, Pub. L. No. 79-601, 60 Stat. 812, 842–47 (1946) (codified as amended in scattered sections of 28 U.S.C. (2012)).

67. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. §§ 1346(a), 1491 (2012)).

contract law.<sup>68</sup>

Under the FTCA, federal district courts have exclusive jurisdiction over damage suits against the United States involving:

personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>69</sup>

Justice Felix Frankfurter best encapsulated the intent of Congress in enacting the FTCA in *Indian Towing Co. v. United States*:

The broad and just purpose which the [FTCA] statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.<sup>70</sup>

Functionally, the FTCA creates efficiency in two ways. First, it saves politicians time by replacing private claim bills for “the payment of money for property damages” with a “well-defined, continually operating machinery to redress wrongs arising out of Government activity.”<sup>71</sup> Second, it streamlines access to remedies for victims of governmental negligence by making them “effective and readily available.”<sup>72</sup>

## B. THE DISCRETIONARY FUNCTION EXCEPTION: A SHORT HISTORY

Simultaneous with the FTCA enactment, Congress carved out thirteen specific, statutory exceptions to its waiver of

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68. Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 869 (1970).

69. 28 U.S.C. § 1346(b)(1) (2012).

70. *Indian Towing Co. v. United States*, 350 U.S. 61, 68–69 (1955) (holding the Coast Guard liable for not keeping a lighthouse’s battery charged, an act that the Court found was not steeped in policy judgment). In its most recent pronouncement on the exceptions to the FTCA’s waiver of sovereign immunity, a much less tort-friendly court confirmed that *Indian Towing* is still good law. *United States v. Gaubert*, 499 U.S. 315, 326 (1991).

71. *See Tort Claims Hearings*, *supra* note 64, at 45.

72. *Id.* at 45.

immunity in tort actions brought against the United States government.<sup>73</sup> The “most gaping and frequently litigated” FTCA exception<sup>74</sup> is the DFE, which acts as a jurisdictional bar to claims “based upon the exercise or performance [of] or the failure to exercise or perform a discretionary function or duty.”<sup>75</sup> Congress’s waiver of sovereign immunity for tort actions has been systematically narrowed through judicial activism.<sup>76</sup> In this regard, the DFE’s function conforms to the general evolution of sovereign immunity doctrine in other areas.

Historically, legal academics have excoriated sovereign immunity doctrine. Law review journals are filled with academic critiques<sup>77</sup> of the doctrine for threatening the Constitution and

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73. Legislative Reorganization Act of 1946, § 421, Pub. L. No. 79-601, 60 Stat. 812, 845–46 (codified as amended at 28 U.S.C. § 2680(a)–(n) (2012)) (providing exceptions that range from postal exceptions to intentional torts).

74. James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (suggesting an administrative solution to private tort actions against the government); see also Jackson, *supra* note 63, at 563–64 (identifying the DFE as the “most important” FTCA exception).

75. 28 U.S.C. § 2680(a) (2012).

76. See Jonathan R. Bruno, Note, *Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 449 (2012) (challenging an expansive application of the DFE on policy grounds). On conservative judicial activism, see generally ERWIN CHEMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010).

77. The list is too long to be exhaustive here; for a taste, see JOHN T. NOONAN, *NARROWING THE NATION’S POWER* 11 (2002) (contending that “the Supreme Court, as the devotee of dignity and the hitchhiker of history, has embraced with mistaken enthusiasm a doctrine of state immunity that is overextended, unjustified by history, and unworkable in any consistent way”); Ernest Angell, *Sovereign Immunity—The Modern Trend*, 35 YALE L.J. 150, 151 & n.5 (1925) (summarizing the proponents of the movement as a “growing army”); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1217 (2001) (arguing that a concern to protect the treasury underlies all of the Supreme Court’s decisions on sovereign immunity); Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 444 (2011) (concluding that the Supreme Court’s immunity jurisprudence “negate[s] constitutional supremacy and undermine[s] the rule of law”); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 954–55 (2000) (critiquing the Rehnquist Court’s expansion of state sovereign immunity as unstable and ahistorical); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 40 (2002) (arguing that Article III gives the federal judiciary jurisdiction to hear “controversies to which the United States shall be a party,” which should not be negated by a mere common law limitation); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 *passim* (2003) (analyzing the Supreme Court’s rhetoric of “dignity” in its defense of expanding states’ rights at the expense of Congress and individual citizens); Weaver & Longoria, *supra* note 48, at 337, 343–47 (analyzing the success rate of DFE



foreclosing “a “healthy competition among limited governments for the hearts of the American People [that] can protect popular sovereignty and spur a race to the high ground of constitutional remedies.”<sup>78</sup> By contrast, academic defenders of the law of sovereign immunity in any of its forms are rare.<sup>79</sup>

Even when Justice Antonin Scalia was a law professor at the University of Virginia, he observed that for nearly a century, “learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth, calling into question not only [sovereign immunity’s] utility but even the legitimacy of its alleged origins.”<sup>80</sup> Professor Scalia recommended a judicial approach of compartmentalizing cases by type first, and then focusing on the particular facts of an

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defenses on the basis of three metrics: the number of potential plaintiffs, the involvement of the bureaucracy, and the presence of significant policy implications).

78. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428 (1987).

79. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 7–9 (1990) (arguing that *Hans v. Louisiana* was correctly decided); Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006) (concluding that, from a national point of view, disallowing private lawsuits for retrospective money damages still leaves many workable alternatives to compelling states to adhere to federal policy priorities); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001) (arguing that “when adopted, the Constitution was understood as embodying an understanding that the federal and state governments were free to invoke the doctrine of sovereign immunity for themselves, even if this meant that rights given by the federal Constitution would go unenforced”); Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 900 (2010) (arguing that federal sovereign immunity “enhances democratic rule and fortifies the separation of powers between the political and judicial branches”); Zillman, *supra* note 54, at 388 (concluding that the Supreme Court’s expansive reading of the DFE of the FTCA to virtually swallow Congress’s original waiver of immunity for tort liability in the case of government negligence would please a parsimonious Congress). One of the reasons Professor Hill is not as alarmed as most of his colleagues by our sovereign immunity jurisprudence is because he assumes that “governmental interference with a property right may in all cases be tantamount to a taking, with relief allowable on that basis.” *Id.* at 585. Hill’s optimism is squarely countered by Professor Richard Epstein’s tracking of the demise of Supreme Court protection for what once was a protected fundamental value: private property. See generally RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* (2008). However, with the Supreme Court’s latest temporary taking ruling in *Arkansas Game & Fish Comm’n v. United States*, it is possible the Supreme Court jurisprudence on property rights may have turned a corner. 133 S.Ct. 511, 515 (2012).

80. Scalia, *supra* note 68, at 867 (arguing that scholars would do well to stop analyzing sovereign immunity’s applicability from the top down).

individual case.<sup>81</sup>

According to Justice John Paul Stevens's law clerk during the 2000–2001 term,<sup>82</sup> the Rehnquist Court's signature theme was its "attitudinal orientation against litigation."<sup>83</sup> Most germane to this Article, the Rehnquist Court increasingly narrowed the Court's construction of "statutes and case law to reduce and eliminate remedial options," while simultaneously expanding immunity doctrines to protect governments from fiscal accountability.<sup>84</sup> This skepticism, Professor Andrew Siegel contends, extended not only to litigation, but also to the ideals of "equity" and "judicial discretion."<sup>85</sup>

In 2006, however, an almost unanimous Roberts Court warned against letting a FTCA exception engulf the overarching rule.<sup>86</sup> The Court identified *Dolan v. U.S. Postal Service* as an example of a case where "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," which "waives the Government's immunity from suit in sweeping language."<sup>87</sup> Seven of nine Justices narrowly read the postal-matter exception and held the U.S. Postal Services accountable for its actions.<sup>88</sup> A judicial branch's pruning of DFE's overreach may be the best hope for governmental accountability.

### C. EXTENDING GAUBERT'S SUSCEPTIBLE-TO-POLICY-ANALYSIS CAPE TO CLOAK PUBLIC-SAFETY CASES

The *Robinson* plaintiffs sued the Corps under the FTCA. The case was allotted to Judge Stanwood Duval, Jr., an Episcopalian raised among Catholics, a fact to which he attributes his independence of mind.<sup>89</sup> He grew up in Houma, Louisiana, a Cajun outpost. In a place of honor inside his office is

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81. See Scalia, *supra* note 68, at 919–20.

82. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation As an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1182 n.362, 1194 n.421 (2006).

83. *Id.* at 1114.

84. *Id.* at 1117.

85. *Id.* at 1199.

86. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006).

87. *Id.* at 491–92 (citations omitted) (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984); *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)).

88. *Id.* at 482. Justice Thomas dissented, while Justice Alito recused himself. *Id.*

89. Interview with Judge Stanwood Duval, United States District Court for the Eastern District of Louisiana (Nov. 14, 2012) (interview notes on file with the author) [hereinafter, Duval Interview].

a picture of his father and his uncle in Marine uniforms.<sup>90</sup> Patriotism, a work ethic, and an outlier's stance govern his approach to being a judge.

Judge Duval's sixty-seven-page opinion followed a nineteen-day bench trial of six bellwether plaintiffs.<sup>91</sup> Judge Duval's chief finding was that:

Plaintiffs have proven that the Corps knew the dangers that the MR-GO was creating by virtue of its own engineering mistakes. The most glaring issue the Court sees is in the context of the state's negligence claim itself—its failure to implement foreshore protection when it recognized or should have recognized the extreme degradation that failure caused to the Reach 2 Levee. In addition, the Corps' failure to warn Congress officially and specifically and to provide a mechanism to rectify the problem by properly prioritizing the requested funding to alleviate life threatening harm which the MR-GO posed is the key.<sup>92</sup>

The Corps was not immune under the DFE of the FTCA, Duval explained, because *United States v. Gaubert* did not overrule *Indian Towing Co. v. United States*.<sup>93</sup> In other words, *Indian Towing's* rule that a government agency was liable for the damage its bungled safety precautions caused private citizens did not fit within *Gaubert's* "susceptible-to-policy-analysis" loophole.<sup>94</sup> Like Professors Peter Schuck and James Park, Duval demonstrated an approval of the judicial practice of disaggregating factors in order to identify whether policy was a cause in fact of the tort.<sup>95</sup> As he explained, the Corps's decisions were "grounded [in] its engineering position that the MR[-]GO

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90. Duval Interview, *supra* note 89.

91. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 647–48 (E.D. La. 2009), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

92. *Id.* at 706–07.

93. *Id.* at 711–12, 714–15.

94. *Id.*; see generally Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 474 (1997) (likening the Court's broadening of the applicability of the DFE in *Gaubert* to a colonizing extension of sovereign immunity).

95. *In re Katrina*, 647 F. Supp. 2d at 711–12, 714–15; see also Coulthurst v. United States, 214 F.3d 106 (2d Cir. 2000) (refusing to immunize under the DFE the negligent daily inspection of equipment that led to an accident in a prison weight room); Peter H. Schuck & James J. Park, *The Discretionary Function Exception in the Second Circuit*, 20 QUINNIPIAC L. REV. 55, 59–61 (2000) (discussing *Coulthurst*).

had no adverse effects with respect to storm surge,” an assumption that “any layperson, much less an engineer, could see” was wrong.<sup>96</sup> Judge Duval reasoned that the heart of the Corps’s tortious conduct was its very failure to engage in a rudimentary analysis of the “engineering blunders that . . . put the Parish of St. Bernard at risk. . . . The Corps cannot mask these failures with the cloak of ‘policy.’”<sup>97</sup>

The Fifth Circuit Court of Appeals panel convened to hear the Corps’s appeal praised the district court’s “careful attention to the law and even more cautious scrutiny of complex facts . . . .”<sup>98</sup> In fact, as the appellate panel pointed out, the Corps did not appeal on the basis of the facts.<sup>99</sup>

The only interpretation of law that the first appellate panel overruled was what it called a “minor restatement of [Flood Control Act]<sup>100</sup> immunity.”<sup>101</sup> Throughout the four years of pre-trial activity, the government brought numerous jurisdictional motions to dismiss,<sup>102</sup> two of which were granted: (1) those governed by the FCA,<sup>103</sup> and (2) those related to dredging under the DFE of the FTCA.<sup>104</sup> Both the first and second appellate panels accepted Duval’s categorization of the MR-GO as a navigational channel not governed by the FCA.<sup>105</sup>

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96. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 708 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

97. *Id.* at 708–09.

98. *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 399 (5th Cir.), *withdrawn on reh’g*, 696 F.3d 436 (5th Cir. 2012).

99. *Id.* at 385 n.1.

100. 33 U.S.C. § 702c (2012) (“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . .”).

101. *In re Katrina*, 673 F.3d at 390–91, 399. In the district court, Judge Duval held that § 702c immunity did not attach to the damages caused by the Corps’s failure to provide foreshore protection because it was allocable to MR-GO, a navigational project, not to a flood-control project, like the levees. *In re Katrina*, 647 F. Supp. 2d at 699. The Fifth Circuit held that the purpose of the foreshoring was controlling, not the nature of the project to which the foreshoring was allocated. *In re Katrina*, 673 F.3d at 390. Nonetheless, the result in this case was the same, as the Fifth Circuit found foreshoring not to have a flood-control purpose. *Id.* at 390–91.

102. Duval, *supra* note 18, at 1487–89.

103. *See In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 637 (E.D. La. 2008), *aff’d sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

104. *Id.* at 642.

105. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 444 (5th Cir. 2012) (accepting the trial court’s classification of the MR-GO); *In re Katrina Canal*

The first appellate panel in *Canal Breaches* explained that the purpose of the DFE is “to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”<sup>106</sup> It approved of the trial court’s examination of “[e]vidence of the actual decision” in order to shed light on whether the “nature’ of the decision implicated policy judgments.”<sup>107</sup> The first appellate panel compared the “considerable evidence amassed” by plaintiffs to support the position “that the Corps’ decisions were grounded on an erroneous scientific judgment, not policy considerations” with the government’s lack of “affirmative evidence.”<sup>108</sup> In the first appellate panel’s view, only once did the government almost argue “that it had policy reasons—and not faulty scientific ones—for delaying [the] MR[-]GO’s armoring.”<sup>109</sup> Because the Corps “flatly failed to gauge the risk,” the first appellate panel affirmed the trial court’s ruling that “the DFE is inapplicable to the *Robinson* plaintiffs’ claims.”<sup>110</sup>

Six months after the first appellate opinion was issued, the same three-judge panel<sup>111</sup> reconsidered its affirmance of the trial court’s verdict. The second panel opinion was triggered by the Corps’s petition for *en banc* review.<sup>112</sup> Instead of granting an *en banc* hearing, the panel converted the motion to a motion for panel rehearing and issued a replacement opinion.<sup>113</sup> The second appellate panel affirmed all of its previous affirmations of pro-Corps’s rulings in the trial court opinion and reversed its affirmations of all the pro-plaintiff rulings.<sup>114</sup>

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Breaches Litig., 673 F.3d 381, 387 (5th Cir.), *withdrawn on reh’g*, 696 F.3d 436 (5th Cir. 2012); *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 *passim* (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

106. *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 392 (5th Cir.) (quoting *Spotts v. United States*, 613 F.3d 559, 568 (5th Cir. 2010)) (internal quotation marks omitted), *withdrawn on reh’g*, 696 F.3d 436 (5th Cir. 2012).

107. *Id.* at 394 (quoting *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995)).

108. *Id.* at 395.

109. *Id.*

110. *Id.* at 396.

111. The panel consisted of Judges Smith, Prado, and Elrod. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 441 (5th Cir. 2012); *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 385 (5th Cir.), *withdrawn on reh’g*, 696 F.3d 436 (5th Cir. 2012).

112. Corrected Petition of United States for Rehearing En Banc, *In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012) (Nos. 10-30249, 10-31054, 11-30808), 2012 WL 12332442.

113. *In re Katrina*, 696 F.3d at 441.

114. *Id.* at 454.

The first and second appellate panel opinions virtually mirrored one another. Several paragraphs pertaining to the DFE's inapplicability to the plaintiffs' FTCA claim, however, were replaced with three sentences finding that the Corps's inactions were "susceptible to policy analysis."<sup>115</sup> In pertinent part, the replacement opinion reads:

Although the Corps appears to have appreciated the benefit of foreshore protection as early as 1967, the record shows that it also had reason to consider alternatives (such as dredging and levee "lifts") and feasibility before committing to an armoring strategy that, in hindsight, may well have been optimal. The Corps's actual reasons for the delay are varied and sometimes unknown, but there can be little dispute that the decisions here were susceptible to policy considerations. Whatever the actual reasons for the delay, the Corps's failure to armor timely Reach 2 is shielded by the DFE.<sup>116</sup>

Strikingly, the second opinion did not identify any intervening case law, or any documentary or testamentary evidence imparting newly recognized insights into long-standing jurisprudential doctrines. Emory University Professor Jonathan R. Nash called the unanimous reversal of a unanimous decision by the exact same three judges a "suspicio[us]" decision that "begs for an explanation."<sup>117</sup> A more expansive analysis justifying the 180-degree reversal would have been less disturbing.

The primary purpose of the DFE is to preclude "second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."<sup>118</sup> In *Gaubert*, no evidence of policy deliberations was presented, but the Court supplied hypothetical policy considerations in rendering its opinion.<sup>119</sup> After its publication, *Gaubert* was scathingly critiqued.<sup>120</sup> The *Gaubert* Court itself

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115. *In re Katrina Canal Breaches Litig.*, 696 F.3d 451 (5th Cir. 2012) (quoting *Spotts v. United States*, 613 F.3d 559, 572 (5th Cir. 2010)) (internal quotation marks omitted).

116. *Id.*

117. Jonathan R. Nash, *The Fifth Circuit's Curious About-Face*, NAT'L L.J. & LEGAL TIMES, Nov. 12, 2012, at 39, 39 (concluding that "[a]t the end of the day, the court's actions undermine its own legitimacy and more generally people's confidence in the courts").

118. *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

119. *United States v. Gaubert*, 499 U.S. 315, 324 (1991).

120. *See Peterson & Van Der Weide*, *supra* note 94, at 449 (proposing a rule that

explicitly stated that it was not overruling *Indian Towing*, the leading public-safety case.<sup>121</sup>

In *Canal Breaches* decades of scientific misjudgment were shielded from liability because the Corps's inaction *could have been* the result of a thorough analysis, if only the Corps had fulfilled its mission conscientiously. At issue was not Duval's second guessing of the way the Corps analyzed policy issues or the frequency of the Corps's analyses, but rather the absence of any policy-related deliberations at all.

Moreover, in *Gaubert*, no lives had been lost and no extraordinary property damage had been caused. Thomas A. Gaubert's claim was for pure economic loss: a total of \$100 million for the "lost value of his shares" and for "the property he had forfeited under his personal guarantee" from the federal officials who selected the officers and directors of the Independent American Savings Association that ultimately deprived him of position as chairman of the board of the Association.<sup>122</sup>

The Fifth Circuit's reversal in *Canal Breaches* extended the logic of a DFE decision in a case without property damage or lost lives to a case involving extraordinary property damage and human casualties. In such a context, it is easier to see the danger of the precedent now set by exonerating irresponsibility through the post-facto creation of hypothetical policy considerations. Specifically, in *Canal Breaches*, an accurate reporting to Congress of the costs to keep the MR-GO navigable for the seven ships that navigated it daily—\$20,000 per ship per direction<sup>123</sup>—combined with the amount of money that would have been required to timely reverse the MR-GO's damage to neighboring fast land and wetlands would have taken courage.<sup>124</sup> Without the possibility of liability, there is even less incentive now to be the messenger of news that would upset an agency's core constituency.

#### D. INCENTIVIZING ACCOUNTABILITY FOR PUBLIC SAFETY

The federal circuits remain split on whether the phrase

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would limit DFE immunity only to "those government decisions made by officials who were authorized to and actually did consider genuine policy factors").

121. *United States v. Gaubert*, 499 U.S. 315, 326 (1991).

122. *Id.* at 319–20.

123. Houck, *Retaking*, *supra* note 9, at 1064–65 (citing John Day et al., *Mister Go Must Go*, LPBF: SAVE OUR LAKE 3, 8 (Dec. 4, 2006), [www.saveourlake.org/PDF-documents/our-coast/MRGOwashpresfinalreport12-5-06.pdf](http://www.saveourlake.org/PDF-documents/our-coast/MRGOwashpresfinalreport12-5-06.pdf)).

124. *See id.* at 1065, 1069.

“susceptible-to-policy analysis” applies to public-safety cases.<sup>125</sup> A discussion of the implications of the Fifth Circuit’s reversal of the trial court’s decision in *Canal Breaches* can be organized around two questions. First, does allowing judges to invent possible policy reasons after a government agency’s recklessness has caused damages improve governmental accountability overall and enhance public safety? Second, should a government agency ever be relieved of a duty to warn the citizens in harm’s way of the risk to their property and lives as a result of its negligence, even its “monumental negligence,”<sup>126</sup> that could have been, but was not, subjected to a policy analysis?

### 1. LIABILITY, DETERRENCE, AND PUBLIC-SAFETY GOALS

The debate among sovereign-immunity scholars is whether the threat of “governmental tort liability” is necessary “to produce some degree of political pressure on government to invest in loss prevention.”<sup>127</sup> Some hypothesize that administrators operate most effectively free from considerations of potential agency

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125. See, e.g., *Irving v. United States*, 162 F.3d 154, 168–69 (1st Cir. 1998) (concluding that the DFE attached to a Federal Occupational Safety and Health Administration’s failure to observe and report three serious violations of their published standards because the policy consideration underpinning this decision might have been “efficient and effective use of limited enforcement resources”); *Faber v. United States*, 56 F.3d 1122, 1125–27 (9th Cir. 1995) (refusing to immunize national park officials for their failure to post adequate warning signs to protect divers at the location of the injury on the grounds that no conceivable policy basis could override national parks’ general policy to post warnings); *D.B.S. ex rel. C.R.S. v. United States*, 11 F.3d 791 (8th Cir. 1993) (holding that the DFE shielded the Army, even though it failed to warn a soldier that he might have received a blood transfusion infected with HIV because the court hypothesized that the Army might have acted out of policy considerations stemming from inadequate resources or a concern for morale); *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991) (holding that a negligent omission in routine policy implementation does not trigger policy concerns); *Lemke v. City of Port Jervis*, 991 F. Supp. 261 (S.D.N.Y. 1998) (holding that an inadequate routine inspection was not shielded by a broad policy of safety); *Martin v. United States*, 971 F. Supp. 827 (S.D.N.Y. 1997) (rejecting an attempt to evade liability under the DFE for a poorly maintained walkway).

126. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 717 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

127. Lawrence Rosenthal, *A Theory of Government Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 846, 853–55 (2007) (acknowledging the threat to “republican values” when a judge “unilaterally directs a commitment of government resources to a particular plaintiff”); see also Robert R.M. Verchik, *Afterword: The Economics of Infrastructure*, 52 LOY. L. REV. 1287, 1291–92 (2006) (“The first solution is to use law to put more of the social costs of bad practices onto the balance sheet.”).



liability,<sup>128</sup> which might lead to counter-productive byproducts like vague instruction manuals<sup>129</sup> or over-documentation that makes creative problem-solving impossible.<sup>130</sup>

Nevertheless, there is reason to fear that “the high success rate of the DFE and the extremely small chance that any suit will be successful provide little impetus for administrators to revisit policies after unsuccessful suits.”<sup>131</sup> By contrast, “administrators and officers in organizations and institutions almost universally consider potential liability in tort before undertaking policies, producing products, or engaging in activities.”<sup>132</sup>

Speculation about the impact of liability on engineers is unnecessary. The state of California has undertaken an experiment for the entire country. California has a levee system that saves the state billions of dollars and benefits the entire state.<sup>133</sup> Over decades, the judiciary has created tests for determining liability for shoddy engineering. The point of these tests, as articulated by the Third District Court of Appeal in *Paterno v. State*, is to make sure the State is not given incentive to save money by failing to test or by ignoring warning signs.<sup>134</sup> In *Paterno*, the California court deemed “the costs of the levee failure part of the deferred costs of the project.”<sup>135</sup> As Professor Daniel Farber explains, if the *Paterno* court had ruled otherwise, the public would have received all the benefits of the levee “without having to bear the expense of ensuring it met the designed standards and was capable of carrying the water channeled to it by upstream features of the project.”<sup>136</sup>

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128. Weaver & Longoria, *supra* note 48, at 338.

129. See Zillman, *supra* note 54, at 387.

130. See *id.* at 376, 387–88.

131. Weaver & Longoria, *supra* note 48, at 347.

132. *Id.* at 339; see also Charles B. Anderson, *Marine Pollution and the ‘Polluter Pays’ Principle: Should the Polluter Also Pay Punitive Damages?*, 43 J. MAR. L. & COM. 43, 43 (2012) (“In the United States, and in most of the world’s developed countries, the ‘polluter pays’ principle has become a mainstay of environmental policy. . . . The underlying policy goal is to internalize the cost of polluting activity so that the cost falls on the polluter rather than on the government or the public generally.”).

133. *Paterno v. State*, 6 Cal. Rptr. 3d 854, 857 (Ct. App. 2003).

134. *Id.*

135. *Id.*

136. Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1085 (2009) (paraphrasing the *Paterno* court’s reasoning.); see also *id.* at 1080–83 (tracing the evolution of California’s test for state liability for damage to private property caused by defective levees).

The initial damage award for liability—\$500 million<sup>137</sup>—was said to have captured the attention of engineers and politicians alike. It has had the positive effect of causing a cash-strapped state government to focus on raising money for infrastructure repairs to the most vulnerable levees in order to avoid the threat of liability for damage claims stemming from preventable disasters in the future.<sup>138</sup>

*Canal Breaches* highlights the danger of hobbling tort law's ability to safeguard citizens' safety and property by rendering unnecessary the insertion of numbers for liability risk into budget calculations. Because *Canal Breaches* was decided after a full trial on the merits, it set a new precedent for exculpating failure to embrace modern science and to engage in risk assessment, while doing nothing to penalize government agents for failure to warn their supervisors or the public of danger. It is incalculable what future damages from "monumental negligence" by government officials and civil engineers might have been saved if a more *Paterno*-like message had been sent to specialists in the field of maintaining public infrastructure and politicians faced with budgetary choices.

Louisiana tort law, as proven by the trial court's handling of the law and evidence in *Canal Breaches*, is as protective of property and life as California tort law. The difference in outcomes in *Paterno* and *Canal Breaches* is explained by how the appellate courts interpreted case law on sovereign immunity in California and the United States.<sup>139</sup> In *Canal Breaches* the issue was whether federal sovereign immunity attached to the Corps's scientific malpractice. The answer to that question turned on whether *Gaubert's* "susceptible-to-policy analysis" applied to public-safety cases.

In the Fifth Circuit, *Canal Breaches's* holding has not been limited to public-safety cases relating only to the Corps. This could reduce motivation to spend money on cutting-edge testing

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137. Farber, *supra* note 136, at 1083 (describing the "shock waves" sent through California's "flood control community" and attention attracted from high-ranking politicians after the *Paterno* court required "the state . . . to pay almost half a billion dollars in damages for a levee breach"); see also Levine, *supra* note 74, at 1542 ("The public policy goals of tort law are predicated on a number of effects that liability has on actors. Among these is the aim of increased safety by visiting liability on people best positioned to cause changes in policy and practice.").

138. Farber, *supra* note 136, at 1083, 1116.

139. *Id.* at 1080, 1089 (predicting that under California law Louisiana homeowners would not have lost on sovereign-immunity grounds).

to report negative environmental impacts to Congress. It could also encourage the tendency not to report unwanted news to bosses and funding agencies. Because this was a federal case, it means that everyone in the Fifth Circuit catchment area is now less safe than they were before September 10, 2012. In an era of crumbling infrastructure, it is hoped that the Fifth Circuit soon will have another occasion to rethink this expansion of the DFE's scope.

## 2. FISCAL CONSIDERATIONS

At no point did the Fifth Circuit's second panel opinion in *Canal Breaches* justify its reversal by pointing to the unseemliness—in an era of budget battles, slashed social nets, and deficit spending—of an award for damages that could cost the treasury fifteen billion dollars. The universe of eligible claimants was approximately 100,000.<sup>140</sup> The average size of the award for the bellwether plaintiffs was \$143,800 plus costs and judicial interest.<sup>141</sup> The possible size of the ultimate damage award, however, is perceived as the motivation behind the second panel's reversal of its previous decision.<sup>142</sup>

A common defense of the expansion of sovereign immunity in general and the DFE in particular, voiced by no less than the U.S. Department of Justice, is that it saves the country billions of dollars per year.<sup>143</sup> “Protect[ing] the public treasury” was a top priority of government attorneys adjudicating FTCA claims, according to Paul Figley, a former Deputy Director, Torts Branch, Civil Division, of the United States Department of Justice.<sup>144</sup>

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140. Mark Schleifstein, *Hurricane Katrina Damage Judgment Against Army Corps of Engineers is Reversed by Federal Appeals Court*, NOLA.COM/TIMES-PICAYUNE (Sept. 25, 2012, 10:18 PM), [http://www.nola.com/katrina/index.ssf/2.012/09/katrina\\_damage\\_judgement\\_again.html](http://www.nola.com/katrina/index.ssf/2.012/09/katrina_damage_judgement_again.html); Erin Fuchs, *US Appeals Katrina Canal Breach Defeat to 5th Circ.*, LAW 360 (Feb. 26, 2010, 3:17 PM), [www.law360.com/articles/152270/us-appeals-katrina-canal-breach-defeat-to-5th-circ](http://www.law360.com/articles/152270/us-appeals-katrina-canal-breach-defeat-to-5th-circ).

141. Fuchs, *supra* note 140.

142. Judge Duval believes that it was probably the biggest motivating factor for the peculiar reversal. Duval Interview, *supra* note 89.

143. *Discretionary Function Exemption of the Federal Tort Claims Act and the Radiation Exposure Compensation Act: Hearings on H.R. 1095, H.R. 2372, and H.R. 2536 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 101st Cong. 91 (1989) (statement of Stuart M. Gerson, Assistant Att'y. Gen., Civil Div., Dep't of Justice). *But see* Bruno, *supra* note 76, at 438–43 (suggesting that such arguments are probably based on the assumption that the principles of tort law are not sufficiently calibrated to deny illegitimate causes of action).

144. Paul Figley, *Ethical Intersections and the Federal Tort Claims Act: An*

Likewise, even Dean Erwin Chemerinsky argues that the Supreme Court's decisions on federal, state, and local sovereign immunity share the common goal of protecting the treasury, a goal which the Court, on balance, deems "more important than the benefits of liability in terms of ensuring compensation and deterrence."<sup>145</sup>

Not all the arguments in favor of protecting the public fisc are pragmatic in nature. Gerald Frug, for example, frames the argument in moral terms, pointing out that "[t]he allocation of scarce resources by court order is not likely to be from the fortunate to the powerless; it is already the powerless to whom the state largely directs its resources."<sup>146</sup> Others argue that taxpayers, who are innocent of any wrongdoing or questionable judgment, should not pay for the mistakes of government administrators.<sup>147</sup>

There is no evidence that the costs to correct the Corps's reckless failure to maintain the eroding embankments of the MR-GO along the Mississippi River when first uncovered would have been greater than the billions of dollars poured into the New Orleans Metropolitan Region since Hurricane Katrina to shore up the collapsed levee system, to re-house displaced citizens, and, ultimately, to close the MR-GO. "The Corps' negligence resulted in the wasting of millions of dollars in flood protection measures and billions of dollars in Congressional outlays to help this region recover from [the] catastrophe," concluded Judge Duval.<sup>148</sup> Unless *St. Bernard Parish Government v. United States* is reversed, the government will have to pay the *Robinson* plaintiffs for "temporary takings."<sup>149</sup>

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*Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 374 (2011) (advising government attorneys to adhere to even-handed, routinized processes for handling private claims).

145. Chemerinsky, *supra* note 77, at 1216–17; *see also* Levine, *supra* note 74, at 1549 (arguing that the DFE's "vital fiscal function" of limiting government liability trumps "prevailing theoretical justifications").

146. Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 741–42 (1978) (writing in a comparatively expansive era of government spending on the poor).

147. Rosenthal, *supra* note 127, at 846–47.

148. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 710–11 (E.D. La. 2009), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

149. *St. Bernard Parish Gov't v. United States*, 121 Fed. Cl. 687, 718–39 (2015) (finding for the *Robinson* plaintiffs on their Fifth-Amendment takings claims stemming from land losses wrought by the Corps's destruction of the cypress swamps along the MR-GO); *see also* Louisiana v. U.S. Army Corps of Eng'rs, No. 14-2467,

While this may yet cost the federal government and ultimately U.S. taxpayers an extraordinary amount of money, the *Robinson* plaintiffs will still be prejudiced by having to wait over ten years to be compensated for overwhelming, multi-faceted damages that often included not only the loss of a home and private property but also the loss of a job and a family network.<sup>150</sup> “[T]he elderly were the first and most numerous to die in the first year after the storm.”<sup>151</sup> They did not have ten years to wait.

One of the most passionate currents running through an edited collection of oral testimonies given by displaced Lower Ninth Warders was the intensity of the love they had for their city.<sup>152</sup> Even seven years after the storm, block after block of once lively neighborhoods in the Lower Ninth Ward still resembled a postwar wasteland.<sup>153</sup> In August 2015, an LSU survey confirmed that predominantly white residents of St. Bernard Parish and black residents of Orleans Parish have more negative views of the “extent of recovery” since Hurricane Katrina than white residents of Orleans Parish.<sup>154</sup> What then accounts for the discrepancy

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2015 WL 5083683 (E.D. La. Aug. 27, 2015) (requiring the federal government to pay the entire bill for the closure of MR-GO and the ecosystem restoration project, rather than shifting part of the bill to the State of Louisiana), *appeal docketed*, No. 15-30962 (5th Cir. Oct. 27, 2015).

150. See generally DANIEL WOLFF, *THE FIGHT FOR HOME: HOW (PARTS OF) NEW ORLEANS CAME BACK* (2012).

151. Vincanne Adams et al., *Aging Disaster: Mortality, Vulnerability, and Long-Term Recovery Among Katrina Survivors*, 30 *MED. ANTHROPOLOGY* 247, 247 (2011).

152. See, e.g., PENNER & FERDINAND, *supra* note 4, at 8, 20, 30, 44, 47, 51, 58, 61, 70, 110, 133, 141, 152–55, 157, 160, 194, 199, 213, 228–29 (“When I was away traveling the world [in the Merchant Marines], I missed everything about New Orleans. I missed the streets, the ditches, and the raggedy streets in the Ninth Ward. . . . I missed the St. Augustine grass and the stop light at A.P. Tureaud . . . . New Orleans was a very, very rich and wealthy place, and when I say wealthy, I don’t mean money. I mean family. Where else can you walk down the street and get red beans on Mardi Gras day, on Fat Tuesday. ‘How your mama and them doing?’ You don’t even have to know their mama.”).

153. Nathaniel Rich, *Jungleland: The Lower Ninth Ward in New Orleans Gives New Meaning to “Urban Growth,”* *N.Y. TIMES* (March 21, 2012), <http://www.nytimes.com/2012/03/25/magazine/the-lower-ninth-ward-new-orleans.html> (“To visualize how the Lower Ninth looked in September [2011] . . . you have to understand that it no longer resembled an urban, or even suburban environment. Where once there stood orderly rows of single-family homes with driveways and front yards, there was jungle.”).

154. PUB. POLICY RESEARCH LAB, LA. STATE UNIV., *VIEWS OF RECOVERY TEN YEARS AFTER KATRINA AND RITA* 3, 16 (2015), <https://sites01.lsu.edu/wp/ppr/files/2012/07/Views-of-Recovery-August-2015.pdf> (pointing out that the citizens of St. Bernard and Plaquemines Parishes, predominantly white, felt even gloomier about their post-Katrina recovery than did African-Americans in Orleans parish); see also Robertson, *supra* note 13 (summarizing *Views of Recovery*).

between the oft-expressed fervent desire to return home and so many decisions to stay in regions where a cultural disconnect was lamented from the beginning of the displacement?<sup>155</sup>

Although it is true that the federal government appropriated billions of dollars for post-Katrina relief and rebuilding, it has been well documented that in Louisiana the money was not evenly disbursed by person or by the severity of the damage. A relevant example of uneven distribution of federal funds is the investment of federal resources used by the Corps to enhance flood protection for the Greater New Orleans Metropolitan area. On June 21, 2007, the Army Corps of Engineers made available an interactive, web-based map that showed how the bulk of the resources were used to make Lakeview and Old Metairie much more flood resistant than they were before the storm.<sup>156</sup> By contrast, however, it also showed how few resources had been invested in enhancing flood protection for New Orleans East, the Lower Ninth Ward, and St. Bernard Parish.<sup>157</sup> Another example of an uneven distribution of federal resources after Katrina is the discrepancy between rebuilding grants given to white and black homeowners.<sup>158</sup> In *Greater New Orleans Fair Housing Action Center. v. U.S. Department of Housing and Urban Development*, a District of Columbia court judge granted an injunction requiring the state of Louisiana to use a different formula for distributing federal money for rebuilding damaged properties because the original formula awarded on average \$10,000 more for an equivalent damage claim to white homeowners than to black homeowners.<sup>159</sup> By the time the injunction was granted, however, only a few hundred homeowners' claims remained unprocessed.<sup>160</sup>

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155. See Jonathan Tilove, *Five Years after Hurricane Katrina, 100,000 New Orleanians Have Yet to Return*, TIMES-PICAYUNE (New Orleans) (August 24, 2010, 9:45 PM), [http://www.nola.com/katrina/index.ssf/2010/08/five\\_years\\_after\\_hurricane\\_kat.html](http://www.nola.com/katrina/index.ssf/2010/08/five_years_after_hurricane_kat.html); see also PENNER & FERDINAND, *supra* note 4, at 150 (2009) ("I feel like I been robbed of everything that I love. Even if it was going to my corner store—I had my people there that I hung with. . . . So it's a culture shock.").

156. Amy Laura Cahn, *Our "Rights Are Not Cast in Stone": Post-Katrina Environmental "Red-Lining" and the Need for a Broad-Based Human Rights Lawyering Movement*, 12 U. PA. J.L. & SOC'Y 37, 37–40 (2008).

157. *Id.* at 37–40.

158. See generally Davida Finger, *Stranded and Squandered: Lost on the Road Home*, 7 SEATTLE J. SOC. JUST. 59, 70 (2008) (describing Road Home practices that based the value of a rebuilding grant on the home's pre-storm value, which was frequently determined by the racial mix of the neighborhood in which the home sat).

159. *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 723 F. Supp. 2d 14 (D.D.C. 2010).

160. See David Hammer, *Road Home's Grant Calculations Discriminate Against*

Whatever can be said about the efficiency of federal relief over the resolution of tort claims,<sup>161</sup> in post-Katrina Louisiana it was not much of an improvement over the arbitrariness of personal bills before Congress that the FTCA was enacted to correct.<sup>162</sup> Moreover, whatever damages the *Robinson* plaintiffs might have received for their FTCA claims could have been offset by a requirement to reimburse the government for any Road Home funds received.<sup>163</sup>

Not only do arguments of fairness to right past wrongs favor allowing tort law to perform its restorative function to victims of the Corps's scientific malpractice, but so too does an argument for future fiscal prudence. Here the carrot is saving escalating public health insurance costs by preventing the expensive health problems of individuals involuntarily uprooted along with their entire communities with very little warning. Mental health experts agree that episodes of post-traumatic stress disorder, depression, and anxiety disorders often emerge months or even years after triggering events.<sup>164</sup> Medical evidence proves that survivors of major disasters and cataclysmic events, like the attacks of September 11, 2001, are at a higher risk for depression, heart disease, and strokes for years to come.<sup>165</sup> Untreated

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*Black Homeowners, Federal Judge Rules*, TIMES-PICAYUNE (New Orleans) (Aug. 16, 2010, 6:38 PM, updated Oct. 11, 2010, 12:59 PM), [http://www.nola.com/politics/index.ssf/2010/08/dc\\_federal\\_judge\\_finds\\_road\\_ho.html](http://www.nola.com/politics/index.ssf/2010/08/dc_federal_judge_finds_road_ho.html) (noting that the injunction only provided prospective relief).

161. See generally Julie Isaacson, *Terrorism and Mass Toxic Torts: An Examination of the James Zadroga 9/11 Health and Compensation Act*, 25 FORDHAM ENVTL. L. REV. 509 (2014).

162. See *supra* note 70.

163. Although *Canal Breaches* never moved beyond the bellwether plaintiffs, Judge Duval could have bifurcated the class action lawsuit and held individualized damages trials, with calculations of offsets from insurance companies and relief funds received factored in to the final awards. See, e.g., *Claborne v. Hous. Auth. of New Orleans*, 14-1050, pp. 19–20 (La. App. 4 Cir. 4/15/2015); 165 So. 3d 268, 285, writ denied, 2015-0946 (La. 9/11/2015); 176 So.3d 1039. The doctrine of unjust enrichment would prevent the *Robinson* plaintiffs from receiving double awards for the same damage. See *Dugas v. Thompson*, 2011-0178, pp. 13–14 (La. App. 4 Cir. 6/29/11); 71 So. 3d 1059, 1067–68 (outlining the elements of unjust enrichment).

164. Ann L. Coker et al., *Social and Mental Health Needs Assessment of Katrina Evacuees*, 4 DISASTER MGMT. & RESPONSE 88, 89–90, 93 (2006); Anja J.E. Dirkzwager et al., *Risk Factors for Psychological and Physical Health Problems after a Man-Made Disaster: Prospective Study*, BRIT. J. PSYCHIATRY 144, 145–46, 148 (2006); Sandro Galea, Commentary, *The Long-Term Health Consequences of Disasters and Mass Traumas*, 176 CANADIAN MED. ASS'N J. 1293, 1293–94 (2007).

165. E. Alison Holman et al., *Terrorism, Acute Stress, and Cardiovascular Health: A 3-Year National Study Following the September 11th Attacks*, 65 ARCHIVES GEN. PSYCHIATRY 73, 78–79 (2008).

depression increases the risk of mortality from cardiovascular disease.<sup>166</sup> This will lead to increased health costs, a burden that will be distributed to taxpayers nationwide.

Because a money judgment would not have come directly out of the Corps's budget, it would have shifted the costs for one agency's negligence onto taxpayers as a whole.<sup>167</sup> Professor Farber argues that taxpayers should be likened to shareholders who have to make restitution if their company is convicted of shirking safety duties.<sup>168</sup> Citizens who "enjoyed lower taxes because their government failed to take necessary precautions" should be required to shoulder the compensation burden, lest they benefit from unjust enrichment at other citizens' expense.<sup>169</sup>

The cost of the Corps's scientific malpractice has been unfairly charged to St. Bernard Parish and the Lower Ninth Ward. One of the factors California judges use to determine compensability is that "the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."<sup>170</sup> The universal goal of tort law is to make a victim whole.<sup>171</sup> In *Paterno*, the California court used tort

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166. Jürgen Barth et al., *Depression as a Risk Factor for Mortality in Patients with Coronary Heart Disease: A Meta-Analysis*, 66 PSYCHOSOMATIC MED. 802, 808 (2004) (reaching this conclusion after performing a meta-study); Sandeep Gautam et al., *Effect of Hurricane Katrina on the Incidence of Acute Coronary Syndrome at a Primary Angioplasty Center in New Orleans*, 3 DISASTER MED. & PUB. HEALTH PREPAREDNESS 144, 149 (2009) (concluding that two years after Hurricane Katrina, the number of New Orleanians suffering from heart attacks had increased three-fold).

167. Farber, *supra* note 136, at 1117–18 ("The question, then, is whether it is appropriate to impose liability on . . . taxpayers, even though they were not immediately involved in the harmful conduct and may not even have been aware of the risk."); Weaver & Longoria, *supra* note 48, at 347 ("[J]udgments larger than specified dollar amounts for each agency are paid out of a judgment fund maintained by the Department of the Treasury[] . . .").

168. Farber, *supra* note 136, at 1115–23.

169. *Id.* at 1118.

170. *Albers v. Cty. of Los Angeles*, 398 P.2d 129, 138 (Cal. 1965) (internal quotation marks omitted) (quoting *Clement v. State Reclamation Bd.*, 220 P.2d 897, 905 (Cal. 1950)).

171. See, e.g., Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 389–90 (2013) ("[O]ne of the primary purposes of tort law is to 'restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury.'" (citing VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 1–2 (12th ed. 2010))); John C. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1676 (2002); Molly L. Csaki, Comment, *Compensation for Nonpecuniary Loss: Revising Louisiana Civil Code Article 1998 to Reflect Litvinoff's Damage-Based Approach*, 75 LA. L. REV. 1275, 1278



concepts to award the plaintiff compensatory damages for the harming of his property.<sup>172</sup> In Louisiana, entire neighborhoods have not rebounded because they collectively received less government relief than less damaged areas in wards and parishes with wealthier residents.

If the MR-GO, like the levees protecting New Orleans, had been built as a flood-protection structure, then the Corps should have been granted sovereign immunity, as the federal government would have already taken on a disproportionate burden for the safety of the affected communities. However, the MR-GO serviced military and commercial interests, as Judge Duval pointed out.<sup>173</sup> In 1943, Congress requested a report from the Corps on the viability of the MR-GO.<sup>174</sup> Based on that report, Congress authorized the MR-GO as part of the River and Harbor Act approved on March 2, 1945.<sup>175</sup> According to Judge Duval, “the needs of the maritime industry” and the military drove the congressional authorization.<sup>176</sup> First, “[t]he activity experienced at the Port of New Orleans during World War II made clear that an expansion and dispersion of those facilities was necessary in case of future hostilities.”<sup>177</sup> Second, it was imagined that “a shorter route to New Orleans would provide savings to the maritime industry by decreasing the distance from the Gulf of Mexico to New Orleans by about sixty miles.”<sup>178</sup>

The military interests benefited the entire country, or so, at least, must have decided the policymakers who approved the appropriation in the context of World War II. Just as in the jurisprudence of takings, it is not equitable for one small subset of taxpayers to pay disproportionately for the defense of the nation.<sup>179</sup> In this case, a “strong defense of private property,”

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(2015).

172. *Paterno v. State*, 6 Cal. Rptr. 3d 854, 875–76 (Ct. App. 2003); Farber, *supra* note 136, at 1080.

173. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 649 (E.D. La. 2009), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

174. *Id.*

175. *Id.* (citing H.R. Doc. No. 82-245, at 1 (1951)).

176. *Id.* (citing H.R. Doc. No. 82-245, at 41 (1951)).

177. *Id.* (citing H.R. Doc. No. 82-245, at 35–36 (1951)).

178. *Id.*

179. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 204–09 (1985). *But see* RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 1819 (5th ed. 2010) (“The process of governing almost always helps some and hurts others, but those who are hurt should not necessarily be entitled to

what Professor Richard Epstein sees as an essential test of the value of limited government, would have helped the homeowners of St. Bernard and the Lower Ninth Ward who as a result of the breach of the MR-GO became some of “society’s most vulnerable members.”<sup>180</sup> Moreover, to the extent that taxpayers ignore unpopular issues, vote into office corrupt politicians, and fail to demand safety for others beyond their own back yards, they too bear responsibility for helping to create a reward system for politicians who neglect collapsing infrastructures in favor of lower tax rates.

#### E. PROPOSAL: HARD-LOOK DEFERENCE AND FAILURE-TO-WARN TEST

“In the event the Corps’ monumental negligence here would somehow be regarded as ‘policy’ then the exception would be an amorphous incomprehensible defense without any discernable contours,” warned Judge Duval at the end of his DFE analysis.<sup>181</sup> *Canal Breaches* adds further grounds to question whether *Gaubert*’s “susceptible to policy analysis” rule is not overbroad.<sup>182</sup>

Future courts wrestling with the dilemma of how to treat public-safety cases in the wake of *Canal Breaches* should implement a three-step test. A government defendant’s bid for DFE immunity would survive Step 1 of my test by presenting evidence proving that policy factors had in fact been considered. If a policy evaluation had been conducted, the second step for determining DFE immunity would depend on whether the agency had the ability to report its concerns to Congress and to prioritize its budget requests. (If it did not, Step 2 would be bypassed.) Step 3 (or 2 if the agency had no ability to report to Congress) would require a court to examine whether the defendants had warned the private citizens in harm’s way. If they had not, DFE immunity would only attach in the rare instance where the government agency decided to use the negligence-triggered event to conduct an experiment for the public’s greater good.

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damages from the government.”).

180. EPSTEIN, *supra* note 79, at 9.

181. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 717 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

182. See generally Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1116–47 (2007) (discussing and analyzing alternatives to the *Gaubert* approach).

Firstly, did the government agency conduct a policy evaluation of the action or inaction that ultimately caused the tort? For example, in *Ayer v. United States*, the First Circuit awarded the government DFE immunity against a personal injury claim brought because of an accident that allegedly could have been avoided if the Vandenberg Air Force missile-launch base had had railings around the launch pad.<sup>183</sup> What made this decision unassailable in the *Ayer* court's view was the government's showing that it had weighed the pros and cons of installing a railing before opening the base to visitors.<sup>184</sup>

"Why protect the official who never may have thought about the policy impact of her discretion?" queries Professor Zillman, a proponent of preserving thoughtful discretion whenever possible.<sup>185</sup> Courts in the Second Circuit, for example, have consistently refused to shield shoddy implementation of safety policies under the DFE.<sup>186</sup> After a survey of Second Circuit DFE decisions, Professors Peter Schuck and James Park concluded that "ignoring a known, clear, and recurring danger is not part of a policy choice of the kind immunized by the DFE."<sup>187</sup> The common issue in *Ayer*, *Coulthurst*, and *Canal Breaches* was whether the threat of a known, clear, and recurring danger was actually considered from a policy perspective, not whether the danger was "known, clear, and recurring."

In *Canal Breaches*, both the trial judge and the first appellate panel underscored that the government had presented "no record evidence that, because of budgetary constraints, the Corps failed to implement feasible remedial measures or that it ever performed a cost-benefit analysis."<sup>188</sup> Moreover, the Corps:

ignored the safety issues for the inhabitants of the region and focused solely on the maritime clients it serviced so well. Furthermore, the Corps failed to inform Congress of the

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183. *Ayer v. United States*, 902 F.2d 1038 (1st Cir. 1990).

184. *Id.* at 1043–44.

185. Zillman, *supra* note 54, at 387–88.

186. *Lemke v. City of Port Jervis*, 991 F. Supp. 261 (S.D.N.Y. 1998) (holding that an inadequate routine inspection was not shielded by a broad policy of safety); *Martin v. United States*, 971 F. Supp. 827 (S.D.N.Y. 1997) (rejecting an attempt to evade liability for a poorly maintained walkway via the DFE).

187. Schuck & Park, *supra* note 95, at 69–70.

188. *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 395 (5th Cir.), *withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012); *see also In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 732 (E.D. La. 2009) ("[T]here was no balancing or weighing of countervailing considerations."), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

dangers which it perceived and/or should have perceived in the context of the environmental damage to the wetlands caused by the operation and maintenance of the MR[-]GO.<sup>189</sup>

If a policy evaluation had been conducted, the second step for determining DFE immunity would depend on whether the agency had the ability to report its concerns to Congress and to prioritize its budget requests. If not, then the question of whether the agency timely disclosed to Congress the harm its actions were causing to neighboring property owners would be moot. If so, however, proof of accurate disclosure to its funding source would also have to be demonstrated—along with proof of a policy analysis—in order for the DFE to be applied in a public-safety case.

“Additionally, at some point during the time continuum from the MR-GO’s construction, the Corps certainly could have warned Congress about the potential catastrophic loss of life and property,” wrote Judge Duval.<sup>190</sup> “It did not, and funding only comes with knowledge. . . . Moreover, as was made clear to this Court through the testimony adduced by Mr. Podany and Mr. Luisa there were methods for the Corps to prioritize budgeting matters, and the Corps never placed foreshore protection or any other action to remediate the damage caused by its own non-action at the top of the budgeting heap.”<sup>191</sup> According to my proposed test, *Canal Breaches* failed Step 2 as well.

Thirdly, DFE immunity should extend to cases where government agents knew of the danger to neighboring communities but did not warn them of their risk only in rare instances. Such a rarity would be where a government agency has conducted a policy analysis, has had its analysis vetted by its funding body, and has concluded that alerting at-risk neighbors would pierce the cloak of secrecy necessary for an experiment conducted for the greater public good.

In *In re Consolidated United States Atmospheric Testing Litigation*, the government chose not to warn 250,000 military personnel, 150,000 civilian contract workers,<sup>192</sup> and uncounted

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189. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 717 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

190. *Id.* at 709.

191. *Id.*

192. Carroll Dorgan, Comment, *Section 2212: A Remedy for Veterans—With a Catch*, 75 CAL. L. REV. 1513, 1529 (1987) (citing H.R. Rep. No. 98-124, pt. 4, at 2

“downwinders”<sup>193</sup> of possible injuries “due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.”<sup>194</sup> The Ninth Circuit affirmed the district court’s dismissal of a FTCA suit under the DFE.<sup>195</sup> In *Atmospheric Testing*, the decision not to warn was the direct consequence of a policy decision to use the incident to enable longitudinal studies of the effects of radiation fallout.<sup>196</sup> And there was a scientific reason for failing to warn possible tort victims, who, with forewarning of possible health risks, might have relocated, thereby changing the variables of the scientific experiment for the country’s greater good.

There are two critical distinctions. First, the residents of St. Bernard Parish and the Lower Ninth Ward were not necessary participants in an experiment. No part of keeping citizens in the way of the harm of the MR-GO has scientific value. Common sense now favors encouraging people not to develop in vulnerable coastal locations.<sup>197</sup> Second, no argument exists to justify not forewarning the people made vulnerable by the Corps’s “monumental negligence.” The MR-GO widened and became more dangerous in peace time. The Corps does not have the argument of exigency that administrators in *Dalehite v. United States* enjoyed in the immediate aftermath of World War II when European allies were faced with the threat of famine.<sup>198</sup>

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(1983)).

193. A. Costandina Titus & Michael W. Bowers, *Konizieski and the Warner Amendment: Back to Ground Zero for Atomic Litigants*, 1988 B.Y.U. L. REV. 387, 388 (1988).

194. *In re* Consol. U.S. Atmospheric Testing Litig., 820 F.2d 982, 986 (9th Cir. 1987) (quoting 42 U.S.C. § 2212(a)(1), recodified at 50 U.S.C. § 2783(b)(1) (2012)).

195. *Id.* at 1000, *aff’g*, 616 F. Supp. 759 (N.D. Cal. 1985).

196. *Id.* at 985, 996–99.

197. *See generally* Orrin H. Pilkey & J. Andrew G. Cooper, *Society and Sea Level Rise*, 303 SCIENCE 1781 (Mar. 19, 2004); *see also* John Schwartz, *How to Save a Sinking Coast? Katrina Created a Laboratory*, N.Y. TIMES (Aug. 7, 2015), <http://www.nytimes.com/2015/08/08/science/louisiana-10-years-after-hurricane-katrina.html> (quoting Professor Houck, who suggests prioritizing the relocation of residents still living along the most vulnerable sections of the Louisiana coast); Justin Gillis & Felicity Barringer, *As Coasts Rebuild and U.S. Pays, Repeatedly, the Critics Ask Why*, N.Y. TIMES (Nov. 18, 2012), <http://www.nytimes.com/2012/11/19/science/earth/as-coasts-rebuild-and-us-pays-again-critics-stop-to-ask-why.html>.

198. *See Dalehite v. United States*, 346 U.S. 15, 35–36, 41–42 (1953) (5–4 decision) (holding that the DFE wrapped in a blanket of immunity the federal government’s decision to prioritize speed of transportation of potentially explosive fertilizer to Europe over safety to U.S. citizens at home).

Louisiana had unwarned citizens who also might have relocated if they had been told of the dangers to their property, their families, and their neighborhoods. At a minimum, the Corps should have warned people of the risk to their lives and their property so they could have made educated decisions about their futures. If individual homeowners had been warned in a timely fashion, they could have made informed decisions about whether to keep investing their energy and scarce resources into their family properties or whether to sell and reinvest elsewhere.<sup>199</sup> Moreover, they could have made a more educated decision about the need for flood or hazard insurance, which does not logically follow from proximity to a government project.

Even if one accepts the cynical view of an attorney in the Justice Department's Torts Branch, "simply ignor[ing] problems" should still be within the ambit of the FTCA's waiver of sovereign immunity.<sup>200</sup> For example, in *Andrulonis v. United States*, the Second Circuit allowed FTCA claims to proceed against a researcher participating in a federally funded clinical study for failure to warn the plaintiff of an imminent, clear danger.<sup>201</sup>

By simply ignoring the danger created by an ever-widening MR-GO, the Corps shirked its duties, ignored Congress, and deprived scientific, environmental, and political communities of an opportunity to weigh in with proposed solutions. Had the Corps followed the above-described steps, it is likely there would have been a less costly repair bill after Hurricane Katrina and a less harrowing experience for the communities in the pathway of the exaggerated storm surge.

### III. THE CONTESTED ZONE OF BIG OIL'S LIABILITY FOR THE FORESEEABLE, UNNECESSARY IMPERILING OF LOUISIANA'S COASTAL COMMUNITIES

*[The Tucker Act<sup>202</sup> corrected] the area in which the doctrine*

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199. See, e.g., Alana Semuels, *The Village That Will Be Swept Away*, ATLANTIC (Aug. 30, 2015), <http://www.theatlantic.com/business/archive/2015/08/alaska-village-climate-change> (describing an Alaskan village's decision to relocate as a community before losing their homes to coastal erosion).

200. See David S. Fishback, *The Federal Tort Claims Act is a Very Limited Waiver of Sovereign Immunity—So Long As Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, U.S. ATT'YS' BULL., Jan. 2011, at 16, 16, 19–26, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab5901.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab5901.pdf).

201. *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991) (standing for the proposition that a negligent omission in routine implementation of a policy does not itself, without more, implicate policy concerns).

202. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C.

*of federal sovereign immunity made its most blatant affront to the basic precepts of justice[; contract law.]*<sup>203</sup>

— Justice Antonin Scalia

*“Where dredging canals happens, land loss happens. If you look at the Barataria or the St. Bernard Basin for different intervals of time, where land loss has been high, dredging has been high. Where land loss is low, dredging has been low. And if you plot the data, there’s a line that goes right through zero. The more you dredge, the more land loss you have.”*<sup>204</sup>

—Professor Eugene Turner, Boyd  
Professor, Louisiana State University,  
Department of Oceanography and Coastal  
Sciences

In the fall of 2005, two sets of plaintiffs’ attorneys filed separate class actions on behalf of Louisiana homeowners impacted by Hurricane Katrina against “oil and gas producing companies and/or oil and gas pipeline companies . . . for their activities that [] contributed significantly to the storms’ destructive impact in south Louisiana.”<sup>205</sup> The individual actions were consolidated by Judge Sarah Vance.<sup>206</sup>

At the heart of the plaintiffs’ allegations was the cumulative damage from a web of crisscrossing canals dredged<sup>207</sup> by both classes of defendants in southern Louisiana’s marshlands.<sup>208</sup>

More specifically, the plaintiffs allege[d] that the defendants’ dredging of the canals through south Louisiana has harmfully altered the hydrology of the adjacent marshes by allowing salt water intrusion into the marshlands, and creating spoil banks that limit the tidal and fresh water flows

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§§ 1346(a), 1491 (2012)) (granting the United States Court of Claims and the district courts concurrent jurisdiction over claims not in excess of \$10,000).

203. Scalia, *supra* note 68, at 869.

204. Houck, *Reckoning*, *supra* note 2, at 196 n.53 (quoting Eugene Turner); *see also id.* at 197 (presenting a chart demonstrating the positive, linear correlation between dredging and wetland loss).

205. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 678 (E.D. La. 2006).

206. *Id.*

207. *Jurisich v. La. S. Oil & Gas Co.*, 284 So. 2d 173, 184 (La. 4 App. Cir. 1973) (Lemmon, J., dissenting) (“The phrase ‘dredging canals’ normally denotes the removal of earth, the creation of enlargement of a cavity, and the placement of excavated soil on a spoil bank in proximity to the canal.”).

208. *See Barasich*, 467 F. Supp. 2d at 679.

essential for distributing mineral sediments, inorganic sediments, and organic matter to those areas. The effect of the increased exposure to salt water and reduced exposure to fresh water is destruction of indigenous plant life. . . . Without the marsh vegetation, plaintiffs allege that the root mat disappears, resulting in erosion of the exposed soil and the eventual conversion of the marshlands to open water.<sup>209</sup>

This destruction of “over one million acres of marshland,” plaintiffs averred, “depriv[ed] inland communities, such as the City of New Orleans and St. Bernard Parish, of their natural protection from hurricane winds and accompanying storm surge.”<sup>210</sup>

### A. THE *BARASICH* DILEMMA

*Barasich* was decided on a 12(b)(6) motion, without the benefit of discovery or substantive motions, much less a trial.<sup>211</sup> The *Barasich* court made three mistakes in its dismissal of the plaintiffs before discovery. The primary mistake—the subject of much of the remainder of this Article—was its over-extension of a distorted holding in *Castex* to stand for the principle that no implied duty could exist to compel an E&P operator not to harm the wetlands by virtue of its operation. The court’s second mistake was its lack of familiarity with Louisiana claims for civil conspiracy. Implying its ruling on class certification without due process was the court’s third mistake.

First, the *Barasich* court’s most essential misunderstanding of Louisiana law resided in the area of “contort.”<sup>212</sup> It framed the duty question of its Louisiana Civil Code Article 2315<sup>213</sup> analysis by borrowing from a line of cases examining a prudent operator’s implied duties in contract.<sup>214</sup> Could the “Pipeline Class,”<sup>215</sup> of

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209. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 679 (E.D. La. 2006).

210. *Id.*

211. *Id.* at 678.

212. See generally Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 459 (2010) (“The distinction between contract and tort blurs, however, when an actor breaches a voluntarily assumed contractual duty that is identical or closely related to one otherwise owed to the world at large regardless of the existence of contract.”).

213. Civil Code Article 2315 is the foundation of tort liability in Louisiana: “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” LA. CIV. CODE ANN. art. 2315(A) (2010).

214. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 691 (E.D. La. 2006).



defendants, the “[E&P] Class,” of defendants, or both classes of defendants have had a duty not to destroy Louisiana’s wetlands?

The *Barasich* court announced that its survey of Louisiana jurisprudence led it to conclude that the Louisiana Supreme Court “ha[d] never imposed a duty of this scope in any case that the court could find.” In *Castex*, according to the *Barasich* Court, “[t]he Louisiana Supreme Court . . . declined to imply that the defendants had a general duty to restore the surface of the leased property to its pre-lease condition.”<sup>216</sup> The *Barasich* court finished its reading of *Castex* with the conclusion that any time a lessor expressly gives a lessee permission to dredge canals, the dredging of canals could never be deemed unreasonable.<sup>217</sup> Thus, the *Barasich* court’s reading of *Castex* emboldened the court to treat the determination of whether dredging practices before, during and after operations were reasonable and necessary as a question of law, not of fact.<sup>218</sup>

Second, the *Barasich* court also justified its dismissal of plaintiffs’ claims on a 12(b)(6) motion by reasoning that even if individual class members could prove that the defendants owed them a duty not to destroy Louisiana’s marshlands, their case was still doomed to fail. “The Fifth Circuit has repeatedly rejected theories of group liability or market share liability,” reasoned Judge Vance.<sup>219</sup>

In a case analogous to *Barasich*, another judge sitting in diversity found two sources in Louisiana law for allowing plaintiffs’ claims against a group of defendants to go forward based on theories of collective liability.<sup>220</sup> The case was *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability*

215. See JASON P. THERIOT, AMERICAN ENERGY, IMPERILED COAST: OIL AND GAS DEVELOPMENT IN LOUISIANA’S WETLANDS 4 (2014) (noting that Louisiana’s wetlands are now crisscrossed by 191 pipeline systems connecting offshore rigs to inland transfer stations)

216. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 691 (E.D. La. 2006) (interpreting *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 04-0968 (La. 1/19/05); 893 So. 2d 789).

217. *Id.* at 691–92 (referring to *Castex* as the “closest case to the issue at hand” and noting that the “Louisiana Supreme Court refused to imply a duty to restore coastal wetlands in a two-party mineral lease”).

218. *Id.* at 693 (interpreting *Castex*, 04-0968; 893 So. 2d 789).

219. *Id.* at 694 (citing *Cimono v. Raymark Indus., Inc.*, 151 F.3d 297, 316 (5th Cir. 1998); *Jefferson v. Lead Indus. Ass’n, Inc.*, 106 F.3d 1245, 1247–48 (5th Cir. 1997); *In re Fibreboard Corp.*, 893 F.2d 706, 710–11 (5th Cir. 1990)).

220. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 405–08 (S.D.N.Y. 2005).

*Litigation*.<sup>221</sup> Judge Shira A. Scheindlin agreed with the *MTBE* defendants that “Louisiana courts have been silent regarding collective liability theories.”<sup>222</sup> However, she deemed *Gould v. Housing Authority of New Orleans*, a lead-paint case, to be most analogous to the *MTBE* cases before her.<sup>223</sup> Sitting in diversity, Scheindlin predicted that the Louisiana Supreme Court would allow the Louisiana *MTBE* plaintiffs to “plead in the alternative in accordance with article 892 of the C.C.P.”<sup>224</sup> Scheindlin dismissed the Louisiana plaintiffs’ claims for civil conspiracy only because they were precluded by Louisiana’s Products Liability Act.<sup>225</sup>

Unlike the *MTBE* Louisiana plaintiffs, the *Barasich* plaintiffs were not statutorily precluded from filing a civil conspiracy claim. In *Barasich*, the plaintiffs could have amended their pleadings with copious facts sufficient to survive a 12(b)(6) motion based on the historical evidence uncovered regarding the E&P defendants’ collective awareness of the “permanent ecological changes” being wrought by their canals as early as 1955.<sup>226</sup> The oil and gas industry lobbied tirelessly against wetland protections and pollution controls.<sup>227</sup> The centerpiece of the industry’s efforts was to keep air-cushion vehicles (ACVs) or hoverbarges—vehicles that ride “over wetlands and water with relative ease”—out of Louisiana from 1970 forward.<sup>228</sup> A logical handmaiden to this successful campaign has been the oil and gas industry’s lobbying against backfilling canals.<sup>229</sup> Likewise, the industry successfully resisted efforts to require industry “to spray dredged material over the marsh, rather than piling it on spoil

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221. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 405–08 (S.D.N.Y. 2005).

222. *Id.* at 405.

223. *Id.* at 406–07.

224. *Id.* at 407.

225. *Id.* 408–09; *see also id.* at 365–66 (describing the evidence presented in support of plaintiffs’ conspiracy theory). The Louisiana Products Liability Act “establishes the exclusive theories of liability for manufacturers for damage caused by their product.” LA. STAT. ANN. § 9:2800:52 (2009).

226. Houck, *Reckoning*, *supra* note 2, at 208 (quoting THERIOT, *supra* note 215, at 58); *see id.* at 207–20 (providing a timeline of industry knowledge of the ecological damages caused by its activities).

227. *Id.* at 240; *see id.* at 222–32 (describing industry resistance to ACVs).

228. *See id.* at 240–48. Nonetheless, news of overmarsh drilling barges reached Louisiana by 1980. *See id.* at 241; *see also* WALTER B. SIKORA, WILDLIFE RESOURCES, AIR CUSHION VEHICLES FOR THE TRANSPORT OF DRILLING RIGS, SUPPLIES, AND OIL FIELD EXPLORATION OPERATIONS IN THE COASTAL MARSHES OF LOUISIANA (1988).

229. *See* Houck, *Reckoning*, *supra* note 2, at 248–55.

banks . . .”<sup>230</sup> Moreover, this detailed industry-wide knowledge of harmful practices has been proven to exist on analogous questions including the use of unlined pits for waste products<sup>231</sup> and the exposure of workers in pipe-cleaning yards to radioactive materials.<sup>232</sup> Given the industry’s history of having scientific evidence of the harm of its practices and its awareness of less damaging alternative practices, coupled with its campaigns of disinformation both in negotiating with landowners and in lobbying against public-safety regulations with legislators,<sup>233</sup> it would seem premature to grant a dismissal of a civil-conspiracy claim prior to merits-based discovery.

Finally, the *Barasich* court justified its dismissal of plaintiffs’ case at the 12(b)(6) stage because, it hinted, it did not believe the class of plaintiffs would have been certified.<sup>234</sup> “In all of the cases cited by plaintiffs, no court disregarded the requirements that individual defendants be given an individual hearing as to causation and damages, something that plaintiffs do not contemplate.”<sup>235</sup>

As a threshold matter, a 12(b)(6) hearing is not the proper procedural vehicle through which to determine whether a class can be certified as defined by the proposed class’s counsel. It is an issue that must be briefed by the lawyers, often after limited discovery has been conducted.<sup>236</sup> Moreover, there is significant case law to suggest that plaintiffs would have survived a class certification hearing with three adjustments. First, a narrower class definition would have protected the interests of absentee

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230. Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 18, 19 (2006) (“While intact, the spoil banks cut off the natural drainage for hundreds of yards around, impounding half of the marsh and drowning the other half.”).

231. For a similar chronology of industry awareness of the damage their practices were causing from the continued use of unlined pits for disposal of oilfield waste products, see Loulan J. Pitre, Jr. & D’Ann R. Penner, *Legacy Litigation—What is Reasonable Behavior in the Oilfield?*, 28 TUL. ENVTL. L.J. 333, 346–47 (2015).

232. See, e.g., *Grefer v. Alpha Tech.*, 2002-1237, pp. 10–11 (La. App. 4 Cir. 8/8/07); 965 So. 2d 511, 518–19.

233. For industry awareness of the role of fossil fuels in causing global warming and its public spin against its own science, see Neela Banerjee et al., *Exxon: The Road Not Taken: Exxon’s Own Research Confirmed Fossil Fuels’ Role in Global Warming Decades Ago*, INSIDE CLIMATE NEWS (Sept. 21, 2015), <http://insideclimatene ws.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-war ming>.

234. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 694 (E.D. La. 2006).

235. *Id.* at 694.

236. See LA. CODE CIV. PROC. ANN. art. 592(A)(3)(a)(ii) (Supp. 2015).

class members.<sup>237</sup> Second, subclasses—both geographic and contract-based—would have resolved any difficulties with causation and definitions of duty.<sup>238</sup> Third, a bifurcation of the trial into common issues of law and individual issues of specific causation and damages would have addressed Judge Vance’s concern that the defendants might be deprived of their rights to an individualized defense.<sup>239</sup>

In a recent toxic-mold class action brought by former residents of the housing developments under the management of Housing Authority of New Orleans, the Fourth Circuit Court of Appeal affirmed the trial court’s decision to bifurcate the class action into two phases.<sup>240</sup> The Phase-One questions usefully posed in front of the same judge or jury anticipate analogous questions that the *Barasich* plaintiffs would have needed answers to before proceeding to Phase Two of the trial on specific causation and individual damages:

In Phase 1, the liability issues (e.g., the meaning of “free of mold” as a contractual obligation, whether HANO & the other management defendants factually breached a duty to provide a mold-free environment for the leaseholders (and their permanent domiciliaries) by failing to repair the structural problems allowing water intrusions for purposes of the negligence cause of action; whether the omission and resulting water intrusions in the apartments led to unchecked mold proliferation, whether the documented presence of mold generally has been proven to cause the personal injuries plaintiffs allegedly suffered, and whether the documented instances of mold rise to the level of a nuisance as would be more than a neighbor should be

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237. *See, e.g.*, *Hicks v. Kaufman*, 107 Cal. Rptr. 2d 761, 767 (Ct. App. 2001) (holding that a court “should redefine the class where the evidence before it shows such a redefined class would be ascertainable”); *see also* *Brooks v. Union Pac. R.R. Co.*, 2008-2035, pp. 19–21 (La. 5/22/09); 13 So. 3d 546, 560–61.

238. *See* *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). It is certain that some members of the plaintiff class would have been servitude owners (or third-party beneficiaries of servitude owners) with an express restoration clause pertaining to backfilling canals and restoring marshes at the end of the operation. *See, e.g.*, *St. Martin v. Mobil Expl. & Producing U.S., Inc.*, 224 F.3d 402, 409–10 (5th Cir. 2000).

239. *See, e.g.*, *BPS Inc. v. Richardson*, 20 S.W.3d 403, 408–09 (Ark. 2000); *Reynolds v. CSX Transp., Inc.* 561 N.E.2d 1047, 1052 (Ohio Ct. App. 1989), *dismissed sub nom.* *Reynolds v. CSX Transp. Co.*, 557 N.E.2d 1212 (1990); *see also* *Claborne v. Hous. Auth. of New Orleans*, 14-1050, pp. 19–20 (La. App. 4 Cir. 4/15/2015); 165 So. 3d 268, 285, *writ denied*, 2015-0946 (La. 9/11/2015); 176 So.3d 1039.

240. *Claborne*, 14-1050, pp. 19–20; 165 So. 3d at 285.

expected to bear by a reasonable person's standard[] will be presented on a class basis in a "first phase" trial.<sup>241</sup>

In complex tort litigation, plaintiffs often have to prove both general and specific causation. The class action procedural device is best suited for determining whether the *Barasich* defendants' dredging practices and failure to backfill the canals upon completion of their operation could have caused the destruction of the wetlands alleged by plaintiffs generally.<sup>242</sup> This phase of a class action would have been dominated by a battle of experts and would be most efficiently determined on a class-wide basis. As Judge Posner wrote in *Butler v. Sears, Roebuck & Co.*:

It would drive a stake through the heart of the class action device . . . to require that every member of the class have identical damages. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.<sup>243</sup>

The *Barasich* court encouraged the plaintiffs to file a smaller, more manageable suit "with a less attenuated connection" to "test its theory."<sup>244</sup> As discussed above, the *Barasich* court's alternative explanations for dismissing plaintiffs' claims without allowing for discovery were not meritorious. It is anticipated that the next time a federal court sitting in diversity is required to analyze this complex set of legal questions, the most salient question in need of exegesis is under what set of factual circumstances would an E&P defendant have a duty to backfill a canal under the Civil Code's good-administrator standard or Louisiana's jurisprudence on a prudent operator's

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241. *Claborne v. Hous. Auth. of New Orleans*, No. 2001-20605, slip op. at 17 (La. Civ. Dist. Ct. Orleans Parish June 30, 2014) (Exnicious, J.) (on file with author), *aff'd* 14-1050 (La. App. 4 Cir. 4/15/15); 165 So. 3d 268, *writ denied*, 2015-0946 (La. 9/11/2015); 176 So.3d 1039 .

242. *See, e.g., In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1133 (9th Cir. 2002) (defining general causation as "meaning whether the substance at issue had the capacity to cause the harm alleged").

243. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The more claimants there are, the more likely a class action is to yield substantial economies in litigation.")

244. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 695 (E.D. La. 2006) ("If plaintiffs are right about the defendants' contribution to this development, perhaps a more focused, less ambitious lawsuit between parties who are proximate in time and space, with a less attenuated connection between the defendant's conduct and the plaintiffs' loss, would be the way to test their theory.").

restoration duties, or “The *Barasich* Dilemma.” In order to fully explicate this question, it is necessary to begin with the Louisiana case that presented the most difficulties for the *Barasich* court: *Castex*.

### B. UNDERSTANDING *CASTEX*

In turn-of-the-twenty-first-century America, a school board presiding over a vanishing school district attempted to hold operators liable for the long-term impact of canals they had dredged and used to facilitate a lucrative exploration-and-production (E&P) venture in Terrebonne Parish.<sup>245</sup> Samson Hydrocarbons Company and Bois D’Arc Corporations left the oilfield without backfilling the canals.<sup>246</sup> The Terrebonne Parish School Board was not facing impending legal demise, but rather the disappearance of the very land on which its students lived.<sup>247</sup> By the time the board filed suit, the land in its jurisdiction<sup>248</sup> had lost almost twenty-eight acres to erosion.<sup>249</sup> The board-lessor sought to force the operator-lessees to fulfill their implied contractual duty to restore the marsh under their mineral and surface lease in accordance with Louisiana Mineral Code Article 122 (hereinafter Article 122).<sup>250</sup> Until the spring of 2005, Article 122 had served as authority for courts to require operators to restore damaged land and environmental media to its pre-lease condition.<sup>251</sup> Unless the damaged marsh was restored, the erosion was predicted to continue indefinitely and ultimately envelop the state’s land administered by the school board.<sup>252</sup>

In March of 2005, the Louisiana Supreme Court issued *Terrebonne Parish School Board v. Castex Energy, Inc.*, an important, complicated, and frequently misunderstood opinion.<sup>253</sup> Four of seven justices held that under the particular facts of this

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245. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, pp. 1–4 (La. 1/19/05); 893 So. 2d 789, 791–93.

246. *See id.* at p. 4; 893 So. 2d at 793.

247. *See id.*

248. This state land administered by the school board to support education is referred to in Louisiana as “sixteenth section land.” *See generally* Ryan Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVTL. L.J. 93, 102–18 (2009).

249. *Castex*, 2004-0968, p. 4; 893 So. 2d at 793.

250. LA. STAT. ANN. § 31:122 (2000).

251. *See infra* Part III, Section B. 2.

252. *See Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 4 (La. 1/19/05); 893 So. 2d 789, 793.

253. *See generally id.*

case dredging canals without backfilling them at the end of oil and gas operations was “normal wear and tear,” a term of art taken from the articles on lease in the Louisiana Civil Code.<sup>254</sup> In the absence of a showing of negligence, the *Castex* majority concluded, the E&P companies had no unfulfilled restoration duties.<sup>255</sup> The remaining three judges vehemently disagreed that the damage caused by dredging without backfilling qualified as “ordinary wear and tear.”<sup>256</sup>

From the vantage point of the present day, two striking predictions embedded in the *Castex* dissenting opinions demonstrate what a watershed event Hurricane Katrina was.<sup>257</sup> First is the extent to which even three of the outlier voices on their respective appellate panels underestimated the time-sensitive nature of restoring the wetlands. Siding with the dissenting lower court judge who favored defendants’ slower backfilling plan to restore the marsh naturally,<sup>258</sup> Justice John Weimer observed:

The trial court [judge] stated that his principal reason for choosing the artificial fill plan was that the natural process would take too long. He observed that it might take fifty years for nature to restore the floatant marsh. . . . There is no evidence that [the Terrebonne Parish School Board] would suffer any economic loss if the process took this long. . . .<sup>259</sup>

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254. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, pp. 15–16 (La. 1/19/05); 893 So. 2d 789, 800; *see* LA. CIV. CODE ANN. art. 2683 (2005) (making a lessee liable for returning the leased thing “in the same condition as it was when the thing was delivered to him, except for normal wear and tear”).

255. *Castex*, 2004-0968, pp. 17–18; 893 So. 2d at 801.

256. *Id.* at pp. 3–4; 893 So. 2d at 805–06 (Weimer, J., dissenting) (“[T]he dredging of multiple canals through marshland is not ordinary wear and tear. . . . Such substantial alteration of the surface and subsurface is not wear and tear.”); *id.* at p. 3; 893 So. 2d at 803–04 (Knoll, J., dissenting) (“The dredging operation with the resultant removal of earth, enlargement of a cavity and creation of spoil banks, all of which generally impaired the natural ebb and flow of tidal waters, permanently changed this land and will have deleterious effects upon it unless the surface is restored. The failure to restore the surface has caused further widening of the canals and additional loss of coastal acreage to erosion. Under these circumstances, I do not find the dredging operations constituted normal wear and tear. . . .”).

257. Gallucci, *supra* note 14 (quoting Tulane University Professor Mark Davis, who praises Louisianans for “no longer living in abject denial”).

258. *See Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2001-CA-2634, p. 4 (La. App. 1 Cir. 3/19/14); 878 So. 2d 522, 541 (McDonald, J., dissenting in part and concurring in part), *rev’d*, 2004-0968 (La. 1/19/05); 893 So. 2d 789.

259. *Castex*, 2004-0968, p. 7; 893 So. 2d at 808 (Weimer, J., dissenting) (quoting *Castex*, 2001-CA-2634, pp. 3–4; 878 So. 2d at 541 (McDonald, J., dissenting in part and concurring in part)).

The second noteworthy prediction is found in the majority's optimism that restoration of the coast is best left to politicians, who "allocate[] federal money to match state funds to study, plan, design and construct projects to preserve and restore wetlands."<sup>260</sup> The court imagined that the product of such deliberations would be a "comprehensive plan" with which individually funded efforts could only interfere.<sup>261</sup>

Few areas of Louisiana law are more difficult to keep abreast of than those related to a lessor's contractual duties to restore property arising under an oil and gas lease. *Castex* was not decided in a vacuum. In order to understand why *Castex*'s holding was misunderstood by the *Barasich* court, it is necessary to explain the history of the circumstances triggering an oil and gas operator's duty to restore the property he has damaged at the end of a lease.

### 1. EXPRESS VS. IMPLIED DUTIES TO RESTORE

Landowners have been suing oil and gas companies for damages to their crops, their timber, and their livestock for over a century.<sup>262</sup> Long before *Corbello*,<sup>263</sup> Louisiana courts held oil and gas companies responsible for restoration duties according to the contracts they negotiated.<sup>264</sup>

In the world of oil and gas law, sophisticated lessors operating from a strong bargaining position are sometimes able to successfully revise boilerplate lease language to protect their interests, as did the scrivener of the Corbello family's 1961 surface lease, who traded a low rental payment for a thorough end-of-lease cleanup.<sup>265</sup> By so doing, lessors are able to dictate

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260. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 19 (La. 1/19/05); 893 So. 2d 789, 802 (majority opinion).

261. *Id.* at pp. 19-20; 893 So. 2d at 802.

262. See generally Karen L. Ellmore, Annotation, *Duty of Oil or Gas Lessee to Restore Surface of Leased Premises upon Termination of Operations*, 62 A.L.R. 4th 1153 (originally published 1988).

263. *Corbello v. Iowa Prod. Co.*, 2002-0826 (La. 2/25/03); 850 So. 2d 686, *superseded in part by statute*, Act of June 8, 2006, No. 312, 2006 La. Acts 1472 (codified as amended at LA. STAT. ANN. § 30:29 (Supp. 2015)), as recognized in *State v. La. Land Expl. Co.*, 2012-0884 (La. 1/30/13); 110 So. 3d 1038.

264. See, e.g., *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475, 477, 485 (La. 1991) (awarding the plaintiff restoration costs in the amount of \$2.1 million for unremediated damage to property under a lease obligating the lessee to "pay for all damages caused by Lessee's operations, including damage to . . . soil and other property").

265. See J. MICHAEL VERON, SHELL GAME: ONE FAMILY'S BATTLE AGAINST BIG OIL



the standard to which they want the post-operation's remediation to occur. In the case of *Corbello*, the restoration damages owed by Shell to the Corbello family were to be sufficient to return the land "to [its] original condition."<sup>266</sup> The Louisiana Supreme Court refused to interfere with the parties' rights to enter into any contractual agreement that was not against public policy.<sup>267</sup> Therefore, the property's value after Shell's decades of disposing produced saltwater from not only its own operations, but also the operations of other non-Shell operators, was irrelevant to the determination of the damages the Corbello family was entitled to receive as a result of Shell's breach of its express contractual agreement.<sup>268</sup>

Unlike the *Corbello* plaintiffs, the *Castex* plaintiff-lessor did not create an obligation for post-termination clean-up to original condition. The Louisiana Supreme Court's majority in *Castex* chided the Terrebonne Parish School Board for not having "bargained for an express lease term" providing restoration to the marsh's original condition upon termination of the lease.<sup>269</sup> Whether this was a realistic expectation depends on the bargaining power of the lessor and on which party had access to the science about the risk to the wetlands caused by dredging canals and allowing them to expand over the years. This question will be addressed below.<sup>270</sup> Here it is important to note the distinction between the two types of contractual obligations courts routinely interpret. In the absence of an express restoration clause in the governing lease, the *Castex* plaintiff was left with a claim under Article 122, which for decades had been used as persuasive authority by Louisiana courts to provide an implied duty to restore the land at the end of a lease under Civil Code Article 2683 on lease, which imposes duties of prudent administration and return of the premises in the same condition in which they were leased with the exception of "normal wear and tear."<sup>271</sup>

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21 (2007).

266. *Corbello v. Iowa Prod. Co.*, 2002-0826, pp. 5–6 (La. 2/25/03); 850 So. 2d 686, 693, *superseded in part by statute*, Act of June 8, 2006, No. 312, 2006 La. Acts 1472 (codified as amended at LA. STAT. ANN. § 30:29 (Supp. 2015)), *as recognized in State v. La. Land Exploration Co.*, 2012-0884 (La. 1/30/13); 110 So. 3d 1038.

267. *Id.* at p. 6; 850 So. 2d at 693.

268. *Id.* at pp. 8–9; 850 So. 2d at 694–95.

269. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 19 (La. 1/19/05); 893 So. 2d 789, 802.

270. *See infra* Part III, Section D. 1–2.

271. *See* LA. STAT. ANN. § 31:122 (2000); LA. CIV. CODE ANN. art. 2683 (2005).

## 2. THE CASTEX REVOLUTION: JURISPRUDENTIALLY OVERRULING THE MINERAL CODE'S PRUDENT OPERATOR'S IMPLIED DUTY TO RESTORE THE SURFACE

In Louisiana, there are three historical periods for a lessee's implied duty to restore. The first period is 1920–1974: the pre-Mineral Code period. The second period is 1975–2005: the reign of the implied duty to restore to original condition without a showing of negligence, triggered by Mineral Code Article 122's comment. The third period—the post-*Castex* era—runs from 2005 to the present.

Before the Mineral Code was enacted in 1974, surface-damage disputes without express contractual provisions were governed by Louisiana Civil Code articles pertaining to a lessee's obligation to treat a “thing leased as a good administrator.”<sup>272</sup> A 1953 case illustrates Louisiana's early rule. In *Smith v. Schuster*, the second circuit ruled that the defendant “ha[d] no right to extend his operations on the leased premises beyond what is reasonably necessary to effectively produce minerals under the terms of his contract.”<sup>273</sup> Therefore, the court ordered the defendant to reimburse the plaintiff for returning his own land to its pre-operation condition around the pit and Smith No. 1 well.<sup>274</sup>

In 1974, the Louisiana legislature enacted the Louisiana Mineral Code, which is found in Title 31 of the Louisiana Revised Statutes.<sup>275</sup> Louisiana Revised Statute Section 31:122 outlines a lessee's obligations to act “as a reasonably prudent operator.”<sup>276</sup> The redactors of the Mineral Code included an extensive comment to Article 122, in which they outlined the prudent operator's five implied duties: (1) “reasonable development,” (2) “further exploration,” (3) “protection against drainage,” (4) “diligence in marketing,” and (5) “restoration of surface.”<sup>277</sup> The editors justified including an implied duty to “restore the surface of the lease premises as near as is practical to original condition”

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272. LA. CIV. CODE OF 1870 art. 2710 (Claitor's 1961) (current version at LA. CIV. CODE ANN. art. 2683 (2005)); see also *id.* arts. 2719–2720 (current versions at LA. CIV. CODE ANN. arts. 2683, 2692 (2005)); *Williams v. Humble Oil & Ref. Co.*, 290 F. Supp. 408, 414 (E.D. La. 1968) (“[T]he lessee is bound to enjoy the thing leased as ‘bon père de famille.’”), *aff'd in part, remanded in part*, 432 F.2d 165 (5th Cir. 1970), *superseded by statute*, LA. STAT. ANN. § 31:136 (2000).

273. *Smith v. Schuster*, 66 So. 2d 430, 432 (La. App. 2 Cir. 1953).

274. *Id.* at 433.

275. Louisiana Mineral Code, No. 50, 1974 La. Acts 237 (1974).

276. LA. STAT. ANN. § 31:122 (2000).

277. See LA. STAT. ANN. § 31:122 cmt. (2000) (emphasis added).

on the ground that “there appears no reason whatsoever to exclude this particular obligation as being a specification of the prudent administrator standard.”<sup>278</sup>

Whether a lessor is bound to perform an implied covenant to restore the surface matters because, as the Louisiana Supreme Court explained in *Frey v. Amoco Production Co.*, “the respective parties’ obligations cannot be determined absent reference to the covenants implied in every oil and gas lease.”<sup>279</sup> By definition, these implied covenants “address matters not expressly covered by the lease, including protection of the lessor’s interest . . . .”<sup>280</sup> Moreover, these implied obligations go to the heart of what the parties must perform “in order to ‘effectuate the basic objectives of an oil and gas lease.’”<sup>281</sup> The two main reasons courts “imply covenants in oil and gas leases” is to “complete an incomplete contract” and to “make the ‘unfair’ contract ‘fair,’ or ‘more fair,’” explains Professor David Pierce.<sup>282</sup>

To illustrate: in 1977, two years after the Mineral Code was enacted, the third circuit decided *Broussard v. Waterbury*.<sup>283</sup> Even the absence of a written lease did not deter the *Waterbury* court from ordering the defendant to restore the land to its pre-drilling condition.<sup>284</sup> Because the operator “occupied the status of mineral lessee,”<sup>285</sup> he voluntarily assumed an implied obligation to restore the land “to the same state as before the drilling and

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278. See LA. STAT. ANN. § 31:122 cmt. (2000); see also *Bonds v. Sanchez-O’Brien Oil & Gas Co.*, 715 S.W.2d 444, 445–46 (Ark. 1986) (identifying Louisiana’s implied duty to restore the surface as the modern trend among the oil and gas producing states); *Chevron U.S.A., Inc. v. Murphy Expl. & Prod. Co.*, 151 S.W.3d 306, 310–12 (Ark. 2004) (affirming same); Christopher S. Kulander, *Surface Damages, Site-Remediation and Well Bonding in Wyoming—Results and Analysis of Recent Regulations*, 9 WYO. L. REV. 413, 417 (2009) (commenting on the surface damage statutes’ common requirement of lessees to pay “for damages to the surface estate—even if the actions of the mineral owner were reasonably necessary for development and no other method was open to him”).

279. *Frey v. Amoco Prod. Co.*, 603 So. 2d 166, 174 (La. 1992) (citing Michael P. Pearson & Richard D. Watt, *To Share or Not to Share: Royalty Obligations Arising out of Take-or-Pay or Similar Gas Contract Litigation*, in 42 INST. ON OIL & GAS L. & TAX’N 14-1, 14-68 (Carol J. Holgren ed., 1991)).

280. *Id.* (citing RICHARD W. HEMINGWAY, *THE LAW OF OIL AND GAS* 445–48 (3d. ed. 1991); 5 EUGENE KUNTZ, *TREATISE ON THE LAW OF OIL & GAS* § 54.2 (1991)).

281. *Id.* (quoting LUTHER MCDUGALL, *LOUISIANA OIL AND GAS LAW* § 4.1 (1991)).

282. David E. Pierce, *Exploring the Jurisprudential Underpinnings of the Implied Covenant to Market*, 48 ROCKY MTN. MIN. L. INST. 10-1, 10-10 (2002).

283. *Broussard v. Waterbury*, 346 So. 2d 1342 (La. App. 3 Cir. 1977).

284. *Id.* at 1343–44.

285. *Id.* at 1343.

production.”<sup>286</sup> The third circuit distinguished its finding from a pre-Mineral Code article case, *Rohner v. Austral Oil Exploration Co.*,<sup>287</sup> because of Mineral Code Article 122’s comment finding an “obligation to restore the surface.”<sup>288</sup> Likewise, a 1987 appellate court relied on both prior Louisiana jurisprudence and Article 122’s comment to require Jeems Bayou Production Company to restore “the leased premises as near as is practical to its original condition.”<sup>289</sup> From 1975 to 2005, arguably, both prospective lessees and sophisticated lessors were aware (or should have been aware) that lessees in Louisiana had an implied duty to restore the surface at the end of the lease, rendering superfluous the need for an express restoration clause promising to fulfill an implied duty already made express by the comment to Article 122.

Thus, the *Castex* court’s unexpected decision to shorten the list of implied covenants by deleting the duty to restore the surface drastically changed the kind of evidence the Terrebonne Parish School District had needed to present at trial in order to prevail under the pre-Mineral Code standard of the “good administrator.”<sup>290</sup> Under the good-administrator standard of the Civil Code, a lessor bore the burden of presenting evidence that the lessee’s extraordinary use of its property caused damage extending beyond “normal wear and tear.”<sup>291</sup> Lulled into complacency by decades of jurisprudence relying on Article 122’s comment, the plaintiff did not present the evidence<sup>292</sup> that existed by the date of the trial of the unreasonableness of defendants’ practices in light of the scientific community’s awareness of the

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286. *Broussard v. Waterbury*, 346 So. 2d 1342, 1344 (La. App. 3 Cir. 1977).

287. *Rohner v. Austral Oil Expl. Co.*, 104 So. 2d 253 (La. App. 1 Cir. 1958) (finding that without an express agreement to remediate the soil at the end of the lease, the lessor had no relief for the contaminated acres no longer usable for agricultural purposes).

288. *Broussard*, 346 So. 2d at 1344 (citing LA. STAT. ANN. § 31:122 cmt. (2000)).

289. *Edwards v. Jeems Bayou Prod. Co.*, 507 So. 2d 11, 13 (La. App. 2 Cir. 1987) (holding that “where the lessee has damaged the land it is his duty to appropriately remedy the condition brought on by his use of the lease” (citing *Smith v. Schuster*, 66 So. 2d 430 (La. App. 2d Cir. 1953); *Broussard*, 346 So. 2d 1342); see LA. STAT. ANN. § 31:122 cmt. (2000); see also *Prather v. Chevron U.S.A., Inc.*, 563 F. Supp. 1366 (M.D. La. 1983). Whether the lessee operates under a lease, as in *Jeems*, or a servitude, as in *Prather*, the operator owes the same implied restoration duties to the landowner.

290. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 10 (La. 1/19/05); 893 So. 2d 789, 797.

291. LA CIV. CODE ANN arts. 2683, 2686, 2687, 2692 (2005).

292. *Castex*, 2004-0968, pp. 17–18; 893 So. 2d at 801.

harm canal dredging was doing to Louisiana's wetlands.<sup>293</sup>

As a result of *Castex*, in the absence of an express restoration clause in the contract of lease identifying a higher standard, lessors are once again required to prove an unreasonable or excessive use of lessor's property before a court will order lessees to restore the surface "as near as practical to its original condition."<sup>294</sup> In sum, the language of "reasonably necessary"<sup>295</sup> use governing oil and gas leases is proxy for the Civil Code's "normal wear and tear,"<sup>296</sup> neither of which require compensation. Thus, "unreasonable or excessive use in the mineral lease context is that which exceeds 'normal wear and tear,' thereby triggering a duty to restore," even in the absence of an express restoration clause in the governing lease.<sup>297</sup>

### C. THE *BARASICH* COURT ENCOUNTERS *CASTEX*

Had the *Barasich* plaintiffs been allowed to conduct discovery, they would not have been caught off guard like the Terrebonne Parish School Board was in March of 2005. *Castex* could not have stood for the principle that *all* dredging without backfilling is reasonable and necessary because a reasonableness analysis is fact specific.<sup>298</sup> The issue must be determined by the factfinder on a case-by-case basis.<sup>299</sup> *Castex* itself was decided

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293. See *supra* Part III, Section B. 1.

294. *Edwards v. Jeems Bayou Prod. Co.*, 507 So. 2d 11, 13 (La. App. 2 Cir. 1987); see also LA. STAT. ANN. § 31:122 (2000) (making the Civil Code articles on lease applicable to oil and gas leases when the Mineral Code does not "provide for a particular situation").

295. See Ellmore, *supra* note 262, § 10.

296. LA CIV. CODE ANN art. 2683 (2005).

297. See Pitre & Penner, *supra* note 231, at 344.

298. See *State v. La. Land & Expl. Co.* 2012-0884, pp. 27–29 (La. 1/30/13); 110 So. 3d 1038, 1058–59; *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 321, 323, 325 (5th Cir. 2002). The same is true of oil and gas jurisprudence nationally. See, e.g., *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894, 897 (N.M. 1985) (affirming a finding that the amount of land taken by an oil company for its operations was reasonable because the finding was made by a jury); *Lanahan v. Myers*, 389 P.2d 92, 93–94 (Okla. 1963) (affirming jury award as reasonable based on the evidence presented by plaintiffs concerning the value of land lost and the cost of remediation); *Union Producing Co. v. Pittman*, 146 So. 2d 553, 555–56 (Miss. 1962) (holding that the determination of whether the amount of land used by an oil operator was more than was reasonably necessary was a question of fact for the jury).

299. Cf. *Broussard v. Northcott Expl. Co.*, 481 So. 2d 125, 129 (La. 1986) ("That which constitutes an 'unreasonable exercise of contractual rights' must be determined on a case by case basis.").

after a trial on the merits.<sup>300</sup>

Recently, the Louisiana Supreme Court affirmed a court of appeal's reversal of a trial court's attempt to decide a question requiring a determination of "reasonableness" on a motion for summary judgment in *State v. Louisiana Land & Exploration Co.*<sup>301</sup> After admitting responsibility for the contamination, UNOCAL, the historical operator, filed a motion for a partial summary judgment on the theory that Act 312 capped UNOCAL's liability at "the amount of money needed to fund a 'feasible plan' approved by the court pursuant to LA R.S. 30:29."<sup>302</sup> The supreme court held that defendants operating under a lease without an express restoration provision could not be dismissed on summary judgment on the issue of entitlement to extra-regulatory restoration damages because the inquiry depends on the *reasonableness* of the defendant's operations.<sup>303</sup>

Pre-1974 inquiries focused on how many acres the lessee needed to conduct his operations, whether he used more acres than a prudent operator would have used, and whether the alleged damage—the poisoned cow or the ruined acre of sugarcane—occurred on the reasonable amount of land required or on the excessive acre.<sup>304</sup> An Oklahoma case, *Lanahan v. Myers*, illustrates this principle.<sup>305</sup> In *Lanahan*, the Oklahoma Supreme Court affirmed the jury's pro-lessor verdict, reasoning that the jury was best situated to decide the reasonableness of the lessee's failure to erect a fence around a pit that had not been used for two years after drilling was complete.<sup>306</sup> In this case, the surface owner lost a heifer, not from poisoning, but from falling

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300. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 5 (La. 1/19/05); 893 So. 2d 789, 794.

301. *State v. La. Land & Expl. Co.* 2012-0884, pp. 11–13 (La. 1/30/13); 110 So. 3d 1038, 1046–47.

302. Keith Hall, *Louisiana Oil and Gas Update*, 19 TEX. WESLEYAN L. REV 361, 376 (2013) (quoting *State v. La. Land & Expl. Co.*, 2010-1341, p. 2 (La. App. 3 Cir. 2/1/12); 85 So. 3d 158, 159).

303. *La. Land*, 2012-0884, pp. 10–11, 28; 110 So. 3d at 1046, 1058.

304. See, e.g., *Lanahan v. Myers*, 389 P.2d 92 (Okla. 1963) (illustrating this inquiry). For similar Louisiana cases from this era, see *Smith v. Schuster*, 66 So. 2d 430, 431–32 (La. App. 2 Cir. 1953); *Rohner v. Austral Oil Expl. Co., Inc.*, 104 So. 2d 253, 256–58 (La. App. 1 Cir. 1958). Prior to 1974, Louisiana's implied restoration duties were in line with other oil and gas producing states, like Oklahoma. In 1975, the redactors' comment to Article 122 made Louisiana unique from other states by suggesting a restoration duty without a showing of unreasonable or excessive use by the operator. See LA. STAT. ANN. § 30:122 cmt. (2000).

305. *Lanahan*, 389 P.2d 92.

306. *Id.* at 94.

into the pit, where she died from starvation.<sup>307</sup> The *Lanahan* court anchored its verdict on whether the pits “were reasonably necessary to his operations” at the time of the heifer’s death, not when the well was initially drilled.<sup>308</sup>

The *Castex* court’s majority, by contrast, showed its lack of understanding of the significance of coastal erosion and the destruction of the marsh by drawing a comparison between the facts of *Castex* and the facts in *Riggs v. Lawton*.<sup>309</sup> In *Riggs*, the lessor, a homeowner, gave his permission in advance for the lessee “to build an additional room and bath onto the leased property.”<sup>310</sup> When the lessor demanded that the lessee “remove these additions to the property and to return it in the ‘same state’ in which the lessee received it,” the supreme court denied the lessor’s claim on the ground that he had approved the addition in advance.<sup>311</sup> In *Castex*, the canals were in fact not “additions” to the plaintiff’s property. They were more like “PAC-MAN,” eating the coastal zone.<sup>312</sup> “Left unchecked, the canals [would have begun] to widen, double[] in size and continu[e] to expand until they literally ran out of marsh.”<sup>313</sup>

Even following the pre-1975 standard for “reasonable and necessary” usage as illustrated by *Lanahan*, the correct inquiry for the *Castex* court to follow would have been to ask whether the pre-approved canals were still an enhancement to the Terrebonne Parish School Board’s property in 2005. Critically in *Lanahan*, the date of reasonableness of having a fence constructed around the pit was the date of the incident. The Lanahans’ cow fell in the unfenced pit *after* the operations were completed. Hence, there was no operational necessity for an unfenced pit. So too there are cases where having an unfenced pit or ditch *during* operations was considered reasonable and necessary for

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307. *Lanahan v. Myers*, 389 P.2d 92, 94 (Okla. 1963).

308. *Id.*

309. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, pp. 16–17 (La. 1/19/05); 893 So. 2d 789, 800 (discussing *Riggs v. Lawton*, 93 So. 2d 543, 545 (La. 1957)).

310. *Id.* at p. 17; 893 So. 2d at 800 (discussing *Riggs*, 93 So. 2d at 544).

311. *Id.* (quoting *Riggs*, 93 So. 2d at 544).

312. Houck, *Reckoning*, *supra* note 2, at 203 (referencing N.J. Craig et al., *Land Loss in Coastal Louisiana (U.S.A.)*, 3 ENVTL. MGMT. 133, 138 (1979)).

313. *Id.* at 204 (citing W.B. Johnson & J.G. Gosselink, *Wetland Loss Directly Associated with Canal Dredging in the Louisiana Coastal Zone*, in PROCEEDINGS OF THE CONFERENCE ON COASTAL EROSION AND WETLAND MODIFICATION IN LOUISIANA: CAUSES, CONSEQUENCES, AND OPTIONS 60, 67–70 (Biological Servs. Program, U.S. Fish & Wildlife Serv., Pub. No. FWS/OBS-82/59, Donald F. Boesch ed., 1982)).

production.<sup>314</sup> In those cases, the landowner was liable for the consequences of his livestock's trespass into the zone of operations.<sup>315</sup> In *Castex*, the question before the court should have been whether it was reasonable to leave a metastatic cancer on the property at the end of the twentieth century. The unfenced pit in *Lanahan* is the equivalent of unbackfilled canals in *Castex*.

Lessors willingly believe E&P operators' assertions that drilling a well is "incidental" to producing oil or gas. Nonetheless, even without an express agreement to plug and abandon a well after operations have ceased, it would be negligent for an operator to leave a pathway for remaining thermogenic gas and gas by-products to escape from their natural underground habitat to contaminate landowners' soil and drinking water. So too, here, did the industry's awareness of the extensive harm the dredged canals had caused plaintiff's land demand backfilling to mitigate the continuing harm.

The Mineral Code specifically mandates bilateral consideration of each estate's needs.<sup>316</sup> Even as long as dredging was the only way to accomplish E&P companies' goals in Louisiana's coastal zone, the unnecessary harm to plaintiffs' property could have been remediated by backfilling. Not backfilling, however, constituted excessive use of plaintiff's property after E&P operations were complete. This is a common theme in pre-1974 cases. Landowners won when they proved that E&P operations used a bigger footprint than they needed to in order to conduct their operations.<sup>317</sup> Landowners also won when E&P companies left the field but continued, by virtue of their failure to restore, to occupy, and render useless the landowner's land.<sup>318</sup>

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314. See, e.g., *Peters Petroleum Corp. v. Alred*, 10 P.2d 705, 706 (Okla. 1932); *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410, 412-13 (Tex. 1954).

315. *Peters*, 10 P.2d at 706; *Warren*, 271 S.W.2d at 412-13.

316. LA. STAT. ANN. § 31:11 (Supp. 2015) (requiring both the landowner and the owner of a mineral right to "exercise their respective rights with reasonable regard for those of others").

317. See, e.g., *East v. Pan Am. Petroleum Corp.*, 168 So. 2d 426 (La. App. 3 Cir. 1964) (affirming damage award to plaintiff who proved that the defendant oil company excavated soil from plaintiff's marshland to build a road to access a site on neighboring land); see also *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853 (Tex. Civ. App. 1970); *Schlegel v. Kinzie*, 12 P.2d 223 (Okla. 1932).

318. See, e.g., *Smith v. Schuster*, 66 So. 2d 430 (La. App. 2 Cir. 1953) (holding that a landowner who repeatedly asked a lessee to fill in pits could have the work performed and seek reimbursement from the mineral lessee); see also *Bonds v.*



Under this line of cases, then, the real issue in *Castex* was defendants' unnecessary trespass once operations had concluded. Instead of releasing plaintiff's property back to it for other uses, failure to backfill meant unceasing enlargement of the defendants' destructive footprint on an increasing basis each year. By any standard of excessive behavior, this qualifies.

#### D. POST-KATRINA JURISPRUDENTIAL AND LEGISLATIVE ADJUSTMENTS TO LOUISIANA CONTRACT LAW<sup>319</sup>

Since Hurricane Katrina, the Louisiana Supreme Court has made significant rulings and the Louisiana legislature has enacted important legislation that, collectively, have modernized and made more consistent legal doctrine in the field of implied restoration duties. Collectively, these steps affirm University of Chicago Professor Jack Goldsmith's optimism about the American legal system's ability to correct abuses in our "flourishing constitutional democracy."<sup>320</sup>

##### 1. E&P OPERATORS ARE NOT THE SOLE JUDGE OF REASONABLENESS

Contract's reasonable man is a "more specialized creature, possessing all of the idiosyncratic features of the contracting parties viewed within the context of their interaction."<sup>321</sup> Every judge or jury must decide whether to view an issue from "the perspective of the promisor, the promisee, or neither."<sup>322</sup>

Early common-law courts privileged an oil operator's view of what was necessary. For instance, in *Gulf Oil Refining Co. v. Davis*, a Mississippi court deemed the oil company "the judge as to the kind of pit that it should construct."<sup>323</sup> The lessor might have been forced to endure the consequential damage of a second

Sanchez-O'Brien Oil & Gas Co., 715 S.W.2d 444, 445–46 (Ark. 1986); Lanahan v. Myers, 389 P.2d 92 (Okla. 1963); Nichols v. Burk Royalty Co., 576 P.2d 317 (Okla. Civ. App. 1977); Reading & Bates Offshore Drilling Co. v. Jergenson, 453 S.W.2d 853 (Tex. Civ. App. 1970).

319. An earlier version of this section appeared in Pitre & Penner, *supra* note 231.

320. Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327, 334–35 (2000) (arguing that international human rights standards are unneeded in the United States because "the United States [already] has a vigorous and successful method for human rights protection" that is widely viewed as legitimate).

321. Larry A. Dimatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 317 (1997).

322. *Id.* at 332.

323. *Gulf Oil Ref. Co. v. Davis*, 80 So. 2d 467, 469 (Miss. 1955) (emphasis added).

ninety-foot pit dug in response to his complaints about an initial pit's overflow.<sup>324</sup> By contrast, civilian judges more consistently take into consideration the perspective of the lessor.<sup>325</sup> In so doing, they honor the civilian construct that a contract must represent a true meeting of the minds.<sup>326</sup>

In 2010, the Louisiana Supreme Court privileged the vantage point of the under-educated landowners.<sup>327</sup> In *Marin v. Exxon Mobil Corp.*, the 1941 servitude expressly provided that “in no case shall Humble Oil . . . , its successors and assigns, be obligated . . . to restore the premises to the condition in which they now are but may abandon and surrender the same in the condition in which they may be at such time and shall not be liable in any manner for damages to said land caused by its use of said premises.”<sup>328</sup> However, the lingering contamination from the use of unlined earthen disposal pits before the 1994 novation was considered unreasonable and excessive use of the property.<sup>329</sup> The *Marin* court unanimously concluded that the lessor would not have consented “to the disposal and storage of oilfield wastes into pits known to be environmentally unsound.”<sup>330</sup> Thus, the supreme court in *Marin*, including Justice Jeffrey Victory, held that it was both unreasonable and unnecessary for Exxon to dispose of toxic waste products into unlined pits even before the practice was outlawed by the state in 1986.<sup>331</sup>

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324. *Gulf Oil Ref. Co. v. Davis*, 80 So. 2d 467, 468–69 (Miss. 1955) (reversing the jury’s “excessive” award in favor of the landowner and remanding the case for a new trial).

325. *See, e.g., Rohner v. Austral Oil Expl. Co.*, 104 So. 2d 253, 256–58 (La. App. 1 Cir. 1958) (judging the quality of the workmanship of the repaired fence by the community of farmers, of which the lessor was one); *Marin v. Exxon Mobil Corp.*, 2009-2368, 2009-2371, p. 37 (La. 10/19/10); 48 So. 3d 234, 259 (“[B]ecause of . . . the certainty that plaintiffs would not have consented to the disposal and storage of oilfield wastes into pits known to be environmentally unsound, there is no doubt that Exxon has a duty to restore, the question is simply to what standard.”); *see also* Lowell C. Davis, *Selected Problems Regarding Lessee’s Rights and Obligations to the Surface Owner*, 8 ROCKY MT. MIN L. INST. 315, 349 (1963).

326. LA. CIV. CODE ANN. art. 1908 (2008); *see also* *Sam Staub Enters., Inc. v. Chapital*, 2011-1050, pp. 6–7 (La. App. 4 Cir. 3/14/12); 88 So. 3d 690, 694–95.

327. *Marin*, 2009-2368, 2009-2371; 48 So. 3d 234.

328. *Id.* at p. 34; 48 So. 3d at 257.

329. *Id.* at pp. 37–38; 48 So. 3d at 260.

330. *Id.* at p. 37; 48 So. 3d at 259. The reporter indicates Justice Weimer as dissenting, although the justice dissented only “from that portion of the opinion which holds that the plaintiffs’ tort claims have prescribed.” *Id.* at p. 1; 48 So.3d at 268 (Weimer, J., dissenting).

331. *Marin v. Exxon Mobil Corp.*, 2009-2368, 2009-2371, p. 38 (La. 10/19/10); 48 So. 3d 234, 260.

Perhaps the *Marin* court considered the parties' unequal access to scientific and technical knowledge of which oil and gas E&P processes have been known to cause environmental damage and under which conditions. Scientific knowledge does not "progress in a strictly linear . . . fashion."<sup>332</sup> Rather, it "is accepted . . . in different ways at different times and places."<sup>333</sup> What is virtually always true is that industry knows more about the risks landowners are undertaking by allowing them to operate on their land than landowners do. For example, E&P defendants knew of the "permanent ecological changes" being wrought by their canals to the Louisiana's wetlands as early as 1955.<sup>334</sup>

An inquiry into the "reasonableness" of the use of dredging canals for access to E&P operations might include consideration of some or all of the following questions:

- Were others in the industry using an alternative technology at that time in other countries?
- Were alternatives to dredging known and cost-effective at that time?
- What role did the industry play in disseminating or squelching public awareness of the risks of the old methodology and the advantages of the new technology?
- Would the alternative technologies have been cost effective if industry had included liability for future property damage as part of the equation?

## 2. "FROM THE TIME OF THE ACTIVITY COMPLAINED OF."

Both the Louisiana Supreme Court and the Louisiana legislature have acted in concert, perhaps unintentionally, to bring rationality and consistency to the question of the relevant time period that governs the reasonable person evaluation. The *Castex* court fixated on the moment of execution of the contract: 1963.<sup>335</sup> It assumed the plaintiff should have been able to

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332. Robert N. Proctor, *Expert Witnesses Take the Stand: Historians of Science Can Play an Important Role in US Public Health Litigation*, NATURE, Sept. 7, 2000, at 15.

333. *Id.*

334. Houck, *Reckoning*, *supra* note 2, at 208–19.

335. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, pp. 2, 19 (La. 1/19/05); 893 So. 2d 789, 792, 802 ("We find . . . that imposing an implied duty to restore the surface that was clearly beyond the contemplation of the parties at the

anticipate scientific awareness that, while available to the industry from 1955,<sup>336</sup> only began to penetrate public awareness in the mid-1980s.<sup>337</sup> If the Terrebonne Parish School Board had been privy to the industry's scientific knowledge, they could have included a clause protecting their land from future harm from dredging-induced coastal erosion.

According to Professor Larry Dimatteo, the “truncating of the reasonable person inquiry to the moment of contract formation” is appropriate only when the contract is short-term in nature.<sup>338</sup> “Oilfields tend to be long-lived operations, and oilfield technology has evolved significantly over the decades.”<sup>339</sup> Therefore, courts err when they narrow the reasonable-person inquiry to the date of the contract's execution when interpreting mineral leases.<sup>340</sup>

The contract at issue in *Castex* was to last forty years. By 2010, however, when the *Marin* court asserted that the Marin's ancestors “would not have consented to the disposal and storage of oilfield wastes into pits known to be environmentally unsound,”<sup>341</sup> the supreme court was imputing defendants' awareness of the environmentally unsound nature of their disposal practices to the landowners in *Marin*.

Act No. 400 of the Louisiana legislature, now codified at Louisiana Revised Statute 30:29(M), affirms that reasonableness is to be judged from the perspective of the time the activity triggering the complaint was conducted.<sup>342</sup> “By so doing, the

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time they contracted is not a legally supportable resolution to an undoubtedly difficult problem confronting our state and its people.”)

336. See Houck, *Reckoning*, *supra* note 2, at 208.

337. See generally Oliver Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3 (1983) (pointing out that land loss in Coastal Louisiana was being caused by two primary factors: the diversion of the Mississippi River from its natural course and several oil and gas industry practices that allowed saltwater intrusion into previously fresh-water marshes and swamps).

338. Dimatteo, *supra* note 321, at 323.

339. William R. Keffer, *Drilling for Damages: Common Law Relief in Oilfield Pollution Cases*, 47 SMU L. REV. 523, 527–28 (1994); see also 15 RICHARD A. LORD, WILLISTON ON CONTRACTS § 44:13 (4th ed. 2014) (“[P]roperly adjusting the rights of the parties in the mutual performance of bilateral contracts demands that the situation be examined in light of the events which subsequently take place—whether foreseen or even foreseeable at the time of the formation of the contract.”).

340. See Pitre & Penner, *supra* note 231, at 349–50.

341. *Marin v. Exxon Mobil Corp.*, 2009-2368, 2009-2371, p. 37 (La. 10/19/10); 48 So. 3d 234, 259.

342. Act of June 2, 2014, No. 400, § 1, 2014 La. Sess. Law Serv. 1350, 1352 (codified at LA. STAT. ANN. § 30:29(M) (Supp. 2015)).

legislature adopted a standard that recognizes that scientific understanding and industry practices are forever changing.”<sup>343</sup> La. R.S. 30:29(M) requires E&P operators to keep abreast of scientific and technological progress.<sup>344</sup>

“If the mineral owner or lessee is given the right to make ‘reasonable use’ of the surface,” Professor David Pierce queries, “must the ‘reasonableness’ be evaluated in light of new environmental liabilities, or liability risks, the surface owner might suffer?”<sup>345</sup> In an early Clean Water Act (CWA) case, *Quaker State Corp. v. U.S. Coast Guard*,<sup>346</sup> Quaker State covered its pit “by bulldozing earth over it, compacting and seeding it” one year before abandoning operations in 1978.<sup>347</sup> The surface owners, who were not sophisticated users, authorized the procedure.<sup>348</sup> Seven years later, the lessor was held responsible under CWA Section 311(f) for reimbursing the Coast Guard, which spent \$430,000 cleaning up the pit, after tracing the source of the oil sheen on the surface of a nearby creek back to the pit created, filled, and abandoned by Quaker State.<sup>349</sup> The lessors in *Castex* who allowed dredging to take place on their property were also at risk for being sued by their “neighbors”—however a judge or jury may one day define that subjective term in this context—for property damage caused by the landowners’ allowing of E&P operators to dredge canals on their property without requiring that they be backfilled at the lease’s end. In *Hogg v Chevron*,<sup>350</sup> the plaintiffs sued their neighbors for allowing a plume of gasoline contamination to migrate across their property boundary.<sup>351</sup> But for prescription, there is no evidence that

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343. Pitre & Penner, *supra* note 231, at 351.

344. LA. STAT. ANN. § 30:29(M) (Supp. 2015); *see also* Sam Brandao, Comment, *Louisiana’s Mono Lake: The Public Trust Doctrine and Oil Company Liability for Louisiana’s Vanishing Wetlands*, 86 TUL. L. REV. 759, 783–84 (2012) (urging Louisiana politicians and judges to “protect the res in the present according to present knowledge and to refine that protective approach as often as changing circumstances require”).

345. David E. Pierce, *The Impact of Landowner/Lessor Environmental Risk on Oil and Gas Lessee Rights and Obligations*, 31 TULSA L.J. 731, 740 (1996).

346. *Quaker State Corp. v. U.S. Coast Guard*, 681 F. Supp. 280 (W.D. Pa. 1988).

347. *Id.* at 283.

348. *Id.* at 283.

349. *Id.* at 281, 282, 286. Ultimately, the Coast Guard’s claim against Quaker State was dismissed because the Coast Guard’s evidence was insufficient to show that Quaker State was the sole cause of the oil spill. *Quaker State Corp. v. U.S. Coast Guard*, No. 87-55 ERIE, 1990 WL 272708 (W.D. Pa. Oct. 30, 1990).

350. *Hogg v. Chevron USA, Inc.*, 2009-2632, 2009-2635 (La. 7/6/10); 45 So. 3d 991.

351. *Id.* at pp. 2–3; 45 So. 3d at 994–95.

plaintiffs' cause of action would have been dismissed on an exception of no cause of action.<sup>352</sup>

La. R.S. 30:29(M) brought uniformity to the lower courts' disagreement and fundamentally extended the *Marin* court's reasoning that plaintiffs would not have agreed to practices known at the time of the practice to be environmentally unsound and harmful to their land.

### E. ANSWERING THE *BARASICH* DILEMMA IN 2015

*Castex*'s majority accepted the idea that industry custom and practice at the time of execution of the lease were determinative.<sup>353</sup> Moreover, the *Castex* court ultimately concluded that defendants' practice of not backfilling dredged canals after operations were complete was consistent with industry custom, thereby rendering the alleged damage to the coastland mere "wear and tear" that limits a lessee's implied duty to restore as a good administrator.<sup>354</sup>

Act No. 400 legislatively overruled *Castex* on the question of the perspective of reasonableness and shifted the date of inquiry to "the time of the activity complained of."<sup>355</sup> In *Castex*, the School Board complained of the operator's failure to mitigate the damage caused by the dredging of canals in the late nineties.<sup>356</sup> As mentioned above, hoverbarges were being utilized to support E&P activities as early as the late seventies.<sup>357</sup> The use of overmarsh drilling barges was well known in Louisiana by 1980.<sup>358</sup> Given the availability of hoverbarges, industry's continued use of dredging without backfilling can only be deemed an unreasonable and excessive use of lessor's land.

Before *Castex*, oil and gas jurisprudence always stressed that industry's footprint should be as narrow as affordable technology

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352. See *Hogg v. Chevron USA, Inc.*, 2009-2632, 2009-2635, p. 22 (La. 7/6/10); 45 So. 3d 991, 1006.

353. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2004-0968, p. 19 (La. 1/19/05); 893 So. 2d 789, 802. *But see* Frank L. Maraist & Thomas C. Galligan, Jr., LOUISIANA TORT LAW § 6.07 (2d ed. 2014) ("[A]n actor complying with custom nevertheless may be negligent, and, in some cases, the custom itself may be negligent.").

354. *Castex*, 2004-0968, pp. 15-17; 893 So. 2d at 799-801.

355. Act of June 2, 2014, No. 400, § 1, 2014 La. Sess. Law Serv. 1350, 1352 (codified at LA. STAT. ANN. § 30:29(M) (Supp. 2015)).

356. *Castex*, 2004-0968, p. 4; 893 So. 2d at 793.

357. See *supra* note 228.

358. See Houck, *Reckoning*, *supra* note 2, at 241.

makes possible.<sup>359</sup> Anything more than that, even during production, impermissibly tramples on the servient estate's right to full enjoyment of its property.<sup>360</sup> After the oil rigs have moved on, leaving an ever-enlarging swath of damaged marshland constitutes trespass. To the extent it can be proven that defendants knew their dredging was contributing to Louisiana's loss of marshlands,<sup>361</sup> defendants' continuing trespass would constitute bad-faith trespass, according the plaintiff the civil fruits of those violations.<sup>362</sup>

#### IV. CONCLUSION

*[I]s it appropriate to require those who create extraordinary risks . . . to finance compensation for those who are harmed?*<sup>363</sup>

—Professor Daniel Farber

Fast forward to 2015, ten years after Hurricane Katrina. “The state’s own Coastal Protection and Restoration Authority estimates the annual costs of flooding to increase tenfold if coastal land loss continues at its current rate.”<sup>364</sup> A planning committee created to help launch Louisiana’s Coastal Master Plan meets to talk about planning, but the unified restoration imagined by the *Castex* majority is not yet scheduled to begin.<sup>365</sup> The cost of restoration is now estimated to range between \$50 billion to “simply hold[] a baseline” and \$100 billion for “significant restoration.”<sup>366</sup> Terrebonne Parish has made the list

359. See, e.g., *Smith v. Schuster*, 66 So. 2d 430, 431–32 (La. App. 2 Cir. 1953).

360. See, e.g., *Schlegel v. Kinzie*, 12 P.2d 223, 224 (Okla. 1932); *East v. Pan Am. Petroleum Corp.*, 168 So. 2d 426, 429 (La. App. 3 Cir. 1964).

361. See *supra* notes 226–233 and accompanying text.

362. See *Corbello v. Iowa Prod.*, 2002-0826, p. 34 (La. 2/25/03); 850 So. 2d 686, 709.

363. Farber, *supra* note 136, at 1077.

364. *Recent Developments in Environmental Law*, 28 TUL. ENVTL. L.J. 149, 164 (2014).

365. See Gallucci, *supra* note 14 (highlighting successful smaller projects, which have recreated marshes and rebuilt shorelines).

366. Houck, *Reckoning*, *supra* note 2, at 278 (citing Bob Marshall, *Coastal Restoration Financing is Uncertain, but Louisiana Has Ideas to Find \$50 Billion*, LENS (Apr. 2, 2014, 10:59 AM), <http://thelensnola.org/2014/04/02/coastal-restoration-financing-is-uncertain-but-state-has-ideas-for-more-money/>; Katherine Sayre, *Louisiana \$50 Billion Coastal Restoration Plan Would Inject Billions More into Economy Every Year, Study Finds*, NOLA.COM/TIMES-PICAYUNE (Mar. 27, 2014, 10:02 PM), [http://www.nola.com/business/index.ssf/2014/03/louisiana\\_50\\_billion\\_coastal\\_r.html](http://www.nola.com/business/index.ssf/2014/03/louisiana_50_billion_coastal_r.html)). But see Mark Davis et al., *Financing the Future: Turning Coastal Restoration and Protection Plans into Realities: The Cost of Comprehensive Coastal Restoration and Protection*, TUL. INST. ON WATER RESOURCES L. & POL'Y 4, 6 (Aug.

of the United States's top-ten counties most vulnerable to coastal erosion.<sup>367</sup> Realists are discussing “community resettlement prospects” for many of Louisiana’s working coastal communities.<sup>368</sup>

In the end, both “MR-GO” and “Big Oil” demonstrate why untethering liability from a costs-benefit analysis sets a dangerous precedent. One point the uncompensated, unnecessary damages to Louisiana’s wetlands underscores is the prescience of the *Corbello* court’s reasoning when it justified not “tethering [the award] to the market value of the property” because “[t]o do so would give license to oil companies to perform [their] operations in any manner, with indifference as to the aftermath of its operations because of the assurance that it would not be responsible for the full cost of restoration.”<sup>369</sup> The same logic applies to the Army Corps of Engineers.

If future government agencies responsible for the public’s safety ground their practices in *actual* policy considerations, then immunity should attach to the unintended consequences of their deliberations to prevent unwitting taxpayers from shouldering the costs of the agency’s good-faith policy considerations. However, future public-safety cases should not be blanketed in immunity if the government agency commits scientific malpractice and fails to report the damage its malpractice is causing its neighbors’ land to Congress or to its neighbors.

In essence, taxpayers have already footed the bill for the Corps’s gross negligence that magnified the storm surge funneled

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18, 2014), [http://www.law.tulane.edu/uploadedFiles/Institutes\\_and\\_Centers/Water\\_Resources\\_Law\\_and\\_Policy/Content/Financing%20the%20Future%20Pt%201—The%20Cost.pdf](http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Water_Resources_Law_and_Policy/Content/Financing%20the%20Future%20Pt%201—The%20Cost.pdf) (warning that if one includes even a conservative inflation rate, the number could escalate to between \$94.7 and \$113 billion and that the Master Plan’s \$50 billion budget does not include secondary cost considerations).

367. Susan L. Cutter & Christopher T. Emrich, *Moral Hazard, Social Catastrophe: The Changing Face of Vulnerability Along the Hurricane Coasts*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 106 (2006).

368. See generally Christopher Dalbom et al., *Community Resettlement Prospects in Southeast Louisiana: A Multidisciplinary Exploration of Legal, Cultural, and Demographic Aspects of Moving Individuals and Communities*, TUL. INST. ON WATER RESOURCES L. & POL’Y (Sept. 2014), [http://www.law.tulane.edu/uploadedFiles/Institutes\\_and\\_Centers/Water\\_Resources\\_Law\\_and\\_Policy/Content/Community%20Resettlement%20Prospects%20in%20Southeast%20Louisiana.pdf](http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Water_Resources_Law_and_Policy/Content/Community%20Resettlement%20Prospects%20in%20Southeast%20Louisiana.pdf).

369. *Corbello v. Iowa Prod.*, 2002-0826, p. 9 (La. 2/25/03); 850 So. 2d 686, 695, *superseded by statute in part*, Act of July 2, 2003, No. 1166, 2003 La. Acts 3511 and Act of July 8, 2006, No. 312, 2006 La. Acts 1472, *as recognized in State v. La. Land & Expl. Co.*, 2012-0884 (La. 1/30/13); 110 So. 3d 1038.



via the MR-GO and destroyed entire neighborhoods. Because a judgment against the Corps would not have come from the Corps's budget,<sup>370</sup> perhaps the best hope for incentivizing modern engineering in government work is to appeal to the professional pride of engineers.

There is no basis, however, for creating a DFE-like exception to tort and contract principles for private oil and gas companies. The industry which scientists consistently identify as being the most responsible for Louisiana's coastal erosion has not yet been held accountable for its particular contribution to the destruction through dredging of 1,900 (and counting) miles of wetland.<sup>371</sup> So far the citizens of Louisiana have shouldered a disproportionate burden in overcoming the past damage caused by the oil and gas industry's blatant disregard of the warnings produced by its own scientists. As it stands now, the oil and gas industry's fair share of financing the 50 to 113 billion dollar restoration projects is also being shifted onto taxpayers of the United States.

It is only reasonable and rational that oil and gas operators be made to pay their pro rata share of the damage which they *knew* they were causing to Louisiana's wetlands, after a sufficient period of discovery and a trial on the merits, of course. Unless the judiciary applies the correct reasonable-person standard in future coastal land-loss cases, E&P operators will continue to maximize profits for their shareholders without consideration of the non-shareholding citizens who will end up paying for community resettlements and future property damage.

The danger of rejecting contract law's implied duties for E&P operations is that the E&P companies will simply weigh the risks and rewards of not even having to pay for damages for destruction versus utilizing less damaging equipment. In the case of the 10,000 miles of canals crisscrossing south Louisiana, operators have continued to save money by relying on dredging when a significantly less damaging method of accomplishing their goal has existed since 1970.<sup>372</sup> As early as the mid-1970s, hoverbarges were utilized successfully and economically in "oil and gas operations in Abu Dhabi, Holland, Alaska, and

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370. See Weaver & Longoria, *supra* note 48, at 347.

371. See *supra* note 9.

372. See D.J. Iddins, *Air-Cushion Vehicles in Support of the Oil Industry*, DRILLING & PRODUCTION PRAC., Jan. 1970, at 232, 233 (demonstrating that the industry has been able to effectively use ACVs since 1970).

Canada.”<sup>373</sup> In Louisiana, however, “[d]redge permits were easy to get, the work was relatively cheap, and there were few mitigating requirements. . . .”<sup>374</sup> Without the risk of liability for damaging the wetlands, there is no incentive to use alternative technology or mitigate the damage by backfilling.<sup>375</sup> Companies are still dredging new canals with impunity; the Corps is still busy approving new permits.<sup>376</sup>

It may be that, as a country, we believe that oil and gas products are a public good. We have given pipeline companies the right to expropriate land to build pipelines. Nevertheless, the question remains: if we are going to treat E&P and pipeline companies like quasi-public entities and wrap them in a blanket of pseudo-immunity, then should not the law of takings apply to the oil and gas companies for the property damage caused by the percentage of the coastal erosion caused by their dredging and their failure to backfill? If it does, shareholders in the oil and gas industry would be made to pay for the operators’ damages risked on their behalf to maximize profits, rather than being unjustly enriched by enjoying the dividends of that economy, leaving taxpayers to foot the bill for the extraordinary damages.

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373. See Houck, *Reckoning*, *supra* note 2, at 241 & n.291.

374. *Id.* at 248.

375. On the success of backfilling for canal restoration, see *id.* at 255–57 (citations omitted).

376. *Id.* at 261.