SEAMAN'S MANSLAUGHTER: A POTENTIAL SEA OF TROUBLES FOR THE MARITIME DEFENDANT AND A CLEVER MECHANISM FOR TAKING ARMS AGAINST THE SLINGS AND ARROWS OF MARITIME PLAINTIFFS

William Pitard Wynne[*]

Brian Michael Ballay[**]

> To be, or not to be: that is the question:
> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune,
> Or to take arms against a sea of troubles,
> And by opposing end them?
>
> WILLIAM SHAKESPEARE, HAMLET act III, sc. 1.

I. INTRODUCTION

Due to the piecemeal and sometimes illogical development of the general maritime law, the position of the maritime personal injury defendant, similar to the position of the melancholy Dane, may fairly be described as somewhat precarious. Not only must

[*] After graduating *summa cum laude* from Loyola University New Orleans School of Law and serving as judicial law clerk to the Honorable Ginger Berrigan, Chief Judge of the United States District Court for the Eastern District of Louisiana, Mr. Wynne began work at Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P. with a practice emphasizing admiralty and maritime matters as well as commercial and tort litigation. He remains there today.

[**] Brian M. Ballay is a *magna cum laude* graduate of Loyola University New Orleans School of Law. He is currently clerking for the Honorable Carl J. Barbier, United States District Judge, Eastern District of Louisiana. Upon finishing his clerkship, Mr. Ballay will work in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

this defendant contend with traditional land-bound negligence remedies buttressed by a hoard of rules and regulations promulgated by Congress, the United States Coast Guard, and executive agencies,[1] he must also deal with remedies unique to the maritime world.[2] As demonstrated by a recent criminal prosecution in the Eastern District of Louisiana under an archaic criminal statute, the maritime wrongful death defendant's exposure to these civil slings and arrows may now be exacerbated by potential criminal culpability, premised on actions which, in many cases, could hardly be characterized as criminal.[3] Seaman's manslaughter,[4] the previously mentioned federal criminal offense, could create bigger problems for the defendant, such as those commingled with search warrants, arrest warrants, grand jury subpoenas, and, ultimately, federal criminal prosecutions.

There may, however, be a light at the end of the tunnel for the defendant. The problem with this light at the end of the tunnel is that, on the one hand, justice may be denied to civil litigants and, on the other hand, the possibility of criminal liability for only slightly negligent behavior still looms. With the possibility that criminal liability may be imposed on the wrongful death maritime defendant, although remote, also comes the protections afforded by the United States Constitution to criminal suspects and defendants. With the aid of this largely unknown and rarely prosecuted federal criminal offense, the defendant may be able to invoke the privilege against self-incrimination to take arms against the civil and criminal sea of troubles.

This Article discusses the ramifications that the seaman's manslaughter offense has on the maritime wrongful death defendant's civil case and related issues and suggests that Congress repeal the seaman's manslaughter statute. Part II of this Article demonstrates that prosecution under the seaman's manslaughter statute is a very real hazard by telling the tale of Richard A. O'Keefe, the criminal defendant referred to earlier.

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1. *See, e.g.*, 46 U.S.C. §§ 1–70117 (2000 & Supp. 2004); 46 U.S.C. app. §§ 3–2007 (2000 & Supp. 2004); Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235, 243–45 (2002).

2. *See, e.g.*, THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 6-1 (4th ed. 2004) (explaining that the seaman has remedies for breach of the warranty of seaworthiness and for maintenance and cure).

3. Smooth Minutes March 18, 2004, United States v. O'Keefe, No. 03-CR-137 (E.D. La. June 23, 2004) (Rec. Doc. 73).

4. 18 U.S.C. § 1115 (2000).

Part III analyzes the seaman's manslaughter statute itself explaining the history, the purpose, the elements of the statute, and other similar aspects. Part IV examines the potential sea of troubles already confronted by a maritime wrongful death defendant in civil litigation. Part V provides the mechanism for taking arms against this potential sea of troubles and analyzes the advantages and disadvantages of opposing the slings and arrows examined in Part IV. Part VI concludes by suggesting that the seaman's manslaughter statute should be repealed to eliminate unwarranted criminal culpability and to facilitate the proper administration of civil justice.

II. *UNITED STATES V. RICHARD O'KEEFE*

As demonstrated by the federal prosecution of Captain Richard O'Keefe, prosecution for seaman's manslaughter is a viable and enforced federal offense. On March 13, 2001, Captain Richard O'Keefe ("O'Keefe") boarded the M/V AMY ANN sometime around five o'clock in the afternoon.[5] The AMY ANN was a six-hundred horsepower twin-screw push boat, engaged in work on the Mississippi River.[6] That afternoon, the vessel, crewed by O'Keefe and his deckhand, Jared Norris ("Norris"), was waiting for two 300' x 54' barges to finish offloading at the Shell Motiva Refinery, Dock #4, on the east bank of the Mississippi River in Norco, Louisiana, so that it could transport the barges to another location.[7] Despite the owner's company policy prohibiting unauthorized persons from boarding the vessel, that evening, O'Keefe brought his ex-wife, Gale Imboden ("Imboden"), aboard the vessel.[8]

Shortly after midnight (or in the early morning hours of March 14, 2001), O'Keefe received notice from the dispatcher that the two barges had finished offloading and could be towed from the dock and returned to the fleet.[9] Due to the rapid current and high level of the river, O'Keefe contacted the fleet tug, the M/V CLAIRE ELLEN, a tug with twice the horsepower of the AMY ANN, and requested assistance with moving the barges.[10]

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5. Memorandum in Support of Summary Judgment at 4, *In re* L&L Marine Transp., Inc., No. CIV-01-0775 (E.D. La. Feb. 28, 2002) (Rec. Doc. 55).

6. *Id*. at 2.

7. *Id*.; *see also* Amended Joint Pre-Trial Order at 4, *L&L Marine* (Rec. Doc. 54).

8. Amended Joint Pre-Trial Order at 3–4, *L&L Marine* (Rec. Doc. 54).

9. *Id*. at 4.

10. *Id*. Captain Stacy Cortez, who O'Keefe relieved on the evening of March 13,

O'Keefe learned that the CLAIRE ELLEN was busy, but instead of waiting for the CLAIRE ELLEN to finish its task, O'Keefe decided to attempt to move the barges without assistance by utilizing a "downstreaming" maneuver.[11] O'Keefe instructed his deckhand, Norris, to start the vessel's engines, and then to climb onto the outward barge to release the ropes.[12] After turning the ropes loose, Norris remained on the outward barge in order to tie off once the AMY ANN had faced up to the barge.[13] O'Keefe steered the AMY ANN away from the barge and proceeded up river.[14] Next, he turned the tug around (so that he was now heading downstream) and steered the tug towards the stern of the outward barge so that both the AMY ANN and the outward barge were facing downriver.[15] O'Keefe landed the AMY ANN squarely against the boxed stern of the barge and put both the starboard and port engines in full forward.[16] Due to the river's swift current, however, O'Keefe lost control of the tug; and the river turned the boat causing the stern to face the dock and the bow to face the middle of the river, all the while pushing the AMY ANN towards the barge.[17] The river's current continued to push the tug from the starboard side, which caused the portside of the tug to collide with the boxed end of the barge.[18] At this point the tug became pinched between the boxed end of the barge on the tug's port side and the powerfully persistent current on the tug's starboard side.[19] As a result of the current's constant force against the tug, the tug listed to the starboard side and began

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2001, testified that the assistance of the CLAIRE ELLEN was necessary because the river was very high and the current was rapid. Amended Joint Pre-Trial Order at 4, *L&L Marine* (Rec. Doc. 54). In fact, when the barges were delivered to the Motiva dock on that day, Captain Cortez utilized the assistance of another tugboat. *Id*.

11. *Id.* Specifically, a typical downstreaming maneuver consists of the towboat proceeding upstream above the fleet, then turning downstream towards the fleet. *See* Study Analyzes Reduction of Downstreaming Incidents (July 29, 1999), *at* http://www.maritimetoday.com/more.cfm?ID=389 (providing accident statistics in situations where towboats engaged in "downstream maneuvering"). The boat then moves toward the fleet, preferably with engines in reverse, which allows the tug to approach the barges at a slower speed than the current. *Id.* Ideally, the tug will face up to the barge square, then the deckhand will tie the barge off to the tug. *Id.*

12. Amended Joint Pre-Trial Order at 4, *L&L Marine* (Rec. Doc. 54).

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*.

17. Amended Joint Pre-Trial Order at 4, *L&L Marine* (Rec. Doc. 54).

18. *Id*.

19. *Id*.

taking on water.[20] Within a matter of seconds, the entire vessel was quickly sucked under the water.[21]

Amazingly, both O'Keefe and Imboden abandoned the vessel before it was completely submerged.[22] O'Keefe was rescued by a tug nearby, and Imboden was rescued by shore workers.[23] Once they were brought ashore, they were transported by ambulance to St. Charles Parish Hospital.[24] While at the hospital, both O'Keefe and Imboden were tested to determine whether they had recently used drugs or alcohol.[25] Both O'Keefe and Imboden tested positive for cocaine.[26] As a result of the accident, O'Keefe was diagnosed with a fractured left ankle.[27] Imboden was not as fortunate—she died at approximately eight o'clock that evening.[28]

On March 22, 2001, a Limitation of Liability action ("Limitation Action") was filed by L&L Marine Transportation, Inc. ("L&L Marine"), the owner of the AMY ANN.[29] In the Limitation Action, L&L Marine sought exoneration from and/or limitation of liability for all claims arising out of the sinking of the AMY ANN.[30] On May 29, 2001, O'Keefe filed an Answer to Complaint for Exoneration from or Limitation of Liability and

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20. Amended Joint Pre-Trial Order at 4, *L&L Marine* (Rec. Doc. 54).

21. *Id*.

22. *Id.*

23. *Id*.

24. *Id*. at 4–5.

25. Amended Joint Pre-Trial Order at 5, *L&L Marine* (Rec. Doc. 54).

26. *Id*.

27. *Id.*

28. *Id*.

29. Complaint for Exoneration from or Limitation of Liability, *L&L Marine* (Rec. Doc. 1); *see also* 46 U.S.C. app. §§ 181–89 (2000 & Supp. 2004) (providing the procedures and requirements by which a vessel owner may limit its liability for damages caused by or resulting from the vessel). Provided that the proper procedures are followed, § 183 allows for a vessel owner to limit its liability to the amount or value of the owner's interest. *Id.* § 183. Specifically, § 183 provides, in part:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id. § 183(a).

30. Complaint for Exoneration from or Limitation of Liability at 5, *L&L Marine* (Rec. Doc. 1).

Claim for Damages.[31] He filed another Answer and Claim for Damages individually, and on behalf the minor children of Imboden.[32] In his Answer, O'Keefe alleged that the injuries he sustained from the accident resulted from the negligence of the owners and their agents and from the unseaworthiness of the vessel.[33]

Despite O'Keefe's assertion, Stacy Cortez, the relief captain, Byron Heffner, the vessel's mechanic, and Norris, all testified that there was nothing mechanically wrong with the vessel.[34] On August 28, 2001, L&L Marine filed a Counter-Claim against O'Keefe asserting that the vessel sank as a result of his willful misconduct, namely, the use of narcotics that caused intoxication.[35] On February 28, 2002, the Limitation Action was dismissed after the parties reached a compromise.[36]

Approximately fifteen months after the civil suit was dismissed, O'Keefe was indicted by a grand jury and charged with the death of his ex-wife under the seaman's manslaughter statute.[37] On December 19, 2003, the government filed a superseding indictment; and, on February 27, 2004, the government filed a Second Superseding Indictment.[38] O'Keefe was tried on the Counts contained in the Second Superseding Indictment, which charged O'Keefe as follows:

> COUNT 1: On or about March 14, 2001, at Shell Motiva Dock #4 in the Mississippi River, a navigable water of the United States, within the Eastern District of Louisiana and within the admiralty jurisdiction of the United States, RICHARD A. O'KEEFE, defendant herein, being then and there the pilot of

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31. Answer to Complaint for Exoneration from or Limitation of Liability and Claim for Damages, *L&L Marine* (Rec. Doc. 6).

32. Answer to Complaint for Exoneration from or Limitation of Liability and Claim for Damages, *L&L Marine* (Rec. Doc. 7).

33. Answer to Complaint for Exoneration from or Limitation of Liability and Claim for Damages ¶¶ 15–16, *L&L Marine* (Rec. Doc. 6).

34. Amended Joint Pre-Trial Order at 5, *L&L Marine* (Rec. Doc. 54).

35. Counter-Claim ¶ VIII, *L&L Marine* (Rec. Doc. 19).

36. Order of Dismissal, *L&L Marine* (Rec. Doc. 61).

37. Indictment for Misconduct and Neglect of a Ship Officer Resulting in the Loss of Life, *O'Keefe* (Rec. Doc. 1). 18 U.S.C. § 1115 of the United States Code is often referred to as the "Seaman's Manslaughter" Statute. *See infra* Part III.

38. Second Superseding Indictment for Misconduct, Negligence and Inattention to Duty of a Captain Resulting in the Loss of Life and Obstruction of Justice, *O'Keefe* (Rec. Doc. 56); Superseding Indictment for Misconduct and Neglect of a Ship Officer Resulting in the Loss of Life and Obstruction of Justice, *O'Keefe* (Rec. Doc. 17).

> the M/V AMY ANN, a vessel within the meaning of Title 18, United States Code, Section 1115, did cause said vessel to capsize resulting in the loss of life of a person on board, Gale Imboden; that said capsizing and resulting loss of life was caused by the misconduct, negligence and inattention to duties of the defendant as captain of the vessel; all in violation of Title 18, United States Code, Section 1115.
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> COUNT 2: From in [sic] or about November, 2001, until December 14, 2001, in the Eastern District of Louisiana, the defendant, RICHARD A. O'KEEFE, did knowingly engage in misleading conduct and attempted to corruptly persuade, intimidate and threaten a captain of the vessel M/V AMY ANN, with intent to influence the testimony of that captain in a civil lawsuit in the United States District Court for the Eastern District of Louisiana, Civil Docket No. 01-0775, Section B, by attempting to cause that captain to provide false testimony that the M/V AMY ANN had mechanical problems and a bent propeller prior to its sinking; all in violation of Title 18, United States Code, Section 1512(b)(1).[39]

O'Keefe's criminal trial began on Monday, March 15, 2004.[40] Three days later, both sides rested; the court instructed the jury; and the jury retired for deliberation.[41] Later that day, the jury returned a verdict. The jury found O'Keefe guilty on Count I and not guilty on Count II.[42]

As stated by the Judgment and Commitment, O'Keefe was found guilty of the offense of "18 U.S.C. § 1115—MISCONDUCT, NEGLIGENCE, AND INATTENTION TO DUTY BY A SHIP'S CAPTAIN RESULTING IN LOSS OF LIFE."[43] O'Keefe was sentenced to a term of twelve months imprisonment and three years supervised release.[44] Further, O'Keefe was ordered to make restitution to L&L Marine Transportation in the amount of $32,500, to The Center Marine Managers, Inc. in the amount of

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39. Second Superseding Indictment for Misconduct, Negligence and Inattention to Duty of a Captain Resulting in the Loss of Life and Obstruction of Justice, *O'Keefe* (Rec. Doc. 56).

40. Smooth Minutes March 15, 2004, *O'Keefe* (Rec. Doc. 68).

41. Smooth Minutes March 18, 2004, *O'Keefe* (Rec. Doc. 73).

42. *Id*.

43. Judgment and Probation Commitment Order, *O'Keefe* (Rec. Doc. 91).

44. For an explanation of supervised release and its requirements, see *infra* notes 61–70 and accompanying text.

$607,968, and he was ordered to pay a special assessment of one hundred dollars.[45]

III. STATUTORY ANALYSIS

Title 18, § 1115 of the United States Code, colloquially referred to as "seaman's manslaughter," literally provides:

> Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.
>
> When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.[46]

As one may readily surmise, § 1115 provides the source of criminal liability for three distinct classes of potential criminal defendants.[47] First, criminal punishment may be imposed on any officer or other person employed aboard a vessel who, through the negligent performance of his employment duties, directly causes the death of a human being.[48] Second, when the death of a

45. Judgment and Probation Commitment Order, *O'Keefe* (Rec. Doc. 91).

46. 18 U.S.C. § 1115 (2000).

47. *Id*.

48. *See* United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 224574, at *1 (E.D. La. Feb. 3, 2004) (discussing the standard of criminal culpability under the seaman's manslaughter statute in a criminal action against the captain of a vessel for "merely negligent" performance of duties); United States v. Collyer, 25 F. Cas. 554, 554–55 (C.C.S.D.N.Y. 1855) (No. 14,838) (providing that a person who temporarily replaced the captain while ill exercised sufficient authority and control over the vessel to be prosecuted under the statute); United States v. Taylor, 28 F. Cas. 25, 25 (C.C.D. Ohio 1851) (No. 16,441) (providing that any officer of a steamboat, whose negligence or ignorance causes the death of a person, is guilty of seaman's manslaughter).

human being results from the fraud, neglect, connivance, misconduct, or violation of the law by a vessel owner, a vessel charterer, an inspector, or some other public officer, criminal liability may be imposed on that person.[49] Third, criminal punishment may be imposed on an executive officer of a corporate vessel owner or vessel charterer, whose duty it is to control and manage the operation, equipment, or navigation of the vessel, who knowingly and willfully allowed the corporate entity's neglect to cause the death of a human being.[50] Although criminal liability may be imposed on a charterer, owner, or executive officer, one should note that liability attaches only as provided by the statute, not vicariously through the negligent actions of a person employed aboard the vessel.[51]

Supplying § 1115 with teeth, Congress provided a penalty which requires that anyone convicted under its dictates shall be fined under title 18 or imprisoned for a term of up to ten years.[52] The judiciary is responsible for determining the length of imprisonment and the amount of fine, after deciding if either is warranted.[53] Under § 1115, the maximum fine that may be

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49. *See* United States v. Van Schaick, 134 F. 592, 603–04 (C.C.S.D.N.Y. 1904) (stating that a corporation, which was the owner of a steam vessel, may be guilty of seaman's manslaughter notwithstanding the fact that it could not be subjected to the punishment imposed and that such fact did not affect the right of the government to prosecute individuals who aided and abetted the corporation in the commission of the crime).

50. *See* United States v. Allied Towing Corp., 602 F.2d 612, 615 (4th Cir. 1979) (upholding the conviction of a towing company under 18 U.S.C. § 1115 for the death of its employees as a result of the company allowing two of its employees to weld the hull of a tank barge without securing the gas free certification required by U.S. Coast Guard Regulations); United States v. Harvey, 54 F. Supp. 910, 910–11 (D. Or. 1943) (explaining that under the predecessor to § 1115, the guilt of which executive officers may be charged is the guilt of the corporation and not the guilt of the captain, pilot, or other person employed on the vessel).

51. *Harvey*, 54 F. Supp. at 911 (explaining that executive officers or corporate owners could not be charged as principals for acts and omissions of the captain, pilot, or other persons in charge of the vessel without an allegation of corporate guilt).

52. *See* 18 U.S.C. § 1115 (2000). Although the statute provides that a court "shall" impose a fine and/or imprisonment, there is no statutory minimum. *Id*. Therefore, a court can impose a penalty consisting of a fine and no imprisonment, imprisonment and no fine, neither, or both. *Id*.

53. *See* Hoopengarner v. United States, 270 F.2d 465, 472 (6th Cir. 1959). In *Hoopengarner*, the appellate court found that the trial court did not abuse its discretion by imposing a prison term of one year on the defendant, who was convicted for reckless operation and misconduct in the operation of a motor boat that caused the death of one and endangered the lives of others. *Id*. Notably, the court found that the district court did not abuse its discretion despite the fact that the defendant

imposed is $250,000 or twice the gross financial gain to the defendant or twice the gross financial loss to a victim, whichever is greatest.[54] Due to the nature of the crime, however, it is probably unlikely that the maximum possible fine would be calculated by determining the gross financial gain to the defendant or the gross financial loss to the victim.[55]

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had been previously convicted on the same evidence in state court of simple assault and fined one hundred dollars. *Id*.

54. 18 U.S.C. § 3559 provides that seaman's manslaughter is a felony. 18 U.S.C. § 3571 governs the determination of the applicable fine amount and provides as follows:

> (a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.
>
> (b) FINES FOR INDIVIDUALS.—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—
>
> (1) the amount specified in the law setting forth the offense;
>
> (2) the applicable amount under subsection (d) of this section;
>
> (3) for a felony, not more than $250,000;
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> (4) for a misdemeanor resulting in death, not more than $250,000;
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> (5) for a Class A misdemeanor that does not result in death, not more than $100,000;
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> (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or
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> (7) for an infraction, not more than $5,000.
>
> (c) FINES FOR ORGANIZATIONS.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of —
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> (1) the amount specified in the law setting forth the offense;
>
> (2) the applicable amount under subsection (d) of this section;
>
> (3) for a felony, not more than $500,000;
>
> (4) for a misdemeanor resulting in death, not more than $500,000;
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> (5) for a Class A misdemeanor that does not result in death, not more than $200,000;
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> (6) for a Class B or C misdemeanor that does not result in death, not more than $10,000; and
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> (7) for an infraction, not more than $10,000.
>
> (d) ALTERNATIVE FINE BASED ON GAIN OR LOSS.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.
>
> (e) SPECIAL RULE FOR LOWER FINE SPECIFIED IN SUBSTANTIVE PROVISION.—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

Id.

55. It appears that a fine calculated by determining either the gross financial gain to the defendant or loss to the victim is highly unlikely. The loss to the victim, death, is generally not considered a "financial loss" to the victim as contemplated by § 3559. Similarly, it is difficult to imagine a situation where a defendant experiences a "gross

Despite the fact that the statute allows for a maximum term of imprisonment of ten years and does not proscribe a mandatory minimum,[56] the Federal Sentencing Guidelines have severely curtailed a court's power to impose the maximum term of imprisonment or sentence a defendant without any term of imprisonment whatsoever.[57] In the recent opinion of *United States v. Booker*, however, the United States Supreme Court determined that the portion of the Federal Sentencing Guidelines that makes the Guidelines mandatory is unconstitutional.[58] Consequently, courts are no longer bound by the Guidelines; however, courts must consider the Guidelines when imposing a sentence.[59] Thus, one can argue that post-*Booker*, a sentencing court is more likely to impose the statutory maximum of ten years. Nevertheless, the statutory maximum remains the maximum sentence a judge may impose on a defendant.[60]

Although not provided specifically in § 1115, a sentencing court may impose a term of supervised release after imprisonment or, in lieu of imprisonment, probation.[61] Simply

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financial gain" by negligently causing the victim's death. One might envision, however, a situation where a defendant could experience a "gross financial gain." Imagine, for example, a scenario factually similar to *O'Keefe*, with the additional fact that the defendant is the beneficiary on his ex-wife's life insurance policy.

56. "[A defendant] shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. § 1115.

57. *See generally* Koon v. United States, 518 U.S. 81, 93–96 (1996) (examining some of the limited circumstances, pre-*Booker*, that allow a district court to impose a sentence outside of the guideline range); Williams v. United States, 503 U.S. 193, 196 (1992) (noting, pre-*Booker*, that a district court may depart from a guideline range under certain circumstances, as provided by 18 U.S.C. § 3553(b)).

58. United States v. Booker, 125 S. Ct. 738, 746 (2005) (concluding that the two provisions of the Sentencing Reform Act of 1984 that make the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent); Blakely v. Washington, 124 S. Ct. 2531, 2537–38 (2004) (finding that Washington's sentencing guidelines violated the Sixth Amendment because they allowed a judge to impose an enhanced sentence without an admission by the defendant or a finding by a jury).

59. *Booker*. 125 S.Ct. at 756.

60. *Id.*

61. *See* 18 U.S.C. § 3561 (governing probation); U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 (1989) (governing supervised release). 18 U.S.C. § 3561 provides as follows:

> (a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—
>
> (1) the offense is a Class A or Class B felony and the defendant is an individual;
>
> (2) the offense is an offense for which probation has been expressly precluded; or

stated, supervised release consists of conditions imposed upon a recently released convict's initial term of freedom.[62] Probation, on the other hand, is nearly identical to supervised release except that the defendant is not sentenced to a term of imprisonment.[63]

> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.
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> (b) DOMESTIC VIOLENCE OFFENDERS.—A defendant who has been convicted for the first time of a domestic violence crime shall be sentenced to a term of probation if not sentenced to a term of imprisonment. The term "domestic violence crime" means a crime of violence for which the defendant may be prosecuted in a court of the United States in which the victim or intended victim is the spouse, former spouse, intimate partner, former intimate partner, child, or former child of the defendant, or any other relative of the defendant.
>
> (c) AUTHORIZED TERMS.—The authorized terms of probation are—
>
> (1) for a felony, not less than one nor more than five years;
>
> (2) for a misdemeanor, not more than five years; and
>
> (3) for an infraction, not more than one year.

18 U.S.C. § 3561. Section 5D1.1 of the United States Sentencing Guidelines provides as follows:

> (a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.
>
> (b) The court may order a term of supervised release to follow imprisonment in any other case.

U.S. SENTENCING GUIDELINES MANUAL § 5D1.1.

62. As explained by the Fifth Circuit, "[s]upervised release may be imposed in order to facilitate the defendant's re-integration into the community, to enforce a fine or restitution order, or to fulfill any other purpose authorized by statute." United States v. Mills, 959 F.2d 516, 518 (5th Cir. 1992).

63. The basic purpose of probation is to provide a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the guidance of a probation officer and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuses this opportunity. 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 529 (3d ed. 2004); *see also* Roberts v. United States, 320 U.S. 264, 272–73 (1943) (providing that the purpose of probation is to provide a period of grace in order to aid the rehabilitation of a penitent offender and to take advantage of an opportunity for reformation that actual service of the suspended sentence might make less probable); Burns v. United States, 287 U.S. 216, 220 (1932) (same); United States v. Torrez-Flores, 624 F.2d 776, 783–84 (7th Cir. 1980) (same).

In addition to the greater possibility of reform an offender has available while on probation, probation is much more economical than institutional confinement. For instance, the 1967 Annual Report of the Director of the Administrative Office of the United States Courts provides, in part:

> The costs of imprisonment generally run about 10 times higher then the costs of probation. During 1967 the per capita cost of Federal probation was $285 a year, or 78 cents a day, compared with $3,100 a year, or $8.51 a day, for confinement in a Federal penal or correctional institution. A person on probation not only is spared the stigma of imprisonment, but is given an opportunity to regain his self-respect, to resume a useful life, and to maintain normal relationships with family and friends. During the year, Federal probationers reported earnings in excess of $82 million, thus providing self and family support, increased tax revenue, and a positive contribution to the general economy. The cost of operating the Federal probation system in 1967 was less

The conditions imposed under supervised release or probation include requiring that the defendant obtain and maintain gainful employment,[64] refrain from certain activities,[65] attend drug or

than $12 million.

1967 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 162 (1967), *cited in* 3 WRIGHT ET AL., *supra*, § 529.

64. 18 U.S.C. § 3563(b)(4) (governing the conditions that may be imposed on a convict's probation); U.S. SENTENCING GUIDLEINES MANUAL § 5D1.3(c)(5) (governing the conditions that may be imposed on a convict's supervised release). Section 3563 provides, in pertinent part:

> (b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—
>
> . . . .
>
> (4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;
>
> (5) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;
>
> (6) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;
>
> (7) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;
>
> (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
>
> (9) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;
>
> . . . .
>
> (15) report to a probation officer as directed by the court or the probation officer;
>
> (16) permit a probation officer to visit him at his home or elsewhere as specified by the court;
>
> (17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;
>
> (18) notify the probation officer promptly if arrested or questioned by a law enforcement officer . . . .

18 U.S.C. § 3563. Section 5D1.3 of the United States Sentencing Guidelines provides:

> (a) Mandatory Conditions—
>
> (1) the defendant shall not commit another federal, state or local offense;
>
> (2) the defendant shall not unlawfully possess a controlled substance;
>
> (3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant;

(4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant;

(5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine;

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;

(7) a defendant convicted of a sexual offense as described in 18 U.S.C. 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student;

(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

. . . .

(c) (Policy Statement) The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

. . . .

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

. . . .

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

(d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

. . . .

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of

substance abuse counseling,[66] or that he regularly meet and report to a probation officer.[67] Most of these limitations will be lifted after the term of supervised release or probation expires.[68] Nevertheless, some conditions on a convict's freedom may never be lifted, such as, for example, the prohibition against a felon possessing a firearm.[69] Additionally, every person convicted under § 1115 must pay the government a mandatory assessment of either one hundred dollars, if an individual is convicted, or four hundred dollars, in a situation where a juridical entity is convicted.[70]

Last, restitution may, and sometimes must, be ordered in cases in which it was warranted.[71] When determining the amount of restitution, the court (with the assistance of a probation officer)

> narcotics, other controlled substances or alcohol—a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

U.S. SENTENCING GUIDELINES MANUAL § 5D1.3.

65. 18 U.S.C. § 3563(b)(5)–(8); U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(a).

66. 18 U.S.C. § 3563(b)(9); U.S. SENTENCING GUIDELINES MANUAL §§ 5D1.3(a)(4), (d)(4).

67. 18 U.S.C. § 3563(b)(15)–(18); U.S. SENTENCING GUIDELINES MANUAL §§ 5D1.3(a)(7), (c)(1)–(3), (10), (11), (13), (15).

68. 18 U.S.C. § 3563; U.S. SENTENCING GUIDELINES MANUAL § 5D1.3; *see, e.g.*, United States v. Thomas, 991 F.2d 206 (5th Cir. 1993) (providing that upon a felon's release from prison, the suspension of his rights to vote, to hold public office, and to sit on a jury evaporate because the felon ceases to be in custody or on probation).

69. 18 U.S.C. § 922(g). This section provides, in part:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

70. 18 U.S.C. § 3013 provides that the "court shall assess on any person convicted of an offense against the United States . . . in the case of a felony . . . the amount of $100 if the defendant is an individual; and . . . the amount of $400 if the defendant is a person other than an individual." *Id*. § 3013.

71. 18 U.S.C. §§ 3556, 3663–64. Title 18, § 3556 governs whether a court must or may impose as part of the sentence a requirement that the defendant pay restitution. *Id*. § 3556. Section 3556 provides that "[t]he court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section." *Id*.

must make a rather intrusive investigation into the financial resources of the defendant.[72]

The power of Congress to mandate criminal punishment for violations of § 1115 and, accordingly, the power of the federal courts to impose penalties for such violations, emanates from the Commerce Clause of the United States Constitution.[73] Arguably, there are other constitutional sources providing Congress the power to criminalize the activity prohibited in § 1115. For instance, one might assert that Congress's decision to punish a person for violating § 1115 is constitutionally authorized by Article III, Section 2, Clause 1 of the United States Constitution.[74]

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72. 18 U.S.C. § 3664(d)(3). Section 3664, governing the procedure for determining the proper quantum of restitution, provides:

> (a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.
>
> . . . .
>
> (d) . . . .
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> . . . .
>
> (3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

Id. § 3664(a), (d)(3).

73. U.S. CONST. art. I, § 8; United States v. Coombs, 37 U.S. (12 Pet.) 72, 78 (1838) (providing that the power to regulate commerce includes the power to regulate navigation connected with commerce between foreign nations and among the states); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 3 (1824) (same); United States v. LaBrecque, 419 F. Supp. 430, 435 (D.N.J. 1976) (discussing the court's jurisdiction to prosecute a criminal under the statute); United States v. Holtzhauer, 40 F. 76, 78 (C.C.D.N.J. 1889) (providing that the predecessor statute to the current embodiment of seaman's manslaughter was enacted under the commerce power and that this power allows Congress to regulate navigation connected with commerce between foreign nations and among the states); United States v. Beacham, 29 F. 284 (C.C.D. Md. 1886) (same).

74. *See* Romero v. Int'l Terminal Operating Tow Co., 358 U.S. 354, 360–61 (1959). In *Romero*, the Court stated that Article III, impliedly contained three grants, namely:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," and to

Today, the power under Article III extends to all navigable waters of the United States.[75] As such, hypothetically, the scope of the statute under the Article III power would be substantially similar to the scope of the statute under the commerce power.[76] Prior to 1852, however, this Article III power extended only to waters within the ebb and flow of the tide.[77] Nevertheless, courts have held that Congress's power under the Commerce Clause provided Congress with the ability to enact § 1115.[78]

Due to the fact that Congress's power to enact § 1115 stems from Congress's power to regulate commerce, the territorial jurisdiction of a court to hear criminal prosecutions under § 1115

> continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

Id. (citations omitted); *see also* Crowell v. Benson, 285 U.S. 22, 55 n.18 (1932) (noting that Congress's power to amend and revise admiralty and maritime law is "distinct from the authority to regulate interstate or foreign commerce and is not limited to cases arising in that commerce") (citing London Guarantee & Accident Co. v. Indus. Accident Comm'n, 279 U.S. 109, 124 (1929); *Ex parte* Boyer, 109 U.S. 629 (1884); *In re* Garnett, 141 U.S. 1, 15, 17 (1891); The Belfast, 74 U.S. (1 Wall.) 624, 640, 641 (1868); The Propeller Commerce, 66 U.S. (1 Black) 574, 578, 579 (1861); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 452 (1851)).

75. The United States Supreme Court announced the accepted definition of "navigable waters" for the purpose of determining admiralty jurisdiction as those bodies of water that are navigable in fact. The Daniel Ball, 77 U.S. (1 Wall.) 557, 563 (1870). Specifically, the Court wrote:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Id. Prior case law explained that because Congress's power extended to "navigable waters," federal jurisdiction over admiralty and maritime jurisdiction is extremely broad. Foremost Ins. Co. v. Richardson, 457 U.S. 668, 677 (1982); The Eagle, 75 U.S. 15, 24–26 (1868); Milton Conover, *The Abandonment of the "Tidewater" Concept of Admiralty Jurisdiction in the United States*, 38 ORE. L. REV. 34, 52–53 (1958); Milton Connover, *Geography and Industry in the Development of Admiralty and Maritime Jurisdiction*, 27 BROOK. L. REV. 273, 282 (1961).

76. *See* sources cited *supra* note 75.

77. *See The Genesee Chief*, 53 U.S. at 457 (determining that federal jurisdiction depends upon the navigable character of the water and not the ebb and flow of the tide); Guillory v. Outboard Motor Corp., 956 F.2d 114, 115 (5th Cir. 1992) (finding that a purely in-state reservoir was not within admiralty jurisdiction).

78. *See* cases cited *infra* note 79.

is extremely broad.[79] Unlike the territorial limitations imposed on the prosecution of offenders for similar federal offenses, persons who violate the dictates of § 1115 on the high seas or on the navigable waters of the United States, even those navigable waters solely within the territory of the several states, such as the Mississippi River, may be federally prosecuted for violating § 1115.[80] Despite the Supreme Court's recent restrictive interpretation of Congress's power to regulate commerce,[81] because of the applicability of § 1115 to navigable waters, it is not likely that the statute will be found constitutionally unenforceable.[82]

Since § 1115 arises out of Congress's power to regulate commerce, prosecutions for *all* violations of the plain language of § 1115 are limited to the confines of the Commerce Clause. While the plain language of § 1115 makes criminal any of the prohibited activities or omissions of persons employed aboard a vessel if they lead to the destruction of the life of a person, the case law suggests that the activity or omission may lead to criminal prosecution only if it is partaken by a person employed aboard a *commercial* vessel.[83] In *United States v. LaBreque*, a United

79. United States v. Allied Towing Corp., 602 F.2d 612, 613–14 (4th Cir. 1979); Hoopengarner v. United States, 270 F.2d 465, 470–71 (6th Cir. 1959); United States v. LaBreque, 419 F. Supp. 430, 435 (D.N.J. 1976); United States v. Harvey, 54 F. Supp. 910, 910–11 (D. Or. 1943); United States v. Holtzhauer, 40 F. 76, 78 (C.C.D.N.J. 1889); *In re* Doig, 4 F. 193, 194–96 (C.C.D. Cal. 1880); United States v. Collyer, 25 F. Cas. 554 (C.C.S.D.N.Y. 1855) (No. 14,838). *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253–58 (1964) (discussing Congress's broad powers under the Commerce Clause).

80. United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 439897, at *1 (E.D. La. Mar. 8, 2004) (discussing the underlying facts upon which Richard O'Keefe was later convicted of seaman's manslaughter, wherein the accident occurred on the Mississippi River far removed from the ebb and flow of the tide).

81. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617–18 (2000) (finding that the Violence Against Women Act of 1984 was an unconstitutional exercise of Congress's power under the Commerce Clause); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (finding that the Gun-Free School Zones Act of 1990 was an unconstitutional exercise of Congress's commerce power). Prior to the Court's decision in *Lopez*, the Court had not found a law unconstitutional as exceeding Congress's commerce power since 1936, in *United States v. Butler*, 297 U.S. 1 (1936). ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §3.3.5 (2d ed. 2002) (discussing the effect of *Lopez* on Congress's commerce power).

82. Almost since its inception, the commerce power has extended to navigable waters. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 3 (1824).

83. *LaBreque*, 419 F. Supp. at 435–37 (determining that the purpose behind the enactment of § 1115—to ensure safety aboard vessels engaged in commerce—did not permit the application of the statute when non-commercial vessels were involved).

States District Court sitting in New Jersey held that the captain of a noncommercial pleasure vessel could not be held criminally responsible for the deaths of two crewmembers.[84]

Almost every reported prosecution under § 1115 has involved commercial vessels; however, at least one exception exists. In *Hoopengarner v. United States*, the owner of a pleasure boat was successfully prosecuted under § 1115 for recklessly operating a boat while drunk and, thereby, causing the death of a person in another pleasure boat with which he collided.[85] In *Hoopengarner*, however, the defense never raised the question of whether § 1115 applied to the owners of noncommercial vessels.[86] As such, the precedential value of *Hoopengarner* is diminished.

The history of § 1115 demonstrates that "Congress enacted this statute as an integral part of its regulation of the nation's maritime commerce."[87] Although § 1115 was enacted in 1948, the notion of imposing criminal liability for seaman's manslaughter has been part of the statutory law of the United States since 1838.[88]

As originally enacted in 1838, seaman's manslaughter was part of an act entitled "An Act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam."[89] The 1838 Act set forth licensing and safety standards for steamboats transporting goods, wares, merchandise, or passengers upon the navigable waters of the United States.[90] Section 12 of the 1838 Act is the predecessor of § 1115.[91] The Act's original purpose was to prevent explosions on

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The case law, which overwhelmingly suggests that the vessel must be *commercial* for prosecution under § 1115, appropriately coincides with Congress's power under the Commerce Clause to enact § 1115.

84. *LaBreque*, 419 F. Supp. at 437 (declining to extend § 1115 to non-commercial, pleasure vessels and acquitting Defendant on the seaman's manslaughter charge).

85. Hoopengarner v. United States, 270 F.2d 465, 472 (6th Cir. 1959).

86. *Id*.

87. United States v. Allied Towing Corp., 602 F.2d 612, 615 (4th Cir. 1979).

88. *See id*. at 614 (explaining that the earliest precursor of § 1115 appeared in 1838).

89. Act of July 7, 1838, sec. 12, 5 Stat. 304, 306.

90. *Id*.; *see also* United States v. Locke, 529 U.S. 89, 99 (2000) (explaining that as a result of the importance of martime trade and transport by steamship, the Act was promulgated to further federal licensing requirements and ensure the safety of the crew and passengers aboard steam powered vessels).

91. *Allied Towing Corp.*, 602 F.2d at 614.

steamboats plying the navigable waters of the United States.[92] During this period in the history of the United States, steamboat travel was common on the nation's waterways.[93] Also common were horrific accidents that resulted in the deaths of crew members and hundreds of passengers.[94] As mentioned above, the goal of the law was to prevent these types of disasters by demanding paramount attention from the crew and attaching criminal liability for a crewmember's negligence that resulted in the loss of human life.[95] Additionally, the amount of federal legislation regulating this area was not nearly as massive as it is today.[96] By approving the Act, Congress attempted to institute legislation that would comprehensively bring an end to the tragic accidents involving steam-powered vessels.[97] The Act of 1838 not only provided for criminal penalties, but it also contained a list of obligations and liabilities imposed upon vessel owners, pilots, captains, employees, and inspectors.[98] Notably, section 12 of the Act provided:

> That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years.[99]

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92. *Allied Towing Corp.*, 602 F.2d at 614; Charge to Grand Jury, 30 F. Cas. 990, 990 (E.D. La. 1846) (No. 18,253) (explaining that the Act was designed to protect the public and punish captains, engineers, and pilots of steamboats for their negligence or inattention).

93. United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 224574, at *1 (E.D. La. Feb. 3, 2004).

94. *Id*.

95. *Id.*

96. *See* sources cited *supra* note 1.

97. Act of July 7, 1838, 5 Stat. 304.

98. *Id*.; *see, e.g.*, *Charge to Grand Jury*, 30 F. Cas. at 990 (addressing numerous sections of the statute and listing the obligations and liabilities it imposes).

99. Act of July 7, 1838, sec. 12, 5 Stat. 304, 306. Further, the Act required the defendant in civil actions to bear the burden of proving he was not negligent, as opposed to requiring a plaintiff to show the defendant acted negligently. Section 13 provided:

> That in all suits and actions against proprietors of steamboats, for injuries arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such

As explained in *United States v. Holtzhauer*, Congress promulgated the Act by employing its power to "'to regulate commerce with foreign nations and among the several states,' and it was early decided by the United States Supreme Court that this power included the power to regulate navigation as connected with the commerce of foreign nations and among the states."[100] Further, the Act's

> purpose was to establish a supervision over the conduct of the officers and other persons employed on any steam-boat or vessel navigating the waters of the United States, and to make each officer or person so employed personally and criminally responsible for any misconduct, or neglect of duty on his part in consequence of which a human life should be destroyed.[101]

The 1838 Act was clearly intended to reach vessels engaged in commerce, and its purpose was to act as a deterrent to "[t]he frequent loss of human life in consequence of explosions of the boilers of steamboats, of collisions and the burning of steamboats on [the] western waters . . . ."[102]

In 1871, Congress significantly overhauled the regulatory regime governing steam-powered vessels, adding provisions for watchmen, safety equipment, vessel design standards, inspection and testing of equipment, and licensing of captains, chief mates, engineers, and pilots.[103] Section 12 of the 1838 Act was recodified as section 57 of the 1871 Act.[104] The law regulated "steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or

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> bursting, collapse, or injurious escape of steam, shall be taken as full prima facie evidence sufficient to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment.

Id. sec. 13 (emphasis added); *cf*. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1874) (providing that a vessel, actually in violation of a rule intended to prevent collisions at the time of a collision, must prove she did not cause the collision).

100. *See* United States v. Holtzhauer, 40 F. 76, 78 (C.C.D.N.J. 1889) (citing United States v. Coombs, 37 U.S. (12 Pet.) 72 (1838) (citing and reaffirming Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824))).

101. *Id*.

102. *Charge to Grand Jury*, 30 F. Cas. at 990; *see also* United States v. Warner, 28 F. Cas. 404 (C.C.D. Ohio 1848) (No. 16,643).

103. Act of Feb. 28, 1871, 16 Stat. 440; United States v. Allied Towing Corp., 602 F.2d 612, 614 (4th Cir. 1979).

104. Act of Feb. 28, 1871, sec. 57, 16 Stat. 440, 456; *Allied Towing Corp.*, 602 F.2d at 614.

other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation."[105]

Three years later, section 57 of the 1871 Act was codified in the Revised Statutes of 1874 and denominated as section 5344.[106] Section 5344 was placed in a chapter pertaining to crimes arising within the maritime and territorial jurisdiction of the United States.[107] Notably, similar statutes, such as those prohibiting murder, manslaughter, and rape, expressly precluded federal jurisdiction over violations occurring on waters within the jurisdiction of any state, whereas section 5344 contained no such restriction.[108] In 1905, Congress added to section 5344 a provision substantially the same as the second paragraph of current section 1115.[109] Four years later, the statute was reenacted in its present form.[110] Although the 1909 Act is almost identical to the prior statute, one notable difference is that vessels other than steamboats are now included within its reach, thereby keeping up with the technological advances in maritime travel.[111]

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105. Act of Feb. 28, 1871, sec. 41, 16 Stat. 440, 453; *Allied Towing Corp.*, 602 F.2d at 614.

106. As codified in the Revised Statutes of 1874, section 5344 provided as follows:

> Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed; and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years.

The Revised Statutes of 1874, tit. 70, sec. 5344, 18 Stat.1, 1038.

107. United States v. Allied Towing Corp., 602 F.2d 612, 614 (4th Cir. 1979).

108. *See id*.

109. Act of Mar. 3, 1905, sec. 5, § 5344, 33 Stat. 1023, 1025–26.

110. Act of Mar. 4, 1909, ch. 11, sec. 282, 35 Stat. 1088, 1144. Section 282 provided:

> Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both: *Provided*, That when the owner or charterer of any steamboat or vessel shall be a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.

Id.; *see also Allied Towing Corp.*, 602 F.2d at 615; United States v. LaBrecque, 419 F. Supp. 430, 435 (D.N.J. 1976).

111. *See LaBrecque*, 419 F. Supp. at 435 (stating that by including the term

Additionally, in 1909, Congress expressly restricted the reach of the statute by denominating it as section 282 of the new Criminal Code.[112] With placement in the Criminal Code, the statute was limited by the definition of the special maritime and territorial jurisdiction in section 272 of the Criminal Code.[113] Specifically, section 272 provided as follows:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.
>
> Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the International boundary line.
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building.
>
> Fourth. On any island, rock, or key, containing deposits of guano, which may, at the discretion of the President, be

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"vessels" as opposed to "steamboats," the revision reflects technological developments since its prior re-enactment).

112. Act of Mar. 4, 1909, ch. 11, sec. 282, 35 Stat. 1088, 1144; *Allied Towing Corp.*, 602 F.2d at 615.

113. Act of Mar. 4, 1909, ch. 11, sec. 272, 35 Stat. 1088, 1142–43; *Allied Towing Corp.*, 602 F.2d at 615.

considered as appertaining to the United States.[114]

Consequently, "the law no longer applied to homicides committed on waters within the territorial jurisdiction of any state."[115] Notably, the 1926 recodification of the federal statutes placed Criminal Code sections 272 and 282 in 18 U.S.C. §§ 451 and 461, respectively; however, the jurisdictional limitation remained in force.[116]

When Congress revised and reenacted the criminal statutes in 1948, the jurisdictional restriction was removed.[117] The old chapter on crimes within the special maritime and territorial jurisdiction was abolished, and its sections were reorganized throughout title 18.[118] Section 451 was relocated to its present place in 18 U.S.C. § 7, and section 461 was placed in the homicide chapter as 18 U.S.C. § 1115.[119] As a result, the jurisdictional limitation was removed from § 1115 and placed in § 7, thereby not only subjecting § 1115 to the jurisdictional restriction, but also each statute in Chapter 18 that utilizes the term "special maritime and territorial jurisdiction of the United States."[120] The historical and revision note explains the reason for the change:

> Section restores the intent of the original enactments, R.S. § 5344, and act Mar. 3, 1905, ch. 1454, § 5, 33 Stat. 1025, and makes this section one of general application. In the Criminal Code of 1909, by placing it in chapter 11, limited to places within the special maritime and territorial jurisdiction of the United States, such original intent was inadvertently lost as indicated by the entire absence of report or comment on such limitation.[121]

The numerous transitions and multiple identities assumed by the current § 1115 can be summarized as follows: section 12 of the 1838 Act became section 57 of the 1857 Act.[122] Three years later, the statute was codified in the Revised Statutes of 1874 as

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114. Act of Mar. 4, 1909, ch. 11, sec. 272, 35 Stat. 1088, 1142–43.

115. *Allied Towing Corp.*, 602 F.2d at 615.

116. Act of June 30, 1926, tit. 18, ch. 11, 44 Stat. 1, 498–99.

117. *Allied Towing Corp.*, 602 F.2d at 615.

118. *Id*.

119. Act of June 25, 1948, chs. 1, 51, secs. 7, 1115, 62 Stat. 683, 685, 757.

120. *Allied Towing Corp.*, 602 F.2d at 615.

121. 18 U.S.C. § 1115 (2000).

122. Act of Feb. 28, 1871, sec. 57, 16 Stat. 440, 456; Act of July 7, 1838, sec. 12, 5 Stat. 304, 306; *Allied Towing Corp.*, 602 F.2d at 614.

section 5344.[123] In 1905, a second paragraph was added to include corporations and officers of corporations.[124] In 1909, the statute was codified in section 282 of the Criminal Code and broadened by including "vessels" as opposed to "steamboats," but was also limited under the definition of maritime and territorial jurisdiction found in the penal codes.[125] In 1926, section 282 was again recodified in 18 U.S.C. § 461.[126] In 1948, the jurisdictional restriction was removed; the statute was recodified as 18 U.S.C. § 1115 and placed among the homicide statutes.[127]

Despite the placement of § 1115 among the homicide statutes, § 1115 differs from statutes dealing with crimes committed in areas where both the state and federal governments have an interest, such as murder.[128] Because the restriction contained in 18 U.S.C. § 7 applies to most of the federal homicide provisions, its absence from the seaman's manslaughter statute, codifying Congress's concern that homicide generally be prosecuted by the states, demonstrates that Congress desired federal prosecution of seaman's manslaughter.[129]

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123. Revised Statutes of 1874, tit. 70, ch. 3, sec. 5344, 18 Stat. 1, 1038.

124. Act of Mar. 3, 1905, sec. 5, § 5344, 33 Stat. 1023, 1025–26.

125. Act of Mar. 4, 1909, ch. 11, sec. 282, 35 Stat. 1088, 1144; *Allied Towing Corp.*, 602 F.2d at 614–15.

126. Act of June 30, 1926, tit. 18, ch. 11, sec. 461, 44 Stat. 1, 499; *Allied Towing Corp.*, 602 F.2d at 615.

127. Act of June 25, 1948, ch. 51, sec. 1115, 62 Stat. 683, 757; *Allied Towing Corp.*, 602 F.2d at 615.

128. *Allied Towing Corp.*, 602 F.2d at 615.

129. 18 U.S.C. § 7 provides:

> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
>
> (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
>
> (2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.
>
> (4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.
>
> (5) Any aircraft belonging in whole or in part to the United States, or any citizen

Aside from the statute's direct relation to the commerce power, another difference between § 1115 and criminal statutes relating to the loss of human life is the degree of criminal culpability.[130] To impose criminal liability under § 1115, the burden is placed on the government to show beyond a reasonable doubt that the defendant committed all elements of § 1115.[131] To accomplish this with respect to the first two categories of potential criminal defendants, the government must show the existence of a duty,[132] a negligent breach of that duty,[133] and the

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thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

18 U.S.C. § 7 (2000 & Supp. 2004).

130. *Compare id*. § 1111–14, 1116–22, *with id*. § 1115 (requiring different degress of criminal culpability).

131. *See* United States v. Keller, 19 F. 633, 636–37 (C.C.D. W. Va. 1884).

132. United States v. Abbott, 89 F.2d 166, 169 (2d Cir. 1937) (explaining that an instruction leaving it to the jury to decide whether the chief engineer, considering his position, acted as a reasonably prudent man without explaining the duties of a chief engineer is erroneous).

133. United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 224574, at *1 (E.D. La. Feb. 3, 2004).

loss of life directly caused by that negligent breach of duty.[134]

Due to the history and purpose of the statute, the level of culpability required to sustain a conviction under § 1115 is generally considered by the courts to be relatively low, especially when compared to similar statutes, i.e., involuntary manslaughter.[135] Section 1115 states that captains, engineers, pilots, and other persons employed on the vessel may be criminally responsible when loss of life is caused by either their "misconduct, negligence, or inattention to duties."[136] The statute further provides that owners, charterers, inspectors, and other public officers may be criminally responsible when the loss of life is caused by their "fraud, neglect, connivance, misconduct, or violation of the law."[137] Notably, the requisite culpability level for either of the two categories of potential criminal defendants has been described as imposing culpability for simple or mere negligence. As demonstrated by the case law, most courts agree that criminal responsibility under § 1115 attaches at a showing of any negligence, not a showing of intent, gross negligence, or criminal negligence.[138]

Interestingly, the degree of negligence required to establish guilt under § 1115 is lower than that required in similar statutes with identical penalties. For example, courts have found that a greater degree of negligence is required for a defendant to be convicted of manslaughter (either voluntary or involuntary), than what is required for a finding of guilt under seaman's manslaughter.[139] Section 1115 does not require a defendant to act

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134. *O'Keefe*, 2004 WL 224574, at *1.

135. The United States Fifth Circuit Court of Appeal will likely address the issue when it hears the appeal from *O'Keefe*. At the date of this Article's publication, no such opinion has been rendered.

136. 18 U.S.C. § 1115 (2000).

137. *Id*.

138. *See infra* notes 142–66.

139. 18 U.S.C. § 1112 defines manslaughter as follows:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
> Voluntary—Upon a sudden quarrel or heat of passion.
> Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
> (b) Within the special maritime and territorial jurisdiction of the United States,
> Whoever is guilty of voluntary manslaughter, shall be fined under this title or imprisoned not more than ten years, or both;
> Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than six years, or both.

with wanton or reckless disregard, but only requires a "mere negligence" standard—a standard akin to a finding of negligence in civil actions.[140] The maximum penalty under § 1115 (imprisonment for not more than ten years), however, is identical to that of voluntary manslaughter, which requires a finding of "gross negligence" or "wanton or reckless disregard for human life, with knowledge that his conduct was a threat to lives of others or with knowledge of such circumstances as could reasonably have enabled him to foresee peril to which his act might subject others."[141] Despite the fact that the maximum penalty under § 1115 is greater than the maximum under involuntary manslaughter, the requisite degree of negligence seems to be much lower, as discussed by the case law.[142]

In one of the first reported cases to discuss the seaman's manslaughter statute, a federal judge presided over a grand jury convened in the Eastern District of Louisiana to investigate alleged violations of the statute.[143] The court explained the purpose of the law and the level of culpability required:

> The frequent loss of human life in consequence of explosions of the boilers of steamboats, of collisions and the burning of steamboats on our western waters, and especially on the Mississippi River, imposes upon you the solemn duty of diligently inquiring into every case that may be brought before you or that may come under your cognizance. The strong arm of the law must be interposed to put an end if possible to these terrible disasters. . . . There is a disposition to inquire whether wicked motives may have prompted the

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18 U.S.C. § 1112.

140. *See* United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 224574, at **1–4 (E.D. La. Feb. 3, 2004) (examining case law and finding that under § 1115 neither "gross" negligence nor "wanton or reckless conduct" are required for a determination of guilt).

141. *See* United States v. Schmidt, 626 F.2d 616, 618 (8th Cir. 1980) (upholding the defendant's conviction after concluding that the defendant "was beyond a reasonable doubt guilty of a wanton or reckless disregard for human life, and that he knew his conduct was a threat to the lives of others or had knowledge that could reasonably have enabled him to foresee the peril").

142. *See* United States v. Keith, 605 F.2d 462, 463–64 (9th Cir. 1979) (dismissing the indictment for involuntary manslaughter because it failed to allege an essential element of the crime, namely, gross negligence amounting to wanton or reckless disregard for the value of human life); United States v. Parisien, 515 F. Supp. 24, 26 (D.N.D. 1981) (same).

143. *In re* Charge to Grand Jury, 30 F. Cas. 990 (E.D. La. 1846) (18,253).

> commission of the act, and in the absence of all supposed malice to conclude that there can be no guilt. The law, however, looks to the consequences of the act, and is utterly regardless of the purpose that may have prompted its commission. I wish you, gentlemen, to bear in mind that the [statute] has nothing to do with the motives. It was designed to punish the captains, engineers and pilots of steamboats for their negligence or inattention. . . . We may admit what doubtless generally is the fact, that when a boiler explodes or a collision takes place, there was no malice on the part of the officer of the boat, through whose negligence or inattention it occurred; still, if there be evidence to show that negligence or inattention, the officer is guilty in the eye of the law. . . . That statute virtually says to the officers of steamboats who assume the solemn responsibility of transporting persons and property from one port to another. You shall attend strictly to the duty which you have, for a valuable consideration, assumed to perform. You shall observe abundant caution; you shall take all proper care that no disaster occurs which may result in the loss of life.[144]

While the court clearly explained that neither intent nor "malice" is required, he made no distinction between simple or gross negligence or simple or gross inattention.[145] Instead, the court instructed that the statute demanded that the crew "attend strictly to duty" and "observe abundant caution" in light of the destruction that can result from a mistake.[146]

The 1848 case of *United States v. Warner* appears to be the first reported prosecution under the law.[147] The facts in *Warner* involve a collision between a steamboat and schooner, which resulted in the sinking of the steamboat and the death of several passengers.[148] While instructing the jury, the trial court discussed intent:

> At common law, and usually in statutory crimes, the intention with which the act is done, charged as criminal, constitutes the element of the crime. But, in the section now brought to the notice of the court, the legislature seem

144. *In re Charge to Grand Jury*, 30 F. Cas. at 990.
145. *Id*.
146. *Id*.
147. United States v. Warner, 28 F. Cas. 404 (C.C.D. Ohio 1848).
148. *Id*. at 406.

> studiously to have avoided the use of any terms, or words, making the intention of the party an ingredient of the offense. It is declared, in words so plain as to admit of no doubt, that *any* act of "misconduct, negligence or inattention," on the part of any one concerned in steamboat navigation, producing as a result, the loss of life, shall incur the guilt and the penalty of the crime of manslaughter.[149]

Again, the court made it clear that *deliberate* misconduct is not necessary by reading the statute to "admit of no doubt, that any" act of negligence or inattention sufficed for a finding of guilt.[150]

The court also discussed the history behind the law, the numerous steamboat disasters, and the fatalities which "justif[ied] the conclusion that there was gross negligence [on the part of those in charge], yet without the possibility of proving . . . a malicious intent."[151] While this language leads one to believe that "gross" negligence is required, the court also noted that the statute is "stern" and was designed to "enforce the greatest possible vigilance and caution on the part of those concerned in steamboat navigation."[152]

The 1853 case of *United States v. Farnham* offers the clearest declaration that any degree of negligence suffices.[153] In *Farnham*, the master of a steamboat was charged with violating the statute—the particular act of negligence being the failure to open the safety valve on the boiler while the ship was docked.[154] Many lives were lost in the ensuing explosion.[155] Instructing the jury, the court stated:

> The law does not require the public prosecutor to prove willful mismanagement or malconduct by the accused. The inquiry is not, whether he was guilty of intentional negligence or inattention, but only whether he did what is forbidden by the law, and whether the explosion and destruction of life charged in the indictment arose from either

149. *Warner*, 28 F. Cas. at 407 (emphasis added).
150. *Id*.
151. *Id*. at 408.
152. *Id*.
153. United States v. Farnham, 25 F. Cas. 1042 (C.C.S.D.N.Y. 1853) (15,071).
154. *Id*. at 1044.
155. *Id*. at 1043.

> of those causes. To resolve that question, you must have a clear and accurate understanding of the meaning of the terms used by congress in the law.
>
> By misconduct, negligence or inattention in the management of steamboats, mentioned in the statute, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; *and it is no matter what may be the degree of misconduct, whether it be slight or gross*, if the proof satisfies you that the explosion of the boiler was the necessary or most probable result of it.[156]

In *United States v. Collyer*, the defense attorney specifically argued that the "mere negligence" which would trigger civil liability was not enough to satisfy the statute, but rather "gross negligence" was required.[157] In his jury charge, however, the trial judge adopted the language from *Farnham*:

> What was meant by misconduct, negligence, and inattention, in the law of congress, upon which this prosecution is founded, is well expressed by the learned judge, in his charge to the jury, in the case U.S. v. Farnham [Case No. 15,072]. I, in substance, use his language. "By misconduct," he says, "negligence, or inattention in the management of steamboats, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may the degree of misconduct, whether it is slight or serious, if the proof satisfy you that the setting fire to the boat was the necessary or most probable cause of it."[158]

Almost thirty years later, a district court in West Virginia conducted a seaman's manslaughter prosecution involving the collision of two steamboats on the Ohio River.[159] Instructing the jury, the presiding judge provided an instruction that dictated a finding of negligence if the defendant "omitted to perform any duty."[160] Specifically, the judge instructed the jury as follows:

> It has been well defined to be "a breach of duty." I think,

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156. *Farnham*, 25 F. Cas. at 1044 (emphasis added).

157. United States v. Collyer, 25 F. Cas. 554 (C.C.S.D.N.Y. 1855) (14,838).

158. *Id*. at 578.

159. United States v. Keller, 19 F. 633 (C.C.D.W. Va. 1884).

160. *Keller*, 19 F. at 637.

> however, the better definition is that it is an omission to perform some duty, or it is a violation of some rule, which is made to govern and control one in the discharge of some duty. Applying this rule of law, if you should find from the evidence that the accused omitted to perform any duty, or that there was an absence of proper attention, care, or skill, and the performance of his duties as pilot of the Scioto, then you must of necessity find him guilty of negligence; and that if in consequence of such negligence the life of any person was lost, then you must find him guilty as charged in the indictment.[161]

In 1908, the United States Second Circuit Court of Appeals briefly provided their interpretation of the requisite degree of negligence in *Van Schaick v. United States*.[162] The defendant in *Van Schaick*, the captain of a steamboat, was prosecuted under the statute after a fire broke out on the steamboat, killing over 900 passengers.[163] The government alleged that the captain violated a number of duties, including the failure to have adequate life preservers, pumps, and fire hoses and the failure to have an adequately trained crew to deal with a disaster.[164] In affirming the conviction, the appellate court explained the elements of the offense:

> First, that the defendant was captain of the Slocum. Second: that he was guilty of misconduct, negligence or inattention to his duties on the Slocum. Third: that by reason of such misconduct, negligence or inattention human life was destroyed. Intent is not an element of the offense, malice need not be proved and it is unnecessary to show that the acts or omissions which caused the loss of life were willful or intentional.[165]

Later in the opinion, the court stressed that vessel owners and masters "should be held to the strictest accountability and required to exercise the highest degree of skill and care. In this way alone can human life be safeguarded and such appalling disasters, as that which befell the General Slocum, be effectually

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161. *Keller*, 19 F. at 637.

162. Van Schaick v. United States, 159 F. 847 (2d Cir. 1908).

163. *Id.* at 848–49.

164. *Id*. at 849.

165. *See id*. at 850 (citing United States v. Holmes, 104 F. 884 (C.C.N.D. Ohio 1900), United States v. Keller, 19 F. 633 (C.C.D.W. Va. 1884)).

prevented."[166]

It appears clear from the purpose of the statute, its legislative history, and the available case law interpreting it that any degree of negligence is sufficient to meet the culpability threshold, however slight. Notably, a decision from the United States Ninth Circuit Court of Appeals exists in which the trial judge dismissed an indictment under § 1115 for failure to allege "gross negligence" as an essential element.[167] Unfortunately, the reasoning behind the dismissal is unavailable because the district court decision was not reported; and, the appellate court did not reach the issue on appeal, but instead affirmed the district court on separate grounds.[168]

Most recently, the requisite degree of negligence for a finding of guilt under § 1115 was examined by the district court in United States v. O'Keefe.[169] Prior to O'Keefe's criminal trial, both parties submitted proposed jury instructions concerning the requisite level of culpability for a conviction under § 1115.[170] The defendant urged the court to consider decisions interpreting 18 U.S.C. § 1112, the involuntary manslaughter statute.[171] As stated by the court, 18 U.S.C. § 1112 defines involuntary manslaughter in part as the commission "without due caution and circumspection, of a lawful act which might produce death."[172] The phrase "without due caution and circumspection" has been interpreted by the Fifth Circuit to require "gross negligence, meaning a wanton or reckless disregard for human life . . . ."[173] O'Keefe argued that since § 1115 and its predecessor statutes have been referred to in case law as seaman's manslaughter, the element of gross negligence should be read into this statute as well.[174]

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166. *Van Schaick*, 159 F. at 855.

167. United States v. Hilger, 867 F.2d 566 (9th Cir. 1989).

168. *Id*.

169. United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 224574 (E.D. La. Feb. 3, 2004).

170. *Id*. at *1.

171. *Id*. at *4.

172. *Id*. For the statutory definition of manslaughter, see *supra* note 139.

173. *See* United States v. Browner, 889 F.2d 549, 553 (5th Cir.1989); United States v. Fesler, 781 F.2d 384, 393 (5th Cir. 1986).

174. *See* United States v. Meckling, 141 F. Supp. 608, 620 n.27 (D. Md. 1956); *see also* United States v. Mitlof, 165 F. Supp. 2d 558, 560–63 (S.D.N.Y. 2001). For an explanation of the degree of negligence required under the involuntary manslaughter statute, see *supra* notes 140–66.

The court did not agree that because the predecessor to § 1115 was called manslaughter that the jurisprudence interpreting different definitions of manslaughter from other statutes should be adopted and implanted into the interpretation of § 1115.[175] Specifically, the court noted that § 1112 and § 1115 are separate crimes addressing different concerns composed of different elements and dissimilar penalties.[176] The court stated:

> Involuntary manslaughter as defined in § 1112 applies to *all* persons, regardless of where the offense occurs or whether the offender had any unique responsibility or fiduciary duty towards the victim of the crime. On the other hand, § 1115 applies only to commercial vessels whose operators and owners, historically speaking, "daily have the lives of thousands of helpless human beings in their keeping."[177]

As such, the court concluded that gross or criminal negligence is not an element of § 1115.[178] The United States Fifth Circuit Court of Appeals is expected to address the issue on an appeal filed by Captain O'Keefe. Notwithstanding the apparently low level of negligence required to sustain a conviction, other more stringent elements of the statute must also be met.

A slightly different standard applies to executive officers of corporate vessel owners and corporate vessel charterers.[179] Criminal liability may be imposed on them only upon a showing that they knowingly and willfully caused or allowed the fraud, neglect, connivance, misconduct, or violation of the law, chargeable to the corporate owner or corporate charterer, which, in turn, caused loss of life.[180] This standard is much higher than the standard of care imposed on non-corporate vessel owners and those actually employed aboard the vessel.[181] It might appropriately be referred to as a gross negligence standard or a criminal negligence standard.[182]

The tortious notion of duty is both explicitly included in the

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175. *O'Keefe*, 2004 WL 224574, at *5.
176. *Id*.
177. *Id*. (citing Van Schaick v. United States, 159 F. 847, 854 (2d Cir. 1908)).
178. *Id.*
179. 18 U.S.C. § 1115 (2000).
180. *Id*.
181. *Id*.
182. *Id*.

statutory text and tacitly imported into the construction of the statute.[183] The statute explicitly refers to inattention to duties and violation of law.[184] The statute implies that the existence of a duty is necessary by using the words negligence and neglect.[185] Indeed, from a review of the relevant case law, one may easily surmise that courts will not penalize any of the potential classes of defendants under this statute for their substandard conduct unless there is a duty imposed on them not to take part in that substandard conduct.[186] Such a duty apparently should be established by reference to a federal statute, regulation, or jurisprudential holding rather than the general duty of care.[187]

The notion of causation is also directly included in the wording of the statute.[188] Section 1115, however, does not limit in any way the notion of causation.[189] Notably, courts, however, have interpreted § 1115 as requiring that the loss of life be directly caused by the prohibited behavior.[190] As the case law suggests, this notion of direct causation seems to import the notion of proximate cause into the criminal statute, including such other notions as superseding cause and intervening cause.[191]

IV. THE SLINGS AND ARROWS OF THE MARITIME PLAINITFF

As one might ascertain, title 18, § 1115 is quite a remarkable statute. The most remarkable feature of the statute for the purpose of this Article, however, is the statute's probable imposition of criminal liability upon only a finding that the defendant's negligence resulted in a human being's demise.[192] As previously mentioned, gross negligence or criminal negligence is not now considered an element of the offense.[193] Another important feature of the statute is its imposition of criminal

183. 18 U.S.C. § 1115; United States v. Abbott, 89 F.2d 166, 168–69 (2d Cir. 1937).
184. 18 U.S.C. § 1115.
185. *Id*.
186. *Abbott*, 89 F.2d at 168–69.
187. *Id*.
188. 18 U.S.C. § 1115.
189. *Id*.
190. United States v. Collyer, 25 F. Cas. 554 (C.C.S.D.N.Y. 1855) (No. 14,838).
191. *Id*.
192. 18 U.S.C. § 1115; United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 224574, at *1 (E.D. La. Feb. 3, 2004).
193. *O'Keefe*, 2004 WL 224574, at *1.

liability on an executive officer of a corporate vessel owner or vessel charterer who knowingly and willfully allows corporate misconduct to result in the death of a person.[194] These two aspects of the statute should raise huge concerns for any attorney representing a maritime defendant in a wrongful death suit.[195] The statute itself combined with the broad range of civil remedies afforded a maritime plaintiff puts the defendant in an unenviable position. These civil slings and arrows are described below, beginning with their origins. Before one can realize these concerns, however, one must first have a general understanding of the relevant statutory law and general maritime law governing the substantive rights of the survivors of a person killed in the admiralty jurisdiction.

Maritime law has its origins in the customs of earliest antiquity, when men first ventured out onto the Persian Gulf, the Arabian Sea, and the Mediterranean Sea.[196] The Babylonians, the Sumerians, the Egyptians, and the Mycenaen Greeks all made contributions to this body of law.[197] Maritime commerce continued to flourish as the Greeks became a more prevalent political and economic force.[198] The principal centers of maritime commerce adjudicated disputes utilizing a type of international law with special courts established for this purpose.[199]

The Romans, who first began to build large ships as Hannibal laid waste to the European countryside, did not invent their own maritime law, but accepted and amplified the maritime law of the Greek world.[200] It is from the time of the Roman Empire, specifically, the Byzantine Empire, that the Rhodian Sea Code, the oldest complete maritime code to be passed down to modern man, came into existence.[201] As the might of the

194. 18 U.S.C. § 1115; United States v. Allied Towing Corp., 602 F.2d 612 (4th Cir. 1979); United States v. Harvey, 54 F. Supp. 910 (D. Or. 1943). This standard may be interpreted as a gross negligence standard by the Fifth Circuit. Such an interpretation, however, will not affect the availability of the defense described in Part V.

195. *See infra* Part V.

196. SCHOENBAUM, *supra* note 2, § 3-1; *see also* 1 BENEDICT ON ADMIRALTY § 2 (7th ed. 1974).

197. 1 BENEDICT, *supra* note 196, § 2; THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 1-2 (1st ed. 1987).

198. SCHOENBAUM, *supra* note 197, § 1-2.

199. *Id*.

200. *Id*. § 1-3.

201. SCHOENBAUM, *supra* note 197, § 1-3.

Byzantine Empire waned, more maritime codes came into existence, including the Basilica,[202] the Ordinance of Trani, the Tables of Amalfi, the Judgments of Danme, the Ordinance de la Marine of 1681, and the German Commercial Code of 1867, among others.[203]

In England, the maritime law of continental Europe was of no concern until the 1200s when the English became more interested in trade with the continent and in defense against non-British invaders.[204] Local courts established in port towns applied the more civilian Laws of Oleran rather than the common law.[205] Eventually, the Admiralty Court was created to "control and supervise the jurisdiction over maritime and foreign affairs exercised by the local courts";[206] and the result was approximately five hundred years of territorial brawls between the Common Law and the Admiralty, which was eventually engulfed by its landlubber foe.[207] Once this happened, the civilian tradition in the adjudication of maritime matters virtually disappeared.[208]

At the same time as the Admiralty Court began its descent into obsolescence and eventual oblivion, the British began Vice Admiralty Courts in colonial America.[209] Because the opponents of the Vice Admiralty Courts' jurisdiction were largely colonists and the proponents the British, the jurisdiction of the Vice Admiralty Courts was considerably broader than that of its motherland forebear.[210]

Much of the British system of maritime adjudication was rejected after the revolution under the Articles of Confederation.[211] The turmoil which subsequently engulfed interstate and maritime commerce resulted in Article III, Section 2 of the United States Constitution, which extends the judicial power of the United States "to all cases of admiralty and

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202. SCHOENBAUM, *supra* note 197, § 1-3.

203. *Id.* § 1-4; *see also* 1 BENEDICT, *supra* note 196, §§ 4–15.

204. SCHOENBAUM, *supra* note 197, § 1-5.

205. *Id*.; *see also* 1 BENEDICT, *supra* note 196, § 6.

206. SCHOENBAUM, *supra* note 197, § 1-5.

207. *Id*.

208. *Id*.

209. 1 BENEDICT, *supra* note 196, § 61; SCHOENBAUM, *supra* note 197, § 1-6.

210. DeLovio v. Boit, 7 F. Cas. 418, 422 (C.C.D. Mass. 1815) (No. 3776), *cited in* SCHOENBAUM, *supra* note 197, § 1-6.

211. SCHOENBAUM, *supra* note 197, § 1-6; *see also* 1 BENEDICT, *supra* note 196, §§ 181, 183–89.

maritime jurisdiction."[212] Apparently, the new Americans also adopted the British practice of adjudicating both admiralty as well as legal and equitable cases in one court, although they did somewhat nominally retain the distinction between the two types of cases.[213]

Along with the birth of the federal admiralty jurisdiction came the birth of the general maritime law.[214] This child, although young, was more of a reincarnation of the laws of yesterday and of ages past.[215] Like most toddlers, however, the general maritime law would not remain static for long. The constitutional grant of jurisdiction empowered admiralty judges to continue the development of the general maritime law;[216] and federal judges, keepers of the general maritime law, were not

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212. SCHOENBAUM, *supra* note 197, § 1-6.

213. M. Bayard Crutcher, *Imaginary Chair Removed from the United States Courthouse; or, What Have They Done to Admiralty?*, 5 WILLAMETTE L. REV. 367, 369 (1969); Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1, 2 (1965); David J. Sharpe, *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium*, 31 J. MAR. L. & COM. 217, 218–19 (2000).

214. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65 (1986) ("Drawn from federal and state sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules."); SCHOENBAUM, *supra* note 2, § 3-1.

215. Thompson v. The Catherina, 23 F. Cas. 1028, 1030–31 (D. Pa. 1795) (No. 13,949). In *The Catherina*, the court stated:

> [T]he change in the form of our government has not abrogated all the laws, customs and principles of jurisprudence, we inherited from our ancestors, and possessed at the period of our becoming an independent nation. The people of these states, both individually and collectively, have the common law, in all cases, consistent with the change of our government, and the principles on which it is founded. They possess, in like manner, the maritime law, which is part of the common law, existing at the same period; and this is peculiarly within the cognizance of courts, invested with maritime jurisdiction; although it is referred to, in all our courts on maritime questions. It is, then, not to be disputed, on sound principles, that this court must be governed in its decisions, by the Maritime Code we possessed at the period before stated; as well as by the particular laws since established by our own government, or which may hereafter be enacted. These laws and the decisions under them, must be received as authorities, in this, and other courts of our country "in all cases of admiralty and maritime jurisdiction," to which, by the constitution, it is declared "the judicial power of the United States shall extend." Nor shall I think myself warranted to exclude more modern expositions, or adjudged cases from being produced here. Whatever may, in strictness, be thought of their binding authority, I shall always be ready to hear the opinions of the learned and wise jurisprudents or judicial characters of any country. On subjects agitated in this court, often deeply affecting the property and reputation of the suitors, I am not so confident in my own judgment, as not to wish for all the lights and information, it may be in my power to obtain, from any respectable sources.

Id.

216. U.S. CONST. art. III, § 2, cl. 1; Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 360–61 (1959).

afraid to wield this power.[217] Likewise, Congress took an active role in fashioning the law to be applied to maritime disputes as well as supplanting the general maritime law.[218]

One important example of the lack of stagnation in the general maritime law has been those causes of action afforded people injured by a maritime tort.[219] Despite the ancient origin of the maritime law, significant redress for personal injury has been a relatively recent development. The redress allowed plaintiffs differed and still differs significantly depending on whether the injured person is a seaman or not.[220] Seaman typically had two

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217. McDermott, Inc. v. AmClyde, 511 U.S. 202, 207 (1994) ("'[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime.'") (quoting United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975)); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 96 (1981) ("[I]n admiralty . . . the federal judiciary's law-making power may well be at its strongest . . . ."); Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) ("No area of federal law is judge-made at its source to such an extent as is the law of admiralty.") (Frankfurter, J., dissenting); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 323 (1955) ("[T]he preponderant body of maritime law comes from this Court and not from Congress") (Frankfurter, J., concurring).

218. *See* sources cited *supra* note 1.

219. *See, e.g.*, SCHOENBAUM, *supra* note 2, §§ 3-2, 3-9, 3-10, 4-8, 4-21, 4-25, 4-28, 5-2, 6-2 to -6.

220. This distinction exists not only due to statutory enhancements of the seaman's rights, but due to the protection they are afforded by the admiralty courts. Harden v. Gordon, 11 F. Cas. 480, 481–85 (C.C.D. Me. 1823) (No. 6047). In *Harden*, Justice Story, sitting on the circuit court, stated:

> But it appears to me so consonant with humanity, with sound policy, and with national interests, that it commends itself to my mind quite as much by its intrinsic equity, as by the sanction of its general authority. Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. . . . On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency. Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country; and the parental law, which relieves them in sickness by fastening their interests to

distinct theories of recovery: they could recover indemnification from the ship owner of the vessel on which they were employed for the cost of their food, lodging, and necessary medical services if they became injured in the service of the vessel under the ancient doctrine of maintenance and cure,[221] and they could recover in tort, which originally consisted solely of those intentionally tortious causes of action adopted by the general maritime law.[222] Others were limited to this second remedy.[223] With the dawn of the industrial revolution and the age of the railroad, however, common law courts began to liberalize the common law of torts by allowing plaintiffs to recover for a defendant's negligence, not just his intentional wrongdoing.[224] The general maritime law, previously largely dominated by its civil law mother, added the negligence cause of action to those

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> the ship, is as wise in policy, as it is just in obligation. Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw.
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> . . . .
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> . . . Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.

Id.

221. *Harden*, 11 F. Cas. at 480 (recognizing the ancient doctrine of maintenance and cure); SCHOENBAUM, *supra* note 2, §§ 4-28 to -35.

222. The Osceola, 189 U.S. 158, 174–76 (1903). The *Osceola* was decided after the extension of the warranty of a seaworthy ship to seaman. *Id*. Notwithstanding that single abrogation, it recognized that intentional torts and maintenance and cure were two viable causes of action for seaman. *Id*.

223. *See* sources cited *supra* note 221.

224. Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 195 (1926); John H. Wigmore, *Responsibility for Tortious Acts: Its History—III* (pt. 3), 7 HARV. L. REV. 441, 453 (1894).

remedies afforded non-seaman.[225] Seamen, however, were not given this remedy against their employer, usually the shipowner.[226] At about the same time, in another move befitting its common law ancestry, it borrowed the doctrine of seaworthiness from the statutory law of England, allowing a seaman to recover damages from a shipowner for any injury he sustained because of a defective condition of the ship, its equipment, or its appurtenances.[227]

Soon Congress interceded to grant a seaman the right to bring a negligence cause of action against his employer.[228] Also, Congress took away the rights or lack thereof of longshoremen and harbor workers under state law and replaced them with a comprehensive worker's compensation statute.[229] The courts, however, also granted these workers a cause of action against vessel owners for their failure to maintain a seaworthy vessel;[230] but Congress retracted it.[231] Both the legislative and judicial branches made sure, however, that these workers were afforded a negligence cause of action against the vessel owners.[232]

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225. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630–32 (1959) (providing that the general maritime law has long allowed a negligence cause of action in virtually every situation except when a seaman sues his employer, which right extends from the Jones Act); Leathers v. Blessing, 105 U.S. 626, 629–30 (1882) (recognizing negligence as a cause of action under the general maritime law).

226. *The Osceola*, 189 U.S. at 174–76; SCHOENBAUM, *supra* note 2, § 4-8.

227. *The Osceola*, 189 U.S. at 175. In *The Osceola*, the Court observed:

> [A] departure has been made from the Continental Codes in allowing [seamen] an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876, above quoted, and in this country, in a general consensus of opinion among the circuit and district courts, that an exception should be made for the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine . . . .

Id. (citations omitted).

228. 46 U.S.C. app. § 688 (2000) (legislatively overruling the bar against a seaman's negligence action against his employer as set forth in *The Osceola*).

229. 33 U.S.C. §§ 901–50 (2000 & Supp. 2004).

230. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) (holding that an implied warranty of workmanlike performance ran from the stevedore by contract to a vessel owner and the vessel owner has a cause of action for breach of this warranty on the part of the shipowner against the stevedore); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (holding that the warranty of seaworthiness runs to a longshoreman who is aboard the vessel doing the ship's work).

231. 33 U.S.C. § 905.

232. *See* 33 U.S.C. § 905 (providing that a vessel owner may not be liable to a longshoreman for breach of the warranty to provide a seaworthy vessel); Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156, 171 (1981) (same).

A second relevant example of the vibrant nature of the general maritime law is the creation of a cause of action for wrongful death.[233] Neither the common law of Great Britain nor the common law of the United States provided a remedy either for losses due to wrongful death or for damages incurred by the injured party before death.[234] The English and state legislatures began creating wrongful death and survivor statutes to overcome this barbarous aspect of the common law.[235] Courts sitting in admiralty were forced to either follow the draconian common law

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233. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970) (recognizing a cause of action for wrongful death under the general maritime law).

234. The general maritime law was the last island for the common law rule that "the death of a human being could not be complained of as injury." Baker v. Bolton, 170 Eng. Rep. 1033, 1033 (N.P. 1808). Several justifications for the rule have been put forth. First, it was conjectured that no value could be placed on human life. Second, allowing a claim might lead to juries awarding runaway damages. The *Moragne* Court explained that the rule has its origin and purpose in the felony merger doctrine:

> One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous." Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical in the two cases: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him—usually spouse and children—seek to recover for their total loss of one on whom they depended. This difference, however, even when coupled with the practical difficulties of defining the class of beneficiaries who may recover for death, does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort. One expects, therefore, to find a persuasive, independent justification for this apparent legal anomaly.
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> Legal historians have concluded that the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century—the felony-merger doctrine. According to this doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. The tort was treated as less important than the offense against the Crown, and was merged into, or pre-empted by, the felony. The doctrine found practical justification in the fact that the punishment for the felony was the death of the felon and the forfeiture of his property to the Crown; thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action. Since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death.

Moragne, 398 U.S. at 381–82 (citations omitted).

235. All fifty states have some form of statutory action for the recovery of the wrongful death of another. STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 1.9 (3d ed. 1992). Most of the statutes were modeled after Lord Campbell's Act, mentioned in *Moragne*. *Moragne*, 398 U.S. at 381–82.

rule or apply state statutes.[236] Around this time, Congress adopted the Jones Act,[237] the Death on the High Seas Act,[238] and the Longshoremen's and Harbor Worker's Compensation Act,[239] within a period of approximately seven years.[240] These Acts, respectively, provided wrongful death and survival remedies to seaman who die by the negligence of their employers, anyone who dies on the high seas, and longshoremen and harbor workers who die in the course and scope of their employment.[241] Finally, in 1970, the United States Supreme Court, in *Moragne v. States Marine Lines, Inc.*, overruled its earlier jurisprudence and held that there was a cause of action for wrongful death under the general maritime law.[242] The Court has yet to officially bestow a survival action on the maritime plaintiff, but the consensus among the courts of appeals is that such an action does indeed exist.[243] Of lesser note, wrongful death and survival claims may be brought against the United States under the Suits in Admiralty Act and the Public Vessels Act.[244]

The third and last relevant development in the maritime law is of congressional origin. Though the notion that a shipowner should not be liable beyond the value of his vessel appears in medieval sea codes,[245] the Limitation of Shipowners' Liability Act was not enacted by Congress until 1851 in response to *New Jersey Steam Navigation Co. v. Merchants' Bank*,[246] where a shipowner was held liable for the entire amount of lost cargo, consisting of money, notwithstanding contractual language between the shipper and carrier to the contrary.[247] Congress reacted swiftly by passing the Limitation of Libility Act.[248] As noted by Professor Schoenbaum, "[t]his act provides a procedure in admiralty to

236. SCHOENBAUM, *supra* note 2, § 6-1; Paul S. Edelman, *Recovery for Wrongful Death Under General Maritime Law*, 55 TUL. L. REV. 1123, 1123–24 (1981).

237. 46 U.S.C. app. § 688 (2000).

238. *Id*. §§ 761–68.

239. 33 U.S.C. §§ 901–50 (2000 & Supp. 2004).

240. SCHOENBAUM, *supra* note 2, § 6-1.

241. *Id*.

242. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970).

243. THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 6-1 (3d ed. 2001).

244. 46 U.S.C. app. §§ 741–52, 781–90 (2000 & Supp. 2004).

245. James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1000–01 (1979); SCHOENBAUM, *supra* note 2, § 13-1.

246. New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. 344 (1848).

247. *Id*.; SCHOENBAUM, *supra* note 2, § 13-1.

248. SCHOENBAUM, *supra* note 2, § 13-1.

enjoin all pending suits and to compel them to be filed in a special limitation proceeding so that liability may be determined and limited to the value of the shipowner's vessel and pending freight."[249] This concession to the shipping industry, however, was not absolute.[250] The Limitation Act allows claimants to circumvent the limitation on liability if the shipowner fails to show that it lacked privity or knowledge of the underlying events that caused the plaintiff injury.[251] Given all these remedies available to the maritime plaintiff, the existence of the seaman's manslaughter statute is just the latest of a multitude of slings and arrows with which the defendant must contend; however, as explained in Part V, the seaman's manslaughter statute may be a blessing in disguise.

V. TAKING ARMS AGAINST A SEA OF TROUBLES

Aware that the maritime law affords almost all plaintiffs a wrongful death and survival action,[252] a cause of action for negligence,[253] and a method for circumventing the shipowner's right to limit his liability[254] and cognizant of the troublesome knowledge that the seaman's manslaughter statute only requires a finding of mere negligence on the part of the defendant to support criminal liability,[255] one is forced to come to the almost inexorable conclusion that most wrongful death suits cognizable in the admiralty bring not only the toils and tribulations of civil litigation but also the possibility of concomitant criminal

249. SCHOENBAUM, *supra* note 2, § 13-1.

250. 46 U.S.C. app. §§ 181–96 (2000 & Supp. 2004). Limitation of liability is accepted as necessary to serve the needs of commercial practicality as well as the shipowner. SCHOENBAUM, *supra* note 2, § 13-1. From an economic standpoint, this principle makes possible realistic insurance coverage and reasonable apportionment of the costs of a maritime disaster. *See* Leslie J. Buglass, *Limitation of Liability from a Marine Insurance Viewpoint*, 53 TUL. L. REV. 1364, 1364 (1979); A.H.E. Popp, Q.C., *Limitation of Liability in Maritime Law—An Assessment of Its Viability from a Canadian Perspective*, 24 J. MAR. L. & COM. 335, 336–37 (1993). Commercial needs, however, cannot be served by tortfeasors who consciously commit malfeasance. For a review of the law of limitation of liability and its history, see *In re* Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234 (9th Cir. 1989); 3 BENEDICT, *supra* 194, §§ 1–120; Symposium, *Admiralty Law Institute: Symposium on Limitation of Liability*, 53 TUL. L. REV. 999 (1979).

251. *See* sources cited *supra* note 219.

252. SCHOENBAUM, *supra* note 197, § 6-1.

253. *Id*. § 3-2.

254. *Id*. §§ 13-1 to 13-9.

255. United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 224574, at *5 (E.D. La. Feb. 3, 2004).

culpability.[256] For instance, every time a visitor or passenger aboard a vessel is killed due to the negligence of a captain, pilot, engineer, or seaman, a civil suit against that tortfeasor and that tortfeasor's employer, usually a vessel owner, puts in issue the negligence of and, accordingly, the criminal liability of the primary tortfeasor, the vessel owner, and the corporate officers of a corporate vessel owner.[257] Even though the negligence of a vessel owner or the knowledge of a vessel owner's corporate officer may not be at issue in every civil case, these topics are almost certainly within the scope of discovery.[258] More pertinent, every time a corporate vessel owner seeks to limit his liability, the privity and knowledge of the corporate vessel owner and the corporate officer comes directly into issue.[259] Accordingly, an owner's failure to prove lack of privity or knowledge can lead not

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256. *O'Keefe*, 2004 WL 224574, at *5.

257. As noted herein, the standard of criminal culpability is likely the same standard upon which a finding of civil liability could rest. *Compare O'Keefe*, 2004 WL 224574, at *5, *with* the standards set forth in 46 U.S.C. app. § 688, *and* Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108 (1963).

258. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

FED. R. CIV. P. 26(b)(1). As noted by numerous courts, the scope of discovery under Rule 26 is extremely broad. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 297 (1969); United States v. Holley, 942 F.2d 916, 924 (5th Cir. 1991); Great W. Life Assurance Co. v. Levithan, 152 F.R.D. 494, 497 (E.D. Pa. 1994). The Supreme Court, in a famous passage, has spoken of the proper scope of the discovery rules:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(d) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

Hickman v. Taylor, 329 U.S. 495, 507–08 (1947); *see also* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2007 (2d ed. 1994 & Supp. 2004).

259. A shipowner may limit his liability to the amount of the vessel except when he has "privity or knowledge" of the injury causing mechanism. 46 U.S.C. app. § 183(a) (2000).

only to the catastrophic result that the shipowner cannot limit his liability, but also to the even more disastrous result that the shipowner and its executive officers will face federal indictments while the corporate offices are raided by federal agents with warrants to search, seize, and arrest anything and everything possible.[260] While it would be ludicrous to suggest that civil liability or the failure to prove lack of privity or knowledge will inevitably end in criminal consequences, it would be even more absurd to ignore this possibility, especially considering the abnormally low standard of criminal culpability under the archaic seaman's manslaughter statute.[261]

One must further consider that every answer given to every pleading, every motion, every opposition to every motion, every response to every interrogatory, every answer to every deposition question, every response to every request for admission, every document produced, every pre-trial order, and every bit of testimony given at trial will be preserved and "can and will be used against [the defendant] in a court of law."[262] Moreover, absent exceptional circumstances, there is no protective order or agreement that can withstand the awesome power of the grand jury to subpoena almost anything at will.[263] If the defendant plans to proceed with his defense, he must realize that, with

260. Suggesting that federal officers can seize "anything and everything" is a slight exaggeration. Maryland v. Garrison, 480 U.S. 79, 84–85 (1987) (providing that the persons or things to be searched or seized must be adequately described). Obviously, constitutional restraints prohibit judicial officers from issuing warrants lacking in specificity. *Id*. It is important, however, to note that the fruits of a search by officers in good faith that execute an unconstitutionally vague warrant are admissible in a criminal prosecution. United States v. Leon, 468 U.S. 897, 919–20 (1984) (providing that the exclusionary rule does not prohibit admission of evidence obtained by officers executing in good faith an invalid warrant).

261. While *O'Keefe* was described extensively in Part II for the purpose of showing that criminal prosecutions under 18 U.S.C. § 1115 do occur, prosecutions under this statute have not occurred with great frequency.

262. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966); 8 WRIGHT ET AL., *supra* 258, § 2018.

263. *In re* Grand Jury, 286 F.3d 153, 159–60 (3d Cir. 2002) (providing that, absent exceptional circumstances, a civil litigant may not conceal evidence from a grand jury by seeking a protective order); *In re* Grand Jury Subpoena, 138 F.3d 442, 444 (1st Cir. 1998) (same); *In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes, 62 F.3d 1222, 1226 (9th Cir. 1995) (same); *In re* Grand Jury Proceedings, 995 F.2d 1013, 1017 (11th Cir. 1993) (same); *In re* Grand Jury Subpoena, 836 F.2d 1468, 1475 (4th Cir. 1988) (same). *But see* Martindale v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979) (providing that the protective order is an integral part of civil litigation).

every subsequent stage of litigation, he will become more and more prone to criminal prosecution.

The maritime wrongful death defendant, however, need not despair. Due to the beneficence of our forefathers, a solution to this problem lies in one of the most sacred rights preserved to the criminal defendant (or potential criminal defendant) in one of the most important documents ever created—the United States Constitution's preservation of the right not to incriminate oneself.[264]

As noted by Professors Wright and Miller, "[t]he famous words of the Fifth Amendment, 'no person [. . .] shall be compelled in any criminal case to be a witness against himself,' have no obvious application to pretrial discovery in a civil action [or any other aspect of civil litigation], . . . but history has given the words a broader reading than is literally required."[265] Originally, it was thought that the privilege would apply only in criminal proceedings.[266] Indeed, in *United States v. Sullivan*, Justice Holmes stated, in dicta, that a civil litigant may not draw a conjurer's circle around every piece of discoverable information simply by incanting the magical Fifth Amendment invocation.[267] These views, however, were later repudiated by courts adopting Justice Brandeis' views:

> The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.[268]

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264. The Fifth Amendment provides, in pertinent part, that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

265. 8 WRIGHT ET AL., *supra* note 258, § 2018 (quoting U.S. CONST. amend. V).

266. *Id*.

267. United States v. Sullivan, 274 U.S. 259, 264 (1927) (opining that the Fifth Amendment privilege against self-incrimination has limited application in civil proceedings).

268. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); *see also* Maness v. Meyers, 419 U.S. 449, 464 (1975); United States v. Kordel, 397 U.S. 1, 7–8 (1970); Nat'l Life Ins.

The Fifth Amendment privilege against self-incrimination is rather all-inclusive.[269] It protects any information which would be "a link in the chain of evidence needed to prosecute" a crime.[270] This standard is very broad and may cover almost every activity of the defendant at issue in the civil litigation, even completely innocent activities.[271] Moreover, the privilege also may be employed even when the likelihood of prosecution is very low.[272]

As noted by Professor Heidt,[273] the privilege is only subject to four very narrow exceptions: the privilege may be attacked on the ground that the information will not incriminate; the privilege may be attacked on the ground that prosecution is barred by Double Jeopardy; the privilege may be attacked on the ground that it is barred by the statute of limitations; and the privilege may be attacked on the ground that prosecution is barred by past grants of use immunity.[274] These exceptions, in almost every civil case, are largely inapplicable.[275]

One important point must be noted though. Business entities—whether they be corporations, partnerships, unincorporated associations, or limited liability companies—do not have a privilege against self-incrimination.[276] Sole

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Co. v. Hartford Accident & Indem. Co., 615 F.2d 595, 596 (3d Cir. 1980); Wehling v. CBS, 608 F.2d 1084, 1086 (5th Cir. 1979); In re Penn Cent. Sec. Litig., 347 F. Supp. 1347, 1348 (E.D. Pa. 1972); Alioto v. Holtzman, 320 F. Supp. 256, 257 (E.D. Wis. 1970); Moll v. United States Life Title Ins. Co. of New York, 113 F.R.D. 625, 628 (S.D.N.Y. 1987).

269. Hoffman v. United States, 341 U.S. 479, 486 (1951); Coffey v. United States, 198 F.2d 438, 440 (3d Cir. 1952).

270. Malloy v. Hogan, 378 U.S. 1, 11 (1964); *Hoffman*, 341 U.S. at 486.

271. *See, e.g.*, *In re* Folding Carton Antitrust Litig., 609 F.2d 867, 871 (7th Cir. 1979); *In re* Master Key Litigation, 507 F.2d 292, 293–94 (9th Cir. 1974); Camelot Group, Ltd. v. W.A. Krueger Co., 486 F. Supp. 1221, 1228–29 (S.D.N.Y. 1980); Leblanc v. Spector, 378 F. Supp. 310, 313–14 (D. Conn. 1974); Duffy v. Currier, 291 F. Supp. 810, 814 (D. Minn. 1968); de Antonio v. Solomon, 42 F.R.D. 320, 323 (D. Mass. 1967).

272. Gentile v. Nulty, 146 F. Supp. 2d 340, 350–51 (S.D.N.Y. 2001) (providing that the remote possibility of criminal prosecution is still grounds for the privilege against self-incrimination).

273. Robert Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1071–81 (1982).

274. *Id*.

275. *Id*.

276. All business entities with their own legal identity for Fifth Amendment purposes—and therefore unable to invoke the privilege on their own behalf—will be referred to simply as "corporations." Bellis v. United States, 417 U.S. 85, 95–97 (1974) (partnerships); George Campbell Painting Corp. v. Reid, 392 U.S. 286, 288–89

proprietorships, however, do have the privilege.[277] Regardless, since a corporation can do little else aside from responding to requests to produce documents without some type of certification from a human agent who may and likely should invoke his privilege against self-incrimination,[278] the distinction the privilege makes between juridical persons and real persons is largely unimportant.[279] Even if a corporate agent, without his own privilege, may be found to testify, it is unlikely he will have any information of value lest he too might invoke the Fifth Amendment.[280]

Accordingly, by employing the privilege, the civil defendant may effectively shut down discovery.[281] Those corporate employees not directly implicated by the seaman's manslaughter statute and able to gain access to relevant information may, nevertheless, avoid responding to discovery requests due to the criminal culpability that could be imposed on them as accessories after the fact[282] or as conspirators.[283] As such, given the

(1968) (corporations); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 196, 208–10 (1946) (same); Local 57, Int'l Union of Operating Eng'rs v. Wertz, 326 F.2d 467, 469 (1st Cir. 1964) (unincorporated associations).

277. *Bellis*, 417 U.S. at 87–88.

278. Malloy v. Hogan, 378 U.S. 1, 12–14 (1964); Emspak v. United States, 349 U.S. 190 (1955) (upholding the claim of privilege by a member of a union in the congressional investigation of a union); Heidt, *supra* note 273, at 1066–68.

279. United States v. Kordel, 397 U.S. 1, 9 (1970) (declining to decide the "troublesome question" arising where no one could answer interrogatories addressed to a corporation without subjecting himself to danger of prosecution); Priebe v. World Ventures, Inc., 407 F. Supp. 1244, 1246 (C.D. Cal. 1976) (ordering a corporation to answer interrogatories, but noting that a "reformulation" of the order might be necessary if the corporation was unable to appoint anyone to answer who would not thereby incriminate himself); Heidt, *supra* note 273, at 1066–68.

280. Heidt, *supra* note 273, at 1069–70.

281. Josef D. Cooper, *Fifth Amendment Rights in Private Treble Damage Litigation*, 48 ANTITRUST L.J. 1381, 1392–95 (1979); Glen Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 903–04, & n.26 (1980) (discussing suppression of corporate information through use of corporate attorney's privilege); Lance J. Madden, Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 766 (1971) (same).

282. 18 U.S.C. § 3 (2000). Section 3 provides:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.
>
> Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be

dependence of a wrongful death plaintiff on initial disclosures or other discovery directly from the defendant, its officers, and its employees, the plaintiff may experience a complete meltdown of his case.[284] As far as analyzing the advantages secured by the defendant, Professor Heidt put it best:

> The privilege's many opportunities for use and its resistance to attack render it a potent weapon in the hands of civil defendants. By invoking at every opportunity, defendants and their employees can prevent plaintiffs from obtaining any discovery from them, except for the documents plaintiffs will admittedly obtain from defendant corporations. Worse, those who invoke during discovery may convince the court at trial that since they plan to invoke again the plaintiff should not be allowed to call them to testify or to inform the jury that they had invoked previously. Worse yet, if the plaintiff manages to establish a prima facie case at trial through other evidence, those who invoked earlier may then waive the privilege in order to testify as defense witnesses.
>
> A defense strategy calling for defendants and their officers and employees to invoke at every opportunity before trial yields several other advantages. By forcing plaintiffs to seek evidence from sources other than the defendants and their staffs, it increases plaintiffs' expenses and delays their progress. Such delays, in addition to their usual benefits, enable invokers siding with the defense to buy time in which to decide whether to waive the privilege and testify. If they

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imprisoned not more than 15 years.

Id.

283. 18 U.S.C. § 371. Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Id. This may seem like a strained argument; however, it is unlikely that an employee upon whom criminal liability could not possibly be imposed will have any relevant information.

284. Due to the nature of maritime employment, which for the most part takes place far removed from the eyes of third-party witnesses, it is difficult for an attorney or investigator to obtain information concerning the injury causing event from any person other than he who may himself have to invoke the privilege against self-incrimination.

> do decide to testify and submit to depositions, the delays will have allowed them to see the other evidence the plaintiff has gathered and to tailor their versions of events accordingly. By limiting plaintiffs' discovery and increasing their risk of failure, this defense strategy also puts plaintiffs in a poor position to negotiate a favorable settlement or prepare for trial.
>
> The strategy may also yield less direct benefits. For instance, it may sharply reduce the expenses, especially in attorney and employee time, that defendants incur in responding to plaintiffs' discovery. It may also contain the disruptive impact of plaintiffs' case on the day-to-day operations of a defendant company.
>
> Should a plaintiff push on to trial, the strategy may cause a failure of proof. In price-fixing conspiracies, for example, the strategy is likely to cause a failure of proof when the defendants and their staffs have kept knowledge of the conspiracy to themselves and have carefully refrained from leaving any evidence of the conspiracy in company documents. In short, defendants' full exploitation of this constitutional privilege may deny plaintiffs any opportunity for meaningful access to the courts, an opportunity that is itself becoming a right worthy of constitutional status.[285]

There are only two significant disadvantages to invocation of the privilege, both of which are minimal. First, the suspicions of federal prosecutors may be aroused if every member of a defendant organization takes the Fifth Amendment. This should present little concern though. Proving criminal culpability under § 1115 is already difficult given the "beyond a reasonable doubt" standard.[286] As such, prosecutors will be wary of making a federal case out of what is largely a civil matter. Additionally, prosecutions for seaman's manslaughter take away from the focal points of federal criminal practice in jurisdictions having navigable water: preventing illegal immigration and drug trafficking. As such, only the most egregious conduct will garner the ire of the United States Attorney.[287]

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285. Heidt, *supra* note 273, at 1081–82.

286. It goes without saying that convictions will not stand unless a prosecutor is able to prove his case beyond a reasonable doubt. United States v. Booker, 125 S. Ct. 738, 748 (2005); *In re* Winship, 397 U.S. 358, 364 (1970).

287. *See, e.g.*, United States v. O'Keefe, No. CRIM.A.03-137, 2004 WL 439897 (E.D.

The second disadvantage is that the plaintiff may be entitled to an adverse jury instruction.[288] In criminal prosecutions, a defendant's invocation of the Fifth Amendment or his refusal to take the stand in his own defense may not be regarded as indicative of his guilt.[289] This rule does not apply in civil cases.[290] When a civil defendant refuses to take the stand in his own defense, a plaintiff may be entitled to a jury instruction that the defendant's failure to take the stand allows them to infer that, had he taken the stand, his testimony would have had a negative impact on his case.[291] This adverse inference may, depending on the judge, also be given when an employee or former employee of the defendant takes the Fifth.[292] While the instruction may be given, the jury is not required to make this adverse inference.[293] Additionally, effective cross-examination of the plaintiff and his witnesses could probably destroy the potential negative effect of

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La. Mar. 8, 2004). In *O'Keefe*, it is arguable that one consideration, if not the only consideration, of the prosecutors in taking the case was the presence of cocaine metabolites in the defendant's bloodstream. *O'Keefe*, 2004 WL 439897.

288. United States v. 900 Rio Vista Boulevard, 803 F.2d 625, 629–30 (11th Cir. 1986) (finding that a negative inference may be taken from a claimant's silence in a civil forfeiture proceeding as long as the court's final judgment is not based solely on that inference); Dennis J. Bartlett, Note, *Adverse Inference Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 NOTRE DAME L. REV. 370, 370 (1985); Shannon T. Noya, Comment, *Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture*, 86 J. CRIM. L. & CRIMINOLOGY 493, 494 (1996); Charles H. Rabon, Jr., Note, *Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment*, 42 VAND. L. REV. 507 (1989). *But see* United States v. 15 Black Ledge Drive, 897 F.2d 97, 103 (2d Cir. 1990) (stating that negative inferences may be impermissible in the forfeiture context "given the severity of the deprivation at risk").

289. Griffin v. California, 380 U.S. 609, 612–13 (1965) (providing that, in the criminal context, the silence of an accused cannot be considered as evidence of guilt, and the prosecution cannot comment on a defendant's decision to invoke the right to remain silent).

290. Baxter v. Palmigiano, 425 U.S. 308, 319–20 (1976) (ruling that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them or in response to probative questions); Rad Services, Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271, 277 (3d Cir. 1986) (acknowledging that the jury can draw adverse inferences from the invocation of the Fifth Amendment privilege); Wilson v. Olathe Bank, No. CIV.A.97-2458, 1998 WL 184470, at *8 (D. Kan. Mar. 2, 1998) (ruling that a civil litigant may invoke the Fifth Amendment privilege, but must "accept the consequence" of an adverse inference being drawn from that circumstance).

291. *Baxter*, 425 U.S. at 319–20; Arango v. United States Dep't of the Treasury, 115 F.3d 922, 926 (11th Cir. 1997); United States v. Stelmokas, 100 F.3d 302, 311 (3d Cir. 1996); Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir. 1995).

292. Bartlett, *supra* note 288, at 370.

293. *Id*.

this adverse inference.

Should either or both of these seeming disadvantages present too much concern to the defendant, however, there is another option besides waiving the Fifth Amendment privilege. One might simply seek a stay of the entire case until the privilege is no longer applicable.[294] Stays of civil matters pending the outcome of criminal investigation or possibility thereof are available depending on the judge's discretion.[295] Stays usually last until the statute of limitations has run, thereby eliminating the possibility of prosecution or the need to take the Fifth.[296] The statute of limitations for seaman's manslaughter is five years.[297] The advantage of this strategy is that the delay may influence a plaintiff to settle the claim during the period of the stay to take care of debts or other obligations due which could not have been previously settled because of the decedent's death. Moreover, although a five year stay is a relatively short period of time, adverse evidence may deteriorate or disappear in the meantime. Additionally, the time period within which the law requires that a corporation maintain certain negative paperwork may pass, thereby allowing for lawful destruction.

A petitioner for exoneration from or limitation of liability may not be able to take advantage of a stay. This is because the petitioner is usually precluded from seeking the civil court's aid and then blatantly frustrating its practices through invocation of

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294. United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983); De Vita v. Sills, 422 F.2d 1172, 1181 (3d Cir. 1970); Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp., 269 F. Supp. 540, 542 (E.D. Pa. 1967); David A. Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 TUL. L. REV. 1389, 1448–50 (1997).

295. *See* cases cited *supra* note 294. In determining whether to stay a civil proceeding in response to a pending or a potential criminal proceeding, courts look to five factors: (1) interests of plaintiff in proceeding expeditiously with civil action as balanced against prejudice to plaintiffs from delay; (2) burden on defendant; (3) convenience to courts; (4) interests of persons not a party to civil litigation; and (5) public interests. *In re* Mid-Atlantic Toyota Antitrust Litig., 92 F.R.D. 358, 359 (D. Md. 1981); Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980).

296. Heidt, *supra* note 273, at 1081–82; Bartlett, *supra* note 288, at 376.

297. 18 U.S.C. § 3282(a) (2000 & Supp. 2004). Section 3282(a) provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Id. Moreover, because culpability under other homicide statutes lacking any limitation period is possible, a stay may be indefinite.

the privilege.[298] Sometimes, however, the person invoking the court's jurisdiction may be able to obtain a stay.[299]

In short, the combination of the privilege against self-incrimination and the remote, but possible, chance of prosecution under the seaman's manslaughter statute meld together to afford the maritime wrongful death defendant a virtually impenetrable fortress of defenses.[300] The defendant may pick the plaintiff's poison—either go to trial with no evidence and a flimsy adverse inference, wait five years or longer to begin discovery, or accept a quick check.[301] As such, regardless of what slings and arrows a plaintiff may eventually be able to bring to bear on the defendant, the defendant is armed to the teeth to take it on.[302]

VI. CONCLUSION

Given the technological advances in maritime travel from 1838 to present that have resulted in the fact that engine room disasters on steamships no longer pose a grave concern, the purpose necessitating Congress's enactment of the seamans's manslaughter statute has largely disappeared. Further, in today's world, commercial vessels are highly regulated and subject to numerous laws and regulations from the national, state, and local governments. These regulations, along with the multitude of statutory and jurisprudential remedies afforded maritime plaintiffs, largely ensure that maritime defendants have ample incentive to use all means necessary to avoid causing wrongful deaths. As such, it seems that the statute's deterrent effect has been somewhat nullified. Accordingly, § 1115 may serve only to unduly punish those who unfortunately cause death despite their best efforts.

As displayed herein, however, the statute does provide the defendant with a means of vigorously defending and, perhaps,

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298. Lyons v. Johnson, 415 F.2d 540, 541–42 (9th Cir. 1969); Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141, 149 (W.D. Wis. 1968); *see also* Brown v. United States, 356 U.S. 148, 153–55 (1958) (precluding a litigant from invoking the Fifth Amendment privilege on cross-examination after he had testified fully on direct examination). *But see* Wehling v. CBS, 608 F.2d 1084, 1087 (5th Cir. 1980) (finding that the district court erred in dismissing the plaintiff's lawsuit after he asserted the Fifth Amendment privilege in pretrial discovery).

299. *Wehling*, 608 F.2d at 1087.

300. Heidt, *supra* note 273, at 1081–82.

301. *Id*.

302. *Id*.

avoiding civil liability. The combination of these competing interests may result in both the possibility of undeserved criminal liability and the undue delay or denial of civil relief to the families of those wrongfully killed on the navigable waters of the United States.

As mentioned above, the United States Fifth Circuit Court of Appeals will soon have an opportunity to address the level of culpability required by the statute. Despite the vast amount of case law supporting the proposition that the level of culpability is one of mere negligence, the Fifth Circuit is not bound by this case law and may decide the issue as it deems best. Regardless, the Fifth Circuit's decision will not alleviate the dual problem of undeserved criminal prosecution and the delay or denial of deserved civil remedies. Defendants must still be wary of criminal prosecution and may, therefore, still be required to assert the Fifth Amendment privilege, thereby, prohibiting the pursuit of civil remedies either temporarily or permanently.

In this regard, it is the humble suggestion of the authors that Congress repeal the archaic seaman's manslaughter statute. This action would not only serve to eliminate unnecessary prosecutions, but would also facilitate the speedy and proper administration of civil litigation to vindicate the rights of the innocent maritime defendant and to compensate the families of those wrongfully slain by the actions of negligent defendants. Moreover, truly culpable criminal defendants could be prosecuted under more appropriate sections of the United States Code or analogous state statutes. As such, the repeal of § 1115 would represent a favorable change in the law.