Navigating Still-Murky Waters: The Search for Punitive Damages in an Injured Seaman's Unseaworthiness Action

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A "seaman" is a unique type of maritime actor, one entitled to a trilogy of heightened legal protections unavailable to other maritime workers thanks to his routine exposure to the perils of the sea. One of these protections includes a recovery of damages for injuries the seaman receives as a result of a ship's unseaworthiness. Historically, seamen were also permitted to recover punitive damages for a shipowner's wanton, willful, or outrageous breach of the duty to maintain a seaworthy vessel. In 2014, however, the Fifth Circuit held that punitive damages are not recoverable in a seaman's unseaworthiness action. The Ninth Circuit disagreed, in a case decided just last year. In reaching their conclusions, both courts discussed the same two Supreme Court decisions, yet both differed wildly in their respective interpretations of the Court's reasoning in those two cases—hence, the inconsistent holdings. This Note, by challenging the classic arguments marshaled in favor of denying seamen the punitive-damages remedy, contends that the Ninth Circuit has the better reading of the Supreme Court's case law and that seamen should therefore be allowed to recover such damages in an unseaworthiness action.

∗To my family, Chelsea, Giulio, and Mrs. Donna White. Also, to Professors Lisa Eskow and Natalia Blinkova. And lastly, to the late Professor David Robertson, without whom this Note would not exist. You will be missed.

Introduction

Christopher Batterton was a crew member and deckhand working on a fleet of vessels owned and operated by The Dutra Group.[1] In August 2014, he was aboard one of those vessels—located in navigable waters near Newport Beach, California—when the hatch cover (used to close off and protect the cargo) blew open as a result of a dangerous amount of pressurized air being pumped into the compartment below the hatch.[2] Batterton sustained serious injuries, including a crushed left hand, and subsequently brought an

1. Batterton v. Dutra Grp., No. 14-CV-7667-PJW, 2014 WL 12538172, at *1 (C.D. Cal. Dec. 15, 2014), *aff'd*, 880 F.3d 1089 (9th Cir. 2018), *cert. granted*, No. 18-266, 2018 WL 4185911 (U.S. Dec. 7, 2018).

2. *Id.*

action against Dutra seeking compensatory and punitive damages for the unseaworthiness of the vessel under general maritime law.[3] In *Batterton v. Dutra Group*,[4] the Ninth Circuit held that Batterton was entitled to seek punitive damages.[5]

Saul Touchet was a crew member working on a barge supporting a truck-mounted drilling rig owned by Estis Well Service.[6] In March 2011, Touchet and other crew members were operating the rig in Bayou Sorrell, Louisiana, when the rig collapsed as a result of unrepaired holes in the bottom of the barge that caused it to list.[7] Although Touchet escaped the collapse, he suffered injury to his left arm and spine while trying to free another crew member who was pinned down by the rig.[8] Touchet additionally suffered psychological trauma—including depression, post-traumatic stress disorder, and anxiety—stemming from the rig collapse.[9] He brought suit against Estis, seeking compensatory and punitive damages for the unseaworthiness of the vessel under general maritime law.[10] In *McBride v. Estis Well Service, L.L.C.*,[11] the en banc Fifth Circuit determined that Touchet was *not* entitled to seek punitive damages.[12]

Why the difference of opinion between the Fifth and Ninth Circuits? The divergence, perhaps unsurprisingly, can be traced back to two murky Supreme Court decisions: *Miles v. Apex Marine Corp.*[13] and *Atlantic Sounding Co. v. Townsend*.[14] Whereas the Ninth Circuit read *Miles* somewhat narrowly and *Townsend* somewhat broadly, the Fifth Circuit read *Miles* very broadly and *Townsend* very narrowly. This Note will seek to explain how, and why, those two circuit courts reached the inconsistent results that they did, based in large part on their conflicting understandings of two landmark Supreme Court admiralty decisions. In so doing, this Note hopes to bring greater clarity to the larger disagreement over whether punitive damages

3. *Id.*

4. 880 F.3d 1089 (9th Cir. 2018).

5. *Id.* at 1096.

6. Brief on Behalf of Appellee/Cross Appellant, Saul C. Touchet at 1, McBride v. Estis Well Serv., L.L.C., 853 F.3d 777 (2017) (No. 16-30481), 2016 WL 7212245, at *1.

7. *Id.* at 1, 3–4.

8. Petition for a Writ of Certiorari at 4, Touchet v. Estis Well Serv., L.L.C., 138 S. Ct. 644 (2018) (No. 17-346), 2017 WL 3948483, at *4.

9. *Id.*

10. *Id.* at 9.

11. 768 F.3d 382 (5th Cir. 2014) (en banc). The case went up on certiorari to the Supreme Court, certiorari was denied, 135 S. Ct. 2310 (2015), and the case subsequently went back up *sub nom* as Touchet v. Estis Well Serv., L.L.C., 138 S. Ct. 644 (2018), where certiorari was again denied.

12. *McBride*, 768 F.3d at 391.

13. 498 U.S. 19 (1990).

14. 557 U.S. 404 (2009).

should be made available to injured[15] seamen suing on an unseaworthiness cause of action.[16]

Given that punitive damages typically act to punish the defendant and to deter others from engaging in similar conduct,[17] this issue is one of understandable concern to seamen, who view the availability of punitives in their maritime causes of action as a limitation on an employer/shipowner's display of otherwise egregious behavior. Employers and shipowners, on the other hand, would obviously prefer not to be on the hook for punitive damages, but at the very least, they would like a definitive answer to the question such that they can adequately assess their liability exposure and purchase the necessary insurance. Plus, a decision either way will have a significant impact on global prices, as "sizeable percentages of the world's goods" travel on ships or "are indirectly influenced by the prices of the goods that do travel on ships."[18] Far from being a niche concern, then—pertinent only to admiralty scholars and practitioners—the debate over punitives' availability is one of national importance.

Before delving into the cases, Part I will provide a brief overview of some general admiralty concepts, including the scope of admiralty law and the unique causes of action accessible to seamen like Batterton and Touchet. Additionally, Part I will explore the traditional availability of punitive

15. The distinction between personal injury and wrongful death is significant in the maritime realm, especially regarding the availability of punitive damages. This Note, though, is concerned only with the issue of whether punitive damages should be available in *personal-injury* actions. Addressing the separate issue of their availability in wrongful-death cases, while a worthwhile endeavor, would take us too far afield, even if a few of the cases relevant to this discussion are wrongful-death suits themselves. *See, e.g.*, *In re* Asbestos Prods. Liab. Litig., MDL No. 875, 2014 WL 3353044, at *11 (E.D. Pa. July 9, 2014) ("In sum, a general maritime claim of unseaworthiness can support a punitive damages award when brought directly by an injured seaman, but not when brought by a seaman's personal representative as part of a wrongful death or survival action.").

16. *Compare* Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1550 (11th Cir. 1987) ("Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship . . . ."), *cert. denied*, 486 U.S. 1033 (1988), *and* Tabingo v. Am. Triumph LLC, 391 P.3d 434, 441 (Wash. 2017) ("We hold that a seaman making a claim for general maritime unseaworthiness can recover punitive damages as a matter of law."), *cert. denied*, 138 S. Ct. 648 (2018), *with* Horsley v. Mobil Oil Corp., 15 F.3d 200, 203 (1st Cir. 1994) ("[A]n admiralty court may not extend the remedies available in a [nonfatal] unseaworthiness action under the general maritime law to include *punitive* damages . . . ."), *and* Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993) ("The rationale of *Miles* compels its extension to the present case, a Jones Act seaman's claim for punitive damages in an unseaworthiness action arising from *nonfatal* injuries."). In addition, the Sixth Circuit reasoned that punitive damages are not recoverable in unseaworthiness actions for the wrongful death—as opposed to personal injury—of a seaman. Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1459 (6th Cir. 1993), *cert. denied*, 510 U.S. 915 (1993).

17. Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984).

18. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 401 (5th Cir. 2014) (Clement, J., concurring); *see also* Brief of At-Sea Processors Association et al. as *Amici Curiae* in Support of Petitioner at 3, Dutra Grp. v. Batterton, No. 18-266 (U.S. Oct. 1, 2018) (reciting statistics emphasizing the importance of the maritime industry to the U.S. economy).

damages in maritime law dating back to the early nineteenth century. Part II will then analyze in detail the two Supreme Court cases at the heart of the present controversy—*Miles* and *Townsend*—before considering the Fifth and Ninth Circuits' competing interpretations of those decisions. Finally, Part III will demonstrate why the Ninth Circuit has the better of the argument and thus why punitive damages ought to lie in a seaman's personal-injury unseaworthiness claim.

Although the intention of this Note is not to expound a position one way or the other on whether punitive damages are a normative good such that they should be made available in a seaman's unseaworthiness action as a *policy* matter, the fact remains that resolution of this issue, by the Supreme Court, is needed to restore calm and certainty to an otherwise fraught seascape. This Note simply contends that, from a *doctrinal* perspective, the Court should decide in favor of the seamen.

I. Background

Over the course of several centuries, American admiralty law has evolved into a unique body of principles addressing the often-distinctive circumstances encountered by those engaged in the maritime life. For these principles to apply, a court must first determine that it has the requisite admiralty jurisdiction. If so, the court can then proceed as to assigning the various rights and liabilities of the parties involved based on the substantive maritime law. Such liabilities included, at least historically, the possibility of owing punitive damages.

A. The Sources of Maritime Law

Article III, Section 2 of the Constitution provides that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."[19] This Admiralty Clause authorizes the federal courts to develop a body of substantive federal common law, often referred to as "general maritime law" or "federal maritime law."[20] In addition to the courts' grant of admiralty authority, the Constitution also empowers Congress to revise and supplement the maritime law through the enactment of statutes.[21] Given that "the Laws

19. U.S. CONST. art. III, § 2. Congress later codified the federal courts' jurisdiction at 28 U.S.C. § 1333 (2012): "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

20. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359–61 (1959) ("[The Admiralty Clause] 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 continue the development of this law within constitutional limits." (citations and internal quotations omitted)).

21. Panama R.R. Co. v. Johnson, 264 U.S. 375, 385–86 (1924); *see* Butler v. Bos. & Savannah

of the United States . . . shall be the supreme Law of the Land,"[22] it is plain that a congressional statute that speaks directly to a question will displace conflicting general maritime law.[23] In the absence of controlling congressional legislation, however, the Supreme Court has concluded that a federal court sitting in admiralty has "jurisdiction to decide [the federal maritime law] in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."[24] Seamen, for their part, are permitted to pursue causes of action under both the general maritime law and the maritime statutory law as set out by Congress.

B. Seamen and Their Trilogy of Protections

Seamen like Batterton and Touchet are unique within the maritime realm. They are entitled to a trilogy of heightened legal protections unavailable to other maritime workers given "the special hazards and disadvantages to which" seamen are routinely subjected.[25] These protections include causes of action for maintenance and cure and unseaworthiness—both of which arise under the general maritime law—as well as a cause of action under the Jones Act for negligence against the seaman's employer.

1. Maintenance and Cure.—When a seaman becomes ill or is injured while in the service of the ship, his employer must provide him maintenance (room and board) and cure (medical care) until he reaches maximum cure—i.e., the point at which medical science can no longer improve his condition.[26] This duty is owed to the seaman regardless of any fault.[27] If the employer unreasonably refuses to pay, he becomes liable not only for the maintenance

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S.S. Co., 130 U.S. 527, 556 (1889) ("[W]hilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt.").

22. U.S. CONST. art. VI, cl. 2.

23. Miles v. Apex Marine Corp., 498 U.S. 19, 31 (1990) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

24. Exxon Shipping Co. v. Baker, 554 U.S. 471, 489–90 (2008).

25. Chandris, Inc. v. Latsis, 515 U.S. 347, 354, 370 (1995). In fact, until relatively recently, the life of an American seaman was characterized by extreme hardship. They confronted cruel treatment; long, arduous, and dangerous hours; and frequent chicanery and even criminality on the part of employers. There was little in the way of regulation regarding proper health and treatment. *See* DAVID W. ROBERTSON ET AL., ADMIRALTY AND MARITIME LAW IN THE UNITED STATES: CASES AND MATERIALS 145–48 (3d ed. 2015) (collecting cases). As a result, courts in the United States tried to some extent to provide rudimentary protections, and it is this combination of protections that today make "seamen the most generously-treated personal injury victims in American law." *Id.* at 188. Because of those protections, seaman status—that is, trying to meet the requirements for obtaining seaman classification—is highly litigious. *Id.*

26. Vaughan v. Atkinson, 369 U.S. 527, 531 (1962).

27. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527–28 (1938).

and cure owed to the seaman but also for any compensatory damages (e.g., enhancement of the injury, costs of finding alternative medical care, pain and suffering) proximately resulting from the employer's failure to pay.[28] If the employer's breach of the maintenance-and-cure obligation is more significantly blameworthy—if it connoted an intentional disregard of a seaman's rights—the award can include punitive damages.[29]

2. Unseaworthiness.—The second of the seaman's trilogy—and the claim at issue in *Batterton* and *McBride*—involves a vessel owner's[30] liability to seamen for injuries suffered as a result of the owner's failure "to furnish a vessel and appurtenances reasonably fit for their intended use."[31] As the Court clarified, "The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel is reasonably fit to carry the cargo.'"[32] A ship can be unseaworthy, and thus not reasonably fit for its intended use, as a result of deficiencies in equipment, gear, personnel, or operational methods.[33] A shipowner owes to a seaman an absolute non-delegable duty to furnish a seaworthy vessel, one completely independent of the duty under the Jones Act to exercise reasonable care—in other words, shipowners are held strictly liable for unseaworthiness.[34]

3. The Jones Act.—Lastly, seamen have a negligence cause of action against their employers via the Jones Act.[35] Although the modern history of the seaman's trilogy of protections began with *The Osceola*[36] in 1903, which announced that seamen were entitled to both maintenance and cure and unseaworthiness, the Court specifically declined to provide a negligence action to seamen against their employers.[37] It was not until 1920, when Congress enacted the Jones Act (and partially overruled *The Osceola* in the

28. Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987).

29. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009).

30. The maintenance-and-cure and Jones Act actions run against the seaman's employer, who may or may not be the owner of the vessel on which the seaman worked. The unseaworthiness action, by contrast, runs against the shipowner, who may or may not be the direct employer of the sick or injured seaman. *See, e.g.*, Mahramas v. Am. Exp. Isbrandtsen Lines, Inc., 475 F.2d 165, 167 (2d Cir. 1973) (explaining how the injured seaman was aboard the defendant-owner's vessel as an employee of a beauty salon operating on the ship).

31. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

32. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 339 (1955) (citing The Silvia, 171 U.S. 462, 464 (1898)).

33. ROBERTSON ET AL., *supra* note 25, at 185; *see, e.g.*, Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 724, 729 (1967) (too few crewmen assigned to perform a task); *Boudoin*, 348 U.S. at 339–40 (vicious crew member).

34. *Mitchell*, 362 U.S. at 549–50.

35. 46 U.S.C. § 30104 (2012).

36. 189 U.S. 158 (1903).

37. *Id.* at 175.

process), that seamen were accorded a negligence claim. But while the Jones Act created a new statutory cause of action for negligence, "it did not eliminate pre-existing remedies available to seamen for . . . separate common-law cause[s] of action . . . ."[38] The Act provides in full:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.[39]

The second sentence of the Act, referring to "railway employee," incorporates by reference the Federal Employers' Liability Act (FELA),[40] which Congress passed in 1908 to provide railway workers with a negligence cause of action against their employers. Because of that, cases interpreting FELA also apply to the Jones Act. Whether punitive damages are available to a seaman suing under the Jones Act remains an open question.[41] But, at least traditionally, punitive damages have been available under the general maritime law.

C. Punitive Damages in Maritime Law

Punitive (also known as "exemplary" or "vindictive") damages have long been an extant common law remedy "for wanton, willful, or outrageous conduct."[42] Courts in the United States have permitted awards of punitive damages from at least as early as 1784.[43] In 1851, the Supreme Court, in *Day*

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38. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 415–16 (2009).

39. 46 U.S.C. § 30104. The phrase "with the right of trial by jury" is an important addition because in admiralty there is no right to a jury trial except as provided by statute. FED. R. CIV. P. 9(h) advisory committee's note to 1966 amendment.

40. 45 U.S.C. §§ 51–60 (2012).

41. *Townsend*, 557 U.S. at 424 n.12 ("Because we hold that *Miles* does not render the Jones Act's damages provision determinative of respondent's remedies, we do not address the dissent's argument that the Jones Act, by incorporating the provisions of the Federal Employers' Liability Act . . . prohibits the recovery of punitive damages in actions under that statute." (citations omitted)). Although certainly important, the issue falls outside the scope of this Note, which concerns only whether punitive damages should be available in a seaman's *unseaworthiness* action. For a more thorough discussion of the subject, however, compare Robert Dahlquist, *Punitive Damages under the Jones Act*, 6 MAR. LAW. 1, 36 (1981) (arguing that punitive damages are not available under the Jones Act), with Brief of Mick McHenry et al. as *Amici Curiae* in Support of Plaintiff-Appellee Christopher Batterton, and Urging Affirmance at 16, Batterton v. Dutra Grp., 880 F.3d 1089 (9th Cir. 2018) (No. 15-56775), 2016 WL 3521924 (arguing that punitive damages are properly available in actions under the Jones Act).

42. *Townsend*, 557 U.S. at 409; *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25 (1991) (Scalia, J., concurring in the judgment) ("[P]unitive or 'exemplary' damages have long been a part of Anglo-American law.").

43. *Townsend*, 557 U.S. at 410 (citing Genay v. Norris, 1 S.C.L. (1 Bay) 6, 7 (1784)).

v. Woodworth,[44] affirmed the authorization of punitive damages as a recognized doctrine of the common law:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.[45]

Then in 1893, in *Lake Shore & Michigan Southern Railway Co. v. Prentice*,[46] the Court, citing *Day*, confirmed that the general common law rule permitting punitive damages extended to cases falling within the general maritime law: "[C]ourts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages . . . ."[47] In *The Amiable Nancy*,[48] an action against the owners of a privateer whose crew plundered the plaintiff's neutral vessel, Justice Story stated that while the facts of this particular case did not establish sufficient blameworthiness to justify punitive damages against the privateer's owners—the only defendants—punitive damages would probably have lain against the privateer's crew in order to "visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct."[49]

Day, *Lake Shore*, and *The Amiable Nancy* are not scattered cases; they evidence that punitive damages were generally accepted as appropriate in the maritime-law realm. As the Court in *Townsend* noted, "[M]aritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen."[50]

Take, as an illustrative example, *Gould v. Christianson*,[51] arguably the first reported decision where a seaman was awarded punitive damages. In *Gould*, the eighteen-year-old son of an affluent New Yorker, described by the court as having a "delicate constitution" and "slender strength"—a "gentleman's son"—decided he wanted a bit of adventure and so used his father's influence to procure a post as a sailor on board the *Commerce*.[52] Perhaps unsurprisingly, the ship's master treated the boy rather harshly

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44. 54 U.S. (13 How.) 363 (1851).

45. *Id.* at 371.

46. 147 U.S. 101 (1893).

47. *Id.* at 108.

48. 16 U.S. (3 Wheat.) 546 (1818).

49. *Id.* at 558.

50. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 412 (2009) (internal quotations omitted) (quoting David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 115 (1997)).

51. 10 F. Cas. 857 (S.D.N.Y. 1836) (No. 5,636).

52. *Id.* at 859, 862–63.

(given the latter's unsuitability to performing the seaman's duties), so the boy, upon leaving the ship and returning home, sued to recover damages—including punitives—for the perceived harsh treatment he suffered at the hands of the master.[53] Although the boy was not treated nearly as badly as was the typical expectation for those plying the seafaring life,[54] the court still found that the master had crossed the line.[55] Because of that, the court thought it appropriate to "augment the damages beyond a mere remuneration for the bodily injury" so as to deter such "coarse and rude" behavior toward apprentices.[56] The court said the enhanced award was appropriate as a signal of the United States' "deep interest in encouraging young men of capacity, ambition and good character, to seek employment in the merchant marine."[57] It then awarded the plaintiff $100 in damages and costs.[58]

The court's decision in *Ralston v. The State Rights*[59] is also instructive. In that case, a Delaware River steamboat—engaged in a fierce competition for passengers with the vessel of another company—intentionally rammed its rival to take it out of operation, causing minor property damage and no personal injuries.[60] The court determined that exemplary damages should be awarded against the employers of the offending vessel:

> [I]t is not legally correct, to say that a court cannot give exemplary damages, in a case like the present, against the owners of a vessel. . . . There is no subject upon which more repeated and solemn complaints have been made [by] the public . . . than the accidents . . . from the collision of steamboats. Many of them have been occasioned by the contest between rival boats, maintained with a reckless disregard of human life. Our river has been particularly exempt from these

53. *Id.* at 857–58.

54. *Id.* at 863 ("I think it clear, upon the proofs, that the punishments complained of were exceedingly slight in kind, inflicted no injury upon the person of the libellant, and were only calculated to wound his pride and sensibilities."); *see also* ROBERTSON ET AL., *supra* note 25, at 145–46 (recounting the brutal punishments often inflicted upon seamen—e.g., floggings, beatings, and in the case of contagion, abandonment on a remote island—and concluding that the "reported decisions indicate that nineteenth-century seamen led miserable lives").

55. *Id.* at 862–63 ("[O]n two or three occasions the respondent assaulted the libellant and committed violence upon his person, in a manner not justified by the proofs . . . . This was unwarranted in law. A master has no authority to fall upon a mariner with blows for every inadvertency or act of misbehavior, unless the urgency to subdue him instantly or to resist some outrage threatened by him, be palpable.").

56. *Id.* at 864.

57. *Id.*

58. *Id.* Although $100 may not seem like a lot—and may even cast doubt on the idea that the plaintiff was actually awarded punitive damages at all—it was a good deal more than what the court likely would have awarded in the typical battery case. The fact that the court said it was going beyond actual compensatory damages lends support to the claim that this case was indeed one involving an award of punitive damages.

59. 20 F. Cas. 201 (E.D. Pa. 1836) (No. 11,540).

60. *Id.* at 202.

> disasters, and it should be the determination, as it is the duty, not only of the courts when appealed to, but of every good citizen, to keep it so.[61]

The court ultimately awarded $250 in damages, clarifying that the total included lost profits, as well as repair costs.[62] Although to a modern reader that award may seem like nothing more than standard compensatory damages, it was well-established at the time of this case that lost profits were not a customary item of compensatory damages in property-damage cases.[63] Thus, the inclusion of the lost-profits item of damages, in addition to the court's express reference to exemplary damages and its stated goal of enhancing the river's safety, all undergird the conclusion that exemplary damages were in fact awarded in *Ralston*.

Over the next century and a half, it went largely unquestioned that punitive damages were available for claims arising under the general maritime law. The Sixth Circuit recognized their availability in 1969,[64] as did the Second Circuit three years later.[65] The Fifth Circuit then confirmed the prevailing view in 1981: "[P]unitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions."[66] The Ninth[67] and Eleventh Circuits[68] followed suit soon thereafter.

Clearly, seamen had the right to seek punitive damages well into the late twentieth century. That makes sense, since seamen—long considered the "wards of the admiralty,"[69] given their routine exposure to the perils of the sea and the need for heightened legal protections—would certainly benefit

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61. *Id.* at 210.

62. *Id.*

63. *See, e.g.*, The Lively, 15 F. Cas. 631, 634 (C.C.D. Mass. 1812) (No. 8,403) ("I am not aware of a single authority in the higher courts of admiralty, in which supposed profits have formed an item of damage in cases of restitution."); The Smyrna, Leipsic & Phila. Steamboat Co. v. Whilldin, 4 Del. (4 Harr.) 228, 233 (Del. Super. Ct. 1845) ("[B]ut the plaintiffs will not be entitled to recover for any supposed profits they might have made from passengers . . . .").

64. *See* U.S. Steel Corp. v. Fuhrman, 407 F.2d 1143, 1148 (6th Cir. 1969) (recognizing that punitive damages were recoverable against a shipowner for the actions of a master if "the owner authorized or ratified the acts of the master" or "was reckless in employing him").

65. *See In re* Marine Sulphur Queen, 460 F.2d 89, 105 (2d Cir. 1972) (explaining, in the unseaworthiness context, that "the award of punitive damages is discretionary with the trial court," and a "condition precedent to awarding them is a showing by the plaintiffs that the defendant was guilty of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct" (citations omitted)).

66. Complaint of Merry Shipping, Inc., 650 F.2d 622, 623 (5th Cir. Unit B July 1981).

67. *See* Evich v. Morris, 819 F.2d 256, 258 (9th Cir. 1987) ("Punitive damages are available under general maritime law for claims of unseaworthiness.").

68. *See* Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1550 (11th Cir. 1987) ("Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship . . . .").

69. Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047).

from making punitive damages available in order to deter willful and wanton conduct on the part of shipowners and employers. But some courts began denying them that remedy.[70] Why? The answer, it turns out, was the Supreme Court's 1990 decision in *Miles v. Apex Marine Corp.*, which, although it had nothing do with punitive damages, was latched onto by lower courts that found within "[t]he logic and analytical framework of *Miles*" a justification for refusing to grant seamen the punitive-damages remedy.[71] In other words, *Miles* served as the impetus for upending what had heretofore been considered a relatively benign and well-established principle—i.e., the recognition of punitive damages in admiralty.

II. The Changing Tides: *Miles*, *Townsend*, and the Uncertainty Left in Their Wake

After *Miles* was decided, and lower courts began using it as a basis to deny punitives to seamen, scholars feared that the punitive-damages remedy was "rapidly disappearing from maritime personal injury law" and unlikely to survive.[72] In 2009, however, the Supreme Court seemingly halted punitives' demise when it handed down its opinion in *Atlantic Sounding Co. v. Townsend*, which confirmed that seamen have the right to seek punitive damages in maintenance-and-cure actions. But as *Batterton* and *McBride* highlight, lower courts still disagree as to the meaning of those two Supreme Court cases, ensuring that only resolution by the Court will end the debate as to whether punitive damages are available in a seaman's unseaworthiness cause of action. Before exploring the respective opinions of the Fifth and Ninth Circuits, however, it will be helpful to first analyze the two cases at the center of the controversy.

A. Miles v. Apex Marine Corp.

Ludwick Torregano, a seaman serving on the vessel *M/V Archon*, was brutally killed after being stabbed sixty-two times by a fellow crew member.[73] Torregano's mother, Mercedel Miles, sued the *Archon*'s owner and operators, asserting causes of action for unseaworthiness under the

70. *E.g.*, Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1510 (5th Cir. 1995) (en banc), *abrogated by* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009); Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495, 1505 (9th Cir. 1995), *abrogated by* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009); Horsley v. Mobil Oil Corp., 15 F.3d 200, 203 (1st Cir. 1994); Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1455–57 (6th Cir. 1993); *In re* Mardoc Asbestos Case Clusters 1, 2, 5, and 6, 768 F. Supp. 595, 599–600 (E.D. Mich. 1991).

71. *Guevara*, 59 F.3d at 1510.

72. David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 463 (2010).

73. Miles v. Apex Marine Corp., 498 U.S. 19, 21 (1990).

general maritime law and for negligence under the Jones Act.[74] She sought compensatory damages for, among other things, loss of society resulting from the death of her son, as well as compensation to Torregano's estate for his pain and suffering prior to his death and for his lost future income.[75] In addition to the compensatory damages, Miles also sought punitive damages, but the trial court struck this claim—which the Fifth Circuit affirmed—finding that the facts did not support holding the employers vicariously liable for such damages.[76] At this point, the punitive-damages issue disappeared from the case. The Supreme Court did not concern itself with the matter, mentioning the term "punitive damages" only in its recounting of the case's procedural history, which it did without any indication of doubt that such damages were available in unseaworthiness actions.[77] While the Court affirmed a $140,000 award for Torregano's pain and suffering and Miles's other damages claims, it concluded that loss-of-society damages are not recoverable under either a Jones Act negligence action or under a general maritime law unseaworthiness claim.[78]

In the absence of some controlling statute, the general maritime law as developed by the federal courts governs the particular admiralty question at issue.[79] But the Court has likewise concluded that when an "area [is] covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries."[80] The *Miles* Court thus had to determine whether the Jones Act "covered" the issue of recoverability of loss-of-society damages in a seaman's wrongful-death action. To do so, the Court examined the purpose and history of the Jones Act.

When Congress passed the Jones Act in 1920 to provide seamen with a

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74. *Id.* Recall that an unfit crew member can make a ship unseaworthy, see *supra* note 33 and accompanying text, and here, the Fifth Circuit concluded that the killer's "extraordinarily violent disposition demonstrated that he was unfit . . . ." *Id.* at 22. As for the Jones Act negligence claim, the Fifth Circuit determined that the employees should have known that the killer was a dangerous man. Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd*, 498 U.S. 19 (1990).

75. *Miles*, 498 U.S. at 21–22. There are two types of fatal-injury litigation: wrongful-death actions, which compensate the decedent's family for the losses they suffered as a result of the decedent's death, and survival actions, which assert the right of the decedent's estate to "prosecute the personal injury action that the decedent would have had but for his death." ROBERTSON ET AL., *supra* note 25, at 232.

76. *Melrose*, 882 F.2d at 989. The Fifth Circuit did explicitly recognize, however, that punitive damages were available in unseaworthiness cases; it was just that they were not awardable in this particular case because the behavior at issue was at most negligent, not the type of outrageous conduct that would justify an imposition of punitive damages. *Id.*

77. *Miles*, 498 U.S. at 22.

78. *Id.* at 22–23. The Court also addressed the issue of whether the deceased seaman's estate could recover for lost future earnings as part of his survival damages—to which it answered no—but this issue is not significant for our purposes. *Id.* at 33–36.

79. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917); *see supra* subpart I(A).

80. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

negligence cause of action, it did not spell out the action specifically but rather incorporated FELA by reference. The *Miles* Court therefore examined FELA to determine whether that Act permits loss-of-society damages in a wrongful-death action.[81] The provision laying out FELA's wrongful-death remedy, though, does not specify or restrict the types of damages available in those actions, providing only that employers "shall be liable in damages."[82] However, in 1913, the Supreme Court, in *Michigan Central Railroad Co. v. Vreeland*,[83] determined that only "pecuniary" losses could be recovered in FELA wrongful-death actions and that loss of society was not a pecuniary loss.[84] Relying on this limitation, the *Miles* Court determined that "[w]hen Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well."[85] The Court thus concluded that because FELA precluded loss-of-society damages in a wrongful-death action, the Jones Act—which incorporated FELA by reference—must also preclude recovery for loss of society in a wrongful-death claim.[86]

Miles's claim, however, encompassed not just the Jones Act but also a general maritime claim for unseaworthiness. The Court decided, though, that the Jones Act's limitation on pecuniary damages extended to the general maritime law, explaining that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence."[87] Because the Jones Act—i.e., statutory maritime law—denied recovery of loss-of-society damages in a seaman's wrongful-death action, those damages were also unavailable in a seaman's unseaworthiness claim arising under the general maritime law.

The actual holding of *Miles* is narrow: the families of *deceased* seamen cannot recover *loss-of-society* damages for unseaworthiness or Jones Act

81. *Miles*, 498 U.S. at 32.

82. 45 U.S.C. § 51 (2012).

83. 227 U.S. 59 (1913).

84. *Id.* at 69–71. "[FELA has] been continuously interpreted as providing only for compensation for pecuniary loss or damage. A pecuniary loss or damage must be one which can be measured by some standard. . . . [But for] loss of the society and companionship of the deceased relative . . . it is not possible to set a pecuniary valuation." *Id.* at 71. The *Vreeland* Court surmised that, although the FELA provision is silent as to the available damages, contemporaneous wrongful-death statutes were typically confined to "pecuniary" loss; that loss-of-society damages are properly classified as nonpecuniary because they "cannot be measured"; and that Congress, in enacting FELA in 1908, must have meant to follow the prevailing view. *Id.* at 69–71.

85. *Miles*, 498 U.S. at 32.

86. *Id.*

87. *Id.* at 32–33.

negligence. The Court does not concern itself with the issue of punitive damages. But courts soon began extending the limited holding of *Miles*—based upon *Miles*'s inherent "logic and analytical framework"—to encompass not just loss-of-society damages in wrongful-death cases but also punitive damages in any litigation involving the injury, illness, or death of a seamen. *In re Mardoc*,[88] decided just a year after the Court's decision in *Miles*, illustrates the approach taken by these courts. First, the *Mardoc* court seizes upon *Miles*'s classification of loss-of-society damages as "nonpecuniary" and expands that into the broad proposition that it now "must restrict *any* damages plaintiff might recover to those which would compensate 'pecuniary loss,' as this is the limit on recovery under the Jones Act . . . ."[89] Then, because the Jones Act prohibits all nonpecuniary recovery, that must mean that "non-pecuniary loss, such as loss of society, is therefore unavailable under general maritime law" as well.[90] Finally, that also means that because punitive damages, which "serve to punish wrongdoers and to deter those who might follow their example, and not to compensate plaintiff's losses, . . . are non-pecuniary," they, too, cannot lie in a seaman's unseaworthiness claim.[91] Although this trend might have signaled the end of punitive damages for seamen, the Court's decision in *Townsend* nearly twenty years later offered a glimmer of hope.

B. Atlantic Sounding Co. v. Townsend

Edgar Townsend, a crew member of the Motor Tug Thomas, injured his arm and shoulder after falling on the steel deck of the tugboat.[92] When Atlantic Sounding, the owner of the tugboat, informed Townsend that it would not provide him with maintenance and cure and proceeded to file a declaratory action seeking endorsement of that decision, Townsend responded by filing his own suit, alleging wrongful termination, negligence, and unseaworthiness, and seeking punitive damages for the willful failure to pay maintenance and cure.[93] The Supreme Court determined that Townsend was allowed to recover punitive damages for Atlantic Sounding's willful and wanton disregard of the maintenance-and-cure obligation.[94]

The Court in *Townsend* reached its conclusion using a tripartite

88. *In re* Mardoc Asbestos Case Clusters 1, 2, 5, and 6, 768 F. Supp. 595 (E.D. Mich. 1991); *see also* Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1513 (5th Cir. 1995) (en banc) (applying similar reasoning to deny seamen punitive damages in the maintenance-and-cure context), *abrogated by* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

89. *In re Mardoc*, 768 F. Supp. at 599 (emphasis added).

90. *Id.* (internal quotations omitted).

91. *Id.* at 599–600.

92. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 407 (2009).

93. *Id.* at 408.

94. *Id.* at 424.

approach. First, the Court recognized that "the legal obligation to provide maintenance and cure dates back centuries as an aspect of general maritime law."[95] Second, punitive damages have also "long been an available remedy at common law for wanton, willful, or outrageous conduct," a remedy that was extended to claims arising under federal maritime law.[96] Finally, "[n]othing in maritime law undermines the applicability of this general rule in the maintenance and cure context."[97] Thus, the Court concluded that punitive damages should be available "unless Congress has enacted legislation departing from this common-law understanding," and the only statute capable of doing that in this case would be the Jones Act.[98] Nothing in the Jones Act, however, suggested any divergence from the accepted common law doctrine. The Act simply "created a statutory cause of action for negligence, but it did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on a seaman's right to maintenance and cure."[99] Accordingly, the Jones Act did not bar recovery of punitive damages in a seaman's maintenance-and-cure cause of action.[100]

The Court further explained that *Miles* was not controlling because that case did "not address either maintenance and cure actions in general or the availability of punitive damages for such actions."[101] Although the Court in *Miles* grounded its decision on the maritime principle of uniformity—that if a class of damages is unavailable under a maritime cause of action established by statute, it is similarly unavailable for a parallel claim brought under general maritime law—the Court in *Townsend* found it inapplicable because the Jones Act does not address a seaman's right to maintenance and cure.[102] In fact, because "no statute casts doubt on their availability under general maritime law," punitive damages are permitted in a seaman's maintenance-and-cure action.[103] So while the "reasoning of *Miles* remains sound,"[104] the Court clarified that "[t]he laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action."[105]

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95. *Id.* at 413; *see* Reed v. Canfield, 20 F. Cas. 426, 429 (C.C.D. Mass. 1832) (No. 11,641) ("The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship's service.").

96. *Townsend*, 557 U.S. at 409, 410–11 (citing Day v. Woodworth, 54 U.S. 363, 371 (1851) and Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 108 (1893)); *see supra* subpart I(C).

97. *Townsend*, 557 U.S. at 412.

98. *Id.* at 415.

99. *Id.* at 415–16.

100. *Id.*

101. *Id.* at 419.

102. *Id.*

103. *Id.* at 421.

104. *Id.* at 420.

105. *Id.* at 424.

Although *Miles* does not address punitive damages, and *Townsend* does not address unseaworthiness, both cases serve as justification for the Fifth and Ninth Circuits' respective positions on whether punitives are available in a seaman's unseaworthiness action.

C. McBride *and* Batterton

The Fifth Circuit was the first federal court of appeals to consider whether punitive damages are available in a seaman's general maritime claim of unseaworthiness after the Supreme Court rendered its decision in *Townsend*. The court answered no. Less than four years later, the Ninth Circuit answered yes. Both discuss *Miles* and *Townsend*, yet both differ considerably in their respective interpretations of the Supreme Court's decisions in those cases.

1. The Fifth Circuit Denies Seamen the Punitives Remedy.—Miles did not involve punitive damages, but the Fifth Circuit determined that the Supreme Court's reasoning in that case was dispositive, especially since *Miles* was "completely indistinguishable from" and "on all fours with" *McBride*.[106] The court characterized its opinion as simply following the "uniformity rule"[107] that *Miles* established, a rule that is "applicable to all actions for the wrongful death of a seaman, whether under . . . the Jones Act[] or the general maritime law."[108] Congress having "struck the balance" as to the recovery permissible under the Jones Act,[109] *Miles* had no choice but to follow Congress, and *McBride* had no choice but to follow *Miles*. This, in turn, led the *McBride* court to hold that seamen may not seek punitive damages in Jones Act cases or unseaworthiness cases.[110] A linchpin in the *McBride* court's reasoning was also its vehement assertion that punitive damages are nonpecuniary: because punitive damages are not "designed to compensate the plaintiff for an actual loss suffered," such damages are nonpecuniary and therefore "are barred for an unseaworthiness claim under general maritime law."[111] Finally, although *Miles* involved a wrongful-death

106. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 386, 388 (5th Cir. 2014).

107. That rule is regularly read to mean that the general maritime law cannot award rights and remedies that go beyond those made available by Congress, especially when the applicable congressional provision involves a negligence action and the general-maritime-law contender is a presumably more plaintiff-friendly strict liability action.

108. Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990).

109. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978).

110. *McBride*, 768 F.3d at 388, 390. The *McBride* plaintiffs were not seeking Jones Act punitives, and the availability of punitive damages in Jones Act cases was technically an open question in the Fifth Circuit. In fact, the *Townsend* Court said that the availability of punitives in Jones Act cases presents an open question in the Supreme Court. *See* 557 U.S. at 424 n.12 (declining to address the question of whether the Jones Act "prohibits the recovery of punitive damages").

111. *McBride*, 768 F.3d at 390 (internal citations omitted).

claim—whereas Touchet's was a nonfatal injury—the *McBride* court insisted there is no reason "why its holding and reasoning would not apply to an injury case."[112] The Fifth Circuit noted that no cases under the Jones Act had awarded punitive damages, and under the uniformity principle set out by *Miles*, "the same result flows when a general maritime law personal injury claim is joined with a Jones Act claim."[113] Thus, *Miles*'s conclusion that "Congress has struck the balance for us in determining the scope of damages[] applies to the personal injury actions as well as [the] wrongful death action."[114]

Once the *McBride* court was done with its construction of *Miles*, the court found it possible and appropriate to treat *Townsend* as little more than an interesting footnote. That was a surprising technique for the Fifth Circuit to deploy. As the *McBride* case was working its way toward resolution by the en banc Fifth Circuit, most analysts probably would have said that *Townsend* and *McBride* (both of which addressed the availability of punitive damages for personally injured seamen) were more closely related than *Miles* (which involved loss-of-society damages for the families of deceased seamen) and *McBride*. Moreover, *Townsend* was the more recent Supreme Court precedent by a span of almost two decades. Nevertheless, viewed through *McBride* lenses, the issue of the availability of punitives in maintenance-and-cure cases bears little relationship to the issue of punitives in unseaworthiness cases such that *Townsend* does not control.[115] After all, *Townsend* itself recognized that "a seaman's action for maintenance and cure is 'independent' and 'cumulative' from other claims such as negligence and that the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act].'"[116] In contrast, the negligence and unseaworthiness actions are alternative, overlapping actions that stem from the same incident and look toward the same recovery.[117] Thus, where *Townsend* could "adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act," the Fifth Circuit could not, as Congress had spoken directly to the issue of unseaworthiness but not to the issue of maintenance and cure.[118]

112. *Id.* at 388.
113. *Id.* at 388–89.
114. *Id.* at 389 (internal quotations omitted).
115. *Id.*
116. *Id.* (quoting Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 (2009)).
117. *Id.* at 389 n.36 (citing Balt. S.S. Co. v. Phillips, 274 U.S. 316, 319 (1927)).
118. *Id.* at 389–90 (internal quotations omitted) (quoting *Townsend*, 557 U.S. at 420).

2. The Ninth Circuit Grants Seamen the Punitives Remedy.—In contrast to the Fifth Circuit, the Ninth Circuit in *Batterton* read *Miles* more narrowly: it was simply a wrongful-death case that dealt with loss-of-society damages. The case did not address punitive damages, and its reasoning suggests no broad expansion of the holding to cover that separate arena.[119] To read *Miles* as broadly as the *Batterton* defendant urged would not only denigrate *Townsend* but infringe on the language of *Miles* itself: "[The Jones Act] 'does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness.'"[120] Although the Ninth Circuit acknowledges that the Supreme Court's decision, *taken alone*, could be read to suggest that the damages available in a general maritime unseaworthiness claim by an injured seaman should be limited to those damages available under the Jones Act for wrongful death, the *Batterton* court thinks "that is a stretch."[121]

The Ninth Circuit also read *Townsend* much more broadly than did the Fifth Circuit. It recognized that the narrow holding of *Townsend* was that *Miles* has no negative bearing on the availability of punitive damages in maintenance-and-cure actions.[122] But maintenance and cure and unseaworthiness are both seamen-protective general maritime causes of action, and the *Townsend* Court's reasoning in addressing the maintenance-and-cure punitives point had powerful and unmistakable implications for unseaworthiness punitives.[123] And although there are many distinctions between unseaworthiness and maintenance-and-cure claims, as the Fifth Circuit noted, the *Batterton* court urged that nothing in *Townsend*'s reasoning suggests that such distinctions should entail a limitation on the availability of punitive damages in unseaworthiness actions.[124] Ultimately, then, the Ninth Circuit read *Townsend* as announcing the general rule that punitive damages are available for actions, like unseaworthiness, that arise under the general maritime law.

III. The Ninth Circuit Sails in Clearer Waters

As between the Fifth and Ninth Circuits, the latter has the better of the argument. The Fifth Circuit impermissibly expands the holding of *Miles* beyond the Court's language while making the opposite mistake with respect to *Townsend* by severely narrowing that holding to the point of vanishing. The Ninth Circuit, on the other hand, takes the Court's holding in *Miles* at

119. Batterton v. Dutra Grp., 880 F.3d 1089, 1095–96 (9th Cir. 2018), *cert. granted*, No. 18-266, 2018 WL 4185911 (U.S. Dec. 7, 2018).

120. *Id.* at 1094 (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 29 (1990)).

121. *Id.* at 1095.

122. *Id.* at 1091–92.

123. *Id.* at 1092.

124. *Id.* at 1096.

face value, ascribing no more to it than what is plainly stated, while also recognizing that *Townsend*'s reasoning applies just as equally to the unseaworthiness context.

A. Adrift at Sea: McBride*'s Flawed Reading of* Miles

Relying on faulty reasoning expounded by courts soon after *Miles* was decided, the majority opinion in *McBride* adds to the muddle by inexplicably declaring that *Townsend* "did not involve a claim for punitive damages under either the Jones Act or the general maritime law."[125] That statement is simply wrong. As *Townsend* itself made clear: "[T]he legal obligation to provide maintenance and cure dates back centuries as an aspect of *general maritime law*."[126] That was not the Fifth Circuit's only misstep, however.

1. Punitive Damages Are Not Nonpecuniary.—A key link in the logical chain used by *McBride* to justify denial of punitive damages in an unseaworthiness claim is the assertion that such damages are nonpecuniary. By so proclaiming, the court could simply conclude that punitive damages fall outside of the Jones Act's pecuniary limitation—and thus outside of the unseaworthiness cause of action by virtue of *Miles*'s uniformity principle—as determined by *Miles*'s reading of *Vreeland*. But, it is a weak link. After all, the pecuniary/nonpecuniary distinction was meant as a tool for classifying various types of *compensatory* damages. Categorizing loss of society and pain and suffering—two types of compensatory damages—as nonpecuniary simply means that assessment of those damages may entail special difficulties.[127] Punitive damages simply don't fall within that ambit. As the Ninth Circuit in *Batterton* recognized, "pecuniary" simply means "pecuniary *loss*," so while punitive damages are pecuniary in the sense that they are, like all damages, for money, they are not awarded for a *loss*.[128] The court continued:

> That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners . . . deserve punishment for callously disregarding the

125. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 384 (5th Cir. 2014).

126. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 413 (2009) (emphasis added); *see also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 303 (4th ed. 2004) ("[M]aintenance and cure is a right created under the general maritime law, first mentioned by Justice Story in 1823.").

127. Robert Force, *The Curse of* Miles v. Apex Marine Corp.*: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 792 (1995) ("The classification of damages into categories of pecuniary and non-pecuniary . . . should be restricted to compensatory damages . . . . Punitive damages are not compensatory."); Robertson, *supra* note 72, at 474.

128. *Batterton*, 880 F.3d at 1094 (emphasis added).

> safety of seamen. . . . [I]t cannot reasonably be argued that they are both compensation for "loss."[129]

The argument that punitives are neither pecuniary nor nonpecuniary, and are instead their own category, stems in part from the history of the law of damages and in part from the view that the pecuniary/nonpecuniary distinction merely beclouds issues of punitives' availability to seamen without shedding any light whatsoever.[130] Any other organizational scheme tends to beg the central question: instead of dispassionately classifying punitives, both sides of the debate simply label them depending on whichever classification serves their argument—hence, the question-begging. That is why it would be best to simply take the whole pecuniary/nonpecuniary argument out of play altogether.

But even if we had to classify punitives as either one or the other, there is no reason why they should not be pecuniary. "Pecuniary" means "of or relating to money."[131] "Pecuniary damages" are "[d]amages that can be estimated and monetarily compensated,"[132] while "nonpecuniary damages" are "[d]amages that cannot be measured in money."[133] All of these definitions would seem to support the assumption that punitive damages can reasonably be classified as pecuniary: they are conferred as money, can be estimated, and, according to the Court in *Exxon Shipping Co. v. Baker*,[134] are awarded as "measured retribution."[135]

The fact remains that *Miles* said nothing about punitive damages, let alone that they were nonpecuniary. The Court used the term "nonpecuniary" only twice, each time in reference to loss-of-society damages.[136] Even assuming, however, that punitive damages are rightly classified as nonpecuniary, *Miles* barred only loss-of-society damages, not *all* nonpecuniary damages as *McBride* claims. If *Miles* truly did prohibit all nonpecuniary damages, it would not have affirmed a $140,000 award for

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129. *Id.*

130. *See* Force, *supra* note 127, at 777 ("The use of the terms 'pecuniary loss' and 'non-pecuniary loss' has unfortunately induced some courts to dismiss some types of claims for damages without much analysis.").

131. *Pecuniary*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 912 (11th ed. 2014).

132. *Pecuniary Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014). The comment after the definition adds that the term is considered redundant, as damages are always pecuniary. *Id.*

133. *Nonpecuniary Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

134. 554 U.S. 471 (2008).

135. *Id.* at 513; *see also* John W. deGravelles, *Supreme Court Charts Course for Maritime Punitive Damages*, 22 U.S.F. MAR. L.J. 123, 144 (2009) ("Punitive damages are pecuniary and therefore there is no legitimate reason why punitive damages should be withheld in a Jones Act case.") (emphasis omitted).

136. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 30 (1990) ("The Court held that a dependent plaintiff in a maritime wrongful death action could recover . . . for the nonpecuniary loss of society suffered as the result of the death."); *id.* at 31 ("This explicit limitation forecloses recovery for nonpecuniary loss, such as loss of society, in a general maritime action.").

Torregano's pain and suffering,[137] a category of damages that is indisputably nonpecuniary.[138] The Court simply expressed no general hostility to the awarding of nonpecuniary damages, evidencing its intent to confine use of that term strictly to loss-of-society damages. Thus, it is a stretch to read *Miles*, as *McBride* does, as completely ruling out punitive damages for seamen, even if they are classified as nonpecuniary. More importantly, it provides another reason why the whole pecuniary/nonpecuniary quarrel simply does not advance the larger debate over the availability of punitive damages.

2. The Jones Act Does Not Preclude Punitive Damages.—Concluding that punitive damages are rightly classified as nonpecuniary is one logical flaw; asserting that punitive damages are foreclosed under the Jones Act is another. The Fifth Circuit insisted that because the Jones Act precludes punitive damages, the *Miles*'s uniformity principle demanded that such damages must also be precluded in an unseaworthiness action as well. But that reasoning is incorrect for two reasons. First, *Miles* entailed a key difference: the wrongful-death action at issue in *Miles* was created *after* passage of the Jones Act (indeed, by the *Miles* Court itself), whereas in *Townsend* (and in *McBride* and *Batterton*) the general maritime causes of action (maintenance and cure and unseaworthiness) and the remedy (punitive damages) "were well established before the passage of the Jones Act."[139] That essential difference is the heart of the narrow holding in *Townsend*. It is a simple principle: The 1920 Jones Act did not undo preexisting rights and remedies of seamen.

Second, that reasoning begins with the faulty premise that the Jones Act precludes punitives in the first place. *Townsend*, however, explicitly left the question open when it explained: "[W]e do not address the dissent's argument that the Jones Act . . . prohibits the recovery of punitive damages in actions under that statute."[140] The argument, therefore, that punitives are unavailable for unseaworthiness because they are unavailable under the Jones Act simply does not work, regardless of how many sources the Fifth Circuit cites in support.[141]

But even assuming arguendo that punitive damages are unavailable in Jones Act claims, why should that entail automatic preclusion in the separate

137. *Id.* at 22.

138. *See* Dooley v. Korean Air Lines Co., 524 U.S. 116, 123 (1998) ("[T]heir cause of action would expand the recoverable damages for deaths on the high seas by permitting the recovery of nonpecuniary losses, such as pre-death pain and suffering.").

139. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 420 (2009).

140. *Id.* at 424 n.12 (citations omitted).

141. *Cf.* Steven F. Friedell, *The Interplay of the Jones Act and the General Maritime Law*, 48 J. MAR. L. & COM. 371, 397–401 (2017) (arguing that punitive damages should be available under the Jones Act).

realm of unseaworthiness? After all, the Court has confirmed that "unseaworthiness . . . is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute (e.g., the Jones Act) or under general maritime law (e.g., maintenance and cure)" and has "repeatedly taken pains to point out that liability based upon unseaworthiness is *wholly distinct* from liability based upon negligence."[142] Focusing sharply on the point, in 1939, the then-leading admiralty treatise declared that the Jones Act "left untouched" the unseaworthiness cause of action.[143] That point of view stood, uncontested, until the *Miles* bandwagon began rolling. The Jones Act and unseaworthiness are closely similar in some respects, but they are "separate and distinct" claims with different standards of causation and different elements.[144] Besides, the Jones Act was specifically enacted to protect seamen—as the wards of the admiralty—by providing them with a negligence action against their employers. It would thus make no sense to read into the Jones Act a hidden limitation on the remedies available to them.

Finally, although *Miles* disallowed loss-of-society damages in a seaman's unseaworthiness action based on its interpretation of the Jones Act's preclusive effect, the Court specifically noted that the Act "evinces no general hostility to recovery under maritime law" and "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[145] Yet the *McBride* court still sought to disturb the remedies available in a seaman's general maritime unseaworthiness claim by denying punitive damages, explicitly disregarding both *Miles*'s statement and the Court's precedent in over a dozen earlier cases, each of which held that the Jones Act does not take anything away from seamen.[146]

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142. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498 & nn.10–11 (1971) (emphasis added); *see also* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) ("What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence."); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1946) ("[T]he [unseaworthiness] liability is neither limited by conceptions of negligence nor contractual in character."); Friedell, *supra* note 141, at 385 ("The Supreme Court also developed the unseaworthiness remedy independently of the Jones Act.").

143. GUSTAVUS ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 309 (1939).

144. Chisholm v. Sabine Towing & Transp. Co., 679 F.2d 60, 62 (5th Cir. 1982).

145. Miles v. Apex Marine Corp., 498 U.S. 19, 29 (1990).

146. *See, e.g.*, Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 283–84 (1980) (plurality opinion) ("[A] remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts."); Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942) ("[The Jones Act] is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its wards."); The Arizona v. Anelich, 298 U.S. 110, 123 (1936) ("[T]he Jones Act . . . was remedial [legislation], for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it."); Bainbridge v. Merchs.' & Miners' Transp. Co., 287 U.S. 278, 282 (1932) ("Seamen have always been regarded as wards of the admiralty and their rights, wrongs and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has

*3. Two of the Supreme Court's Post-*Miles *Decisions Undermine the Applicability of* Miles*'s Uniformity Principle*.—Not only does *Miles*'s uniformity principle lose potency in the separate realm of punitive damages and outside the narrow confines of *Miles*'s holding denying loss-of-society damages, but two Supreme Court cases decided prior to *Townsend*—*Norfolk Shipbuilding & Drydock Corp. v. Garris*[147] and *Exxon Shipping Co. v. Baker*—also weaken the principle's impact. And *Townsend* itself says that reading *Miles* as limiting recovery in maritime cases involving death or personal injury to the remedies available under the Jones Act is "far too broad" and "would give greater pre-emptive effect to the [Jones] Act than is required by its text, *Miles*, or any of this Court's other decisions interpreting the statute."[148]

a. Norfolk Shipbuilding & Drydock Corp. v. Garris.—Prior to the Court's 2001 decision in *Garris*, the Court narrowly held in *Moragne v. States Marine Lines, Inc.*[149] that a longshoreman's family can seek compensatory damages in wrongful-death actions.[150] *Miles* subsequently broadened *Moragne* to say that the same is true of seamen's families.[151] Needless to say, the Jones Act did not impede the *Moragne* or *Miles* holdings. Then came *Garris*, where the question was whether the family of a maritime worker (who was neither a seaman nor a longshoreman) could seek compensatory damages in a general maritime negligence action. To the concurring judge in the court below, there was absolutely no problem recognizing such a cause of action.[152] And Justice Scalia, writing for the Court, agreed that the previously unrecognized maritime cause of action for negligent wrongful death could be validated without the help of Congress

been to deal with them as a favored class." (citations omitted)); Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138–39 (1928) ("[The Jones Act] was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages . . . ."). For further evidence that the Jones Act does not limit a seaman's remedies, see also Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995); McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991); Cox v. Roth, 348 U.S. 207, 209–10 (1955); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 782 (1952); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431 (1939); Beadle v. Spencer, 298 U.S. 124, 129–30 (1936); Cortes v. Balt. Insular Line, Inc., 287 U.S. 367, 377–78 (1932); Jamison v. Encarnacion, 281 U.S. 635, 640–41 (1930).

147. 532 U.S. 811 (2001).

148. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 419, 424–25 (2009).

149. 398 U.S. 375 (1970).

150. *Id.* at 409. Longshore workers are another type of maritime actor typically involved in the process of loading or unloading a ship.

151. Miles v. Apex Marine Corp., 498 U.S. 19, 30 (1990).

152. Garris v. Norfolk Shipbuilding & Drydock Corp., 210 F.3d 209, 227 (4th Cir. 2000) (Hall, J., concurring) ("[I]n my view Appellant's cause of action is not a new ship that has suddenly appeared on the horizon. Rather, Appellant's cause of action has been lurking just under the surface for quite some time."), *aff'd*, 532 U.S. 811 (2001).

since the action was "new only in the most technical sense."[153] The Court stated that *Miles* presented no barrier to such an endorsement, as that decision could not be read as precluding "*any* action or remedy for personal injury beyond that made available under the Jones Act."[154] Rejecting such an expansive interpretation of *Miles*'s conclusion as to the Jones Act's preclusive effect, Justice Scalia wrote: "[E]ven as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes. *See, e.g.*, *Miles* . . . (seaworthiness)."[155] *Garris* is thus inconsistent with the "lowest common denominator" approach denounced by *Townsend* and espoused by courts denying unseaworthiness punitives.

b. Exxon Shipping Co. v. Baker.—In *Baker*, the second Supreme Court decision decided in the interim between *Miles* and *Townsend*, the Court unanimously upheld an award of punitive damages—which it agreed was based solely on the general maritime law—to fishermen, Alaska Natives, and landowners whose livelihoods were damaged by the 1989 *Exxon Valdez* oil spill.[156] Exxon argued that the Clean Water Act (CWA)[157] displaced[158] any general maritime punitive-damages remedy being sought by the plaintiffs. The Court unanimously responded that the CWA had no such displacing effect.[159] The Court refused to believe that an act of Congress granting particularized maritime rights and remedies could silently preclude the admiralty courts from recognizing others. Operating in the Jones Act context, those supporting a broad reading of *Miles* concede that compensatory

153. Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001).

154. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 421 (2009) (citing *Garris*, 532 U.S. at 818).

155. *Garris*, 532 U.S. at 818.

156. Exxon Shipping Co. v. Baker, 554 U.S. 471, 490, 515–16, 523, 525 (2008). Although the Court did not address seamen's rights specifically, it is difficult to see how seamen, as the wards of the admiralty and traditionally treated as a favored class, could have fewer remedies available to them than fishermen. After all, the Court in *Baker* cited to a Ninth Circuit opinion—*Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974)—as the ground on which to sustain the blue-collar commercial fishermen's cause of action for loss of livelihood. *Baker*, 554 U.S. at 508 n.21. In that decision, the Ninth Circuit chose to recognize the loss-of-livelihood action in part because fishermen "have been treated as seamen" and should thus have recourse to the "principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection." *Oppen*, 501 F.2d at 561, 567 (quoting Carbone v. Ursich, 209 F.2d 178, 182 (9th Cir. 1953)). And if the Court allowed such blue-collar workers to sue for punitives in an action for loss of livelihood—a general maritime cause of action—it would make no sense to preclude those same workers from seeking punitives in an action for being maimed, such as what happened to Batterton.

157. 33 U.S.C. §§ 1251–1281 (2012).

158. Throughout its opinion, the *Baker* Court actually uses the term "preemption" rather than "displacement." But preemption more helpfully refers to the question of when a federal maritime law will trump *state* law, while displacement refers to the issue relevant here: whether an Act of Congress will trump federal maritime common law. ROBERTSON ET AL., *supra* note 25, at 108.

159. *Baker*, 554 U.S. at 487–89.

damages are available in unseaworthiness actions; they simply contend that punitives are not. Operating in the CWA context, however, the *Baker* Court determined that the CWA (and thus, by analogy, the Jones Act) says nothing about "fragmenting the recovery scheme this way"[160]—in fact, the Jones Act says absolutely nothing at all about either punitive damages or unseaworthiness. Moreover, the Court has specifically rejected analogous attempts to sever remedies from their causes of action.[161]

Defendants jumping on the *Miles* bandwagon also argue that punitive damages are unavailable for unseaworthiness because such damages were never awarded pre-Jones.[162] Exxon made precisely this argument in *Baker*: because there had never been a punitive-damages award in an oil-spill case before the enactment of the Clean Water Act, the CWA displaced the general maritime law's capability of awarding them.[163] The Court, however, brushed this argument aside.[164] Given all of that, the Court in *Baker* had no problem concluding that the defendant's claim that the CWA somehow displaced punitive damages was "untenable."[165] The arguments of those who would warp the Jones Act into a vehicle for denying punitives in the distinct sphere of unseaworthiness are likewise untenable, especially once *Townsend* was decided.

B. Townsend *Charts a Course for Unseaworthiness Punitives*

Although *Townsend* involved a claim for maintenance and cure, the Court provided a helpful analytical framework for determining whether punitives would lie in a claim for unseaworthiness as well.[166] If a general maritime action (such as maintenance and cure or unseaworthiness) and a remedy (such as punitive damages) predated the Jones Act, and if the Jones Act does not preclude either the action or the remedy, then both the action and the remedy remain available to seamen.[167] A case for allowing punitive

160. *Id.* at 489.

161. *Id.* (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255–56 (1984), where the Court held that federal statutes regulating nuclear safety did not preempt a state-law action for punitive damages, asserting that the punitive-damages remedy should persist absent "irreconcilable conflict" with the objectives of federal law).

162. This Note will show that the "never awarded" argument is false. *See infra* section III(B)(2); *see also* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 n.12 (2009).

163. Reply Brief for Petitioners at 20 & n.11, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (No. 07-219), 2008 WL 466089.

164. *See Baker*, 554 U.S. at 488–89 (agreeing with the Ninth Circuit that Exxon's CWA argument should fail).

165. *Id.* at 489.

166. *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 414–15 (5th Cir. 2014) (Higginson, J., dissenting) ("If the [test] in *Townsend* were amended by replacing 'maintenance and cure' with 'unseaworthiness,' it would retain its persuasive force . . . .").

167. *Townsend*, 557 U.S. at 424–25.

damages in an unseaworthiness action would thus pass muster: the seaman's cause of action for unseaworthiness was established by *The Osceola* in 1903,[168] seventeen years before passage of the Jones Act, and *Townsend* determined that the punitive-damages remedy also preexisted the Jones Act.[169] Lastly, the Court in *Miles* confirmed that the Jones Act "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness,"[170] and the Court in *Townsend* reiterated that its "case law also supports the view that punitive damages awards, in particular, remain available . . . after the [Jones] Act's passage."[171] Accordingly, the court in *Batterton* was correct that under the analysis adopted by the *Townsend* Court, a seaman suing for unseaworthiness should be entitled to seek punitive damages.

1. McBride*'s Effort to Distinguish* Townsend *Runs Aground.*—The Fifth Circuit tried to narrowly constrain *Townsend*'s holding by claiming that while the Jones Act and unseaworthiness causes of action are like "Siamese twins," maintenance and cure is at most a distant cousin.[172] According to the

168. 189 U.S. 158, 175 (1903). One may argue that *The Osceola*'s statement recognizing unseaworthiness was actually dictum—as the injured seamen in that case did not allege unseaworthiness—and therefore that the case is weak evidence as to the existence of the unseaworthiness cause of action prior to the Jones Act. Even if that is true, the Court actually applied the doctrine in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922), a case in which the events giving rise to the litigation arose in 1917, three years before passage of the Jones Act. In *Carlisle Packing*, a seaman was injured in an explosion because the vessel on which he sailed was equipped with a coal-oil can—used for igniting the cook stove—mistakenly filled with gasoline prior to the voyage. *Id.* at 257. Although the seaman prevailed in his state-court action by alleging negligence against the employer, the employer argued that *The Osceola* precluded such liability (since this was, again, a few years before the Jones Act overruled that preclusion) and that the trial judge's negligence-based jury charge was therefore in error. Sandanger v. Carlisle Packing Co., 192 P. 1005, 1008–09 (Wash. 1920), *aff'd*, 259 U.S. 255 (1922). The Supreme Court affirmed in favor of Sandanger, holding that although there was error (because a negligence claim against a seaman's employer had yet to be recognized), such error was harmless:

> [W]e think the trial court might have told the jury that *without regard to negligence* the vessel was unseaworthy when she left the dock if the can marked "coal oil" contained gasoline . . . . The verdict shows that the jury found gasoline had been negligently placed in the can . . . . [A]nd we think no damage could have resulted from the erroneous theory adopted by the trial court.

Carlisle Packing, 259 U.S. at 259–60 (emphasis added). So, even though the case was decided after enactment of the Jones Act in 1920, the Act did not apply retroactively to the 1917 accident. For that reason, *Carlisle Packing* can be viewed as applying the unseaworthiness cause of action as a matter of general maritime law prior to the Jones Act's passage.

169. *Townsend*, 557 U.S. at 412 (quoting Professor Robertson in support of its conclusion that "prior to enactment of the Jones Act in 1920, 'maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen'"); *see* discussion *supra* subpart I(C).

170. Miles v. Apex Marine Corp., 498 U.S. 19, 29 (1990).

171. *Townsend*, 557 U.S. at 417.

172. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 389 & n.36 (5th Cir. 2014) (contending

court, then, anything *Townsend* had to say about the availability of punitives in the maintenance-and-cure realm has absolutely no bearing on the entirely separate claim for unseaworthiness. But that minimizes the complex and interconnected relationship among the seaman's three protections.

While maintenance and cure and unseaworthiness arise from the general maritime law, the seaman's negligence action arises from the Jones Act. And while unseaworthiness and Jones Act negligence are tort-based rights of action for seamen's injuries, they are importantly different: The Jones Act plaintiff must prove negligence, whereas the unseaworthiness plaintiff is protected by a strict liability doctrine.[173] Maintenance-and-cure, on the other hand, entails two rights of action.

First, a maintenance-and-cure plaintiff may seek only the maintenance and cure due to him. That kind of litigation is ancient, quasi-contractual, and status based.[174] There is no parallel right of action or remedy under *either* the Jones Act or the unseaworthiness doctrine. Second, a maintenance-and-cure plaintiff may seek compensatory damages, alleging that the employer was negligent regarding its maintenance-and-cure obligations in such a way as to cause damages over and above the wrongfully withheld or delayed maintenance and cure (e.g., slower recovery or iatrogenic injury).[175] That is a tort action. Justice Cardozo, in *Cortes v. Baltimore Insular Line, Inc.*, held that this right of action can be pursued under either the Jones Act or as a standalone general maritime action, at the plaintiff's option.[176] In other words, the Jones Act encompasses (at the plaintiff's option) maintenance-and-cure negligence litigation. Thus, this second type of maintenance-and-cure litigation is "twinned" with the Jones Act but (like the Jones Act) separate from the unseaworthiness cause of action.

If a plaintiff seeks punitive damages under any of these three causes of action, he must prove egregious fault. There is no difference at all in the proof required in the three contexts. For example, a maintenance-and-cure plaintiff

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that the Court in *Townsend* understood that the "negligence/unseaworthiness actions are alternative, overlapping actions derived from the same accident and look toward the same recovery," while the maintenance-and-cure action is "'independent' and 'cumulative'" from those other claims); *id.* at 392–94 (Clement, J., concurring) ("But *Townsend*, as a maintenance and cure case, offers minimal support given the significant differences between maintenance and cure actions and unseaworthiness actions." (citations omitted)).

173. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549–50 (1960) (holding that a shipowner owes to a seaman an absolute non-delegable duty to furnish a seaworthy vessel, one completely independent of the duty under the Jones Act to exercise reasonable care). For more on the distinction between unseaworthiness and the Jones Act, see *supra* notes 142–44 and accompanying text.

174. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938).

175. Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987).

176. 287 U.S. 367, 374–75 (1932); *see also* Friedell, *supra* note 141, at 384 ("[B]y combining these two obligations [for maintenance and cure and Jones Act negligence], the Supreme Court held . . . that an employer could be liable.").

may seek punitive damages for an employer's egregious failure to timely meet its maintenance-and-cure obligations,[177] which is the *very same kind* of general-maritime-law action as the one for unseaworthiness.[178] The two are historically and customarily linked, and there is no intellectually respectable way to uncouple them. Although unseaworthiness imposes liability without regard to fault, recovery for *punitive damages* in an unseaworthiness action (and in a maintenance-and-cure action, for that matter) always requires a finding of willful and wanton conduct.[179] Thus, we have a twinning of maintenance and cure and unseaworthiness.

The notion, therefore, that the Jones Act and unseaworthiness causes of action are somehow identical, while the maintenance-and-cure claim is distantly related—meaning that a seaman like Batterton cannot look to *Townsend* for support—is simply incorrect. All three are interrelated, similar in some respects, and different in others. The Court in *Townsend* even acknowledged that maintenance and cure, unseaworthiness, and negligence each have remedies with different origins that may call for the application of slightly different principles.[180] Each of the three actions have evolved through the decades.[181] And each of the three actions make available punitive damages *only if* a defendant is guilty of fault more greatly blameworthy than negligence.

2. Punitives Were *Awarded in Pre-Jones Act Unseaworthiness Cases.*—*Townsend* holds that punitive damages are available in maintenance-and-cure actions—and are not displaced by the Jones Act—*unless* defendants can show that punitives were unavailable for maintenance-and-cure actions

177. *Morales*, 829 F.2d at 1358.

178. Most of the courts of appeals would perceive no Jones Act parallel here, but the Supreme Court has flagged the availability of Jones Act punitives as an open question. *See supra* note 41. And given that liability for Jones Act negligence stems from the duty of reasonable care, it is uncontested that if punitives were available in such cases, a finding of egregious fault would have to be shown for such damages to be awarded.

179. Complaint of Merry Shipping, Inc., 650 F.2d 622, 626 (5th Cir. Unit B July 1981). That also puts the lie to the argument that it makes little sense to allow recovery for punitives in an unseaworthiness action, which imposes strict liability, yet deny such relief on a Jones Act claim, which requires a finding of negligence. As the Fifth Circuit noted:

> It does not follow . . . that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law . . . [because] recovery of punitive damages is restricted to where there is willful and wanton misconduct, reflecting a reckless disregard for the safety of the crew, a much higher standard of culpability than that required for Jones Act liability.

Id.

180. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 (2009).

181. *See* Joel K. Goldstein, The Osceola *and the Transformation of Maritime Personal Injury Law: Some Propositions About the Case and Its Propositions*, 34 RUTGERS L.J. 663, 664 (2003) ("*The Osceola*'s four propositions provided the baseline from which Congress and the Court addressed, and ultimately expanded, seamen's rights and remedies during the twentieth century.").

prior to the Jones Act.[182] This, the *Townsend* defendants could not do.[183] The same is equally applicable in the unseaworthiness context: evidence of pre-Jones Act punitive awards for unseaworthiness cases is not required for such damages to be available to seamen suing under that cause of action in the present day. To prevail, then, the defendant must show that punitive damages were *categorically unavailable*—that they could not have been awarded no matter how egregious the shipowner's fault. But that is an impossible hurdle to overcome, given the ample evidence that punitive damages were available before the Jones Act.[184] Even so, the *Townsend* plaintiff's case was strengthened by the fact that there actually are maintenance-and-cure cases preceding the Jones Act in which courts awarded damages that included punitive elements.[185] That same strengthening is available for unseaworthiness cases, as the evidence shows that punitive damages were awarded in at least one case—*The Rolph*[186]—(and likely others) prior to 1920.

The vessel involved in *The Rolph* was alleged to have been unseaworthy (just like the *M/V Archon* in *Miles*) because of the habitual viciousness of First Mate Hansen, described as a brutal "giant weighing in the neighborhood of 285 pounds, all bone and muscle, and with a reputation for ferocity as wide

182. *See Townsend*, 557 U.S. at 414–15 ("[T]here is no evidence that claims for maintenance and cure were excluded from [the] general admiralty rule [allowing punitive damages]."); *id.* at 414 n.4 ("Nor does the dissent explain why maintenance and cure actions should be excepted from this general rule. It is because of this rule, and the fact that these early cases support—rather than refute—its application to maintenance and cure actions that the pre-Jones Act evidence supports the conclusion that punitive damages were available [for highly blameworthy] denial of maintenance and cure . . . ." (citations omitted)).

183. *Id.* at 418 ("Petitioners do not deny the availability of punitive damages in general maritime law, or identify any cases establishing that such damages were historically unavailable for breach of the duty of maintenance and cure.").

184. *See supra* subpart I(C).

185. *Townsend*, 557 U.S. at 414 (citing The City of Carlisle, 39 F. 807 (D. Ore. 1889), and The Troop, 118 F. 769 (W.D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904)). In *The City of Carlisle*, the court, after surveying the indignities to which the seaman had been subjected as he recovered without medical attention—"gross neglect and cruel mistreatment"—decided to add $1,000 to its damages award to compensate him for the abuse he endured. 39 F. at 809–12, 817. In *The Troop*, the court awarded the injured seaman $4,000, explaining that the captain's "failure to observe the dictates of humanity" and obtain prompt medical care for the seaman warranted such an award. 118 F. at 770–71, 773.

186. 293 F. 269 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924). Although the events giving rise to the litigation in *The Rolph* transpired after enactment of the Jones Act, they occurred at a time when seamen were required to elect between suing under the Jones Act or suing under the preexisting maritime law. *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 397 n.18 (5th Cir. 2014) (Clement, J., concurring) ("The election requirement is no longer good law. *See* McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 222 n.2 . . . (1958)."). The plaintiffs in *The Rolph* chose the latter, and the Jones Act was neither involved nor mentioned in the case. Thus, the case merely reflected the remedies extant in the pre-Jones Act general maritime law; it did not set out a new unseaworthiness remedy.

as the seven seas."[187] Even before *The Rolph* set sail, First Mate Hansen's reputation for ferocity was already on full display: he became inebriated and attacked the entire gang of longshoremen who were loading the ship, causing them to flee.[188] During the voyage, Hansen—who later ended up in prison—savagely beat the four plaintiffs in this case, all of them seamen who simply had the misfortune of falling under the giant's supervision.[189] The beatings—which the first mate carried out with belaying pins, pieces of scantling, and, on one occasion, a bucket—left one seaman deaf in one ear, another nearly blind "to the extent that he is just barely able to walk around," and the other two men sore but uninjured.[190] (Another seaman, though not a plaintiff here, was assaulted by Hansen and left on the deck to wash overboard and drown.)

The court, after concluding that the vessel was clearly unseaworthy by virtue of Hansen's presence, awarded $3,500 to the hearing-impaired seaman, $10,000 to the blinded seaman, and $500 each to the two uninjured men.[191] The two uninjured men who received $500 apiece, however, "did not claim any personal injury," meaning that those awards had to have included some punitive element.[192] As for the $10,000 award to the blinded seaman, it was very much compensatory in significant part, given that he was so severely injured. But the court's explanation of the award indicated that it was also in some part punitive: "It is not alone a question of common humanity, not alone a question *even of the award of proper compensation* for the natural results of such treatment . . . ."[193]

Although a concurring opinion in *McBride* discredited *The Rolph* as "one dust-covered case," the concurrence still conceded that the award probably included at least some punitive element.[194] Plus, *The Rolph* court also explicitly said that the award to the blinded seaman was not all compensatory. And he had received his maintenance and cure and unearned wages in a separate proceeding,[195] lending more weight to the notion that such a large award—$10,000—had to comprise some measured consideration on the part of the court that such a case warranted an award of exemplary damages.

In addition to *The Rolph*, however, two other cases substantiate the claim that punitive damages were available to seamen suing for

187. *The Rolph*, 293 F. at 269; *see supra* note 33 and accompanying text.

188. *The Rolph*, 293 F. at 270.

189. *Id.* at 269–70.

190. *Id.* at 269–71.

191. *Id.* at 272.

192. *Id.* at 269.

193. *Id.* at 271 (emphasis added).

194. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 397 (5th Cir. 2014) (Clement, J., concurring).

195. The Rolph, 299 F. 52, 55–56 (9th Cir. 1924).

unseaworthiness prior to the Jones Act. In *The City of Carlisle* and *The Troop*—the two cases cited by *Townsend* as evidence of punitives' availability in maintenance-and-cure cases—the vessels' respective captains each displayed unconscionable behavior in refusing to provide medical treatment to an injured seaman.[196] Given the improper withholding of medical care, both cases unquestionably involve maintenance and cure. But they also involve unseaworthiness. A ship is unseaworthy when its master, officers, or crew are dangerously unfit for service, and here, the masters were not "worthy to command" the vessel and not "fit to be trusted with the safety and welfare" of the crew.[197] Thus, the captains' cruelty demonstrated that the vessels there were just as unseaworthy as the vessel in *Miles* and the vessel in *The Rolph*.

Even though *Townsend* does not require it, there is persuasive evidence that prior to the Jones Act courts awarded punitive damages to seamen bringing unseaworthiness claims. And if *Miles* is taken at its word—that the Jones Act "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness"[198]—there is no reason why such damages should not remain available to seamen injured as a result of unseaworthiness today.

Conclusion

The debate over whether punitive damages should lie in a seaman's unseaworthiness action has proved contentious, especially in recent years. It was not always so. Prior to the Supreme Court's 1990 decision in *Miles*, courts declared with some frequency that seamen had the ability to recover punitives. But after *Miles*, more and more courts held that such damages were no longer available. The actual language of *Miles*, though, provides minimal support for these courts' seeming determination to deny seamen the punitives remedy. And any support there might have been was soon dashed, or so it appeared, by the Court's decision in *Townsend*. Enter the Fifth and Ninth Circuits, the only two courts of appeals to have addressed the issue after *Townsend* was handed down. As such, they make an interesting case study: whereas the Fifth Circuit's *McBride* opinion found *Miles* dispositive and *Townsend* anything but, the Ninth Circuit in *Batterton* found nearly the

196. *See* The City of Carlisle, 39 F. 807, 808, 811–17 (D. Ore. 1889) (describing how the captain left the seaman "in an unconscious or delirious state, sweltering and roiling [in his bunk] in his own excrement" and denouncing the captain's conduct as "brutal and indecent," "simply inhuman," and "a grievous wrong"); The Troop, 118 F. 769, 770–71, 773 (W.D. Wash. 1902) (deploring the master's conduct as "a shocking instance of 'man's inhumanity to man,'" as a "failure to observe the dictates of humanity," as "a monstrous wrong," and "sickening"), *aff'd*, 128 F. 856 (9th Cir. 1904).

197. *City of Carlisle*, 39 F. at 817; *see supra* note 33 and accompanying text.

198. Miles v. Apex Marine Corp., 498 U.S. 19, 29 (1990).

reverse. Examining the opinions—and keeping in mind the Court's pronouncements in *Miles* and *Townsend*—the Ninth Circuit simply has the more persuasive argument that injured seamen should be permitted to recover punitive damages in unseaworthiness actions. But ultimate resolution can come only from the Supreme Court. With petition for certiorari already granted in *Batterton*,[199] it seems that resolution will happen sooner rather than later.

199. *See* Dutra Grp. v. Batterton, No. 18-266, 2018 WL 4185911 (U.S. Dec. 7, 2018).