Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend

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I. INTRODUCTION

In 1997 I wrote that "[p]unitive damages are . . . rapidly disappearing from maritime personal injury law, and it is hard to see how they can long survive in property damage cases." It turns out this was a premature obituary. The United States Supreme Court's 2008 decision in Exxon Shipping Co. v. Baker upheld an award of maritime punitive damages to commercial fishermen suing an ocean polluter for loss of livelihood, and the brand new decision in Atlantic Sounding Co. v. Townsend has now held that injured seamen are entitled to seek punitive damages against employers who willfully or wantonly flout their obligation to provide maintenance (room and board) and cure (medical care). This Article will explore this unfolding maritime punitive damages story.

II. BACKGROUND: FIVE CONCEPTUAL AND ANALYTICAL TOOLS

Understanding this Article will be eased and enriched by reviewing the following five concepts.

A. The Seaman's Trilogy

Under general maritime law, ill and injured seamen have a "trilogy" of rights against shipowners and employers. First, when a seaman falls ill or is injured while in the service of the ship, the

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* W. Page Keeton Chair in Tort Law and University Distinguished Teaching Professor, University of Texas at Austin. An earlier version of this Article was presented to the Seventh Judge Alvin B. Rubin Conference on Maritime Personal Injury Law, LSU Law Center, March 6, 2009. The views expressed here are based on years of academic scholarship. But the reader should know that I have represented the seaman's side of the punitive damages issue in several cases. Most recently, I wrote the Brief of American Association for Justice as Amicus Curiae in Support of Respondent in Atlantic Sounding Co., Inc. v. Townsend, infra note 3. Portions of this Article draw on that brief.
seaman’s employer immediately owes the seaman maintenance (room and board) and cure (medical care).\textsuperscript{5} If the employer fails to honor these obligations, the seaman can sue to recover what is due. If the employer’s failure is negligent and causes the seaman to sustain additional injury, illness, or pain, the seaman can recover compensatory damages. If the employer’s failure was more egregious than that, traditionally the seaman could additionally recover attorneys’ fees and punitive damages.\textsuperscript{6}

Second, when a seaman is injured by the operational unfitness of the ship, the seaman can sue in tort for unseaworthiness. Like the right to maintenance and cure, the right to sue for unseaworthiness emanates from general (nonstatutory) maritime law.\textsuperscript{7}

Third, when a seaman is injured by workplace negligence, the seaman has a statutory cause of action in tort against the employer under the Jones Act.\textsuperscript{8}

Historically, conceptually, and functionally, the unseaworthiness and Jones Act tort actions are “Siamese twins.”\textsuperscript{9} The much older maintenance and cure action does not derive from tort principles and is something like a first cousin to the other two.\textsuperscript{10}

B. The Distinction Between Compensatory and Punitive Damages

This Article draws a clean distinction between compensatory damages and punitive damages. Compensatory damages aim at reimbursing losses. Punitive damages aim at punishing reprehensible behavior, teaching the perpetrator not to do it again, and admonishing others never to do it.\textsuperscript{11}

C. The Distinction Between Pecuniary Compensatory Damages and Non-Pecuniary Compensatory Damages

In traditional damages analysis, compensatory damages fall into two subcategories. Pecuniary compensatory damages are those that

\textsuperscript{5} See FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., ADMIRALTY IN A NUTSHELL 209–10 (5th ed. 2005).
\textsuperscript{6} Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987).
\textsuperscript{7} MARAIST & GALLIGAN, supra note 5, at 222.
\textsuperscript{10} See O’Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42 (1943) (“[T]he seaman’s right [to maintenance and cure] was firmly established in the maritime law long before recognition of the distinction between tort and contract.”).
\textsuperscript{11} Robertson, supra note 1, at 75, 80–81.
are measurable in money, at least notionally. In personal injury cases, the standard pecuniary categories of compensatory damages are lost earnings and earning capacity and medical and related expenses. In wrongful death litigation, the standard pecuniary categories of compensatory damages are loss of support and loss of services.

Non-pecuniary compensatory damages are those that are not measurable in money, although courts award money to assuage the losses. In personal injury cases, the non-pecuniary categories of compensatory damages are pain and suffering and hedonic (loss of enjoyment of life) damages. In wrongful death cases, the standard non-pecuniary category of compensatory damages is loss of society (companionship, consortium).

D. The Two Types of Fatal-Injury Litigation

The distinction between two types of fatal-injury litigation is basic in tort law, but it is often confused or elided. Wrongful death actions seek to recover the victim’s family’s losses. Survival actions seek to recover on behalf of the victim’s estate “whatever . . . the deceased . . . would have . . . been able to sue [for] at the moment of . . . death—for example, for his pain and suffering, loss of wages, and medical expenses between the time of injury and death.”

E. The Distinction Between Causes of Action and Remedies

Finally, this Article draws a clean distinction between causes of action and remedies. In simple terms, a cause of action is a basis for imposing liability, whereas a remedy is a consequence of imposing liability. Thus, injured seamen have causes of action against shipowner–employers for Jones Act negligence, unseaworthiness, maintenance and cure, and wrongfully withholding maintenance and cure.

12. Id.
14. Id.
15. The Supreme Court’s Townsend opinion makes good use of the cause of action–remedy distinction, noting that “both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act” and emphasizing that the “Jones Act . . . created a statutory cause of action for negligence, but it did not eliminate preexisting remedies available to seamen for the separate common-law cause of action based on a seaman’s right to maintenance and cure.” Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2570, 2572 (2009).
When any of these causes of action succeed, the available remedies can include compensatory damages for medical and related expenses, lost earnings and earning capacity, and pain and suffering. When a seaman’s injuries are fatal, the family has a wrongful death remedy that might include compensatory damages for loss of support, loss of services, and loss of society. The estate of a fatally injured seaman has a survival remedy that enables the estate to sue for whatever damages the deceased would have been able to sue for at the moment of death.

And—if the defendant’s conduct was bad enough to warrant punishment—the remedies in all of the foregoing types of cases might also include punitive damages. In cases of seriously blameworthy failure of an employer to furnish maintenance or cure, the remedies might also include attorneys’ fees.

III. A SHORT VERSION OF THE MARITIME PUNITIVE DAMAGES STORY

In U.S. maritime law up to 1990, the punitive damages remedy was deployed in pursuit of the goals of punishing reprehensible behavior and discouraging its repetition. The punitive damages remedy obtained throughout maritime law, including property damage cases, personal injury cases, and cases involving shipowners’ mistreatment of passengers and seamen.

Then came Miles v. Apex Marine Corp., a bombshell Supreme Court decision holding that the families of seamen killed by the negligence of their employers or the unseaworthiness of the vessels they serve cannot recover damages for loss of society. Miles had nothing to do with punitive damages, but the courts of appeals soon began finding in “[t]he logic and analytical framework of Miles” a

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16. This is a remedy, not a cause of action. The family will assert whatever cause of action the deceased would have asserted had the injuries not been fatal.
17. See, e.g., Hines v. J.A. LaPorte, Inc., 820 F.2d 1187 (11th Cir. 1987) (affirming awards of $5,000 in punitive damages and $10,150 in attorneys’ fees).
18. See generally Robertson, supra note 1. In the 1970s, some courts began holding that punitive damages could not be sought in Jones Act cases. See infra Part VI.F. This was a minority viewpoint until the lower courts began reading the Supreme Court’s 1990 decision in Miles to preclude seamen from seeking punitive damages in any action against their employers. See infra note 19.
basis for denying punitive damages to seamen.\textsuperscript{21} On the view that seamen have always been the most favored litigants in U.S. maritime law, the idea then developed that if an injured seaman cannot seek punitive damages, no personal injury plaintiff should be able to do so.\textsuperscript{22} The next "logical" step would presumably have been a complete obliteration of the punitive damages remedy because if such damages are unavailable in personal injury cases, there seems no principled reason that should they be available in property damage cases.

The linchpin of the modern movement against maritime punitive damages has been the courts of appeals decisions using \textit{Miles} as a basis for denying punitive damages to seamen. The driving force behind these cases was not anything the \textit{Miles} Court held or even said but was simply a pronounced judicial disapproval of the punitive damages remedy. But the "logic and analytical framework" of \textit{Miles} that the courts seized upon as their doctrinal tool has been so often relied upon that the entailed chain of reasoning should be set forth.

The \textit{Miles} Court reached its conclusion that fatally injured seamen's families cannot recover for loss of society in Jones Act and unseaworthiness actions in the following way:

- In 1920 Congress enacted the Jones Act to provide seamen with a negligence cause of action against their employers.\textsuperscript{23} Rather than spelling out the negligence cause of action, the Jones Act incorporates by reference the 1908 Federal Employers' Liability Act (FELA), which sketches a negligence cause of action for railway workers against their employers.\textsuperscript{24}
- FELA also sets forth a wrongful death remedy.\textsuperscript{25} The relevant provision, 46 U.S.C. § 51, does not limit or specify the types of compensatory damages that are available in FELA wrongful death actions,\textsuperscript{26} but in 1913 the Supreme Court held in \textit{Michigan Central Railroad Co. v. Vreeland} that plaintiffs in FELA wrongful death actions could recover only for "pecuniary" loss—including loss of support and loss

\textsuperscript{21} In addition to \textit{Guevara}, see Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495 (9th Cir. 1995); Horsley v. Mobil Oil Corp., 15 F.3d 200 (1st Cir. 1994); Miller v. Am. President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993).

\textsuperscript{22} See, e.g., \textit{Guevara}, 59 F.3d at 1510; Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1094 (2d Cir. 1993).


\textsuperscript{25} \textit{Id.} § 51.

\textsuperscript{26} \textit{Id.}
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of services—and that loss of society (companionship) was not a pecuniary loss.\footnote{27}

- \textit{Miles} held that when Congress incorporated FELA into the Jones Act, it also incorporated \textit{Vreeland} as judicial “gloss” on FELA.\footnote{28} Therefore, loss-of-society damages are unavailable in Jones Act wrongful death actions just as they are in FELA wrongful death actions.

- \textit{Miles} further held that the unavailability of loss-of-society damages in Jones Act cases entailed their unavailability in general (nonstatutory) unseaworthiness actions because “[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 [for unseaworthiness] in which liability is without fault than Congress has allowed in cases of death resulting from negligence.”\footnote{29}

In an impressive three-step \textit{tour de force}, several courts of appeals expanded the holding in \textit{Miles}—that deceased seamen’s families cannot recover \textit{compensatory} damages for loss of society in actions for Jones Act negligence or unseaworthiness—into a broad rule that \textit{punitive} damages are wholly unavailable in all litigation involving illness, injury, or death of seamen.\footnote{30} In the first step, the courts seized upon the \textit{Vreeland} and \textit{Miles} characterization of loss-of-society damages as “non-pecuniary” as a basis for asserting that no FELA or Jones Act plaintiff can recover any form of non-pecuniary damages.\footnote{31} Second, they read \textit{Miles} to mean that categories of damages unavailable to Jones Act plaintiffs are also unavailable to plaintiffs in the related general maritime actions for unseaworthiness \textit{and} maintenance and cure.\footnote{32} Third, they simply pronounced in \textit{ipse dixit} fashion that “punitive damages . . . are . . . rightfully classified as non-pecuniary.”\footnote{33}

When I published the premature obituary of maritime punitive damages in 1997, the use of \textit{Miles} as a tool for denying punitive damages in seamen’s litigation was in its ascendancy. Then came \textit{Baker}, in which the Supreme Court upheld a punitive award under general maritime law of $507.5 million to “commercial fishermen, Native Alaskans, and landowners” who were damaged by the \textit{Exxon}

\begin{itemize}
\item \footnote{27} 227 U.S. 59, 69–71 (1913).
\item \footnote{28} Miles v. Apex Marine Corp, 498 U.S. 19, 32 (1990).
\item \footnote{29} \textit{Id.} at 32–33.
\item \footnote{31} \textit{Id.} at 1512–13; Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495, 1502 (9th Cir. 1995), \textit{abrogated by} Townsend, 129 S. Ct. 2561.
\item \footnote{32} Glynn, 57 F.3d at 1502.
\item \footnote{33} Guevara, 59 F.3d at 1506.
\end{itemize}
Because there is no clear statutory or policy basis for treating seamen less favorably than the types of plaintiffs who succeeded in Baker, that decision seems to cast significant doubt on the correctness of the view that seamen are foreclosed from seeking punitive damages.

The most recent case in this line is Townsend, a five–four decision holding that seamen can sue their employers for punitive damages for seriously blameworthy violations of the maintenance and cure obligation. Understanding the importance and potential impact of Townsend (see infra Parts VII and VIII) will be aided by first considering the following Parts that explore Miles in detail (Part IV), analyze Baker (Part V), and set forth the arguments that the Supreme Court confronted in Townsend (Part VI).

IV. An Analysis of Miles

As discussed in Part III, a widely held belief that seamen have no right to seek punitive damages was based primarily on Miles. But Miles afforded no legitimate support for the view.

A. The Holdings and Reasoning of Miles

1. Facts and Holding: Punitive Damages Were Not at Stake

Mercedel Miles was the mother of a seaman named Ludwick Torregano who died from sixty-two stab wounds inflicted by a fellow crew member on the vessel M/V Archon. Miles pleaded two causes of action against the Archon's owner and operators, asserting their liability for unseaworthiness under the general maritime law and for negligence under the Jones Act. She asserted two types of fatal-injury remedies under which she sought five categories of compensatory damages: (1) a wrongful death remedy that in Miles' view should allow her to recover damages for loss of support, loss of services, and loss of society; and (2) a survival remedy that Miles argued should allow Torregano's estate to recover damages for his pain and suffering and for his lost future earnings.
Miles also sought punitive damages. The trial court struck the punitive damages claim. Miles did not sue the vicious stabber, but only his employers (the ship’s operators), and the trial court held that the facts did not support holding the employers vicariously liable for punitive damages. The Fifth Circuit affirmed this ruling, and the punitive damages issue dropped out of the case at that point. The Supreme Court was not concerned with the issue, and it mentioned punitive damages only in the course of reciting the case’s procedural history.

Respecting Miles’ five compensatory damages claims, the trial court decided against the wrongful death claim for loss of society and against the survival claim for lost future earnings. It upheld the other three claims. The Fifth Circuit affirmed an award of $7,800 for Miles’ loss of support and services and $140,000 for Torregano’s pain and suffering. The Supreme Court granted the plaintiff’s petition for certiorari to decide “whether the parent of a seaman who died from injuries aboard respondents’ vessel may recover under general maritime law for loss of society, and whether a claim for the seaman’s lost future earnings survives his death.”

The Miles Court answered both questions no, affirming the Fifth Circuit’s decision that Miles’ wrongful death remedy did not include damages for loss of society and that her survival remedy did not include damages for Torregano’s lost future earnings.

2. The Plaintiff’s Two Causes of Action

The Supreme Court was not concerned with the Miles defendants’ liability vel non, but a quick look at this matter may enhance understanding of the decision.

The defendants’ liability under the unseaworthiness cause of action was unproblematic. A shipowner is strictly liable for unseaworthiness when an operationally defective ship hurts a seaman, and the Fifth Circuit ruled that the vicious stabber’s “extraordinarily violent disposition demonstrated that he was unfit

41. She tried to, but he “was outside the jurisdiction of the district court and could not be served.” Id. at 981.
42. See id.
43. Id.
45. Id.
46. Id. at 21.
47. Id. at 32–33.
48. Id. at 36.
and therefore that the Archon was unseaworthy as a matter of law.\textsuperscript{49}

The defendants' liability under the cause of action for Jones Act negligence was only slightly less obvious. The evidence showed that the defendants should long since have known that the stabber was a dangerous man.\textsuperscript{50}

3. The Plaintiff's Two Fatal-Injury Remedies

All of the issues addressed in Miles involved the categories of compensatory damages available in maritime wrongful death and survival actions. Potentially, the sources of these remedies were the Jones Act\textsuperscript{51} and the holding in Moragne v. States Marine Lines, Inc., that general maritime law includes a wrongful death remedy and (arguably) a survival remedy.\textsuperscript{52}

The Jones Act was enacted in 1920 to fill a gap in federal maritime law's fabric of protections for seamen.\textsuperscript{53} The gap stemmed from the Supreme Court's 1903 decision in The Osceola.\textsuperscript{54} In that case the question was whether a seaman injured at work on a vessel had a cause of action for the negligence of the vessel's master in bringing about the injury.\textsuperscript{55} The Court held no, noting that injured seamen were entitled to maintenance and cure and could sue in tort for unseaworthiness but holding that they had no action against their employers for workplace negligence.\textsuperscript{56}

The Jones Act filled the Osceola gap by incorporating by reference the provisions of FELA.\textsuperscript{57} FELA sketches out a negligence cause of action for railway workers, and it includes a wrongful death remedy\textsuperscript{58} and a survival remedy.\textsuperscript{59}

The portion of Miles concluding that Miles' wrongful death remedy would not redress loss of society proceeded in three steps.\textsuperscript{60} The Court first looked to a pre-Jones Act decision, Vreeland, which gave a narrow construction to the FELA wrongful death provision.\textsuperscript{61}

\textsuperscript{49} Id. at 22.
\textsuperscript{50} See Miles v. Melrose, 882 F.2d 976, 984 (5th Cir. 1989).
\textsuperscript{52} 398 U.S. 376 (1970). The Miles Court "decline[d] to address the issue" of whether Moragne created a survival remedy. Miles, 498 U.S. at 34.
\textsuperscript{54} 189 U.S. 158 (1903).
\textsuperscript{55} Id. at 175.
\textsuperscript{56} Id.
\textsuperscript{58} Id. § 51.
\textsuperscript{59} Id. § 59.
The provision says nothing about the categories of damages available, but the Vreeland Court reasoned that earlier and contemporaneous wrongful death statutes were generally confined to "pecuniary loss," that loss-of-society damages were not pecuniary because they "cannot be measured or recompensed by money," and that in enacting FELA the 1908 Congress must have meant to follow the prevailing view.

In its second step, the Miles Court concluded that Vreeland precludes recovery for loss of society in wrongful death actions under the Jones Act, explaining:

When 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. We assume that Congress is aware of existing law when it passes legislation. There is no recovery for loss of society in a Jones Act wrongful death action.

The Miles Court’s third step determined that the Jones Act preclusion of loss of society damages also controlled the plaintiff’s general maritime (Moragne-based) wrongful death action. The Court explained:

The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It 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. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Turning to the issue of whether Miles’ survival action allowed recovery for Torregano’s lost future income, the Court’s reasoning was similar. Taking it as settled that the Jones Act–FELA survival

63. Vreeland, 227 U.S. at 70–71.
64. Miles, 498 U.S. at 32 (citation omitted).
65. Id. at 32–33.
remedy\textsuperscript{66} does not allow such damages, the Court stated that "[b]ecause Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law."\textsuperscript{67}

**B. Refuting the Revisionist Version of Miles**

The *Miles* opinion does not touch upon any issues other than the types of compensatory damages available in maritime fatal-injury litigation. So how did the courts of appeals manage to turn a decision addressing compensatory damages in seamen's fatal-injury cases into one controlling punitive damages in all types of seamen's litigation? As discussed supra in Part III, the technique was simply to assert that punitive damages are non-pecuniary damages and that *Miles* holds that in no cause of action on behalf of a seaman may any form of non-pecuniary damages be recovered. Both of those ideas seem wrong.

1. Punitive Damages Are Easily Characterized as Pecuniary

In ordinary English, "pecuniary" means "consisting of or pertaining to money" or "requiring the payment of money."\textsuperscript{68} *Black's Law Dictionary* defines "pecuniary damages" as "damages that can be estimated and monetarily compensated" and "nonpecuniary damages" as "damages that cannot be measured in money."\textsuperscript{69} By any of these definitions, punitive damages can sensibly be called pecuniary. They are awarded as money, can be estimated, and—as recently exhaustively analyzed by the Supreme Court in *Baker*—are awarded as "measured retribution."\textsuperscript{70}

The revisionist reading of *Miles* not only proposed a controversial definition of the term "non-pecuniary," but it also entailed the implausible suggestion that the *Miles* Court would have characterized punitive damages that way. This seems highly unlikely. In her opinion for the Court in *Miles*, Justice O'Connor used the term "non-pecuniary" just twice, at each instance tying it

\begin{footnotesize}
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\item \textsuperscript{66} 45 U.S.C. § 59 (2006).
\item \textsuperscript{67} 45 id. at 36.
\item \textsuperscript{68} AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 965 (1981).
\item \textsuperscript{69} BLACK'S LAW DICTIONARY 418 (8th ed. 2004).
\item \textsuperscript{70} Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2633 (2008) (emphasis added).
\end{itemize}
\end{footnotesize}
tightly to the issue of compensatory damages for loss of society. And not much more than a year before writing Miles, Justice O'Connor repeatedly referred to punitive damages as "pecuniary punishment."

The pecuniary–non-pecuniary distinction came into Miles from the Court's 1913 FELA decision in Vreeland. The Vreeland Court was no more concerned with punitive damages than the Miles Court, but it is hard to believe that the Vreeland Court would have characterized punitive damages as non-pecuniary. At the time Vreeland was decided, it seems to have been generally thought that punitive damages were properly conceptualized as pecuniary rather than not. For example, in Louisville, E. & St. L.R. Co. v. Clarke, the Supreme Court described an ancient German remedy (called a "weregild") as a privately initiated proceeding designed to give the victim of a crime "a pecuniary satisfaction" while effecting "the punishment of public crimes." This sounds much like a modern action for punitive damages. Moreover, in the pre-Vreeland jurisprudence the Court routinely referred to civil and criminal fines and penalties of all kinds as "pecuniary punishment."

The pecuniary–non-pecuniary distinction is a useful tool for classifying subtypes of compensatory damages; classifying loss of society and pain and suffering as non-pecuniary damages is a signal that their assessment entails special difficulties and may require special restrictions. But the pecuniary–non-pecuniary distinction is not useful in the completely different realm of punitive damages: "[i]t would be an abdication of judicial responsibility to preclude recovery of punitive damages merely because they are 'nonpecuniary.'"

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71. See Miles v. Apex Marine Corp., 498 U.S. 19, 30 (1990) ("nonpecuniary loss of society suffered as the result of the death"); id. at 31 ("non-pecuniary loss, such as loss of society").


74. 152 U.S. 230, 239 (1894).


76. Force, supra note 19, at 793. See also Portwood v. Cooper Valley Elec. Assoc., 785 P.2d 541, 543 (Alaska 1990) ("Because punitive damages are not
None of the authorities that have been cited for the proposition that punitive damages are non-pecuniary make any effort to justify the appellation; each merely proclaims it, seeming eager to succumb to word magic. (All of the explicit judicial statements that punitive damages are non-pecuniary can be traced to a terse *ipse dixit* in *Kopczynski v. The Jacqueline.*77)

2. **Miles Does Not Rule Out All Non-Pecuniary Damages for Seamen**

Even in the compensatory damages context, the pecuniary–non-pecuniary distinction has limited utility. The *Miles* Court used the distinction as a tool for deciding the loss of society issue and only for that. Miles’ claim for Torregano’s future earnings was indisputably a pecuniary-loss claim, yet the Court rejected it.78 On the other hand, the Court gave three indications that it approved of Jones Act plaintiffs recovering for pain and suffering, although this is a paradigmatic non-pecuniary item: (1) the Court said that “[t]he Jones Act, through its incorporation of FELA, provides that a seaman’s right of action for injuries due to negligence survives to the seaman’s personal representative”;79 injured seamen invariably seek pain and suffering damages; (2) the Court cited *St. Louis, I.M. & S.R. Co. v. Craft*80 for the proposition that the FELA survival remedy81 allows recovery for “losses suffered during the decedent’s lifetime”;82 in *Craft*, the Court affirmed a $5,000 survival award for the deceased’s pain and suffering;83 and (3) the *Miles* Court noted with no hint of disapproval that the Fifth Circuit had awarded “$140,000 for Torregano’s pain and suffering.”84

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77. 742 F.2d 555, 561 (9th Cir. 1984).
79. Id. at 33.
80. 237 U.S. 648 (1915).
82. Miles, 498 U.S. at 35.
84. Miles, 498 U.S. at 22.
V. AN ANALYSIS OF BAKER

A. Baker Reaffirmed Maritime Law's Recognition of Punitive Damages

1. Baker Awarded Maritime Punitive Damages

In its 2008 decision in Baker, the Supreme Court upheld a punitive damages award to fishermen whose livelihoods were damaged by the Exxon Valdez oil spill. The Court unanimously agreed that a punitive award was appropriate.

The Court also unanimously agreed that the punitive award was based solely on federal maritime common law. The Court emphasized this, stating that "maritime law remains federal common law" and asserting its "jurisdiction [under the grant of admiralty and maritime jurisdiction in U.S. Const., Art. III, § 2, cl. 3] to decide [the case] in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."

2. Baker Rests on Deep History

Writing for the Supreme Court in The Amiable Nancy in 1818, Justice Story affirmed that general maritime law authorized "exemplary damages [for] the proper punishment [of] lawless misconduct." In 1851 in Day v. Woodworth, the Court stated:

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.

86. Baker was an eight–zero decision, Justice Alito not participating. Five Justices held that the lower court’s punitive award of $2.5 billion must be cut to $507.5 million. Id. at 2634. Three argued that the $2.5 billion award should have been left standing. Id. at 2638–41.
87. A frequently-used synonym for federal maritime common law is “general maritime law.” See, e.g., Miles, 498 U.S. at 21.
89. Id. at 2619.
90. See generally Robertson, supra note 1.
91. 16 U.S. (3 Wheat.) 546, 558 (1818).
92. 54 U.S. (13 How.) 363, 371 (1851).
And in 1893 in *Lake Shore & M.S. Ry. Co. v. Prentice*, the Court cited *The Amiable Nancy* and *Day* for the following proposition:

In this [C]ourt the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations . . . .

The *Lake Shore* Court went on to say that "courts of admiralty . . . proceed . . . upon the same principles as courts of common law, in allowing exemplary damages."94

**B. Baker Implies that Seamen Are Entitled to Seek Punitive Damages**

The parties awarded punitive damages in *Baker* were "commercial fishermen, Native Alaskans, and landowners,"95 the Court had no occasion to directly address seamen's rights. However, it is hard to fathom how seamen, who by long tradition are admiralty's most favored litigants,96 could somehow be worse off under federal maritime law than fishermen and landowners.

The *Baker* Court cited *Union Oil Co. v. Oppen*97 as the basis for the fishermen's cause of action for loss-of-livelihood compensatory damages.98 The reference lends emphasis to the view that it makes no sense for seamen to lack a remedy available to commercial fishermen because the *Oppen* court built its recognition of the fishermen's right upon its understanding of seamen's rights. The *Oppen* court reasoned that fishermen "have been treated as seamen" and are thus allowed to invoke "the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection."99

93. 147 U.S. 101, 107 (1893).
94. *Id.* at 108.
97. 501 F.2d 558 (9th Cir. 1974).
99. *Oppen*, 501 F.2d at 567 (emphasis added) (citing Robins Dry Dock Repair Co. v. Flint, 275 U.S. 303 (1927)).
VI. Issues and Arguments Before the Supreme Court in Townsend

The Eleventh Circuit’s opinion in Townsend followed the court’s pre-Miles jurisprudence and held that seamen have the right to seek punitive damages from employers who wantonly violate their maintenance and cure obligations. The Supreme Court granted certiorari to address the conflict between the Eleventh Circuit and the circuits that had read Miles to abolish seamen’s rights to seek punitive damages.

In the Supreme Court, the arguments for the shipowner all revolved around what this Article calls the revisionist view of Miles. The arguments for the seamen took the view of Miles and Baker that is set forth supra in Parts IV and V. Some additional arguments for the seaman are set forth in the subparts below.

A. Seamen Have Always Had the Right to Seek Punitive Damages

A study of the early American jurisprudence on seamen’s rights soon brings the realization that “nineteenth-century seamen led miserable lives.” Shipowners owed passengers decent treatment, but they could often harshly misuse seamen without anyone batting an eye. Congress did not outlaw “cruel and unusual punishment” of seamen until 1835, and flogging was legal until 1850. Throughout the century, a seaman who deserted the ship could be arrested by public authorities and forcibly returned.

101. See Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2565–66 (2009) (“[T]he Eleventh Circuit . . . held that respondent could pursue his punitive damages claim for the willful withholding of maintenance and cure. 496 F.3d at 1285–1286. The decision conflicted with those of other Courts of Appeals, see, e.g., Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995 (en banc); Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995), and we granted certiorari . . .”).
103. See Robertson, supra note 1, at 88–90 (analyzing Chamberlain v. Chandler, 5 F. Cas. 413, 414 (C.C.D. Mass. 1823) (No. 2575), in which punitive damages were awarded against a ship’s captain for “lasciviousness” and other misconduct toward passengers).
106. See Robertson v. Baldwin, 165 U.S. 275 (1897) (holding that statutes authorizing the arrest and forced return of deserters were not in conflict with the Thirteenth Amendment).
Nevertheless, admiralty courts repeatedly assured seamen that they were "emphatically the wards of the Admiralty." When seamen's employers went too far, admiralty courts would award punitive damages, just as in cases involving mistreated passengers and other victims of abuse. When evaluating these early cases, it is necessary to remember that "[t]he distinction between punitive and compensatory damages is a modern refinement." As the Supreme Court recently noted in Baker, "American courts [began] to speak of punitive damages as separate and distinct from compensatory damages [only as] the [nineteenth] century progressed."

The earliest published indication that American admiralty courts would protect seamen by mulcting their abusers with monetary punishment seems to be the 1799 decision in Swift v. The Happy Return where Judge Peters discussed an earlier (unnamed) case in which he had found a shipowner guilty of a "very atrocious" failure to provide seamen with proper food. Judge Peters said he handled that situation by threatening the shipowner with a judicially-created monetary penalty, thereby bringing about an "accommodation" between the seaman and the shipowner.

The earliest reported decision in which a seaman was actually awarded punishment money seems to have been Gould v. Christianson. In that case, the ship's master's discipline of an inexperienced and clumsy "gentleman's son" who had shipped as an apprentice seamen was held excessive under the circumstances. The court deemed it necessary to "augment the damages beyond a mere remuneration for the bodily injury" in order to deter "coarse and rude usage" of such an apprentice in furtherance of our

107. Ramsay v. Allegre, 25 U.S. (12 Wheat.) 611, 620 (1827) (Johnson, J., concurring). The Supreme Court has called seamen "wards of admiralty" in at least twenty-four decisions. See Westlaw's SCT data base and search "wards"/s "admiralty."
108. Robertson, supra note 1, at 88–95, 99–108.
111. 23 F. Cas. 560 (D. Pa. 1799) (No. 13,697).
112. See id. at 561 n.2.
113. The Act of July 20, 1790, 1 Stat. 135—requiring shipowners to provide adequate food and water "during the voyage" and imposing a penalty for "short allowance"—did not cover Judge Peters' "atrocious" case, which involved seamen's "[e]xpenditures for boarding on shore." Id. Judge Peters said the penalty he threatened the shipowner with "would have gone the length of payment equal to that directed [in the statute] for short allowance." Id.
114. Id.
115. 10 F. Cas. 857 (S.D.N.Y. 1836) (No. 5636).
116. Id. at 857.
country’s “deep interest in encouraging young men of capacity, ambition, and good character, to seek employment in the merchant marine.”

A number of other courts also made punitive awards to seamen. In *The Rolph*, the ship’s mate severely beat a seaman, and the master then callously refused to provide medical care. The court described the mate as a “brutal . . . giant, weighing in the neighborhood of 285 pounds, all bone and muscle, and with a reputation for ferocity as wide as the seven seas.” It noted that the master “brutally refused” the requested medical care “with curses and words of vituperation.” It emphasized that “[s]ailors on an American ship . . . must not be subject to such treatment” because “it is of the utmost importance to the manifest destiny of this republic upon the ocean that the youth of America should be attracted to the sea.” To enforce this national policy, the court made a combined compensatory-punitive award of $10,000.

In *The Margharita*, a seaman who fell overboard and lost his leg to “a shark or some other marine monster” was denied proper medical care for “nearly four months.” During the four-month delay the seaman was in “unspeakable agony . . . , with the ragged extremity of his cruelly wounded leg incased at times in a box of hot tar and at other times rudely bandaged by the kind, but inexperienced, hands of his shipmates.” The district court held the vessel liable for $1,500 in compensatory and punitive damages, stating:

> It is indispensable that in cases of serious injuries to seamen . . . , that in order to obtain proper surgical or medical assistance for them, the courts of admiralty, which proceed ever upon the broadest principles of humanity and justice, should enforce the reasonable rules so frequently announced by the courts . . . . Such is the duty of the courts, not only to compensate the seaman for his unnecessary and unmerited suffering when the duty of the ship is disregarded, but [also] to emphasize the importance of humane and correct

117. *Id.* at 863–64.
118. 293 F. 269, 270 (N.D. Cal. 1923), aff’d, 299 F. 52 (9th Cir. 1924).
119. *Id.* at 269.
120. *Id.* at 270–72.
121. *Id.* at 271.
122. This damages award is equivalent of about $125,908 in 2008 dollars. See *supra* note 83.
123. 140 F. 820, 821, 825 (5th Cir. 1905).
124. *Id.* at 828.
judgment under the circumstances on the part of the [ship’s] master.\textsuperscript{125}

The Fifth Circuit reversed, not because of any doubt about the propriety of the punitive damages remedy, but on the view that the ship’s master had done as well as he could under the circumstances.\textsuperscript{126}

Other courts also gave clear indications that punitive damages are appropriate for seriously blameworthy violations of the maintenance and cure obligation. In \textit{The Scotland},\textsuperscript{127} Judge Addison Brown (who had a large reputation as an admiralty expert\textsuperscript{128}) made a generous damages award for the ship’s improper medical treatment of an injured seaman and said that he would have added “punitive damages” if he had not been persuaded of the “inherent kindness” of the ship’s master.\textsuperscript{129} In the similar case of \textit{The Vigilant}, Judge Brown made a compensatory damages award for the ship’s neglect of an injured seaman’s medical needs and said that he would have been “bound to add considerably” to that award if he had not been “entirely satisfied of the master’s good faith in his conduct, as well as of his intent to treat the seaman kindly and justly.”\textsuperscript{130} In \textit{The Svealand}, the injured seaman’s medical needs were neglected aboard the ship, but the shipowner eventually paid all of the seaman’s medical expenses.\textsuperscript{131} The court awarded an additional $500 for the seaman’s pain and suffering, noting “the apparently aggravated character of the injury” and stating that it would have made a higher award if the shipowner’s medical outlays had not already been so “considerable.”\textsuperscript{132}

Courts made punitive awards to seamen in a number of other cases.\textsuperscript{133} In an even larger number, courts gave indications in dictum

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} \textit{Id.} at 272.
  \item \textsuperscript{127} 42 F. 925 (S.D.N.Y. 1890).
  \item \textsuperscript{128} See Robertson, \textit{supra} note 1, at 109–10 & n.194.
  \item \textsuperscript{129} \textit{The Scotland}, 42 F. at 927.
  \item \textsuperscript{130} 30 F. 288, 288 (S.D.N.Y. 1887).
  \item \textsuperscript{131} 136 F. 109 (4th Cir. 1905).
  \item \textsuperscript{132} \textit{Id.} at 113. See also Nevitt v. Clarke, 18 F. Cas. 29, 31 (S.D.N.Y. 1846) (No. 10,138) (dictum that “vindictive damages” would lie for “wanton and unjustifiable” violations of seamen’s rights); The Child Harold, 5 F. Cas. 619, 620 (S.D.N.Y. 1846) (No. 2676) (stating that “punitive and compensatory” damages would be appropriate if the ship had fed rotten food to the crew).
  \item \textsuperscript{133} See Unica v. United States, 287 F. 177, 180 (S.D. Ala. 1923) (characterizing the ship’s master’s response to a seaman’s need for medical attention as “inexcusable . . . indifference” and awarding $1,500 in compensatory and punitive damages); The Troop, 118 F. 769, 770–72 (D. Wash. 1902), aff’d, 128 F. 856 (9th Cir. 1904) (“shocking” and “monstrous” refusal of medical care yielded combined compensatory-punitive award of $4,000); The
that punitive damages would be to protect seamen from seriously blameworthy abuses of their rights.\textsuperscript{134} The weight of the

City of Carlisle, 39 F. 807, 811–17 (D. Ore. 1889) (calling the ship’s master’s treatment of a seriously injured sixteen-year-old seaman “brutal and indecent,” “simply inhuman,” and “a grievous wrong” and awarding $1,530 in compensatory and punitive damages); Tomlinson v. Hewett, 24 F. Cas. 29, 32 (D. Cal. 1872) (No. 14,087) (captain’s tricking a seaman with smallpox into going ashore so as to sail off and leave the sick man behind merited avowedly “large” $2,500 award); Brown v. Howard, 14 Johns. 119 (N.Y. Sup. Ct. 1817) (“harsh and rigorous, and altogether unjustifiable” punishment of seaman “merit[ed] severe animadversion” and led to a combined compensatory–punitive award). See also Pac. Packing & Nav. Co. v. Fielding, 136 F. 577, 579–80 (9th Cir. 1905) ($5,000 award against a shipowner that included “smart money... as a penalty upon the wrongdoer” for ship captain’s “wanton or oppressive conduct” in imprisoning a seaman was reversed because the captain was not sued and the defendant shipowner was not vicariously liable for punitive damages; Latchimacker v. Jacksonville Towing & Wrecking Co., 181 F. 276, 278–79 (S.D. Fla. 1910), aff’d, 184 F. 987 (5th Cir. 1910) (remitting $10,000 jury award against a towing company that injured a seaman aboard another vessel to $4,826 on the view that the jury’s award included “exemplary damages” and that no “wantonness or reckless negligence on the part of the defendant” had been shown); Sheridan v. Furbur, 21 F. Cas. 1266, 1269 (S.D.N.Y. 1834) (No. 12,761) (holding that a seaman who had been subjected to “unnecessarily abrupt and severe” discipline was entitled to demand “a punishment in damages corresponding to the wantonness of the wrong” but that the seaman had forfeited his entitlement by admitting that he brought suit only at the instigation of an enemy of the defendant).

134. The following cases are presented in chronological order: Sampson v. Smith, 15 Mass. 365, 370 (Mass. 1819) (stating that “malicious or vindictive” punishment of a seaman would yield “retributive justice [to] apportion the penalty and the damages to the malignity of the [punisher’s] motives”); Elwell v. Martin, 8 F. Cas. 584, 587–88 (D. Me. 1824) (No. 4425) (indicating that “a criminal abuse of power” in punishing a seaman would warrant “vindictive” damages); Hutson v. Jordan, 12 F. Cas. 1089, 1092 (D. Me. 1837) (No. 6959) (suggesting that ship’s officers who assault seamen are exposed to “exemplary damages”); Sherwood v. Hall, 21 F. Cas. 1292, 1293 (D. Mass. 1837) (No. 12,777) (dictum that the master of a ship who took on a minor as a seaman, knowing this was against the seaman’s father’s wishes, could be held to “severe” and perhaps “exemplary damages”); Thompson v. Oakland, 23 F. Cas. 1064, 1065 (D. Mass. 1841) (No. 13,971) (dictum that “exemplary damages” will lie for “wanton violation of [a seaman’s] contract [of employment]”); Jay v. Almy, 13 F. Cas. 387, 389–90 (C.C.D. Mass. 1846) (No. 7236) (master who wrongly suspected a seaman of fomenting mutiny and imprisoned him was not liable for “smart money or vindictive damages” only because his actions, while exhibiting poor judgment, were not malicious); The Australia, 2 F. Cas. 236, 238 (D. Me. 1859) (No. 667) (dictum that “aggravated damage[s]” will lie if a ship leaves a seaman in a foreign port without good cause); The General Rucker, 35 F. 152, 155, 158–59 (W.D. Tenn. 1888) (stating that a vessel whose mate “tapped [a seaman] on the head with [a] monkey-wrench,” knocking him into the river, was “no doubt” exposed to punitive damages but finding that the mate’s conduct was not quite bad enough); The State of Missouri, 76 F. 376, 380 (7th Cir. 1896) (stating that a steamboat captain who left port with
jurisprudence is overwhelming: nineteenth-century seamen indisputably had the right to seek punitive damages.

B. The Right of Seamen to Seek Punitive Damages Seemed Especially Clear in the Maintenance and Cure Context

1. Maintenance and Cure Law Aims at Protecting Seamen While Avoiding Litigation

The responsibility to provide sick and hurt seamen with maintenance (room and board) and cure (medical care) is an "ancient duty" that "has been imposed upon the shipowners by all maritime nations."135 Maintenance and cure are the oldest and most fundamental of the seamen’s rights.136 The Supreme Court has often emphasized that "the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficent purposes."137

The law of maintenance and cure is designed to ensure that injured and sick seamen get quick and unstinting maintenance and cure for humanitarian reasons, and to secure their rehabilitation and return to service.138 Litigiousness is anathema. In Farrell v. United States, the Supreme Court emphasized this, stating:

It has been the merit of the seaman’s right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations . . . . [T]he spirit and function of the doctrine [seek to avoid] the

waterfront laborers aboard and tried to force them to serve as crew members would have been "mulcted in exemplary damages" if sued but holding that the defendant shipowner was not vicariously liable for punitive damages); The Ludlow, 280 F. 162, 163–64 (N.D. Fla. 1922) (indicating that a ship’s captain who unjustifiably imprisoned a seaman would be liable for “exemplary or punitive” damages but holding that the captain’s employer was not vicariously liable for punitive damages).


138. In an often-quoted passage, Justice Story elaborated these points in Harden v. Gordon, 11 F. Cas. 480, 482–83 (D. Me. 1823) (No. 6,047).
litigiousness which has made the landman’s remedy so often a promise to the ear to be broken to the hope.\textsuperscript{139}

What this means is that “[m]aintenance and cure are intended to be a remedy free of uncertainty and administrative red tape. The employer has a duty to promptly investigate any claim and should resolve doubts in favor of paying the seaman his due.”\textsuperscript{140}

Nevertheless, litigation is sometimes necessary.\textsuperscript{141} When the employer unjustifiably fails to provide maintenance and cure, the seaman can sue to enforce the obligation and recover the value of the unpaid maintenance and cure.\textsuperscript{142} If the employer’s failure to provide maintenance and cure was negligent, the seamen can also recover compensatory damages resulting from the nonpayment,\textsuperscript{143} “such as the aggravation of the seaman’s condition, determined by the usual principles applied in tort cases to measure compensatory damages.”\textsuperscript{144} And if the “shipowner, in failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault,”\textsuperscript{145} there was a “line of . . . authority for awarding punitive damages.”\textsuperscript{146}

2. Well Before the Jones Act Was Enacted (in 1920), the Availability of the Punitive Damages Remedy in Maintenance and Cure Cases Was Settled Law

A number of the cases treated supra in Part VI.A were actions against shipowners for dishonoring the maintenance and cure obligation. There is little doubt that the pre-Jones Act law of maintenance and cure included the punitive damages remedy.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{139} 336 U.S. 511, 516 (1949).
\item \textsuperscript{140} THOMAS J. SCHÖNBAUM, ADMIRALTY AND MARITIME LAW 307 (4th ed. 2004).
\item \textsuperscript{141} American Maritime Cases (AMC) has reported about 1,115 maintenance and cure cases since its inception in 1923. See AMC five-year digests for 1923–27 through 2003–07, at Articles & Wages ## 143, 144, 161; Illness # 112; and Personal Injury ## 118, 138, 141.
\item \textsuperscript{142} The Osceola, 189 U.S. 158, 169–73 (1903).
\item \textsuperscript{143} The Iriquois, 194 U.S. 240 (1904).
\item \textsuperscript{144} Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987), \textit{abrogated on other grounds by} Guevara v. Mar. Overseas Corp., 59 F.3d 1496 (5th Cir. 1995) (en banc).
\item \textsuperscript{145} \textit{Id}.
\item \textsuperscript{146} Robertson, supra note 1, at 149.
\end{enumerate}
\end{footnotesize}
3. The Jones Act Did Not Take Away Any Pre-Existing Seamen's Remedies

In more than a dozen cases, the Supreme Court has affirmed that the Jones Act did not take anything away from seamen.  

4. Vaughan v. Atkinson Supports the Availability of Punitive Damages in Maintenance and Cure Actions

When Clifford Vaughan fell ill with tuberculosis, his employer's refusal to provide maintenance was "callous, . . . recalcitrant[t], . . . willful and persistent." As a result, Vaughan, sick as he was, had to go to work as a taxi driver. When Vaughan brought suit, the district court held that he was entitled only to the unpaid maintenance—no damages and no attorneys' fees—and, further, that the employer was entitled to a credit for Vaughan's taxicab earnings. The Fourth Circuit affirmed. The Supreme Court, in Vaughan v. Atkinson, reversed the Fourth Circuit, holding that the credit was inappropriate and that attorneys' fees should have been awarded. Justices Stewart and Harlan dissented on the credit issue. On the attorneys' fees issue, Justices Stewart and Harlan indicated that the Court had probably reached


151. Vaughan, 291 F.2d 813.

152. Vaughan, 369 U.S. 527.

153. Id. at 534–40 (Stewart, J., dissenting).
the correct result but that the attorneys' fees award needed a firmer
doctrinal justification than the majority had provided.\textsuperscript{154}

[The majority cites] nothing to [justify] a departure from the
well-established rule [the "American Rule"] that counsel
fees may not be recovered as compensatory damages. However, if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made.\textsuperscript{155}

The \textit{Vaughan} majority did not respond to Justices Stewart and Harlan's views on the fee-award point. However, the majority opinion bristles with indignation on behalf of the mistreated seaman,\textsuperscript{156} and it seems likely that the only reason the majority did not award punitive damages was that Vaughan had not asked for them. The highly regarded Gilmore and Black treatise took that view, stating:

\textsuperscript{154} The majority's explanation of the doctrinal basis for the fee award is analyzed in David W. Robertson, \textit{Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty}, 27 J. MAR. L. & COM. 507, 552–53 (1996).

\textsuperscript{155} \textit{Vaughan}, 369 U.S. at 540 (Stewart, J., dissenting) (emphasis added) (citations omitted) (citing Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851)). The relevant passage in \textit{Day} stated:

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. . . . [T]he degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel-fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

\textsuperscript{156} The Court called the employer's refusal to provide maintenance "callous," "recalcitrant[.]," "willful[,]" and persistent" and said "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." \textit{Id.} at 531. It disparaged the idea that the employer should be credited with Vaughan's taxicab earnings, stating that to allow this would create "a sorry day for seamen" and put "a dreadful weapon in the hands of unconscionable employers." \textit{Id.} at 533.
It will be noted that the [Vaughan] Justices were, in effect, unanimous on the damage recovery. The dissenting Justices felt that the exemplary or punitive damages, if plaintiff was found entitled to them, should be awarded as such; the majority Justices, perhaps because of their narrow interpretation of the grant of certiorari and in order to avoid further proceedings, awarded what were essentially punitive damages under the name of counsel fees.\textsuperscript{157}

In Robinson v. Pocahontas, Inc., the First Circuit agreed, noting that Justices Stewart and Harlan were dissenting on another point and were "seemingly in agreement with the majority's fundamental premise" that punitive damages were appropriate.\textsuperscript{158} In the three decades following Vaughan, many other courts also relied on Vaughan as authority for awarding punitive damages against callous and recalcitrant employers.\textsuperscript{159}

5. The Two Fundamental Policies of Maintenance and Cure Law Require an Effective Penalty

In Miles the Supreme Court cited the work of Judge Richard Posner as presenting "strong policy arguments" for allowing recovery of damages for a fatal accident victim's lost future income in survival actions brought by the decedent's estate.\textsuperscript{160} Judge Posner has also

\textsuperscript{157} GILMORE \& BLACK, supra note 9, at 313 (citations omitted).
\textsuperscript{158} 477 F.2d 1048, 1051 (1st Cir. 1973).
presented strong policy arguments for punitive damages in virtually all cases of serious wrongdoing.\textsuperscript{161}

The need for a punitive damages penalty to deter serious wrongdoing is especially apparent in the maintenance and cure context in order to further the law's central policies of protecting seamen and avoiding litigation.\textsuperscript{162} As the Alaska Supreme Court explained:

When a shipowner refuses to pay maintenance and cure the seaman's only alternative is a lawsuit, which is a lengthy and expensive process. During this time, the seaman may have no funds to effect his recovery, and thus may be forced to work when he should be resting. In addition, the shipowner might use a refusal to pay maintenance as a bargaining tool, forcing an impoverished seaman to accept a low amount or face a lengthy court battle. Thus, the availability of punitive damages will act as a deterrent to the unscrupulous employer, and will result in more speedy resolution of maintenance and cure claims.\textsuperscript{163}

The absence of a punitive damages penalty would have two undesirable consequences: not only would it encourage unscrupulous employers to take advantage of unrepresented or poorly represented seamen, but it would also mean that a seaman with a pure maintenance and cure claim (i.e., a maintenance and cure claim unaccompanied by a related Jones Act or unseaworthiness claim) would have difficulty finding a competent lawyer. Indeed, the Supreme Court has frequently recognized that punitive damages may be necessary "when the value of injury and the corresponding compensatory award are small (providing low incentives to sue)."\textsuperscript{164}

Attorneys' fees awards do not answer either of the foregoing problems. Fee awards do not constitute a sufficient deterrent because they are blind to the conduct of the defendant and hence cannot be scaled to punish and deter reprehensibility. Fee awards will not attract high-quality lawyers to help seamen in pure


\textsuperscript{162} See supra Part VI.B.1.

\textsuperscript{163} Weason, 706 P.2d at 310 (citations omitted).

maintenance and cure cases because fee awards are based on the reasonable amount of time spent by the plaintiff's attorney multiplied by the reasonable hourly rate of the attorney—taking into account "the amount involved and the results obtained"—and are therefore likely to be too small to suffice.

Moreover, there is an additional problem with relying on attorneys' fees as the only penalty for flouting the maintenance and cure obligation. Some of the proponents of restricting employers' exposure solely to the counsel-fees penalty have maintained that the penalty's doctrinal justification is the courts' inherent authority to punish abuses of litigation. This means that the attorneys' fees penalty "may not be used to sanction pre-litigation conduct." The limitation cripples the sanction:

If attorneys' fees are awardable only for abuse of the litigation process, then the unscrupulous employer need have no fear of behaving with full recalcitrance right up to the point when the seaman has to go to court. Conversely, an attorney advising a seaman will need to file a lawsuit as quickly as possible in order to get the potential penalty clock started. These are perverse incentives.

These "perverse incentives" fly in the teeth of both of the fundamental policies of maintenance and cure law set forth in supra Part VI.B.1.

In Townsend the shipowner–employer sought to assure the Supreme Court that employers generally want to "do the right thing" and that there is no "empirical evidence" that an attorneys' fees penalty is insufficient. But these were somewhat implausible claims. In the first place, we all know that Justice Holmes' "bad man's counterparts turn up from time to time." Moreover, as the Supreme Court explained in Griffin v. Oceanic Contractors, Inc., modern seamen continue to require protection "from the harsh consequences of arbitrary and unscrupulous actions of their employers, to which, as a class, they are peculiarly exposed."

In

167. Id.
Kraljic v. Berman Enterprises, Inc. and Hines v. J.A. LaPorte, Inc., the courts indicated that attorneys’ fees awards do not necessarily suffice to dissuade employers from arbitrary and unscrupulous actions.\textsuperscript{171}

There is recent evidence suggesting that these courts were right. In Guevara v. Maritime Overseas Corp. and Glynn v. Roy Al Boat Management Corp., the courts excised the punitive damages penalty from the maintenance and cure law of the Fifth and Ninth Circuits.\textsuperscript{172} In the wake of those decisions, some employers became notably more resistant to maintenance and cure claims.\textsuperscript{173} It thus appears that the threat of punitive damages is needed to dissuade at least a few unscrupulous employers from aggressively overreaching unrepresented and poorly represented seamen.

“Punitive damages are meant as a threat to discourage egregious misconduct. If the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to work.”\textsuperscript{174} In the maintenance and cure context, punitive damages are a salutary threat meant to push unscrupulous employers away from their baser instincts, to lead callous employers away from their tendency to be suspicious of injured seamen’s claims, and to draw a first-class lawyer to the seaman’s side when abuse nevertheless occurs. If the salutary threat had been part of the law governing the cases set forth,\textsuperscript{175} at least some of the worst abuses shown there

\textsuperscript{171} 575 F.2d 412, 416 (2d Cir. 1978); 820 F.2d 1187, 1189 (11th Cir. 1987). See also Vella v. Ford Motor Co., 421 U.S. 1, 4 (1975) (discussing the risk that a shipowner might deny “vitaly necessary maintenance and cure” on the “poorly founded [belief] that the seaman’s injury is permanent and incurable”).

\textsuperscript{172} 59 F.3d 1496 (5th Cir. 1995) (en banc), abrogated by Townsend, 129 S. Ct. 2561; 57 F.3d 1495 (9th Cir. 1995), abrogated by Townsend, 129 S. Ct. 2561.

\textsuperscript{173} See, e.g., Weeks Marine, Inc. v. Bowman, No. 04-0009, 2006 WL 2178514, at *2, 3–5 (E.D. La. July 28, 2006) (deploring “Weeks’ consistently unreasonable and recalcitrant conduct throughout this entire case” and stating that Weeks’ Risk Manager had “credibility problems” and that his conduct in the matter had been “egregiously at fault,” “arbitrary[,] and capricious”); Moore v. The Sally J., 27 F. Supp. 2d 1255, 1261 (W.D. Wash. 1998) (finding that the “defendant did not follow its own company procedures when it failed to investigate” plaintiff’s maintenance and cure claim and that defendant’s refusal to pay was “willful and persistent”); Charpentier v. Blue Streak Offshore, Inc., No. Civ.A. 96-323, 1997 WL 426093, at *5–6, 9 (E.D. La. July 29, 1997) (detailing lengthy course of “callous” mistreatment of seaman, causing him severe economic dislocation and “uncertainty and prolonged mental anguish”); Spell v. Am. Oilfield Divers, Inc., 722 So. 2d 399, 405 (La. App. 3d Cir. 1998), writ denied, 738 So. 2d 587 (La. 1999) (finding that the employer's handling of the maintenance and cure claim was “recalcitrant” and “egregious fault” and noting that the employer's “claims adjuster admitted that the [employer's] attorney told him to ignore” medical information favoring the seaman's claim).

\textsuperscript{174} Robertson, supra note 1, at 162–63.

would probably have been deterred. The seamen would have been
better protected. Expensive, protracted, and unpleasant litigation
might have been avoided.

C. Baker’s Analysis of Statutory Preemption Undercuts the
Revisionist View of Miles

In Baker, defendant Exxon argued strenuously that the Clean
Water Act (CWA)\textsuperscript{176} preempted the general maritime punitive
damages remedy. The Supreme Court unanimously rejected
Exxon’s preemption argument.\textsuperscript{177} The Court’s explanation
comprised the six steps quoted below.\textsuperscript{178} The italicized statement
following each of the quoted steps brings the Baker reasoning to
bear on the issue of seamen’s rights to seek punitive damages in
maintenance and cure cases.

(1) “Exxon . . . admit[s] that the CWA does not displace
compensatory remedies for consequences of water pollution, even
those for economic harms.”\textsuperscript{179}

Correspondingly, no one has contended that the Jones Act took
away the rights of seamen to sue for unpaid maintenance and cure
and for compensatory damages for the failure to pay maintenance
and cure.

(2) “This concession . . . leaves Exxon with the . . . untenable
claim that the CWA somehow preempts punitive damages, but not
compensatory damages, for economic loss.”\textsuperscript{180}

A fortiori, the argument of the Townsend petitioners that the
Jones Act somehow preempts punitive but not compensatory
damages in maintenance and cure cases was equally untenable.

(3) “But nothing in the statutory text [of the CWA] points to
fragmenting the recovery scheme this way . . . .”\textsuperscript{181}

The Jones Act likewise says nothing about maintenance and
cure and nothing about punitive damages.

(4) “[A]nd we have rejected similar attempts to sever remedies
from their causes of action.”\textsuperscript{182}

\textsuperscript{178}. The Baker Court’s treatment of statutory preemption is at Baker, 128 S.
Ct. 2619.
\textsuperscript{179}. Id. at 2619.
\textsuperscript{180}. Id.
\textsuperscript{181}. Id.
In the course of holding that federal statutes regulating nuclear safety did not
preempt a state-law action for punitive damages, the Silkwood Court stressed the
venerability of the punitive damages remedy and said that the remedy should
In arguing that the Jones Act does not impair the maintenance and cure cause of action but does cut into maintenance and cure remedies, the Townsend petitioners sought precisely the kind of severance that Silkwood v. Kerr-McGee Corp. and Baker condemned.

(5) "All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies . . . ."\(^{183}\)

There can be no serious contention that the Jones Act occupied the entire field of seamen's remedies. The Supreme Court has stated that "[t]he only purpose of the Jones Act was to remove the bar created by The Osceola, so that seamen would have the same rights to recover for negligence as other tort victims."\(^{184}\) "[A] remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts."\(^{185}\)

(6) "[N]or for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption."\(^{186}\)

The Townsend petitioners did not suggest any way in which the Jones Act remedial scheme could be frustrated by allowing punitive damages against employers who flout the maintenance and cure obligation.

D. Other Aspects of Baker Also Show that Miles Does Not Diminish the Maritime Punitive Damages Remedy

*Miles* played no significant part in *Baker*.\(^{187}\) There was no suggestion by any member of the *Baker* Court that *Miles* impaired substist absent "irreconcilable conflict" with federal law or "frustrat[ion] [of] the objectives of the federal law." *Silkwood*, 464 U.S. at 256.


187. The *Baker* majority opinion indicated that *Miles* had only peripheral relevance and did not impede the Court's authority to deal with "a perceived defect in [the maritime] common law [punitive damages] remedy" by creating a new ratio-based ceiling on maritime punitive damages. *Baker*, 128 S. Ct. at 2629-30 & n.21. Justice Stevens' opinion—disagreeing with the new ratio-based ceiling—said there is no "question that the Court possesses the power to craft the rule it announces today" but that the wiser *Miles*-driven approach would have heeded "that Congress has affirmatively chosen not to restrict the availability" of the punitive damages remedy. *Id.* at 2638, 2635 (Stevens, J., concurring in part and dissenting in part).
or questioned the general maritime punitive damages remedy. This further indicates that the *Townsend* petitioners were wrong in claiming that *Miles* impedes the recovery of punitive damages in maritime law. If *Miles* did have that meaning, surely some member of the *Baker* Court would have said something about it.

**E. The Revisionist View of *Miles* Is Inconsistent with All of the Supreme Court’s Jurisprudence Treating Congressional Preemption of Federal Common Law**

The Supreme Court has consistently strived to harmonize Congress’ contributions to maritime law with the underlying maritime common law. For example, in its 2001 decision in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, the Court found nothing in the Jones Act, Death on the High Seas Act (DOHSA), or the Longshore and Harbor Workers’ Compensation Act (LHWCA) that impaired the validity of an action under maritime common law for wrongful death damages suffered by the mother of a negligently-killed shipyard worker.\(^{188}\) Focusing on the Jones Act, the Court cited *Miles* for the proposition that “even 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.”\(^{189}\)

Similarly, in *The Arizona v. Anelich*, the Supreme Court refused to interpret the Jones Act in accordance with FELA decisions applying the assumption of risk defense against workers.\(^{190}\) Instead, the Court rejected the defense, explaining that the Jones Act must “be interpreted in harmony with the established doctrine of maritime law of which it is an integral part.”\(^{191}\)

\(^{189}\) Id. at 818.
\(^{190}\) 298 U.S. 110 (1936).
\(^{191}\) Id. at 123. See also *City of Milwaukee v. Cement Div., 515 U.S. 189, 194* (1995) (holding that a statute authorizing post-judgment interest did not cast any negative light on the general maritime law’s pre-judgment interest remedy); *Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 282–84* (1980) (holding that nothing in the Jones Act or DOHSA stood in the way of a general maritime action by the wife of a harbor worker non-fatally injured aboard a ship in state territorial waters); *Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260–63* (1979) (holding that the 1972 amendments to the LHWCA must be interpreted consistently with the general maritime rule of joint and several liability); *Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 622 n.15, 625* (1978) (indicating that DOHSA impairs general maritime wrongful death remedies only when the statute “speak[s] directly to [the] question”); *Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393–403* (1970) (determining that nothing in the Jones Act, LHWCA, or DOHSA impeded the Court’s creation of a maritime wrongful death remedy); *Cox v. Roth, 348 U.S. 207, 209* (1955) (holding that whether a Jones Act suit survives the death of the tortfeasor should be decided under the general maritime law rather
Outside the maritime law field, federal courts’ common-law-making authority is constrained by *Erie Railroad Co. v. Tompkins*, but sizeable bodies of federal common law subsist. Here, too, there is a presumption that “where a [federal] common-law principle is well established . . . , the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’”

Because the Jones Act incorporates FELA, FELA cases have almost direct bearing on seamen’s cases. It is thus particularly significant that the Supreme Court has consistently sought to interpret FELA so as to bring it into harmony with the underlying common law.

The governing principle in all of the foregoing cases is this: “[s]tatutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.” Note that in *Garris*, the Court had no doubt that *Miles* was fully compatible with this principle. The *Townsend* petitioners’ invitation to distort *Miles* into a stark outlier from this entire body of jurisprudence was properly declined.

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than by “literal application of the words of the F.E.L.A.”); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247–48 (1942) (holding that neither statutes protecting seamen against unfavorable compromises of wage claims nor statutes protecting LHWCA workers against unfavorable compromises of workers’ compensation claims impaired a general maritime doctrine protecting seamen against unfavorable compromises of maintenance and cure and Jones Act claims); *Cortes v. Balt. Insular Line*, 287 U.S. 367, 374–77 (1932) (holding that the Jones Act does not impinge upon the rights of seamen to sue for damages for nonpayment of maintenance and cure); *Pac. S.S. Co. v. Peterson*, 278 U.S. 130, 138–39 (1928) (holding that the Jones Act “was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages”).

192. 304 U.S. 64 (1938).


F. FELA Should Not Impair Maritime Punitive Damages

The petitioners in Townsend sought to support their argument that Jones Act plaintiffs cannot seek punitive damages by asserting that FELA plaintiffs cannot. The argument seems wrong for two reasons. First, the Supreme Court has made it clear that FELA restrictions on plaintiffs' rights cannot displace maritime law's protections of seamen.198

Second, on the better view of the law, FELA plaintiffs should be able to seek punitive damages. The Senate Judiciary Committee's Report on the 1910 amendments to FELA stated that when Congress enacted FELA, it meant "to extend and enlarge" the workers' remedies and not to "limit or take away . . . any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred by the Act."199 It ought to follow that if pre-FELA railroad workers could sue their employers for punitive damages, FELA workers can too.

In the pre-FELA jurisprudence, railroad workers so rarely won suits against employers that the issue of punitive damages never came up. However, in Denver & R.G. Railway Co. v. Harris the Supreme Court upheld a punitive damages award against a railroad for shooting a rival railroad's worker.200 And in Harris v. Louisville, N.O. & T.R. Co., a circuit court awarded punitive damages to a job applicant who was accused of theft and imprisoned by the railroad.201 So there is no reason to think that railroad workers would not have been eligible for punitive damages in suits against their employers had they ever managed to win a case.

Mistreated passengers were awarded punitive damages against railroads in Milwaukee and St. Paul Railway Co. v. Arms,202 Railroad Co. v. Brown,203 Cowens v. Winters,204 Fell v. Northern Pacific Railroad Co.,205 Gallena v. Hot Springs Railroad,206 and

198. See Cox v. Roth, 348 U.S. 207, 209–10 (1955) (holding that decisions holding that FELA actions did not survive the death of the tortfeasor had no application in Jones Act cases); The Arizona v. Anelich, 298 U.S. 110, 119–24 (1936) (holding that an assumed risk defense then available to FELA defendants did not apply in Jones Act cases); Cortes v. Balt. Insular Line, Inc., 287 U.S. 367, 376–77 (1932) (holding that the Jones Act imposes broader duties on employers to care for "sick or disabled employees" than FELA).
199. 45 CONG. REC. 4048 (1910).
201. 35 F. 116 (W.D. Tenn. 1888).
202. 91 U.S. 489 (1875).
203. 84 U.S. 445 (1873).
204. 96 F. 929 (6th Cir. 1899).
205. 44 F. 248 (D.N.D. 1890).
Moreover, railroads in pre-FELA cases were frequently exposed to punitive damages. Lake Shore, in supra Part V.A.2, was a punitive damages action by a mistreated railway passenger that ultimately failed on no-vicarious-liability grounds.

Railroads’ exposure to punitive damages was not limited to passenger-abuse cases. In Missouri Pacific Railway Co. v. Humes and Minneapolis & St. L. Railway Co. v. Beckwith, the Supreme Court upheld punitive damages awards against railroads for killing a mule and three pigs. In Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley, the Court said that the railroad would have been cast with punitive damages for defaming a depot builder if “criminal indifference to civil obligations” had been shown.

A 1972 A.L.R. annotation concluded that under the majority view, FELA plaintiffs could sue for punitive damages. Authorities supporting this view include Ennis v. Yazoo & M.V.R. Co., Alabama Northern Railroad Co. v. Methvin, and the federal district court’s thorough and careful opinion in Kozar v. Chesapeake and Ohio Railway Co. Kozar was reversed by the Sixth Circuit, and that opinion is the shaky foundation of the proposition that FELA plaintiffs cannot seek punitive damages. The Sixth Circuit’s Kozar opinion is extremely implausible in two respects. First, it sidesteps FELA’s legislative history by claiming that punitive damages are not a “remedy.” Second, it performs a feat of judicial legerdemain on the Vreeland line of cases, flipping the pecuniary-loss limitation on wrongful death damages into a broad new rule that all “damages recoverable under [FELA] are compensatory only.”

G. Seamen Need and Deserve the Protection of Punitive Damages

As the Court explained in Baker, punitive damages are justified to punish reprehensible conduct and to teach the defendant not to do

207. 7 F. 51 (W.D. Tenn. 1881).
209. 115 U.S. 512 (1885); 129 U.S. 26 (1889).
212. 79 So. 73 (Miss. 1918).
213. 64 So. 175 (Ala. Ct. App. 1913).
216. Id. at 1240.
217. Id. at 1241 (emphasis added).
it again and others not to do it at all. Exxon was subjected to punitive damages in *Baker* because its conduct created a reprehensible threat to marine safety. Seamen are uniquely vulnerable to such threats; that is why they have the special protections that federal maritime law has always afforded them. If seamen had been injured in the *Exxon Valdez* accident, they would have needed and deserved the punitive damages remedy, at least as much so as any other marine interest.

**VII. THE *TOWNSEND* OPINIONS**

Justice Thomas’ majority opinion in *Townsend* was joined by Justices Stevens, Souter, Ginsburg, and Breyer. The opinion’s analysis of the case is notably clear and straightforward, making the following key points:

- 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.”
- Nothing in maritime law undermines the applicability of this general rule in the maintenance and cure context.
- The Jones Act . . . 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. . . . [*Vaughan*] supports the view that punitive damages awards, in particular, remain available in maintenance and cure actions after the [Jones] Act’s passage.
- *Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions. . . . *Miles* does not require us to eliminate the general maritime remedy of punitive damages for the willful or wanton failure to

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221. *Id.* at 2568 (quoting *Robertson, supra* note 1, at 115).
222. *Id.*
223. *Id.* at 2570.
224. *Id.* at 2571.
225. *Id.* at 2572.
comply with the duty to pay maintenance and cure.\footnote{226}{Id. at 2573.}  
. . . Limiting recovery for maintenance and cure to whatever is permitted by the Jones Act would give greater pre-emptive effect to the Act than is required by its text, \textit{Miles}, or any of this Court’s other decisions interpreting the statute.\footnote{227}{Id. at 2575.}

Justice Alito’s dissenting opinion was joined by Chief Justice Roberts and Justices Scalia and Kennedy.\footnote{228}{Id.} It, too, is clear and straightforward, resting on three arguments:

\begin{itemize}
  \item It is . . . reasonable to assume that only compensatory [and not punitive] damages may be recovered under the Jones Act.\footnote{229}{Id. at 2577 (Alito, J., dissenting).}
  \item Endorsing what has been termed a principle of uniformity, \textit{Miles} teaches that if a form of relief is not available on a [Jones Act] claim, we should be reluctant to permit such relief on a similar claim brought under general maritime law.\footnote{230}{Id. at 2576.}
  \item The search for [pre-Jones Act] maintenance and cure cases in which punitive damages were awarded yields strikingly slim results. The cases found are insufficient in number, clarity, and prominence to justify departure from the \textit{Miles} uniformity principle.\footnote{231}{Id. at 2579.}
\end{itemize}

\section*{VIII. Open Questions}

In important footnotes, the \textit{Townsend} majority flagged two open questions. First, the Court did “not address the dissent’s argument that the Jones Act . . . prohibits the recovery of punitive damages in actions under that statute.”\footnote{232}{Id. at 2575 n.12.} This will doubtless be the earliest and most hotly contested of the new issues that \textit{Townsend} has opened up.

Second, the Court expressly did not decide whether punitive damages in maintenance and cure cases are subject to the \textit{Baker} ceiling (a one-to-one ratio to compensatory damages).\footnote{233}{See id. at n.11.} Plaintiffs’ arguments against the applicability of the ceiling will probably point
to suggestions in Baker that the ceiling might be inapplicable to "dangerous activity carried on for the purpose of increasing a tortfeasor’s financial gain . . . [i.e.] strategic financial wrongdoing,"\textsuperscript{234} to "cases with . . . earmarks of exceptional blameworthiness,"\textsuperscript{235} to cases of "modest economic harm or odds of detection,"\textsuperscript{236} and to cases in which "the value of injury and the corresponding compensatory award are small (providing low incentives to sue)."\textsuperscript{237}

Other open questions in the tort realm include the availability of punitive damages in unseaworthiness actions, in personal injury actions by seamen against non-employer–non-shipowner defendants (e.g., products liability actions), and in personal injury actions generally.

In the maintenance and cure area, some might contend that whether attorneys’ fees remain an available remedy against an employer who has refused to provide maintenance or cure has become an open question. However, it should be noted that the Townsend Court strongly endorsed Vaughan, which squarely supported the attorneys’ fees remedy.\textsuperscript{238} Assuming that the attorneys’ fees remedy remains viable, there is probably room for litigation as to what the standard of blameworthiness should now be.

IX. CONCLUSION

The biggest question of all is what the lower courts will make of Townsend. On the face of things, the situation seems clear: punitive damages can be awarded for seriously blameworthy violations of the maintenance and cure obligation, and the Fifth Circuit, Ninth Circuit, and other circuit courts that held to the contrary have been wrong. But circuit-level judges with maritime expertise are not always eager to accept new guidance from the Supreme Court,\textsuperscript{239} and no one who has worked in this field for very long will be much surprised if the immediate aftermath of Townsend is hotly litigious.

\textsuperscript{235} \textit{Id.} at 2633.
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.} at 2622.
\textsuperscript{238} See Townsend, 129 S. Ct. at 2571.