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A Watery Grave for Unseaworthiness Punitive Damages: McBride v. Estis Well Service, L.L.C.

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TABLE OF CONTENTS

INTRODUCTION

Life on the high seas was not easy for seamen, as this life involved cruel treatment by masters and a lack of regulation.[1] Historically, this class of maritime workers has been entitled to special judicial protections as the wards of admiralty.[2] Although admiralty courts understandably became a shield for these workers in turbulent times, a seaman today is no longer thrown into the same rough waters. Congress has legislated extensively in the area of maritime tort remedies,[3] and employers have responded by making worker safety a major goal of the maritime shipping industry.[4] Consequently, courts should no longer use the rocky waters of the past as justification to expand claims and remedies when the seas are much calmer.

One remedy that courts have recently expanded is the availability of punitive damages to seamen.[5] In *Atlantic Sounding Co., Inc. v. Townsend*,[6] the United States Supreme Court held that seamen were entitled under general maritime law to recover punitive damages for their employer's intentional failure to pay maintenance and cure—a remedy that includes medical and living expenses arising out of an accident or illness that occurs during the seaman's employment.[7] The Court based its decision on the

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1. *See infra* Part II.B.1.
2. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 417 (2009).
3. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).
4. *See generally* Stanley A. Millan & Patrick J. Veters, *Deck the Hulls with OSHA*, 2 LOY. MAR. L.J. 44 (2003) (discussing the dual regulatory authority of the United States Coast Guard and the Occupational Safety and Health Administration in the field of maritime worker safety).
5. *Townsend*, 557 U.S. at 424.
6. 557 U.S. 404.
7. *Id.* at 424.

alleged historic availability of such damages and the absence of statutory preemption.[8] It is unclear whether the reasoning of this decision extends to allow recovery of punitive damages for unseaworthiness—the general maritime-law duty imposed on a shipowner to provide a seaworthy vessel.[9] Recently, in *McBride v. Estis Well Service, L.L.C.*,[10] the United States Fifth Circuit Court of Appeals, sitting en banc, held that unseaworthiness punitive damages are unavailable.[11] The Supreme Court denied the plaintiff's petition for a writ of certiorari, ensuring that the availability of unseaworthiness punitive damages and the scope of the Court's reasoning in *Townsend* will remain unsettled outside the Fifth Circuit.[12] As district courts in other circuits have allowed punitive recovery for unseaworthiness, the Court should resolve this important issue and establish uniformity throughout the country.[13] Otherwise, the scattered availability of unseaworthiness punitive damages will have a detrimental impact on maritime shipping, an industry that is responsible for transporting the majority of the world's goods.[14]

In *McBride*, the Fifth Circuit correctly concluded that unseaworthiness punitive damages should not be available to seamen for three reasons.[15] First, the reasoning of *Townsend* does not extend to unseaworthiness, because no significant history of unseaworthiness punitive damages exists, and the failure to pay maintenance and cure is a fundamentally different legal claim.[16] Second, the unavailability of punitive damages under the Jones Act[17]—a statutory negligence action for seamen—should be extended to unseaworthiness because the two claims typically involve a

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8. *Id.* at 424–25.

9. *Compare* Snyder v. L & M Botruc Rental, Inc., 924 F. Supp. 2d 728, 737 (E.D. La. 2013) (holding that unseaworthiness punitive damages are unavailable under general maritime law), *with* Wagner v. Kona Blue Water Farms, LLC, 2010 A.M.C. 2469, 2483 (D. Haw. 2010) (holding that unseaworthiness punitive damages are available under general maritime law).

10. 768 F.3d 382 (5th Cir. 2014) (en banc).

11. *Id.* at 384 (holding that *Miles* controlled their decision).

12. McBride v. Estis Well Serv., L.L.C., 135 S. Ct. 2310 (2015).

13. *Compare Snyder*, 924 F. Supp. 2d at 737, *with Wagner*, 2010 A.M.C. at 2483.

14. *See McBride*, 768 F.3d at 401 (Clement, J., concurring) ("Given the sizeable percentages of the world's goods that travel on ships, and the fact that the prices of the remainder of the world's goods are indirectly influenced by the prices of the goods that do travel on ships (*e.g.*, oil prices ultimately affect the price of a vast range of items), the decision in this case needs to have only the minutest impact on shipping prices to have a significant aggregate cost for consumers. In light of the potentially sizable impact, this court should not venture too far and too fast in these largely uncharted waters without a clear signal from Congress.").

15. *Id.* at 384.

16. *See infra* Part III.A.

17. 46 U.S.C. § 30104 (2012).

single legal wrong.[18] Third, the court in *McBride* properly determined that courts should not distinguish the availability of unseaworthiness punitive damages between injured seamen and wrongful-death representatives.[19] To preserve uniformity in admiralty and protect the interests of maritime commerce, the Supreme Court should address this issue and hold that unseaworthiness punitive damages are unavailable.[20]

Part I of this Note provides background on the powers of Congress and the federal courts to create admiralty law and explicates the specific remedies that these branches have made available to seamen. Part II explains the Fifth Circuit's recent decision in *McBride* and chronicles the uncertain history of maritime punitive damages. Finally, Part III analyzes whether unseaworthiness punitive damages should be available and concludes that the Fifth Circuit reached the correct result in *McBride*.

I. THE ROLE OF CONGRESS AND THE COURTS IN CALMING THE STORMY SEAS

The legislative and judicial branches have a concurrent role in shaping admiralty law.[21] Determining the remedies available to an injured seaman is an important issue in admiralty law that the Constitution requires these institutions to resolve.[22] Those remedies exist under both statutes[23] and judge-made common law;[24] however, whether the responsibility to expand these claims belongs to Congress or the courts remains unclear.

A. The Scope of Admiralty Jurisdiction

The Supreme Court has interpreted the United States Constitution as granting the federal government the power to determine the substantive law in admiralty.[25] In the United States, two primary sources of maritime law exist: general maritime common law, which the federal courts developed

18. *See infra* Part III.B.
19. *See infra* Part III.C.
20. *See infra* Part III.D.
21. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) ("[I]n the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.").
22. *See infra* Part I.B.
23. *See, e.g.*, The Jones Act, 46 U.S.C. § 30104 (2012).
24. *See, e.g.*, The Osceola, 189 U.S. 158, 175 (1903).
25. *Jensen*, 244 U.S. at 215 ("Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.").

under the authority of the Admiralty Clause of the Constitution,[26] and statutory maritime law that Congress enacted.[27] In the absence of a controlling statute by Congress, judge-made common law governs admiralty.[28] The interplay and seemingly concurrent authority in this area causes conflicts to arise between Congress and the federal courts.[29]

Although maritime tort law in early America consisted mostly of judge-made common law,[30] federal statutes now dominate this subset of admiralty.[31] Recently, the Court has advocated for judicial restraint in areas where Congress has passed legislation, speaking specifically to the balance between Congressional statutes and judge-made maritime common law.[32] The Court acknowledged that Congress "retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation."[33] Critics claim that this reasoning was a complete departure from the

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26. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .").

27. 46 U.S.C. § 30104; *see also* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 360–61 (1959); *but see* William H. Theis, *United States Admiralty Law as an Enclave of Federal Common Law*, 23 TUL. MAR. L.J. 73, 75 (1998) ("The Constitution contemplates that, before Congress enacted a single statute, there was an already existing body of maritime law. The historical understanding was that federal courts had the constitutional authority to declare admiralty law only to the extent that they dealt with issues recognized by other maritime countries as calling for a specialized body of law necessary to satisfy the needs of maritime commerce. Although admiralty law was not frozen as of 1789, it is erroneous to posit that admiralty law is whatever law the courts (or the legislature) create to deal with cases that fall within admiralty jurisdiction, a jurisdiction whose limits are largely defined by the courts themselves.").

28. *Jensen*, 244 U.S. at 215.

29. Theis, *supra* note 27, at 74.

30. McDermott, Inc. v. AmClyde, 511 U.S. 202, 207 (1994) ("[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime." (quoting United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975))); *see also* Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 20 (1963) ("Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law."); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 323 (1955) (Frankfurter, J., concurring) ("It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress."); Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (Frankfurter, J., dissenting) ("No area of federal law is judge-made at its source to such an extent as is the law of admiralty.").

31. Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990).

32. *Id.* at 27 ("In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.").

33. *Id.*

traditional roles of Congress and the courts.[34] However, Congress is arguably in a better position to prescribe the substantive law in admiralty as an elected, law-making body. Unlike the judiciary, the legislative branch is able to investigate critical policy concerns, such as the impact of remedial expansions on the maritime shipping industry.[35]

The Supreme Court has interpreted the purpose of the constitutional grant of admiralty jurisdiction to the federal government as providing a body of law "operating uniformly in[] the whole country."[36] The goal of uniformity demands consistency in the law governing persons and companies engaged in the interstate and international maritime industry.[37] For example, in the context of state workers' compensation schemes, the Court held that Congress could not authorize states to provide the compensation remedy for maritime workers under the Constitution because inconsistent remedies in different state systems would destroy the uniformity that the Constitution required.[38] The Court has also applied this uniformity principle to interactions between judge-made common law and maritime statutes by providing that if a certain type of recovery is unavailable under a statutory claim, the courts should be reluctant to allow such relief on a similar claim brought under general maritime law.[39] The uniformity principle gives guidance as to what remedies and recoveries are available to seamen, particularly in the area of punitive damages.

B. The Remedies Available to the Wards of Admiralty

Only maritime workers who qualify as seamen are entitled to sue their employers for maintenance and cure, unseaworthiness, and negligence under the Jones Act.[40] The Court has fashioned a two-part test to determine whether a maritime worker satisfies the requirements of seaman status: (1)

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34. *See* David W. Robertson, *Our High Court of Admiralty and Its Sometimes Peculiar Relationship with Congress*, 55 ST. LOUIS U. L.J. 491, 514 (2011) (arguing that courts should not be hesitant to expand maritime tort remedies simply because federal statutes exist).

35. Theis, *supra* note 27, at 74 (recognizing that Congress is the preeminent creator of admiralty law).

36. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

37. 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, 765 (1995) (arguing that uniformity should not be applied in the personal injury context because that area has "always been characterized by substantial differences").

38. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920).

39. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) ("[A]n admiralty court should look primarily to these legislative enactments for policy guidance."); *see also* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

40. Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995).

the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; and (2) the employee must have a connection to a vessel, or to an identifiable fleet of vessels under common ownership or control, that is substantial in both duration and nature.[41] If that test is satisfied, the worker is a seaman who can recover personal-injury damages under maintenance and cure, unseaworthiness, and Jones Act negligence.

1. Maintenance and Cure

In 1903, the Supreme Court explicated the remedies available to seamen under the general maritime common law in *The Osceola*.[42] First, the Court recognized "[t]hat the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."[43] The remedy is commonly referred to as the employer's obligation to pay maintenance and cure.[44] Following *The Osceola*, the Court has explained that maintenance and cure includes wages until the end of the voyage, a sum for food and lodging, and medical expenses until the seaman reaches maximum medical cure for his condition.[45] An employer's failure to pay maintenance and cure constitutes a second injury occurring after the illness, incident, or negligent act that caused the initial

41. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991) ("The key to seaman status is employment-related connection to a vessel in navigation . . . we believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status." (quoting Offshore Co. v. Robinson, 266 F.2d 769, 779 (5th Cir. 1959))); *Chandris*, 515 U.S. at 368 ("[A] seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."); Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 558, 560 (1997) (The Court added the requirement that the identifiable group of vessels must be subject to "common ownership or control.").

42. 189 U.S. 158, 175 (1903).

43. *Id.*

44. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6:12, at 305–10 (2d ed. 1975).

45. Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001); *see also* GILMORE & BLACK, *supra* note 44, at 305–10 (describing "maintenance and cure" as including medical expenses, a living allowance, and unearned wages). A seaman is entitled to maintenance and cure until he or she reaches "maximum cure"—the point at which medical science can no longer improve the seaman's condition. *See* Farrell v. United States, 336 U.S. 511, 524 (1949) (Douglas, J., dissenting).

injury to the seaman.[46] The Court has acknowledged this distinction by emphasizing that "a seaman's action for [the wrongful failure to pay] 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].'"[47] Due to the unique risks seamen face in the course of their employment, courts have liberally construed the maintenance and cure remedy in favor of the seaman to allow recovery.[48] In this spirit, the Court recently concluded in *Townsend* that an employer's willful failure to pay maintenance and cure could result in punitive damages.[49]

2. Unseaworthiness

The second general maritime law remedy recognized by *The Osceola* was "[t]hat the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."[50] Fundamentally, this means that a shipowner has a duty to provide a seaworthy vessel that is reasonably fit for its intended use.[51] Although the origins of unseaworthiness give the impression that

46. GILMORE & BLACK, *supra* note 44, at 342 ("It is unquestioned law that both the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two.").

47. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 (2009) (quoting Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138–39 (1928)) (alteration in the original); *see also* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 147 (1997) [hereinafter *Punitive Damages*] ("[T]he action for damages for withholding maintenance and cure is 'completely separate and independent' from the Jones Act and unseaworthiness claims." (quoting E. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 95.24 (1987))).

48. Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 727–28 (1943) ("From the earliest times maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen."); *see generally* Koistinen v. Am. Exp. Lines, Inc., 83 N.Y.S.2d 297 (N.Y.C. City Ct. 1948) (awarding maintenance and cure to a seaman who injured himself when he was forced to jump from a brothel window after a dispute arose over fees).

49. *Townsend*, 557 U.S. at 424.

50. The Osceola, 189 U.S. 158, 175 (1903).

51. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) ("What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.").

the claim is rooted in a negligence action, which would impose a duty on the shipowner to exercise due diligence,[52] the Supreme Court has accepted that *The Osceola* "enunciated a concept of absolute liability for unseaworthiness unrelated to principles of negligence law."[53] In *Mahnich v. Southern Steamship Co.*,[54] the Court interpreted *The Osceola* to hold that the duty to provide a seaworthy ship does not depend on the negligence of shipowners or their agents.[55] The Court went further in *Seas Shipping Co. v. Sieracki*,[56] stating that unseaworthiness "is essentially a species of liability without fault . . . . neither limited by conceptions of negligence nor contractual in character."[57] The Supreme Court has argued, however, that the doctrine has developed to closely resemble a negligence action.[58] Rarely will a situation arise where the facts creating an unseaworthy condition would not also give rise to a claim for negligence.[59] In further support of this notion, the Court has stated that "[w]e are able to find no rational basis . . . for distinguishing negligence from seaworthiness."[60] The Supreme Court, however, has not yet decided whether punitive damages are available to seamen when an unseaworthy condition causes injury.[61]

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52. *See id.* at 544 ("The decisions of [the late nineteenth century] for the most part treated maritime injury cases on the same footing as cases involving the duty of a shoreside employer to exercise ordinary care to provide his employees with a reasonably safe place to work.").

53. *Id.* at 547.

54. 321 U.S. 96 (1944).

55. *Id.* at 100.

56. 328 U.S. 85 (1946).

57. *Id.* at 94.

58. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 499 (1971) ("[O]ur cases have held that the scope of unseaworthiness is by no means so limited. A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.").

59. *See, e.g.*, Pope & Talbot Inc. v. Hawn, 346 U.S. 406, 418 (1953) (Frankfurter, J., concurring) ("[I]t will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."); Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819, 820 (1963) ("An unseaworthy condition can be found in almost anything, no matter how trivial, that causes injury."); *but see* Magnussen v. Yak, Inc., 73 F.3d 245, 248 (9th Cir. 1996) (where a jury found the vessel seaworthy, but still found the employer liable for negligence under the Jones Act).

60. Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 815 (2001).

61. *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 384 (5th Cir. 2014) (en banc).

3. Negligence: The Jones Act

Although *The Osceola* prohibited seamen from suing their employers for negligence, the Jones Act legislatively overruled this bar to recovery by creating a negligence action for seamen against their employers.[62] The Jones Act broadened the remedies available to seamen through its incorporation by reference of the Federal Employers' Liability Act ("FELA").[63] In overruling *The Osceola*'s negligence prohibition, Congress demonstrated that maritime statutes preempt judge-made common law.[64] Under the Jones Act, a seaman can recover for injuries sustained in the course and scope of his employment due to the negligence of the owner, master, or fellow crew members.[65] Because of their extensive overlap, Jones Act negligence and unseaworthiness are often referred to as the "Siamese twins" of admiralty.[66] Seamen cannot recover punitive damages under the Jones Act because they are not recoverable under FELA.[67] As a result, the United States Fifth Circuit Court of Appeals has concluded that the logic that blocks punitive damages under the Jones Act extends to unseaworthiness.[68]

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62. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991). The third and fourth points of *The Osceola* overruled by the Jones Act were:

> 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.
>
> 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

The Osceola, 189 U.S. 158, 175 (1903).

63. 46 U.S.C. § 30104 (2012) ("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.").

64. *See Wilander*, 498 U.S. at 341 (explaining that Congress twice tried to overrule *The Osceola* to create a negligence action for seamen).

65. Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1489 (5th Cir. 1992).

66. GILMORE & BLACK, *supra* note 44, § 6:38, at 383.

67. *See infra* Part III.B.1; *but see* 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.").

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

II. *MCBRIDE* AND MARITIME PUNITIVE DAMAGES FOR SEAMEN

In *McBride v. Estis Well Service, L.L.C.*, the United States Fifth Circuit Court of Appeals held that a seaman could not recover punitive damages for unseaworthiness.[69] The decision correctly recognized that courts should be reluctant to allow seamen to recover unseaworthiness punitive damages when a similar statutory claim, the Jones Act, prohibits punitive relief.[70]

A. The Case: McBride v. Estis Well Service, L.L.C.

The Fifth Circuit was the first federal circuit court to consider whether punitive damages are available under the general maritime claim of unseaworthiness after the Supreme Court's decision in *Townsend*.[71] In holding that unseaworthiness punitive damages were not available, the Fifth Circuit addressed important questions regarding the reasoning and scope of the Supreme Court's previous decisions on the subject.[72] This issue is still far from settled, however, as some district courts have reached different conclusions.[73] Although the Supreme Court denied certiorari in *McBride*,[74] the Court will likely resolve this important issue eventually, hopefully using the persuasive reasoning of the Fifth Circuit as guidance.

1. Facts and Procedural History

The case arose from an accident that occurred on Estis Rig 23, a barge that supported a truck-mounted drilling rig operating in Bayou Sorrell, a navigable waterway in Louisiana.[75] The crew, all employed by Estis Well Service, attempted to straighten the monkey board on the derrick, which had twisted the previous night.[76] The derrick pipe shifted during this task, which caused the rig and derrick to topple over.[77] One crew member, Skye

69. *Id.*
70. *Id.* at 391.
71. *Id.* at 384.
72. *Id.* at 384–85.
73. *See, e.g.*, Wagner v. Kona Blue Water Farms, LLC, 2010 A.M.C. 2469, 2483 (D. Haw. 2010) (holding that unseaworthiness punitive damages are available under general maritime law).
74. McBride v. Estis Well Serv., L.L.C., 135 S. Ct. 2310 (2015).
75. McBride v. Estis Well Serv., L.L.C., 872 F. Supp. 2d 511, 512 (W.D. La. 2012).
76. *Id.* A monkey board is a catwalk that extends from a derrick, which is the tower-like framework over an oil well. *See* McBride v. Estis Well Serv., L.L.C., 731 F.3d 505, 507 (5th Cir. 2013), *reh'g en banc granted*, 743 F.3d 458 (5th Cir. 2014).
77. *McBride*, 872 F. Supp. 2d at 512.

Sonnier, died after being pinned between the derrick and the mud tank.[78] Three other members of the crew also claimed injuries resulting from the incident.[79]

Haleigh McBride, individually and on behalf of her and Sonnier's minor child, filed suit against Estis, stating causes of action for unseaworthiness under general maritime law and negligence under the Jones Act.[80] Notably, McBride sought "punitive and/or exemplary" damages in addition to compensatory damages for the claims filed.[81] The other crew members alleged the same theories and requested similar punitive relief.[82] After the case was consolidated into a single action, Magistrate Judge Hanna in the United States District Court for the Western District of Louisiana granted Estis's motion to dismiss the claims for punitive damages under the Jones Act and unseaworthiness, reasoning that a prior Supreme Court decision limited both Jones Act and unseaworthiness recovery to pecuniary losses.[83] McBride appealed to the Fifth Circuit where a three-judge panel reversed the judgment of the district court, applying the reasoning of *Townsend* to hold that unseaworthiness punitive damages were available.[84] After hearing the case en banc, the Fifth Circuit reversed the panel and held that seamen could not recover punitive damages under unseaworthiness or the Jones Act.[85]

2. The Fifth Circuit's Decision

The Fifth Circuit based its opinion on the Supreme Court's decision in *Miles v. Apex Marine Corp.*,[86] which the court found controlling.[87] The court recognized that *Miles* held "the Jones Act limits a seaman's recovery to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness."[88] The court further explained that this pecuniary loss limitation should apply to both wrongful death and personal injury.[89] The

78. *McBride*, 731 F.3d at 507.
79. *Id.* (noting that the injured crew members were Saul Touchet, Brian Suire, and Joshua Bourque).
80. *McBride*, 872 F. Supp. 2d at 512–13.
81. *Id.* at 512.
82. *Id.*
83. *Id.* at 512, 522. Although magistrates do not typically render judgments for the district court, the parties here consented to that procedure. *Id.* at 512.
84. McBride, 731 F.3d at 506–07, 518.
85. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 384 (5th Cir. 2014).
86. 498 U.S. 19 (1990).
87. *McBride*, 768 F.3d at 384. Judge Davis wrote the opinion of the court and only Judge Southwick joined. Seven other judges concurred in the judgment: Jolly, Jones, Smith, Clement, Owen, Elrod, and Haynes. *Id.* at 382–83.
88. *Id.* at 384.
89. *Id.* at 388.

Fifth Circuit acknowledged that *Townsend* "reaffirmed that *Miles* is still good law."[90] The court explained that *Townsend* drew a distinction between maintenance and cure and the other remedies available to seamen so that the reasoning in *Townsend* should not extend to unseaworthiness, which was the cause of action directly addressed in *Miles*.[91] Framing the *Miles* limitation to be "compensation" for pecuniary losses, the court reasoned that punitive damages were non-pecuniary because such damages do not compensate the seaman.[92] The court concluded that, because punitive recovery is not available under the Jones Act, punitive damages are likewise unavailable in unseaworthiness claims.[93]

Judge Clement, joined by four other judges, wrote a meticulous concurring opinion to explain the historical background that directed the court's result.[94] The concurrence first recognized that Supreme Court precedent does not require punitive damages in this case because *Townsend* concerned maintenance and cure, not unseaworthiness.[95] Second, Judge Clement reasoned that no primary authority supports unseaworthiness punitive damages because courts should not use jurisprudence concerning maintenance and cure as a guide.[96] Third, the concurrence undertook an analysis of the historical availability of unseaworthiness punitive damages and discovered that not many cases, if any, have actually awarded those damages.[97] Judge Clement cited language in *Pacific Steamship Co. v. Peterson*[98] to support the proposition that unseaworthiness plaintiffs have historically been entitled to only compensatory damages.[99] Finally, the concurrence cautioned that admiralty courts should be hesitant to sign off "on an aggressive expansion of punitive damages in the unseaworthiness context" because of the sizable impact that this expansion would have on the shipping industry.[100]

Two other judges filed a separate concurrence to argue that the *Miles* reasoning, prohibiting the recovery of non-pecuniary unseaworthiness

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90. *Id.* at 389.
91. *Id.*
92. *Id.* at 390.
93. *Id.* at 391.
94. *Id.* (Clement, J., concurring).
95. *Id.* at 392.
96. *Id.* at 395 ("Rather, the primary authority supporting punitive damages in unseaworthiness cases appears to be a collective judicial 'oh, hell, why not' principle that holds that because punitive damages are available in many other types of actions they should also be available in unseaworthiness cases.").
97. *Id.* at 397.
98. 278 U.S. 130 (1928).
99. *McBride*, 768 F.3d at 398.
100. *Id.* at 401 ("In light of the potentially sizable impact, this court should not venture too far and too fast in these largely uncharted waters without a clear signal from Congress.").

damages, is limited to only wrongful-death claims; accordingly, they argued that punitive damages should be made available to seamen only in cases of personal injury and not in wrongful-death or survival actions.[101] Because this concurrence emphasized that the expansion of a remedy is a subject best left to Congress, however, it joined in the result.[102]

The primary dissenting opinion, which Judge Higginson authored and five others joined, essentially restated the decision Judge Higginson penned for the three-judge panel.[103] This dissent interpreted *Townsend* as establishing that "the common-law tradition of punitive damages extends to maritime claims," and "that in the face of historical dispute, the default rule of punitive damages applies."[104] Additionally, two judges wrote a second dissent to amplify the primary dissent's "observation that extending the *Miles* pecuniary damages limitation to the injured crew members in this case compounds the error in the majority opinion."[105] Using similar reasoning to the second concurrence, this dissent argued that *Miles* should be applied only to wrongful-death causes of action.[106] The judges also argued that the majority incorrectly assumed that compensatory and pecuniary damages are equivalent.[107] The split in reasoning among the Fifth Circuit judges illustrates the confusion that currently exists regarding punitive damages for seamen, likely resulting from the unclear history of such damage awards in maritime cases.

B. The Long, Stormy Voyage of Maritime Punitive Damages

In *McBride*, the Fifth Circuit attempted to bring some clarity to the issue of maritime punitive damages for seamen; however, this task proved difficult, as the history and development of these damages has been tumultuous. In contrast to compensatory damages that are designed to compensate plaintiffs for actual losses, punitive damages serve to punish the defendant and deter the undesirable conduct in the future.[108] The

101. *Id.* (Haynes, J., concurring).
102. *Id.* at 404.
103. *See id.* (Higginson, J., dissenting).
104. *Id.* at 413 n.15.
105. *Id.* at 419 (Graves, J., dissenting).
106. *Id.*
107. *Id.* at 424 ("For example, pain and suffering is not a financial loss and is difficult to reduce to a monetary amount; thus it is not a pecuniary damage according to the definition incorporated into FELA. Yet there can be no question that injured seamen can seek recovery for their own pain and suffering under the Jones Act and the general maritime law." (citation omitted)).
108. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 493 (2008).

history of punitive damages in maritime law is unclear.[109] Their availability is often murky and actual recovery is rare, especially by seamen.[110] By analogy, some Supreme Court decisions regarding loss of society damages are instructive as to whether a certain type of recovery can be judicially expanded when it is unavailable under a similar statutory claim.[111] Although the Court has asserted the default availability of punitive damages under general maritime law, the question remains whether these damages are available to seamen for unseaworthiness.[112]

1. The Availability of Punitive Damages to Seamen Before the Jones Act

Although the fact that plaintiffs can generally seek punitive damages under the common law is fairly settled,[113] whether that general rule extends to the wards of admiralty has been the subject of much debate.[114] In *Day v. Woodworth*,[115] the Supreme Court acknowledged that 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."[116] Although the Court has recognized the general availability of punitive damages in the maritime tort context,[117] few cases, if any, have awarded those damages to seamen.[118] In *The Amicable Nancy*,[119] the Court acknowledged the potential availability of punitive damages; however, the Court did not award those damages because the case was against the shipowner and not the pirates who plundered the ship.[120] The Court's likely motivation for

109. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 431 (2009) (Alito, J., dissenting) ("In sum, the search for 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 *Miles* uniformity principle.").
110. *See infra* Part II.B.1.
111. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990).
112. *See Baker*, 554 U.S. at 476.
113. *Townsend*, 557 U.S. at 409.
114. *See Punitive Damages*, *supra* note 47, at 86.
115. 54 U.S. 363 (1851).
116. *Id.* at 371.
117. *See* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 108 (1893) ("[C]ourts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages . . . .").
118. *See infra* Part II.B.
119. 16 U.S. 546 (1818).
120. *Id.* at 558–59 (explaining that "if this were a suit against the original wrong-doers, it might be proper to . . . visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. . . . Under such circumstances, we are of opinion that they are bound to repair all the

mentioning punitive damages was simply to condemn piracy, which is less prevalent in the modern context of maritime personal injury.[121]

Although the Supreme Court recently asserted in *Townsend* that punitive damages have historically been available to seamen, upon a closer look at the cases the Court cited for that proposition, whether such damages were actually recovered is unclear.[122] In *The City of Carlisle*,[123] a 16-year-old seaman suffered a fractured skull while working on a ship, was forced to continue work for 6 or 7 weeks after the injury, and was denied medical care at the completion of the voyage.[124] Based on the failure to provide maintenance and cure, the *Carlisle* court recognized that "the ship may be held to consequential damages," resulting from the "gross neglect and cruel maltreatment" that aggravated the injury.[125] The court awarded the boy $1,000, but whether these damages contained a punitive element is far from clear, especially because the court's damage calculations appeared to be focused purely on compensating the degree that the injury was aggravated from neglect rather than punishing the defendant.[126] In *The Margharita*,[127] a case some claim lends the most support to the argument that punitive damages were available to seamen prior to the Jones Act, a shark bit off a seaman's leg after he fell overboard and the captain still continued on with the voyage.[128] The trial court awarded the seaman $1,500, explaining that the courts' duty was not only to "compensate the seaman for his unnecessary and unmerited suffering

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real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." (emphasis added)).

121. *See id.* at 547.

122. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 430 (2009) (Alito, J., dissenting).

123. 39 F. 807 (D. Or. 1889).

124. *Id.* at 810–12.

125. *Id.* at 817 (quoting The City of Alexandria, 17 F. 390, 395 (S.D.N.Y. 1883)).

126. *Id.* ("Measured by this rule I estimate and assess these damages as follows: Hospital expenses for five months at $1 per day, $150; expense of trephining, $150; expense of journey to Liverpool, $200;—in all $500. This includes nothing for pain, suffering, or inconvenience resulting from the injury, whether temporary or permanent. He is entitled to wages until his return home or the end of the voyage, which will be about a year. This is £6, or $30. In addition to this, the libelant must have damages for the gross neglect and mistreatment he received after the injury, whereby his injury and suffering were much aggravated."). Similarly in *The Troop*, a seaman was injured after falling from a mast, but the captain continued the voyage for thirty-six days; consequently, the seaman was required to undergo surgery upon his return home. 118 F. 769, 769–70, 773 (D. Wash. 1902). In this case, the court gave the seaman an undifferentiated award of $4,000 with no mention of any punitive or exemplary element, only criticism of the captain's behavior. *Id.* at 773.

127. 140 F. 820 (5th Cir. 1905).

128. *Id.* at 820.

when the duty of the ship is disregarded, but to emphasize the importance of humane and correct judgment under the circumstances on the part of the master."[129] The award did not contain any language regarding "punitive" or "exemplary" damages; rather, the award again appears to only compensate the seaman for his injuries, pain and suffering, and the worsened condition and aggravation of the injury.[130] Even if this trial court award contained a punitive element, the Fifth Circuit ultimately reversed the award of damages.[131]

Although none of these cases contain a clear award of punitive damages to a seaman, courts in this era often did not draw a fine distinction between punitive and compensatory damages.[132] In many cases, determining whether the judge intended the monetary award to contain elements of punishment and deterrence may be impossible.[133] Regardless of whether punitive damages have been historically available to seamen under general maritime law, some cases after the enactment of the Jones Act reasoned that the availability of punitive damages hinges instead on whether the damages are allowed under statutes that Congress enacted.[134]

2. The Analogy to Loss of Society Damages After the Jones Act

Fundamental conflict exists between the concurrent authority of Congress and the courts to determine the substantive law in admiralty.[135] Similar to the conflict concerning unseaworthiness punitive damages, the Court has addressed the problem of statutory preemption as it relates to loss of society damages in maritime law.[136] In *American Export Lines, Inc. v. Alvez*,[137] the Court held that a wife could recover loss of society damages resulting from nonfatal injuries that her husband suffered.[138] Because the

129. *Id.* at 828.
130. *Id.*
131. *Id.* at 824 ("Having in contemplation the whole case, and especially considering that the appellee received all the care and attention from the master and his fellow seamen it was possible to give on a freighting ship . . . we conclude that the master is not chargeable with fault or neglect in failing to deviate from his course to procure such aid.").
132. *See Punitive Damages*, *supra* note 47, at 84.
133. *See, e.g.*, The City of Carlisle, 39 F. 807, 817 (D.C. Or. 1889).
134. *See infra* Part II.B.2.
135. *See supra* Part I.A.
136. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990).
137. 446 U.S. 274 (1980).
138. *Id.* at 276. "The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 585 (1974). Technically, Alvez was a harbor worker classified as a "*Sieracki* seaman" prior to the 1972 amendments.

Court had previously decided in *Sea-Land Services, Inc. v. Gaudet* that a spouse could recover loss of society through a wrongful-death action under general maritime law,[139] the *Alvez* Court reasoned that "[w]ithin this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries."[140] At the time *Alvez* was decided, the Court found irrelevant that the Jones Act precluded recovery for loss of society stating that "a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts."[141] Although the Jones Act did not control the Court's decision in *Alvez*, which concerned a maritime worker not covered by the Act, the Court has held that the Jones Act does control the remedies available to a true seaman.[142]

In *Miles v. Apex Marine Corp.*, the Court held that loss of society damages were unavailable in a wrongful-death action for unseaworthiness because the Jones Act prohibits non-pecuniary recovery.[143] The Court reasoned that seamen no longer have to rely solely on the courts for protection because Congress has legislated extensively in the area of maritime tort remedies and as a result, the courts must look primarily to congressional legislation and stay within those limits.[144] *Miles* was not the

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Alvez, 446 U.S. at 276 n.2 ("Alvez' injury was sustained before the effective date of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act." (citation omitted)).

139. 414 U.S. at 575–76 (concerning the Death on the High Seas Act).

140. *Alvez*, 446 U.S. at 281.

141. *Id.* at 282–84 ("Nor do we read the Jones Act as sweeping aside general maritime law remedies. Notwithstanding our sometime treatment of longshoremen as pseudo-seamen for certain Jones Act purposes, the Jones Act does not exhaustively or exclusively regulate longshoremen's remedies. Furthermore, the Jones Act lacks such preclusive effect even with respect to true seamen; thus, we have held that federal maritime law permits the dependents of seamen killed within territorial seas to recover for violation of a duty of seaworthiness that entails a stricter standard of care than the Jones Act." (citations omitted)).

142. Miles v. Apex Marine Corp., 498 U.S. 19, 32–33 (1990).

143. *Id.* ("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.").

144. *Id.* at 27 ("We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an

first case to use this statutory preemption reasoning. The Court reached the same conclusion in *Mobil Oil Corp. v. Higginbotham*,[145] regarding the Death on the High Seas Act ("DOHSA").[146] The Court held that loss of society damages should not be awarded under general maritime law in a non-seaman wrongful-death action because, at the time of the Court's decision, Congress limited recovery under DOHSA to pecuniary losses.[147] The *Miles* reasoning has since been applied in varying maritime contexts, particularly in the availability of punitive damages.[148] Whether the applicability of *Miles* is limited to wrongful death actions, however, is unclear.[149]

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admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.").

145. 436 U.S. 618 (1978).

146. *Id.* at 625; *Miles*, 498 U.S. at 31 ("Respondents argued that admiralty courts have traditionally undertaken to supplement maritime statutes. The Court's answer in *Higginbotham* is fully consistent with those principles we have here derived from *Moragne*: Congress has spoken directly to the question of recoverable damages on the high seas, and 'when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.' *Moragne* involved gap filling in an area left open by statute; supplementation was entirely appropriate. But in an 'area 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.'" (citiations omitted)); Death on the High Seas Act, 46 U.S.C. § 30302 (2012) ("When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.").

147. *Higginbotham*, 436 U.S. at 625 ("Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements."). The current version of DOHSA, however, allows for the recovery of nonpecuniary losses in commercial aviation accidents beyond twelve nautical miles. 46 U.S.C. § 30307(b) (2012) ("In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.").

148. *See, e.g.*, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, MDL No. 2179, 2011 WL 4575696, at *11 (E.D. La. Oct. 4, 2011) (applying the reasoning of *Miles* to conclude that seamen do not have a remedy of punitive damages for personal injuries, but punitive damages are available to non-seamen).

149. *See In re* Asbestos Prods. Liab. Litig., MDL No. 875, 2014 WL 3353044, at *10–11 (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. Put simply, the remedy of punitive damages exists as it did prior to the passage of the Jones Act, and thus does not survive a seaman's death.").

3. The Default Rule: Punitive Damages are Available under General Maritime Law

In *Exxon Shipping Co. v. Baker*,[150] which concerned the infamous Exxon Valdez oil spill, the Court held that the Clean Water Act's prohibition on the recovery of punitive damages did "not bar a punitive award on top of damages for economic loss, but that the award . . . should be limited to an amount equal to compensatory damages."[151] In creating this 1:1 ratio between compensatory and punitive damages under general maritime common law, the Court reasoned that "no clear indication of congressional intent to occupy the entire field of pollution remedies" were evident.[152] Commentators have used *Baker* to argue that punitive damages should be made available to seamen, who, as the wards of admiralty, should be entitled to more protections than the non-seamen plaintiffs in this oil spill case.[153] Considering the bar to recovery for negligence in *The Osceola*, however, courts have not always given seamen every possible remedy under general maritime law.[154] Soon after the Court's decision in *Baker*, the Supreme Court directly addressed the issue of whether punitive damages are available to seamen for their employers' failure to pay maintenance and cure.[155]

4. The Court's Maiden Voyage into Punitive Damages for Seamen

In 2009, the Supreme Court held in *Townsend*[156] that seamen could recover punitive damages "for the willful and wanton disregard of the maintenance and cure obligation . . . in the appropriate case[s] as a matter of general maritime law."[157] The Court based its decision on three main points.[158] First, the Court recognized the general availability of punitive damages under the common law by indulging in a lengthy discussion of

150. 554 U.S. 471 (2008).
151. *Id.* at 476.
152. *Id.* at 489 (citation omitted).
153. David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles*,* Baker*, and* Townsend, 70 LA. L. REV. 463, 477 (2010) [hereinafter *Miles, Baker, and Townsend*] ("The parties awarded punitive damages in *Baker* were 'commercial fishermen, Native Alaskans, and landowners;' 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, could somehow be worse off under federal maritime law than fishermen and landowners." (quoting Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008))).
154. *See* 189 U.S. 158, 175 (1903).
155. Atl. Sounding Co., Inc. v. Townsend, 557 U.S. 404, 424 (2009).
156. *Id.*
157. *Id.* at 424.
158. *Id.* at 414.

the English and American traditions regarding damages for outrageous conduct.[159] Second, the Court reasoned that the common law tradition of punitive damages extends to maritime claims.[160] The Court reviewed cases decided before the Jones Act, where the availability of punitive damages in the maritime context was generally acknowledged; however, none of these cases involved a clear punitive award to seamen.[161] Third, the Court found no evidence that maintenance and cure actions were excluded from this general maritime law rule and that nothing in the Jones Act precluded such recovery.[162] The Court determined that the Jones Act did not eliminate pre-existing remedies that were available to seamen prior to its enactment.[163] Although the Court undermined the *Miles* uniformity principle by finding that this principle did not apply in the maintenance and cure context,[164] the *Townsend* Court unequivocally reaffirmed *Miles* by stating that its reasoning "remains sound."[165]

The dissenting opinion, written by Justice Alito, sharply criticized the majority's failure to apply the *Miles* analytical framework.[166] Justice Alito argued that *Miles* endorsed a principle of uniformity, "that if a form of relief is not available on a statutory claim, we should be reluctant to permit such relief on a similar claim brought under general maritime law."[167] He reasoned that because punitive damages are not available under the Jones Act, they should likewise be unavailable to seamen under general maritime common law for actions related to personal injury.[168] The dissent also attacked the cases the majority used for its proposition that punitive damages have been historically available, arguing that whether punitive

159. *Id.* at 409–10.
160. *Id.* at 414.
161. *Id.* at 411–14; *see* discussion *supra* Part II.B.1.
162. *Townsend*, 557 U.S. at 414–15.
163. *Id.* at 415. "Further supporting this interpretation of the Jones Act, this Court has consistently recognized that the Act 'was remedial, 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.'" *Id.* at 417 (quoting The Arizona v. Anelich, 298 U.S. 110, 123 (1936)).
164. *Id.* at 424 ("The 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.").
165. *Id.* at 420.
166. *Id.* at 425 (Alito, J., dissenting).
167. *Id.* at 426.
168. *Id.* at 428 ("When Congress incorporated FELA unaltered into the Jones Act, Congress must have intended to incorporate FELA's limitation on damages as well. . . . It is therefore reasonable to assume that only compensatory damages may be recovered under the Jones Act. And under *Miles*' reasoning—at least in the absence of some exceptionally strong countervailing considerations—the rule should be the same when a seaman sues under general maritime law for personal injury resulting from the denial of maintenance and cure." (citations omitted)).

damages were ever actually recovered in those cases is unclear.[169] Alito contended that the "cases found are insufficient in number, clarity, and prominence to justify departure from the *Miles* uniformity principle."[170] The Court's decision in *Townsend* sent waves through the maritime industry[171] but left unanswered whether punitive damages are available in another general maritime law cause of action for seamen—unseaworthiness.

In *McBride*, the Fifth Circuit answered one of the many questions that *Townsend* left open in holding that unseaworthiness punitive damages are unavailable.[172] The significance of the Fifth Circuit's en banc decision in *McBride* cannot be understated. The issues the case raised are of national importance, including the questions of how far the reasoning of *Townsend* should extend, whether the *Miles* uniformity principle is still good law to be applied in the context of punitive damages, and the role of Congress and the courts in determining maritime law.

III. UNSEAWORTHINESS PUNITIVE DAMAGES SHOULD REMAIN UNAVAILABLE

Unseaworthiness punitive damages should not be available to seamen under general maritime law for three reasons. First, the reasoning of *Townsend* does not extend to unseaworthiness.[173] The historic availability of punitive damages for seamen is scarce, particularity for unseaworthiness. Further, maintenance and cure is a fundamentally different type of claim, such that the availability of those damages in that context is irrelevant.[174] Second, punitive damages are not available for a negligence action under the Jones Act, and that unavailability should extend to unseaworthiness because the two claims typically involve a single legal wrong.[175] Third, no logical reason for drawing a distinction between personal injury and wrongful death recovery for unseaworthiness exists, and as such, punitive damages should be unavailable under both theories of recovery.[176] Therefore, the Supreme Court should reach the same result as the Fifth

169. *Id.* at 430 ("[A] search for cases in which punitive damages were awarded for the willful denial of maintenance and cure—in an era when seamen were often treated with shocking callousness—yields very little.").
170. *Id.* at 431.
171. Rod Sullivan, *Enforcing a Seaman's Right to Medical Care After* Atlantic Sounding v. Townsend, 34 TUL. MAR. L.J. 1, 2 (2009) (discussing the practical problems that shipowners, seamen, and their maritime lawyers must face in the wake of the *Townsend* decision).
172. McBride v. Estis Well Service, L.L.C., 768 F.3d 382, 384 (5th Cir. 2014).
173. *See infra* Part III.A.
174. *See infra* Part III.A.
175. *See infra* Part III.B.
176. *See infra* Part III.C.

Circuit in *McBride* and hold that unseaworthiness punitive damages are not available to seamen.[177]

A. Townsend *Does Not Control Unseaworthiness*

The holding of *Townsend* should not be extended to allow for unseaworthiness punitive damages.[178] The primary dissent in *McBride* clarified the *Townsend* rule as follows: "if a general maritime law cause of action and remedy were established before the passage of the Jones Act, and the Jones Act did not address that cause of action or remedy, then that remedy remains available under that cause of action unless and until Congress intercedes."[179] The *McBride* dissent, however, misapplied this rule because, unlike maintenance and cure, unseaworthiness punitive damages do not appear to be historically established prior to the Jones Act.[180] Moreover, even if punitive damages were historically available for maintenance and cure, that availability does not extend to unseaworthiness, which is a separate and independent legal wrong that has significant overlap with the Jones Act.[181]

1. No Punitive Damages Awarded to Seamen Prior to the Jones Act

Although *Townsend* correctly stated that courts recognized the potential availability of punitive damages to seamen prior to the Jones Act, apparently no court during that era actually awarded punitive relief to a seaman.[182] Justice Alito acknowledged in his *Townsend* dissent that the search for cases

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177. *See infra* Part III.D.

178. The technical holding of *Townsend* is that seamen can recover punitive damages "for the willful and wanton disregard of the maintenance and cure obligation . . . in the appropriate case[s] as a matter of general maritime law." 557 U.S. 404, 424 (2009).

179. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 412 (5th Cir. 2014) (en banc) (Higginson, J., dissenting). The court also stated:

> The settled legal principles discussed above establish three points central to resolving this case. First, punitive damages have long been available at common law. Second, the common-law tradition of punitive damages extends to maritime claims. And third, there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule. Instead, the pre-Jones Act evidence indicates that punitive damages remain available for such claims under the appropriate factual circumstances. As a result, respondent is entitled to pursue punitive damages unless Congress has enacted legislation departing from this common-law understanding.

Id. at 412–13 n.14 (citing *Townsend*, 557 U.S. at 414–15).

180. *See infra* Part III.A.1.

181. *See infra* Part III.B.

182. *See infra* note 192.

that awarded punitive damages to seamen prior to the Jones Act produces scarce results.[183] Upon a deeper analysis of the cases cited by the *Townsend* majority, the possibility that the damages contained any punitive element is unlikely.[184] Although some scholars have alleged that these courts awarded punitive damages to seamen because employers failed to pay maintenance and cure, only a single unseaworthiness case during this time has been purported to contain an award of punitive damages.[185] In *The Rolph*, a first mate with "a reputation for ferocity as wide as the seven seas" struck a seaman with a knot in a rope, causing serious injury.[186] The court held that the employment of the brutal first mate rendered the ship an unseaworthy vessel, and the plaintiffs could therefore recover damages.[187] Nevertheless, the damages awarded appear to merely compensate the seaman because the court only considered medical expenses and wages in its calculations.[188]

Some scholars have argued that the reason these old cases do not appear to contain punitive awards is because courts have not made the distinction between punitive and compensatory damages until recently, leading these commentators to conclude that the punitive awards are hidden within a more general award.[189] Even accepting that common law courts may have regarded punitive damages as "exemplary" or "vindictive," however, no case before the Jones Act has been reported where this language was used in relation to a seaman's award.[190] One scholar has claimed that "[t]he weight of the jurisprudence is overwhelming: nineteenth-century seamen

183. *Townsend*, 557 U.S. at 431 (Alito, J., dissenting) (The search for "maintenance and cure cases in which punitive damages were awarded yields strikingly slim results.").

184. *See supra* Part II.B.1.

185. *See* The Rolph, 293 F. 269 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924). Note that this case does not even pre-date the Jones Act but was decided a mere three years after.

186. *Id.* at 269–70.

187. *Id.* at 272.

188. *See id.* (the court's only language concerning damages is as follows: "Inasmuch as the injuries were fully set forth in the testimony by medical and other witnesses, the expectation of life and earnings of these men were laid before the court, there is no necessity for a reference to a commissioner in the usual manner. The decree, therefore, will provide that the judgment be, for Kohilas, in the sum of $10,000; for Kapstein, in the sum of $3,500; for Seppinnen and Arnesen, in the sum of $500.").

189. *Punitive Damages*, *supra* note 47, at 83 ("The term that best emphasizes this function is *exemplary damages*. This is the preferable term. It is not archaic. It emphasizes the right function. And its connotations are less harsh than those of 'punitive,' connotations that further the rhetorical aims of those who would abolish the right to recover such damages. But the 'punitive' term has gained ascendancy.").

190. *See id.* at 103–08.

indisputably had the right to seek punitive damages."[191] To the contrary, the jurisprudence is actually quite underwhelming because, in the cases cited by leading commentators and the courts as evidence that punitive damages have always been available to seamen, no reported case appears to have awarded punitive damages to a seaman prior to the Jones Act.[192]

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191. *Miles, Baker, and Townsend*, *supra* note 151, at 482–83.

192. *See Punitive Damages*, *supra* note 47, at 103–08. To state with particularity, the cases cited in this article for the proposition that punitive damages were awarded or available to seamen prior to the Jones Act are as follows: Pac. Packing & Navigation Co. v. Fielding, 136 F. 577, 580 (9th Cir. 1905) (the Ninth Circuit held that the punitive award of the trial court was erroneous); The Margharita, 140 F. 820 (5th Cir. 1905) (discussed *supra* Part II.B.1); The City of Carlisle, 39 F. 807 (D. Or. 1889) (discussed *supra* Part II.B.1); The Troop, 118 F. 769 (D. Wash. 1902) (discussed *supra* Part II.B.1); *The Rolph*, 293 F. at 272 (discussed *supra* note 186). *See also Miles, Baker, and Townsend*, *supra* note 151, at 479–83. The cases asserted in this article that punitive damages were available or awarded prior to the Jones Act are: The Svealand, 136 F. 109, 113 (4th Cir. 1905) ("[T]he court thinks that an award of $500 should be made to the libelant for the additional suffering imposed upon him, and for the apparently aggravated character of the injury he sustained; the same to be paid in addition to all expenses incurred for medical treatment and cure of libelant, which in this case have been considerable, and on account of which the damages are fixed at so small an amount."); Swift v. The Happy Return, 23 F. Cas 560, 561 n.2 (D. Pa. 1799) (judge merely discussed threatening a shipowner with a judicially-created monetary penalty in a completely different case); Gould v. Christianson, 10 F. Cas. 857, 864 (S.D.N.Y. 1836) ("The considerations before suggested will, in this case, augment the damages beyond a mere remuneration for the bodily injury sustained by the libellant, *but will not entitle him to vindictive or aggravated damages*." (emphasis added)); The Scotland, 42 F. 925, 927 (S.D.N.Y. 1890) ("[N]o punitive damages should be given, but only such as may fairly compensate the libelant for his actual loss through the delay in proper treatment."); The Vigilant, 30 F. 288, 288 (S.D.N.Y. 1887) ("Had I 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, I should have felt bound to add considerably to the sum above named."); The Childe Harold, 5 F. Cas. 619, 620 (S.D.N.Y. 1846) (stating that "punitive and compensatory" damages would be appropriate if the ship had fed rotten food to the crew, but there was no such award in this case); Unica v. United States, 287 F. 177, 180 (S.D. Ala. 1923) (although the court called the conduct "inexcusable," it posed a question which clearly indicated the purpose of the award was to compensate for pain and suffering: "What should be given him for this suffering? I know of no measure by which I can accurately determine it. Who would be willing to undergo it for any fixed compensation? A decree will be entered, fixing his damages at $1,500."); Tomlinson v. Hewett, 24 F. Cas. 29, 32 (D. Cal. 1872) (award was merely called "large" by the court); Latchimacker v. Jacksonville Towing & Wrecking Co., 181 F. 276, 278–79 (S.D. Fla. 1910), *aff'd*, 184 F. 987 (5th Cir. 1910) (reversing a jury verdict that contained "exemplary" damages); Sheridan v. Furbur, 21 F. Cas. 1266, 1269 (S.D.N.Y. 1834) (stating "I should be disposed to visit such intemperate conduct with a punishment in damages corresponding to the wantonness of the wrong, . . ." but no such award was given); Brown v. Howard, 14 Johns. 119, 123 (N.Y. Sup. Ct. 1817) (stating

Although some trial courts awarded seamen punitive damages, those awards were reversed on appeal.[193] The courts may have condemned the behavior of the shipowners in these cases, but the awards all appear compensatory in nature.[194] *Townsend* argued that courts consistently recognized that punitive damages were available to seaman; however, the fact that those damages were never actually awarded undermines the strength and reach of the Court's reasoning .[195] Punitive damages should not be available to seamen because even though the remedy may have been "available" prior to the Jones Act, no court probably ever awarded this remedy.[196]

A likely response to this assertion is that, although courts did not award punitive damages to seamen prior to the Jones Act, their availability was generally recognized.[197] A sweeping judicial expansion of a remedy, however, should not be based solely on mere possibility.[198] Rather, in the absence of clear historical awards of punitive damages to seamen, the courts should be reluctant to expand recovery under maritime claims and should instead defer such an important policy decision to Congress as a law-making body.[199]

2. Maintenance and Cure is a Separate and Independent Claim from Unseaworthiness

The reasoning of *Townsend* does not extend to unseaworthiness because maintenance and cure is, by its nature, a completely different type of action.[200] Although both are general maritime law claims recognized by *The Osceola* as remedies available to seamen,[201] they involve two separate legal wrongs. In contrast to unseaworthiness, the failure to pay maintenance and cure is a second injury occurring after the legal wrong that causes the initial injury to the seaman, specifically the unseaworthy

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"conduct of the captain merits severe animadversion" but no mention of an award).

193. *See supra* note 192.

194. *See supra* note 192.

195. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 412 (2009) ("In short, 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.'" (quoting *Punitive Damages*, *supra* note 47, at 115)).

196. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 412–13 n.14 (5th Cir. 2014) (en banc) (Higginson, J., dissenting).

197. *See supra* note 192 (many of the cases do acknowledge the potential availability of punitive damages).

198. *See McBride*, 768 F.3d at 404 (Haynes, J., concurring).

199. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

200. *See supra* Part I.B.1–2.

201. *See* 189 U.S. 158, 175 (1903).

condition of the vessel.[202] *Townsend* recognized this distinction by emphasizing that "a seaman's action for maintenance and cure is 'independent' and 'cumulative' from other claims."[203] The failure to pay maintenance and cure is an intentional act by an employer who knows what an injured seaman should be owed, yet refuses to tender payment of medical care and living expenses.[204] On the other hand, unseaworthiness requires no intent on the part of the employer, because the unreasonable condition of the vessel can exist without knowledge.[205] Whereas the cause of action for the failure to pay maintenance and cure is a quasi-contractual obligation that arises after the injury, unseaworthiness and Jones Act negligence claims concern the work-related accident itself.[206]

Although some have argued that the duty to provide a seaworthy vessel is also a quasi-contractual claim, the nature of unseaworthiness is more closely aligned to personal injury.[207] Although the shipowner's duty to provide a seaworthy vessel arises from the master-servant relationship and incident of the seaman's employment contract, this duty is more similar to a reasonableness standard of care in tort law.[208] The shipowner's duty to provide a vessel reasonably fit for its intended use is comparable to a standard of care, the breach of which causes personal injury to the seaman.[209] By contrast, the failure to pay maintenance and cure violates the contractual obligation to provide support to a seaman after injury—the legal wrong itself does not concern personal injury.[210] Thus, the Supreme Court's holding that punitive damages are available for maintenance and cure does not automatically extend to unseaworthiness simply because both are general maritime law claims.[211]

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202. GILMORE & BLACK, *supra* note 44, § 6:23, at 342.

203. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 (2009) (quoting Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138–39 (1928)); *see also Punitive Damages*, *supra* note 47, at 147.

204. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 543 (1960).

205. *See id.* at 550.

206. *See supra* Part I.B.2–3.

207. *In re* Asbestos Prods. Liab. Litig., MDL No. 875, 2014 WL 3353044, at *8 (E.D. Pa. July 9, 2014) ("[U]nseaworthiness claims also have a contractual component, as they arise from the master's duty to provide his servants with a seaworthy ship. As with the duty to provide an injured seaman with food and medical care, that duty is firmly anchored in the master/servant relationship . . . .").

208. *See id.*

209. *See Trawler Racer*, 362 U.S. at 550.

210. The Osceola, 189 U.S. 158, 175 (1903); *but see* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 422 (2009) ("[I]t also is true that the negligent denial of maintenance and cure may also be the subject of a Jones Act claim.").

211. For similar reasons, maintenance and cure does not overlap with a negligence action under the Jones Act. 46 U.S.C. § 30104 (2012). Some courts, however, have asserted such a connection by relying on *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), which arguably reasoned that maintenance and

3. No Sound Reasoning for Unseaworthiness Punitive Damages After the Jones Act

After the passage of the Jones Act, some courts held that seamen could recover punitive damages for unseaworthiness.[212] The Fifth Circuit held in the case of *In re Complaint of Merry Shipping, Inc.*[213] that "punitive 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."[214] The court cited to various authorities to support this proposition, but only one of these cases actually awarded punitive damages.[215] The Ninth and Eleventh Circuits soon followed the Fifth Circuit's lead.[216] *Merry Shipping* was fundamentally flawed, however, because the court reasoned that the Jones Act and unseaworthiness were separable, that different classes of damages could be awarded for each, and that a

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cure arose under the Jones Act for equitable, not legal, reasons. *Id.* at 373–74. In *Cortes*, a seaman died because the shipowner failed to get him to a hospital in time, but the administrator of his estate could not recover any damages because a right of action for the denial of maintenance and cure ended with his death. *Id.* at 370 (at this time no general maritime law action for wrongful death existed). The Court reasoned that maintenance and cure overlapped with the Jones Act—which had a wrongful death action—likely to avoid the inequitable result of a shipowner not having to pay damages because the seaman died. *Id.* at 375. Therefore, the Court would not want to create an incentive to kill seamen to avoid the payment of maintenance and cure. *Id.* at 375. *But see* De Centeno v. Gulf Fleet Crews, Inc., 798 F.2d 138 (5th Cir. 1986) (holding that under the Jones Act, a shipowner negligently failed to provide adequate medical treatment to a seaman, often called "found").

212. *See In re* Complaint of Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981).

213. *Id.*

214. *Id.* at 623.

215. *In re* Marine Sulphur Queen, 460 F.2d 89 (2d Cir. 1972) (punitive damages could be recovered upon a showing that the defendant was guilty of gross misconduct, but finding no such misconduct on the facts before it, the court upheld the denial of punitive damages); U.S. Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969) (punitive damages were available upon a showing of the shipowner's reckless conduct, but the court reversed the trial court's award of such damages finding that the evidence was insufficient to support it); Baptiste v. Superior Court for Cnty. of L.A., 106 Cal. App. 3d 87 (Ct. App. 1980) (punitive damages were available under general maritime law, and the court ordered the trial court to reinstate plaintiff's claim for such damages).

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

congressional statute could not bar recovery under general maritime law.[217] An intimate relationship exists between unseaworthiness and Jones Act negligence that does not similarly exist for maintenance and cure, and the *Townsend* Court even acknowledged this settled principle.[218] Because both claims usually involve a single legal wrong, only one compensatory recovery should be available between unseaworthiness and the Jones Act.[219]

Moreover, courts have recognized that *Miles*, which held that Jones Act recovery controlled unseaworthiness, overruled *Merry Shipping* and its progeny.[220] The Court's decision in *Townsend* should not bring *Merry Shipping* back from its watery grave because the *Townsend* Court reaffirmed the sound reasoning of *Miles*.[221] Punitive damages should not be available in unseaworthiness because the Jones Act addressed a similar legal wrong in its negligence action, and the erroneous reasoning of *Merry Shipping* has been overruled or at the very least was called into serious question after the Supreme Court's decision in *Miles*.[222]

B. The Unavailability of Jones Act Punitive Damages Extends to Unseaworthiness

Unseaworthiness and Jones Act negligence are fundamentally two aspects of the same cause of action, where a seaman is entitled to just one indemnity by way of compensatory damages.[223] Accordingly, under the *Miles* uniformity principle, unseaworthiness punitive damages are

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217. *Merry Shipping*, 650 F.2d at 626 ("It does not follow, however, that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law. First, unlike the Jones Act, no statutory restraints bar recovery under general maritime law. This body of law is wholly a product of judicial decisionmaking, fashioned on the basis of tradition and policy." (footnote omitted)).

218. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009) ("It is unquestioned law that both the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two." (quoting GILMORE & BLACK, *supra* note 44, § 6:23, at 342)); *see also infra* Part III.B.

219. *See infra* Part III.B.

220. *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1507 (5th Cir. 1995) ("After *Miles*, it is clear that *Merry Shipping* has been effectively overruled. Its holding—that punitive damages are available in a wrongful death action brought by the representative of a seaman under the unseaworthiness doctrine of the general maritime law—is no longer good law in light of the *Miles* uniformity principle because, in the factual scenario of *Merry Shipping*, the Jones Act damages limitations control."), *abrogated by Townsend*, 557 U.S. 404 (2009).

221. *See Townsend*, 557 U.S. at 420 ("The reasoning of *Miles* remains sound.").

222. *See Guevara*, 59 F.3d at 1507.

223. *See* Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928).

unavailable because such damages are not available under the Jones Act.[224]

1. Punitive Damages Are Not Available Under the Jones Act

The Jones Act imported into maritime law the same negligence action and remedies available to railroad workers against their employers for injury and wrongful death under the FELA.[225] When the Jones Act was enacted, FELA was uniformly interpreted by the Supreme Court to limit the available remedies solely and exclusively to compensatory damages for pecuniary losses.[226] In *Michigan Central Railroad Co. v. Vreeland*,[227] the Court described the remedies available under FELA for wrongful death as follows: "[i]t is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only."[228] The Court echoed this statement in *Gulf, Colorado and Santa Fe Railway Co. v. McGinnis*,[229] unequivocally specifying that, "[i]n a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate . . . for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given."[230] *Miles* recognized that the FELA limitation on damages, which under *Vreeland* is limited to compensation for pecuniary losses, extends to the Jones Act because the Court "assume[s] that Congress is aware of existing law when it passes legislation."[231] Although this matter appeared to be settled, the Supreme Court opened the door to debate on the issue by dodging the question in *Townsend*.[232]

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224. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

225. Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 (2012). "Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." Jones Act, 46 U.S.C. § 30104 (2012).

226. *See* Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 68 (1913).

227. *Id.*

228. *Id.* at 68.

229. 228 U.S. 173 (1913).

230. *Id.* at 175.

231. Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("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.").

232. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 n.12 (2009) ("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'

The current debate on whether punitive damages are available under the Jones Act hinges on the classification of punitive damages as either pecuniary or non-pecuniary.[233] Some argue that punitive damages are pecuniary because they are susceptible of valuation in money and that *Exxon Shipping Co. v. Baker* confirmed the pecuniary nature of punitive damages by developing its ratio for recovery in maritime law.[234] Others claim the jurisprudence has consistently recognized punitive damages as non-pecuniary, and no support exists to deviate from that conclusion.[235] Regardless, the Court's interpretation of the *Vreeland* gloss on the Jones Act is clear: recovery is limited to compensation for pecuniary losses.[236] As such, punitive damages should not be available under either classification system because even if these damages are pecuniary, they do not provide compensation for losses.[237] Considering that the word "pecuniary" has broad application, the Court's language indicates that the more important word is "loss," meaning that the goal is to compensate plaintiffs for their losses.[238] Punitive damages do not compensate for a plaintiff's loss; rather, these damages are designed to punish the defendant. For clarity, using the Court's language in *Pacific Steamship Co. v.*

Liability Act prohibits the recovery of punitive damages in actions under that statute." (citation omitted)).

233. *See Miles, Baker, and Townsend*, *supra* note 151, at 473.

234. *Id.* ("[P]unitive 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.'" (citation omitted)).

235. Kopczynski v. The Jacqueline, 742 F.2d 555, 560 (9th Cir. 1984); *see also* Bergen v. F/V St. Patrick, 816 F.2d 1345, 1347 (9th Cir. 1987); Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1454–59 (6th Cir. 1993); Horsley v. Mobil Oil Corp., 15 F.3d 200, 202–03 (1st Cir. 1994); Guevara v. Maritime Overseas Corp, 59 F.3d 1496, 1506 (5th Cir. 1995), *abrogated by Townsend*, 557 U.S. 404 (2009); Neal v. Barisich, Inc., 707 F. Supp. 862, 873 (E.D. La. 1989); Anderson v. Texaco, Inc. 797 F. Supp. 531, 534 (E.D. La. 1992).

236. *See* Gulf, Colo. & Santa Fe Ry. Co. v. McGinnis, 228 U.S. 173, 175−76 (1913). The Graves dissent in *McBride* makes an intriguing argument that if recovery is truly limited to compensation for pecuniary losses, then a seaman would not be entitled to damages for pain and suffering because such is a compensatory damage that is not easily susceptible of valuation in money: "The majority briefly implies that 'pecuniary damages' are broadly equivalent to 'compensatory' damages." McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 422 (5th Cir. 2014) (Graves, J., dissenting). "[I]f we accept the majority's unexplained implication that pecuniary damages must be equivalent to compensatory damages, it is not clear why loss of society would not have been recoverable in *Miles* or *Higginbotham*, as it is not at all clear why loss of society damages are any less compensatory in nature than damages for pain and suffering." *Id.* at 424. This question, however, is outside the scope of unseaworthiness punitive damages.

237. *See McGinnis*, 228 U.S. at 175–76.

238. *See id.*

Peterson[239] as a guide is preferable, which clarified that a seaman is only entitled to one indemnity of compensatory damages resulting from unseaworthiness or the negligence of his employer.[240]

2. The Jones Act and Unseaworthiness are Intimately Limited to One Indemnity

Jones Act negligence and unseaworthiness have been called the "Siamese twins" of admiralty because they both involve a single legal wrong.[241] Courts have acknowledged that unseaworthiness has been significantly expanded, and it currently resembles something close to a negligence action under the Jones Act.[242] Commentators have long recognized that the claims are "inseparable and indivisible parts of a single cause of action."[243] The Court in *McAllister v. Magnolia Petroleum Co.*[244] affirmed this view in stating that unseaworthiness and negligence under the Jones Act are "but alternative 'grounds' of recovery for a single cause of action."[245] The intimate connection between the two claims, unlike the tenuous link to maintenance and cure, demands consistent remedies.[246] The Supreme Court's statement in *Peterson* best explains this principle:

> [W]hether or not the seamen's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a *single legal wrong* . . . for which he is entitled to but *one indemnity by way of compensatory* damages.[247]

This reasoning establishes that Jones Act negligence and unseaworthiness are similar enough to constitute a single legal wrong or

239. 278 U.S. 130 (1928).
240. *Id.* at 138. The issue before the court, however, was not whether punitive damages could be recovered under the Jones Act or unseaworthiness; the question was actually whether a Jones Act seaman's right to elect to bring a negligence action was barred by his receipt of maintenance and cure benefits. *Id.* at 139.
241. GILMORE & BLACK, *supra* note 44, § 6:38, at 383.
242. *See, e.g.*, Pope & Talbot Inc. v. Hawn, 346 U.S. 406, 418 (1953) (Frankfurter, J., concurring) ("Since unseaworthiness affords . . . recovery without fault and has been broadly construed by the courts, it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."(citation omitted)).
243. *See* Kenneth G. Engerrand & Scott R. Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J. MAR. L. & COM. 327, 348 (1981) (footnote omitted).
244. 357 U.S. 221 (1958).
245. *Id.* at 225.
246. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 (2009).
247. Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928) (emphasis added).

single invasion of a primary right.[248] Further, the reasoning clarifies that a seaman is entitled to a single recovery limited to compensatory damages, and is prohibited from recovering punitive damages.[249] The Court's use of the word "indemnity" is also significant because *The Osceola* uses that exact same word used to describe the recovery for unseaworthiness.[250] The right to an indemnity includes only the ability to recover for losses and should not be extended to punitive damages, which do not concern a plaintiff's loss.[251] Notably, the "indemnity" limitation was not included in *The Osceola*'s pronouncement of the remedy available for failure to pay maintenance and cure.[252]

The persuasive language in *Peterson*, however, was not a clear holding by the Supreme Court; rather, it could be interpreted as dicta because the issue in that case was actually whether a Jones Act seaman's receipt of maintenance and cure benefits barred his right to elect to bring a negligence action.[253] The Court's citation of the *Peterson* decision in *Townsend* to describe the relationship between maintenance and cure, unseaworthiness, and the Jones Act, however, is telling.[254] In doing so, the Court acknowledged that *Peterson* is an adequate authority on the interplay between the claims available to seamen.[255] Moreover, the Court recognized even before *The Osceola* that a court goes beyond the limit of an indemnity by awarding punitive damages.[256] Taken together, these

248. *Id.*; *see also McAllister*, 357 U.S. at 225.

249. *See Peterson*, 278 U.S. at 138.

250. *See* 189 U.S. 158, 175 (1903) ("That the vessel and her owner are, both by English and American law, liable to an *indemnity* for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." (emphasis added)).

251. *See* BLACK'S LAW DICTIONARY 837 (9th ed. 2009) ("A duty to make good any loss, damage, or liability incurred by another. . . . The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty.").

252. 189 U.S. at 175.

253. 278 U.S. at 139.

254. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 (2009) (emphasizing 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]'" (quoting *Peterson*, 278 U.S. at 138–39)).

255. *See id.*

256. *See, e.g.*, Milwaukee & St. Paul R.R. Co. v. Arms, 91 U.S. 489, 492 (1875) ("It is undoubtedly true that the allowance of any thing more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a *general rule*, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be

cases stand for the proposition that even soon after the Jones Act's passage, courts generally recognized that both unseaworthiness and Jones Act negligence concerned a single invasion of a primary right and that seamen should have only one compensatory recovery between the two claims.[257] Accordingly, seamen should be entitled to only one compensatory damage award between unseaworthiness and Jones Act negligence.[258]

3. Sailing in the Occupied the Waters of Congressional Action

According to the sound reasoning of *Miles*, Congress has occupied the field of tort damages available to seamen.[259] The *Miles* uniformity principle provides that if a certain type of relief is not available under a statutory claim, courts should be reluctant to permit that type of relief on a similar claim brought under general maritime law.[260] To support the principle, the Court in *Miles* explained that courts should not overstep the legislative limitations that Congress has imposed.[261] Because punitive damages are not available under the Jones Act, these damages should likewise be unavailable for the related claim of unseaworthiness under general maritime law.[262] In some maritime contexts, the Court has found supplementation of a statutory gap entirely appropriate.[263] *Miles*, however, responded to this argument, stating that "in an 'area 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.'"[264] Here, the Jones Act addresses the damages recoverable in a personal injury action and therefore, supplementation in the general maritime law would be inappropriate.[265]

By contrast, some argue that courts have construed *Miles* far too broadly.[266] Critics argue that courts should read *Miles* narrowly because

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assessed."); *see also* Christensen Eng'g Co. v. Westinghouse Air Brake Co., 135 F. 774, 782 (2d Cir. 1905) ("It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive, and, notwithstanding the foregoing precedents to the contrary, we think that when it is imposed by way of indemnity to the aggrieved party it should not exceed his actual loss incurred . . . .").

257. Balt. S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927).

258. *Peterson*, 278 U.S. at 138–39.

259. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

260. *Id.*; *see also Townsend*, 557 U.S. at 426 (Alito, J., dissenting).

261. *Miles*, 498 U.S. at 27.

262. *Id.*

263. *See generally* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (creating a wrongful death action under general maritime law).

264. *Miles*, 498 U.S. at 31 (quoting Mobil Oil Corp. v. Higginson, 436 U.S. 618, 625 (1978)).

265. *Id.* at 27.

266. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 418–19 (2009).

the Court in *Townsend* limited the preemptive effect of the Jones Act on maintenance and cure.[267] In addition, *Townsend* also stated that the purpose of the Jones Act was not to limit remedies, but to expand them.[268] Although *Miles* did not address maintenance and cure, the case directly addressed the overlap between unseaworthiness and the Jones Act; it concluded that because loss of society damages were not available under the Jones Act, such damages should not be available in unseaworthiness.[269] The Court unequivocally stated 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."[270] The legal overlap between Jones Act negligence and unseaworthiness is still good law, and the Supreme Court has not addressed the overlap since *Miles*.[271] That the purpose of the Jones Act was to expand the remedies available to seamen, but Congress intended to expand recovery by creating a single cause of action—to simply give seamen a negligence action against their employers.[272] Moreover, *Miles* was not such a sharp departure from previous admiralty precedent as some commentators claim.[273] The reasoning of *Miles* was recognized earlier by the Court in *Higginbotham* regarding the statutory preemption of DOHSA.[274]

The prohibition on double recovery between Jones Act negligence and unseaworthiness demonstrates that a statute can control recovery of a general maritime law claim.[275] A seaman has a choice between recovering

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267. *Id.* at 424–25 ("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 or any of this Court's other decisions interpreting the statute." (citations omitted)); *see also* deGravelles, *supra* note 67, at 139–40.

268. *Id.* at 417 ("Further supporting this interpretation of the Jones Act, this Court has consistently recognized that the Act 'was remedial, 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.'" (quoting The Arizona v. Anelich, 298 U.S. 110, 123 (1936))).

269. *Miles*, 498 U.S. at 32–33 (1990).

270. *Id.*

271. *See* McBride v. Estis Well Service, L.L.C., 768 F.3d 382, 384 (2014).

272. *See* McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991).

273. *See* Force, *supra* note 37, at 766 ("During the last twenty years, there has been a major change with respect to the recovery of damages for loss of consortium in American tort law."); *see also* deGravelles, *supra* note 67, at 129 ("The tide turned against seamen when the Supreme Court revisited the issue of loss of society damages in *Miles*.").

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

275. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 n.10 (2009).

under the Jones Act or unseaworthiness.[276] The prohibition against double recovery is significant because if courts made punitive damages available for unseaworthiness, seamen predictably would often choose to bring an action under unseaworthiness rather than the Jones Act. That result would circumvent a statutory remedy in favor of a judge-made remedy and violate the *Miles* uniformity principle.[277] Therefore, because both the Jones Act and unseaworthiness involve the same legal wrong and Congress has occupied the field of seamen tort damages, unseaworthiness punitive damages should be unavailable since those damages are not available under the Jones Act. Nevertheless, courts are still undecided whether to limit the *Miles* reasoning only to wrongful death actions because that is all the Court directly addressed in *Miles*.[278]

C. No Distinction Should Exist Between Personal Injury and Wrongful Death

Courts have no reason to draw a distinction between the types of damages that can be recovered under a wrongful death action and a personal injury claim for unseaworthiness.[279] Some courts have attempted to establish this distinction, however, arguing that punitive damages are available to seamen in personal injury cases but not to their representatives in wrongful death actions.[280] In *McBride*, a significant division among the judges in the en banc Fifth Circuit concerned whether the prohibition on punitive damages should extend to personal injury.[281] Regardless of whether the unseaworthy condition causes personal injury or death, that condition still involves the same legal wrong as a Jones Act negligence claim, where the seaman is entitled to only one indemnity by way of compensatory damages.[282]

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276. *See* 2 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 26:40, at 113–16 (5th ed. 2003).

277. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

278. *See, e.g.*, *In re* Asbestos Prods. Liab. Litig., MDL No. 875, 2014 WL 3353044, at *10–11 (E.D. Pa. July 9, 2014).

279. *See* Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 281 (1980) (reasoning that "[w]ithin this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries").

280. *See Asbestos*, 2014 WL 3353044, at *11 ("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. Put simply, the remedy of punitive damages exists as it did prior to the passage of the Jones Act, and thus does not survive a seaman's death.").

281. *See* analysis of the en banc opinion *supra* Part II.A.2.

282. *See* Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928).

1. No Distinction Under the Jones Act

Courts should not distinguish between personal injury and wrongful death because of the intimate connection between unseaworthiness and the Jones Act.[283] Under FELA, which Congress incorporated by reference into the Jones Act, no distinction between wrongful death and personal injury exists. Likewise, courts should not draw a distinction under the Jones Act.[284] The Jones Act provides recovery for both personal injury and wrongful death, such that courts should extend the prohibition on recovering punitive damages under the Jones Act to unseaworthiness.[285] The courts should not draw distinctions in recovery where Congress has not drawn such a distinction but instead should look to the legislature for policy guidance.[286]

In contrast, some argue that the FELA prohibition on punitive damages applies only to wrongful death claims.[287] No case under FELA, however, has allowed punitive damages for either personal injury or wrongful death.[288] Although the case that originally announced the pecuniary limitation happened to involve wrongful death, the prohibition on punitive damages has also been acknowledged in the personal-injury context.[289] In *Wildman v. Burlington Northern Railroad Co.*, the Ninth Circuit did not draw any distinction in its holding that punitive damages were unavailable for personal injury under FELA.[290] Because the Jones Act incorporated

283. *See supra* Part III.B.2.

284. *See* Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1457 (6th Cir. 1993) ("It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act." (citing Kozar v. Chesapeake & Ohio Ry. Co., 449 F.2d 1238, 1240–43 (6th Cir. 1971))); Wildman v. Burlington N. R.R. Co., 825 F.2d 1392, 1395 (9th Cir. 1987) ("[P]unitive damages are unavailable under the FELA.").

285. *See supra* Part III.B.

286. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

287. *See* Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 68 (1913) ("This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived.").

288. *See Miller*, 989 F.2d at 1457 ("It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act." (citing *Kozar*, 449 F.2d at 1240–43); *Wildman*, 825 F.2d at 1395 ("[P]unitive damages are unavailable under the FELA.").

289. *See Wildman*, 825 F.2d at 1395 (in a personal injury action, the court held that "punitive damages are unavailable under FELA").

290. *Id.*

FELA, Jones Act punitive damages should be unavailable for both personal injury and wrongful death.[291]

2. No Distinction Under the Miles *Uniformity Principle*

Although the reason for establishing a distinction between the recovery for personal injury and wrongful death is based on the argument that courts should read *Miles* narrowly, the uniformity principle is actually a broad rule for how modern courts should fashion remedies in light of congressional action.[292] Some argue that the pecuniary damages limitation applies only to wrongful death causes of action because that is all *Miles* addressed.[293] The reasoning of *Miles*, however, plainly provides that if certain damages are not available under a statutory claim, those damages should be likewise unavailable for a similar claim under general maritime law.[294] The purpose of this reasoning is to foster uniformity in admiralty.[295] Applying the *Miles* uniformity principle, courts should extend the prohibition of recovering punitive damages under the Jones Act for both personal injury and wrongful death to unseaworthiness because both involve a single legal wrong.[296]

General maritime law did not, however, originally provide an action for wrongful death.[297] Accordingly, it could be argued that *Townsend* limited the application of *Miles* because the Court stated that "it was only because of congressional action that a general federal cause of action for wrongful death on the high seas and in territorial waters even existed . . . ."[298] Because a personal-injury action for unseaworthiness existed before the Jones Act, punitive damages arguably could be available for personal-injury

291. Jones Act, 46 U.S.C. § 30104 (2012) ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.").

292. *See In re* Asbestos Prods. Liab. Litig., MDL No. 875, 2014 WL 3353044, at *11 (E.D. Pa. July 9, 2014).

293. Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990) ("Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act."); McBride v. Estis Well Service, L.L.C., 768 F.3d 382, 419 (2014) (Graves, J., dissenting) ("[R]ead with its proper scope, the pecuniary damages limitation recognized in *Miles* applies only to the wrongful death causes of action brought by McBride.").

294. *Id.* at 27; *see also* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 426–27 (2009) (Alito, J., dissenting).

295. *See supra* Part I.A.

296. *See supra* Part III.B.

297. *See generally* The Harrisburg, 119 U.S. 199 (1886) (holding there could be no recovery for wrongful death in admiralty), *overruled by* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

298. *Townsend*, 557 U.S. at 420; *see also McBride*, 768 F.3d at 422 (Graves, J., dissenting).

unseaworthiness, but not wrongful death.[299] This argument, however, undermines the fundamental reasoning of *Miles* that remains sound even after *Townsend*.[300] The purpose of *Miles*, specifically its uniformity principle, was to promote uniformity under maritime law.[301] Creating the anomaly that a personal injury seaman can recover punitive damages for unseaworthiness while the representative of a deceased seaman cannot is antithetical to the central purpose of *Miles*.[302] Nevertheless, controversy regarding the scope of *Miles* still remains, and the Supreme Court should resolve the conflict that exists between the reasoning of *Miles* and *Townsend*.

D. The Fifth Circuit Sets the Right Course for Unseaworthiness Punitive Damages

The issues that *McBride* raised have substantial policy implications. The Fifth Circuit was the first United States Circuit Court of Appeals to hold that unseaworthiness punitive damages are unavailable in the wake of *Townsend*.[303] Significant division among the federal district courts persists on this issue, however.[304] Whereas *McBride* clearly prohibits unseaworthiness punitive damages in the Fifth Circuit, courts have allowed punitive recovery in other parts of the country.[305] In light of the goal of uniformity, the remedies in American maritime law for unseaworthiness should be consistent.[306] Further, the availability of unseaworthiness punitive damages will have a major impact on the maritime shipping industry, where securing liability

299. *See id.* ("Unlike the situation presented in *Miles*, 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.").

300. *See id.* ("The reasoning of *Miles* remains sound.").

301. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990).

302. *See id.* at 27. In *Moragne v. States Marine Lines, Inc.*, the Supreme Court found that it was an anomaly that a longshoreman could recover damages for personal injury, but his representative could not if he died from the injury. 398 U.S. 375, 378 (1970). In response, the Court created a wrongful-death claim under general maritime law based on Congressional intent and the national policy to provide such a remedy. *Id.* at 397.

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

304. *Compare* Snyder v. L & M Botruc Rental, Inc., 924 F. Supp. 2d 728, 737 (E.D. La. 2013) (holding that unseaworthiness punitive damages are unavailable under general maritime law), *with* Wagner v. Kona Blue Water Farms, LLC, 2010 A.M.C. 2469, 2483 (D. Haw. 2010) (holding that unseaworthiness punitive damages are available under general maritime law).

305. *See In re* Complaint of Osage Marine Serv., Inc., No. 4:10CV1674, 2012 WL 709188, at *2–3 (E.D. Mo. March 5, 2012).

306. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

insurance coverage for punitive damages is often difficult.[307] The availability of punitive damages will also drastically alter settlement negotiations, which is a critical part of litigating the maritime personal injury case.[308] A uniform rule regarding unseaworthiness punitive damages is sorely needed. The Supreme Court should be motivated to provide a consistent interpretation of its previous decisions, which would allow the maritime industry to better predict their liability exposure.[309]

Although the Fifth Circuit reached the correct result, this conclusion is not the end of the road for the debate over unseaworthiness recovery. Despite the Supreme Court's recent refusal to answer this question,[310] the Court will likely eventually have to settle this issue and decide a uniform interpretation of the interplay between *Miles*, *Townsend*, unseaworthiness, and the Jones Act. Considering the policy concerns and the national importance of this issue, the Supreme Court must heed the sound reasoning of the Fifth Circuit's decision in *McBride*.[311]

CONCLUSION

In today's maritime industry, the seas are much calmer. Although seamen were historically tossed into rough waters, the mere availability of punitive damages in these ancient times does not justify conjuring up the past to judicially expand claims. Even though current law entitles seamen to recover punitive damages for their employer's failure to pay maintenance and cure, this reasoning does not extend to unseaworthiness and the Jones Act.[312] Both unseaworthiness and the Jones Act involve the same legal wrong whereby a seaman is entitled to recover one indemnity—compensatory damages.[313] Additionally, courts have no reason to draw a recovery distinction between personal injury and wrongful death, as this distinction would create an unjust anomaly in maritime law.[314] Therefore,

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307. 46 CORPUS JURIS SECUNDUM § 1605, at 503 (Joseph J. Bassano & Kathy Macomber eds., 2007) (recognizing that the split of authority whether public policy prohibits the issuance of a liability insurance covering punitive damages).

308. Rod Sullivan, *Enforcing a Seaman's Right to Medical Care After* Atlantic Sounding v. Townsend, 34 TUL. MAR. L.J. 1, 32 (2009) ("A defendant in a civil suit that has liability insurance is therefore motivated, in a case where punitive damages are alleged, to pressure its insurance carrier to settle the liability portion of a lawsuit in order to avoid the prospect of having a judgment entered for uninsured punitive damages.").

309. *See supra* Part II.B.

310. McBride v. Estis Well Serv., L.L.C., 135 S. Ct. 2310 (2015).

311. *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 401 (5th Cir. 2014) (en banc) (Clement, J., concurring).

312. *See supra* Part III.A.

313. *See supra* Part III.B.

314. *See supra* Part III.C.

the Supreme Court, using the persuasive reasoning of the Fifth Circuit in *McBride*, should conclude that unseaworthiness punitive damages are unavailable under general maritime law.

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