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Don't Rock the Boat: Developing a Uniform System of Maritime Punitive Damages After Baker and Townsend

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INTRODUCTION

On May 7, 2005, Derek Hebert was one of several passengers in a small boat operated by Daniel Vamvoras.[1] They were in a former channel of the Calcasieu River in Lake Charles, Louisiana, traveling between Vamvoras' home and the Lake Charles Country Club.[2] While the boat was "on plane,"[3] the hydraulic steering system failed because of fluid loss. The boat whipped around violently, ejecting Hebert and four other passengers. The "kill switch"[4] on the boat was not engaged, and the propeller struck Hebert 19 times, ultimately resulting in his death.

These are the facts of *Warren v. Shelter Mutual Insurance Co*.,[5] a recent Louisiana Supreme Court decision. *Warren* is remarkably evocative of the 1996 United States Supreme Court case, *Yamaha Motor Corp. v. Calhoun*.[6] *Yamaha* involved a minor, Natalie Calhoun, who died in a jet ski accident in the "territorial waters" of Puerto Rico.[7] Because the accident occurred upon the navigable waterways of the United States, admiralty jurisdiction and general maritime law applied to the wrongful death case.[8] To increase potential recovery, Natalie's parents argued for

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1. Warren v. Shelter Mut. Ins. Co., 233 So. 3d 568, 571 (La. 2017).
2. *Id*.
3. "On plane" means that the boat was traveling at a sufficiently high rate of speed to cause the hull to rise out of the water. *Id*.
4. The "kill switch," or "engine safety cut-out switch," is a device used, in the event of a passenger being thrown from the boat, to stop the engine and prevent injury from the spinning propeller. *Id*.
5. *Id*.
6. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996).
7. "Territorial waters" are waters within the territorial limits of a State, as well as the coastal waters fewer than three nautical miles from the shore of a State. *See*, *e.g.*, Calhoun v. Yamaha Motor Corp., 40 F.3d 622, 624 n.1 (3d Cir. 1994) (quoting William C. Brown III, *Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury*, 68 TUL. L. REV. 577, 581 (1994)).
8. *Yamaha*, 516 U.S. at 206 ("'With admiralty jurisdiction,' we have often said, 'comes the application of substantive admiralty law.'") (quoting E. River

application of their resident state's wrongful death statute and its accompanying remedies.[9] The Court agreed and determined that state law remedies, which included punitive damages against the manufacturer of the jet ski, remained available to supplement general maritime law for wrongful deaths of "non-seamen" in territorial waters.[10]

Like Calhoun's parents in *Yamaha*, Hebert's father sought to recover punitive damages from the manufacturer of the boat's steering system in *Warren*.[11] He brought the claim under general maritime law rather than state law.[12] Such a minute difference regarding the source of the claim does not seem particularly significant at first glance—the desired remedy

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S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986)). The terms "admiralty" and "maritime" are used interchangeably. Any appearance of the two words throughout this Comment only reflects customary usage in a unique area of law. *See* FRANK L. MARAIST ET AL., ADMIRALTY IN A NUTSHELL 1 (7th ed. 2017) ("Admiralty *or* maritime law is one of the world's oldest bodies of law.") (emphasis added).

9. Because Natalie Calhoun's permanent residence was in Pennsylvania, her estate and parents brought suit under Pennsylvania wrongful death and survival statutes, which allowed more potential recovery than federal maritime law. Available remedies included loss of future earnings, loss of society, support and services, funeral expenses, and punitive damages. *Yamaha*, 516 U.S. at 202.

10. *See id.* at 199. Punitive damages are generally defined as those damages assessed in addition to compensatory damages to punish the defendant for aggravated or outrageous misconduct, and to deter the defendant and others from similar conduct in the future. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979). Although an entire body of case law interprets this term, generally a "seaman" is a "member of the crew of a vessel." Notably, seamen have a right of action against their employers under the Jones Act (46 U.S.C. § 30104). *See* MARAIST, *supra* note 8, at 215. To the contrary, the Supreme Court has defined a "non-seaman" as a person, such as a recreational boater, who is neither a seaman under the Jones Act nor a longshoreman under the Longshore and Harbor Workers' Compensation Act. *Yamaha*, 516 U.S. at 205 n.2.

11. The father specifically claimed that the manufacturer demonstrated a callous disregard for the safety of others because it knew of the system's flaws but failed to provide warnings in order to avoid "mass hysteria." Warren v. Shelter Mut. Ins. Co., 196 So. 3d 776 (La. Ct. App. 2016).

12. Louisiana law does not recognize claims for punitive damages in such wrongful death actions. *See*, *e.g.*, McCoy v. Ark. Nat. Gas Co., 143 So. 383, 385–86 (La. 1932) ("There is no authority in the law of Louisiana for allowing punitive damages in any case, unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty."); *see generally* John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages – A Conflict of Traditions*, 70 LA. L. REV. 579, 585 (2010) (discussing Louisiana's general refusal to impose punitive damages as a reflection of the civil law tradition).

is the same, and general maritime law applied because of the presence of admiralty jurisdiction.[13] The recovery of punitive damages, however, is a considerably murky area of general maritime law.[14] The 1990 Supreme Court case *Miles v. Apex Marine Corp*. sparked decades of controversial rulings, during which lower courts denied the overall availability of punitive damages under general maritime law.[15] The tide shifted in *Exxon Shipping Co. v. Baker* and *Atlantic Sounding Co. v. Townsend*, signaling the Court's rejection of an overly expansive interpretation of *Miles* and approval of maritime punitive damages, at least under the facts of those cases.[16] Neither *Baker* nor *Townsend* involved non-seamen killed or injured in territorial waters; as a result, cases such as *Warren* raise several important questions regarding the interplay between *Miles*, *Yamaha*, *Baker*, and *Townsend*.[17]

A closer look at *Yamaha* reveals that the decision only permits the use of state law to provide a supplementary remedial option for non-seamen injured or killed in territorial waters.[18] Yet, after *Baker* and *Townsend*, punitive damages may be available to those claimants under general

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13. *See*, *e.g.*, *E. River S.S. Corp.*, 476 U.S. at 864 (citing Exec. Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 255 (1972)).

14. *See* discussion *infra* Part II.

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

16. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (holding that fishermen could recover punitive damages under general maritime law for pure economic harm following the Exxon Valdez oil spill); *see also* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009) (holding that a Jones Act seaman has a general maritime law punitive damages remedy for willful failure to pay maintenance and cure). *See* MARAIST, *supra* note 8, at 179.

17. *See generally Baker*, 554 U.S. 471; *Townsend*, 557 U.S. 404.

18. *Yamaha* is factually limited to general maritime wrongful death actions, but this Comment takes the majority view that state law remedies are available in similar non-seamen personal injury actions. Indeed, after *Yamaha*, a "trend" developed, with many lower courts allowing non-seamen claimants injured in state territorial waters to supplement their remedies under general maritime law with applicable state remedies. *See In re* Consol. Coal Co., 228 F. Supp. 2d 764, 771–72 (N.D. W.Va. 2001) (reasoning that because Congress had not prescribed specific remedies, state remedies could be used to supplement general maritime law where a personal injury claimant in a product liability case against the manufacturer sought punitive damages and West Virginia permitted recovery of such damages); *see also* Taylor v. Costa Cruises, Inc., No. 90 Civ. 2630, 1996 U.S. Dist. LEXIS 22510, at *9–10 (S.D.N.Y. Mar. 13, 1996) (following *Yamaha* in a non-seamen personal injury case and denying defendant's motion for summary judgment because federal maritime law does not preempt application of state law remedies).

maritime law.[19] If available under general maritime law, the only practical reason to apply state law is that state substantive rules on punitive damages are more generous than general maritime law.[20] *Yamaha*, however, does not govern this issue.[21] Under the Supreme Court's landmark choice-of-law decision in *Southern Pacific Co. v. Jensen*, the use of state substantive law is permissible only if federal maritime law does not preempt its application.[22] This Comment argues that although *Yamaha* provides an additional avenue to recover punitive damages for non-seamen maritime torts in territorial waters, *Baker* and *Townsend* have rendered it unnecessary.[23]

Part I of this Comment provides an overview of the sources of maritime law, which reflect the competing federal and state powers in admiralty. Section A recognizes the split between federal and state lawmaking authority, and Section B surveys principles whereby the Supreme Court has attempted to delineate the boundaries of such authority. Further, Section B details the maritime preemption analysis espoused in *Jensen* and subsequent developments.[24] Part II demonstrates the need to reconcile the Supreme Court's case law and clarify the state's role in maritime punitive damages for non-seamen maritime torts in territorial waters. Section A focuses on the historical development of maritime punitive damages, including Miles's influence, and their current status after *Baker* and *Townsend*. Section B discusses *Yamaha* and its accompanying choice-of-law considerations that further complicate the issue of punitive damages in admiralty.

Part III of this Comment attempts to reconcile the complex reasonings of *Miles*, *Yamaha*, *Baker*, and *Townsend*. Section A explains the Supreme Court's decisions in *Baker* and *Townsend* and considers their impact on non-seamen maritime tort cases in territorial waters. Section B shifts the focus to the *Yamaha* decision, analyzing the extent to which its fact-based rationale affects preemption. Part IV analyzes Yamaha's limited utility in the wake of *Baker* and *Townsend* and potential issues that application of state law under the maritime preemption analysis raises. Ultimately, this

19. *See* discussion *infra* Part III.
20. *See* discussion *infra* Part IV.
21. *See supra* text accompanying note 18.
22. *See generally* S. Pac. Co. v. Jensen, 244 U.S. 205 (1917).
23. *See* discussion *infra* Part IV. For purposes of this Comment, the phrase "maritime torts" is used as a comprehensive term to refer to both personal injury and wrongful death suits falling within admiralty jurisdiction. The two causes of action are separate; if the author uses the more specific term, the relevant discussion is limited to that particular cause of action.
24. *Jensen*, 244 U.S. at 215–16.

Comment concludes by advocating for the establishment of a single, uniform system of maritime punitive damages.

I. THE POWER STRUGGLE: AN OVERVIEW OF "THE LAW APPLIED" IN ADMIRALTY

The possible role of state law in punitive damage claims in maritime cases turns on two preliminary issues. First, the relationship between Congress, the federal courts, and the states regarding lawmaking authority in admiralty lays the foundation for an explanation of the maritime preemption analysis adopted in *Jensen*.[25] Second, maritime preemption and its development through federal case law demonstrates that state law may apply only in certain circumstances.[26]

A. Allocation of Maritime Lawmaking Authority Among Sovereigns

Article III, Section 2 of the United States Constitution, also known as the Admiralty Grant, provides that "[t]he judicial power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction."[27] The Judiciary Act of 1789 endowed the courts of the United States with original jurisdiction over admiralty and maritime cases and simultaneously acknowledged and preserved the authority of state courts.[28] As amended, the Act remains largely unchanged and still qualifies the grant of exclusive admiralty jurisdiction to federal courts by "saving to suitors in all cases all other remedies to which they are otherwise entitled."[29] Under the "saving to suitors" clause, a litigant

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25. *Id*.

26. *See* Ronen Perry, *Differential Preemption*, 72 OHIO ST. L.J. 821, 842–46 (2011) (discussing cases).

27. U.S. CONST. art. III, § 2, cl. 1. For a historical explanation of this provision, see DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES 6–17 (Harry W. Jones ed., Foundation Press, Inc. 1970).

28. Judiciary Act of 1789, § 9, 1 Stat. 73, 76 (1789) ("That the district courts shall have, exclusively of the courts of the several States . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.").

29. 28 U.S.C. § 1333 (2006) ("District courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.").

receives the right of a common law remedy, which is virtually any *in personam* remedy.[30] As a result, the clause is interpreted as "leav[ing] . . . state courts competent [through concurrent jurisdiction] to adjudicate maritime causes of action in proceedings *in personam*."[31]

The extent to which state law may be used to remedy maritime injuries, however, is constrained by the "reverse-*Erie*" doctrine, which requires that the state substantive remedies conform to governing federal maritime standards.[32] Despite the "saving to suitors" clause, the Framers intended the constitutional grant to determine applicable law, as its purpose was to protect maritime commerce through uniformity and consistency.[33] Thus, a foundational principle in maritime law is that

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30. Proceedings for remedies *in personam* are against the person, as opposed to those which are against specific things, or *in rem*. For example, the most common claim within the clause is an action *in personam* to recover damages for a tort. *See* Panama R. Co. v. Vasquez, 271 U.S. 557 (1926); *see also* Intagliata v. Shipowners & Mers. Tow Boat Co., 26 Cal. 2d 365 (1945).

31. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222; Bergeron v. Quality Shipyards, Inc., 765 F. Supp. 321 (E.D. La. 1991). *See* David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158, 169; *see also* David W. Robertson, *The Applicability of State Law in Maritime Cases After* Yamaha Motor Corp. v. Calhoun, 21 TUL. MAR. L.J. 81, 84 (1996); David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325, 328, 332 (1995).

32. *Offshore Logistics*, 477 U.S. at 223. The *Erie* doctrine requires a federal court exercising diversity jurisdiction to apply the appropriate substantive law of the forum state, but allows the court to apply federal procedural law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The "reverse-*Erie*" doctrine applies to maritime cases. *See, e.g.*, Peter Thompson, *State Courts and State Law: A New Force in Admiralty?*, 8 U.S.F. MAR. L.J. 223, 230 (1996). Literally understood, the "reverse-*Erie*" doctrine requires state courts, when adjudicating a maritime case, to apply the relevant substantive maritime law rather than state law. *See*, *e.g.*, Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918) (requiring a state court to apply the federal maritime law in determining the rights of an injured seaman). Courts generally do not apply the doctrine strictly, however, allowing state law to prevail over conflicting maritime law in some instances. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917) (developing a three-prong test to determine when state law may apply over federal maritime law).

33. *See*, *e.g.*, The Lottawanna, 88 U.S. (21 Wall.) 558, 574 (1874) ("The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was [referred to] . . . when it was declared . . . that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"); *see also Chelentis*, 247 U.S. 372. *See generally* B.J. Haeck, Yamaha Motor Corp. v. Calhoun*: An Examination of*

generally, "[w]ith admiralty jurisdiction comes the application of substantive admiralty law."[34] "Substantive admiralty law" is a consolidation of federal statutes and federal judge-made law, with some state law remaining applicable under the proper circumstances in the admiralty context.[35]

To fully understand the legal significance and inevitable consequences of this trifold framework, it is necessary to categorize maritime lawmaking authority according to its respective sovereign.

1. Federal Lawmaking Authority

An internal power struggle exists between the legislative and judicial branches of the federal government in the context of admiralty law.[36] Congress has broad legislative power to create rules governing admiralty cases, although the Constitution does not expressly grant it any power over civil maritime law.[37] Pursuant to a combination of constitutional provisions—the Necessary and Proper Clause, the Admiralty Clause, and the Commerce Clause[38]—Congress has "paramount power to fix and

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Jurisdiction, Choice-of-Laws, and Federal Interests in Maritime Law, 72 WASH. L. REV. 181 (1997).

34. *See*, *e.g.*, E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986) (citing Exec. Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 255 (1972)).

35. *See* discussion *infra* Part I.B.2. *See also* 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 4-1, at 220 (5th ed. 2011) (citing cases).

36. *See*, *e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (supporting the notion that Congress's regulatory authority is not limited or defined by the admiralty jurisdiction of the federal courts).

37. *See* Gus A. Schill, Jr., *A Tribute to United States Circuit Judge John R. Brown*, 25 HOUS. J. INT'L L. 239, 273–84 (2003) (discussing the foundation for Congress's role in formulating general maritime law, while also recognizing a lack of express authority in the Constitution).

38. U.S. CONST. art. I, § 8, cl. 18. (Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States . . . ."). U.S. CONST. art. III, § 2 (Congress has the power to craft the rules of decision for maritime cases because the Constitution vests admiralty jurisdiction in the federal courts). U.S. CONST. art. I, § 8, cl. 3. (Congress has the power to "regulate Commerce with foreign Nations, and among the several States"). Commentators believe generally that this grant of legislative authority includes maritime commerce. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The power of Congress, then, comprehends navigation . . . so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States. . . .'"); *see also* Lizabeth L. Burrell, *Application of State Law to*

determine the maritime law . . . ."[39] When Congress exercises this authority and legislates on a particular maritime issue, the federal courts must defer to its judgment.[40]

Where Congress has not exercised its legislative authority, however, federal courts retain the authority to fashion federal judge-made law.[41] Through the Admiralty Clause and its primary purpose of uniformity, the Framers recognized that the Supreme Court needed the authority to implement and develop the "general maritime law," which is "drawn from state and federal sources" and constitutes "an amalgam of traditional common law rules, modifications of those rules, and newly created rules."[42] As a result, the Constitution empowers federal courts to both draw on substantive maritime law in its adjudicatory functions and "continue the development of this law within constitutional limits."[43]

2. State Lawmaking Authority

Although the broad constitutional grant of admiralty jurisdiction to federal courts covers all "navigable waters" of the United States, that jurisdiction coexists with state sovereignty over waters within its own

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Maritime Claims: Is There a Better Guide than Southern Pacific Co. v. Jensen*?*, 21 TUL. MAR. L.J. 53, 53 n.1 (1996) (arguing that Congress's power derives from the Commerce Clause).

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

40. *See generally* Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959); *see also* Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) ("Congress retains superior authority in [matters of maritime law], and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.").

41. As Justice Marshall stated, "the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise." Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 545–46 (1828).

42. E. River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 866 (1986); The Lottawanna, 88 U.S. (21 Wall.) 558, 575–76 (1874).

43. The St. Lawrence, 66 U.S. 522, 526 (1861); *Romero*, 358 U.S. at 360–61; *see also* Currie, *supra* note 31, at 162 ("[The admiralty grant] gives the federal courts power to evolve and apply a national substantive law."); Robertson, *Diplacement of State Law by Federal Maritime Law*, *supra* note 31, at 366 ("Admiralty's traditions emphasize the authority and duty of federal judges to create maritime law."). *But see* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1643–44 (2008) (suggesting that federal lawmaking power in admiralty derives directly from "strong federal interests in uniform rules to govern maritime commerce," rather than indirectly from the jurisdictional grant).

territory.[44] The saving to suitors clause, as interpreted, not only confers concurrent jurisdiction to state courts, but also recognizes the legitimate role of the states in regulating maritime affairs.[45] A long-standing principle of federal constitutional law also recognizes that the states possess certain "police powers" to enact legislation to protect "the lives, limbs, health, comfort, and quiet of all persons [within the state]."[46] State maritime legislation often falls within the states' police powers.[47] Consequently, states have retained at least some degree of lawmaking authority within the ambit of federal admiralty jurisdiction.[48]

Despite the legitimate interest of a state in upholding its own law, differing state laws may be incompatible with federal maritime statutes, judge-made general maritime law, and the goal of uniformity, which has proven to be "a brooding omnipresence" over the sea.[49] The key concern

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44. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (deeming waters to be "navigable" when used, or susceptible of being used, in their ordinary conditions as highways for commerce—both international and interstate in nature); United States v. Bevans, 16 U.S. (3 Wheat.) 336, 388–89 (1818) (disposing of the argument that the grant of admiralty jurisdiction itself ousted state regulatory authority over territorial waters).

45. *Romero*, 358 U.S. at 374 ("The State and Federal Governments jointly exert regulatory power today as they have played joint roles in the development of maritime law throughout [the nation's] history. This sharing of competence in one aspect of […] federalism has been traditionally embodied in the saving clause of the Act of 1789."); *see also* Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1279 (1st Cir. 1993) ("[W]hen Congress established a separate admiralty jurisdiction and empowered the judiciary to develop substantive maritime principles for use nationwide . . . it simultaneously assured that state law would continue to play some role in maritime affairs through the 'saving to suitors' clause."). For a general background on the clause, see discussion *supra* Part I.A.

46. Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)); Sligh v. Kirkood, 237 U.S. 52, 58 (1915) ("[T]here may be legitimate action by the state in the matter of local regulation, which the state may take until Congress exercises its authority upon the subject.").

47. *See* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 330 (1999) (citing examples).

48. *See* Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 381–82 (1996) ("While there is a national concern for maritime activities, the states clearly retain an interest in that industry's effects within their borders. The states have passed a great deal of legislation relating to these interests.").

49. *See generally* ROBERTSON, *supra* note 27, at 193 ("Until *Jensen* and *Chelentis*, the maritime law of the United States was a code of jurisdiction, procedure, and remedies. After those cases, it was a brooding omnipresence over the sea.").

then becomes the boundaries of state lawmaking authority in relation to relevant federal interests, raising the unavoidable question of the circumstances that must exist for federal law to "preempt" state law.[50]

B. State Law Application in Maritime Cases

The Supreme Court stated in *Southern Pacific Co. v. Jensen*: "[I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."[51] Despite this assertion, the *Jensen* Court attempted to draw some boundaries and identified three circumstances in which courts may not apply state law in an admiralty case.[52] Federal maritime law preempts state law if the state law meets one of three prongs: (1) it "contravenes the essential purpose expressed by an act of Congress"; (2) it "works material prejudice to the characteristic features of the general maritime law"; or (3) it "interferes with the proper harmony and uniformity of that law in its international and interstate relations."[53]

The first two prongs of *Jensen* are clear, relating to the statutory maritime law and certain federal principles that originated in admiralty or otherwise enjoy select application.[54] The third prong is more open-ended

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50. This Comment uses the word "preemption" to refer to the issue of legislatively and judicially created federal maritime law's effect on state law, as opposed to "displacement," which considers the impact of a federal maritime statute on a general maritime law claim. *See* Thomas C. Galligan & Brittan J. Bush, *Displacement and Preemption: The OPA's Effect on General Maritime Law and State Tort Law Punitive Damages Claims*, 42 CUMB. L. REV. 1, 9 (2012) (using the same terms); *but see* SCHOENBAUM, *supra* note 35, § 4-3, at 233 (referring to the same concepts as "horizontal preemption" and "vertical preemption").

51. S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). In *American Dredging Co. v. Miller*, Justice Scalia admitted that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in . . . admiralty jurisprudence, or indeed is even entirely consistent within . . . admiralty jurisprudence." 510 U.S. 443, 452 (1994). Likewise, a lower court judge stated that "tack[ing] a sailboat into a fog bank" would be easier than discerning the law in this area. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994).

52. *Jensen,* 244 U.S. at 216.

53. *Id*.

54. *See e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 449–50 (1994) (holding that a legal rule or principle is a "characteristic feature of general maritime law" only if it originated or has exclusive application in maritime law).

and echoes the idea, pervasive in the Supreme Court's jurisprudence, that the development of a uniform maritime law is required to protect maritime commerce.[55] Contrarily, this notion of uniformity does not mandate the automatic preemption of state law.[56] The Supreme Court has declined to create a bright-line test, choosing instead to balance the competing, legitimate interests of both sovereigns.[57] Under the third prong of *Jensen*, therefore, state law will generally not apply if it conflicts with general maritime law.[58] Conflicting state law may apply, however, when the state has a strong interest in the application of its law and uniformity is not required.[59]

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55. Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide* (Part II), 28 J. MAR. L. & COM. 555, 556 (1997) (noting that uniformity and predictability encourage maritime commerce).

56. *See*, *e.g.*, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545–47 (1995) (emphasizing that the "exercise of federal admiralty jurisdiction does not result in automatic displacement of state law" because there is a "highly intricate interplay of the State and the National Government in their regulation of maritime commerce"). A difference exists between federal law incorporating state law as a rule of decision ("borrowing") and state law operating of its own force. *See* Calhoun v. Yamaha Motor Corp., 40 F.3d 622, 627–28 (3d Cir. 1994) (citing cases). "[A]lthough drawing such a distinction identifies the sovereign "power" being exercised," it is of theoretical importance only and "does not have any real bearing on the practical question of whether the state law rule of decision will apply or be [preempted]." *Calhoun*, 40 F.3d at 628; *see also* Boyle v. United Tech. Corp., 487 U.S. 500, 507 n.3 (1988) ("We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case."). This Comment thus refers to the problem generally as "preemption of state law."

57. *See*, *e.g.*, Rodrigue v. LeGros, 563 So. 2d 248, 253 (La. 1990) ("Despite this multitude of cases involving the applicability of state law in maritime situations, the Court has developed no clear test for determining when such application is appropriate and when it violates the Constitution."); *see also* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 210 n.8 (1996) ("We attempt no grand synthesis or reconciliation of our precedent.").

58. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 628 (1st Cir. 1994) (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917)).

59. *See id*. at 628–29 (citing cases). For purposes of this Comment, a court's analysis to resolve identified conflict in the applicable law is referred to as the "maritime preemption analysis."

II. NATURE AND SCOPE OF THE PROBLEM: THE QUEST FOR FEDERAL-STATE COMITY AS APPLIED TO PUNITIVE DAMAGE AVAILABILITY IN MARITIME TORTS

Maritime torts are frequent subjects of maritime preemption, as admiralty has long acknowledged that the states have legitimate interests in tortious actions within their territorial waters.[60] Some examples include the establishment of general rights and duties of persons and property within state boundaries; the police power to prevent dependency on the state by survivors; and the control over "certain local regulations of a maritime nature."[61] Further, maritime torts make up an area of maritime law that is abundant in common law remedies.[62]

Considering recent Supreme Court jurisprudence clarifying the status of maritime punitive damages, the question remains as to whether there is still a place for state law punitive damage remedies.[63]

A. The Status of Punitive Damages After Miles, Baker, *and* Townsend

Despite early indications from the Supreme Court that punitive damages constituted a recognized feature of maritime law, courts prior to *Baker* and *Townsend* remained starkly divided over the awarding of such damages.[64] The uncertainty began in *Miles v. Apex Marine Corp.*, when the Court was asked to determine whether the mother of a deceased

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60. *See*, *e.g.*, City of Norwalk, 55 F. 98, 108 (S.D.N.Y. 1893); *see also Yamaha*, 516 U.S. at 210 n.13 (recognizing that "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters").

61. *See In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1426 (11th Cir. 1997) (recognizing that states have an interest in regulating local matters without interference of the federal government); *see also City of Norwalk*, 55 F. at 108; Hess v. United States, 361 U.S. 314, 331–32 (1960) (Harlan, J., dissenting).

62. *See* The Hamilton, 207 U.S. 398 (1907); *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393 (1970) ("For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful death statutes by allowing recovery whenever an applicable state statute favored such recovery.").

63. *See generally* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

64. *See*, *e.g.*, The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818). For an in-depth recitation of early (pre-Jones Act) case law concerning maritime punitive damages, see David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 96–116 (1997).

seaman was entitled to recover "nonpecuniary," "loss of society" damages in a wrongful death action based on unseaworthiness under general maritime law and negligence under the Jones Act.[65] The Court held that such recovery was not possible under either cause of action.[66]

Before reaching a conclusion, the Court explained the evolution of wrongful death in admiralty; the chronicle began with the rule established in *The Harrisburg* that general maritime law did not authorize a wrongful death action.[67] In response to the harshness of *The Harrisburg*, lower courts began using state wrongful death statutes to allow recovery under general maritime law, which proved a somewhat compatible scheme for many years.[68] The compatibility declined when the Supreme Court transformed the doctrine of unseaworthiness into a strict liability regime.[69] Specifically, state wrongful death statutes often did not recognize the doctrine of unseaworthiness, and various "anomalies" resulted, leaving

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65. Miles v. Apex Marine Corp., 498 U.S. 19 (1990). "Pecuniary damages" are "damages that can be estimated and monetarily compensated," whereas "nonpecuniary damages" are "damages that cannot be measured in money," and whose assessment, therefore, entails some difficulty and may require special restrictions. *Nonpecuniary Damages*, *Pecuniary Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Loss of society" damages embrace the loss of 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 Services, Inc. v. Gaudet, 414 U.S. 573, 585 (1974).

66. *Miles* was entirely unrelated to the preemption of state law. Rather, the case dealt with the scope of general maritime law recovery, in light of congressional legislation. Miles is relevant here because of the expanded reading attributed to the decision, which then called into question the overall availability of punitive damages in maritime law. *See* Miles v. Apex Marine Corp., 498 U.S. 19 (1990).

67. The Harrisburg, 119 U.S. 199, 213–14 (1886).

68. *See* Western Fuel Co. v. Garcia, 257 U.S. 233 (1921) (allowing the widow of a maritime worker killed in California's territorial waters to supplement general maritime law through a wrongful death action under state law); *see also* Just v. Chambers, 312 U.S. 383 (1941) (holding that courts may apply state survival statutes when the injury occurs in territorial waters).

69. *See* Mahnich v. S. S.S. Co., 321 U.S. 96 (1944). The *Mahnich* Court transformed the doctrine of unseaworthiness, previously recognized as a means for a seaman to recover for injuries sustained as a result of the negligence of the shipowner, into a sort of strict liability regime, under which the shipowner was liable for injury resulting from a failure to supply a safe ship, regardless of fault or crew negligence. *Id*. For a more thorough explanation of the historical background, see Nicolas R. Foster, Yamaha v. Calhoun: *The Supreme Court Allows State Remedies in Certain Wrongful Death Cases in Admiralty*, 26 GA. J. INT'L & COMP. L. 233 (1996).

seamen unable to utilize the more generous standard of liability.[70] The Court thus created a general maritime claim for wrongful death in *Moragne v. States Marine Lines* to accommodate the interest of seamen, the "wards of admiralty."[71] *Moragne*, however, did not set forth the recoverable damages in the new cause of action.[72]

Recognizing the change in legal reasoning from *The Harrisburg* to *Moragne*, the *Miles* Court looked to pre-existing maritime statutes for guidance.[73] The Court recognized that both the Jones Act and the Death on the High Seas Act ("DOHSA") allowed only pecuniary losses and emphasized that "[i]t would be inconsistent with [the judicial role] in the constitutional scheme [to expand] 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."[74] Overall, the Court was satisfied that it had ensured operation of a uniform rule in all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or *Moragne*.[75]

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70. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 395 (1970). The anomalies were threefold. First, in territorial waters, if a claim was based on unseaworthiness, general maritime law provided a basis of recovery for injury but frequently not for death. Recovery for wrongful death was still governed by state statutes, which usually did not encompass an unseaworthiness claim. Second, if a death occurred on the high seas, Death on the High Seas Act ("DOHSA") provided unseaworthiness as a basis for recovery. Yet, if the same death occurred within territorial waters because of an identical breach of the duty of seaworthiness, unseaworthiness would likely not be available as a basis for the claim because state law still governed. Third, if a seaman died in territorial waters, his survivors could not recover on a wrongful death claim based on unseaworthiness because the Jones Act provided only a negligence-based claim at the time. Yet, longshoremen—before the 1972 amendments to the Longshore and Harbor Workers' Compensation Act ("LHWCA")—could rely on unseaworthiness, despite the fact that the duty of seaworthiness extended to them only because their work resembled that of a seaman.

71. *See* Harden v. Gordon, 11 F. Cas. 480, 485 (C.C. Me. 1823) (terming seamen "the wards of the admiralty").

72. *Id*. at 408 (declining to set forth boundaries for this new cause of action and leaving available damages for lower courts to develop in future litigation).

73. Specifically, the Court utilized the logic of *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), which refused to allow recovery of loss of society damages in actions resulting from death on the high seas because DOHSA limits recovery to pecuniary losses. Miles v. Apex Marine Corp., 498 U.S. 19, 30–36 (1990).

74. *Miles*, 498 U.S. at 32–33.

75. *Id*. at 33.

On the surface, *Miles* had no direct impact on punitive damages.[76] Nevertheless, some lower federal courts broadly interpreted *Miles* as creating a maritime "uniformity principle" that limited the recovery of several types of damages under general maritime law, including punitive damages.[77] After several years of confusion, the Court revisited maritime punitive damages.[78] In *Exxon Shipping Co. v. Baker*, the Court upheld the recovery of punitive damages in property damage claims brought by commercial fishermen pursuant to general maritime law.[79] More recently, the Court in *Atlantic Sounding Co. v. Townsend* authorized an award of punitive damages in a seaman's action against his employer for willful and wanton failure to pay "maintenance and cure."[80]

B. Non-Seamen Maritime Torts: A Much-Needed Reconciliation of General Maritime Law and State Law Punitive Damages

Following *Baker* and *Townsend*, a few lower courts extended the Supreme Court's logic to non-seamen punitive damage claims in maritime tort actions.[81] To some extent, however, it remains uncertain whether such applications of *Baker* and *Townsend* are warranted; the facts of those decisions are distinguishable from non-seamen maritime tort claims. As a

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76. Punitive damages were not at issue in *Miles*, nor did the Court mention them in passing. *See Miles*, 498 U.S. 19.

77. *See*, *e.g.*, Scarborough v. Clemco Indus., 391 F.3d 660, 663 (5th Cir. 2004). For example, some courts took *Miles* to mean that punitive damages were not available in actions by seamen against their employers under DOHSA, the Jones Act, or the general maritime doctrine of unseaworthiness. Some courts broadly interpreted *Miles* to preclude recovery of punitive damages in any action by a seaman, whether against an employer for failure to pay maintenance and cure or against a non-employer defendant. Other courts read *Miles* to the extreme, precluding all punitive damages actions under maritime law. *See* Robertson, *supra* note 64, at 139 nn.376–79 (collecting cases).

78. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

79. *Baker*, 554 U.S. 471.

80. *Townsend*, 557 U.S. 404. The Court has previously defined a claim for "maintenance and cure" as concerning "the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001).

81. *See* Lobegeiger v. Celebrity Cruises, Inc., No. 11-21620-CIV, 2011 WL 3703329, at *7 (S.D. Fla. Aug. 23, 2011); *see also In re* Deepwater Horizon, MDL No. 2179, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011).

result, the circumstances under which non-seamen may recover general maritime law punitive damages must be clarified.[82]

Undoubtedly, if a non-seaman is killed on the high seas, recovery is confined to pecuniary damages, whether based on a *Moragne* wrongful death claim or DOHSA.[83] Three scenarios, however, remain subject to pre-*Baker* and *Townsend* case law: non-seamen killed in territorial waters;[84] non-seamen injured in territorial waters;[85] and non-seamen injured on the high seas.[86] The Court has already made clear that the high seas are "an area where the federal interests are primary," and Congress has similarly expressed a concern for uniformity.[87]

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82. For example, in a recent Fifth Circuit case which addressed maritime punitive damages, there was one majority opinion, two concurrences, and two dissents. The split demonstrates the continuing unease in maritime punitive damages. *See* McBride v. Estis Well Serv., LLC, 768 F.3d 382 (5th Cir. 2014) (en banc).

83. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978) (holding that although the *Moragne* wrongful-death remedy is applicable beyond three nautical miles, a decedent's survivors cannot recover non-pecuniary damages under general maritime law that are not available under DOHSA because "Congress has struck the balance for us"); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233 (1986) (holding that state wrongful death statutes cannot be used to supplement damages in cases where DOHSA applies).

84. *See, e.g.*, Tucker v. Fearn, 333 F.3d 1216, 1222 (11th Cir. 2003) (holding that non-dependents of non-seamen could not recover non-pecuniary damages in a wrongful death action under general maritime law); *but see* Viollat v. Red & White, No. C 03-3016 MHP, 2004 WL 547146 (N.D. Cal. Mar. 18, 2004) (survivors of passenger killed in territorial waters may recover punitive damages).

85. *See, e.g.*, *In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1429 (11th Cir. 1997) (holding that punitive damages in personal injury actions were not available under general maritime law, even for non-seamen hurt in territorial waters). *But see* Hester v. Cottrell, No. 7:00-CV-70-BR(1), 2001 WL 1764200 (E.D.N.C. Apr. 27, 2001) (holding that punitive damages are recoverable under general maritime law by non-seamen injured in territorial waters).

86. *See, e.g.*, Chan v. Soc'y Expeditions, 39 F.3d 1398, 1408 (9th Cir. 1994) (holding that a dependent of a non-seaman who was injured on high seas could not recover non-pecuniary damages, even though DOHSA was not directly applicable); *but see Lobegeiger*, 2011 WL 3703329 (holding that a passenger on a cruise ship could recover punitive damages for personal injury under general maritime law).

87. *Offshore Logistics*, 477 U.S. at 233; *see also In re* Deepwater Horizon, 808 F. Supp. 2d 943, 954 (E.D. La. 2011) ("But this case does not concern conduct within state borders (waters). This casualty occurred over the Outer Continental Shelf—an area of 'exclusive federal jurisdiction'—on waters deemed to be the 'high seas.'"). The legislative history of DOHSA contains recognition that the Act would confer a right of action "for deaths on the high seas, leaving unimpaired

The Supreme Court has provided little guidance in the context of non-seamen maritime torts in territorial waters.[88] In *Yamaha Motor Corp. v. Calhoun*, the Court held that state wrongful death remedies remained available for a non-seaman killed in state territorial waters because general maritime law did not preempt those state remedies.[89] Non-seamen claimants have since relied upon state remedies in wrongful death claims for deaths in state territorial waters.[90] The *Yamaha* Court emphasized that limitations still exist on the application of state law.[91] Consequently, courts continue to grapple with *Yamaha* to balance the federal interest in uniformity with the availability of state law remedies, particularly regarding punitive damages.[92]

III. NAVIGATING THE STATES' ROLE IN MARITIME PUNITIVE DAMAGES

Presumably, the plaintiffs in *Yamaha* could not argue that punitive damages were available under general maritime law because of the Court's decision in *Miles*.[93] The recent renaissance in maritime punitive damages has softened the blow of *Miles* and may have implications on *Yamaha*'s applicability to state law punitive damages.[94] The extent of these

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the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States. . . . This is for the purpose of uniformity, as the States cannot properly legislate for the high seas." S. Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H.R. Rep. No. 676, 66th Cong., 2d Sess., 3, 4 (1920). Thus, this Comment focuses solely on the scenarios involving state territorial waters.

88. *See generally* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996).

89. *Id*. at 215–16.

90. *See*, *e.g.*, Kelly v. Bass Enters. Prod. Co., 17 F. Supp. 2d 591 (E.D. La. 1998) (holding widow of non-seafarer killed in Louisiana territorial waters could recover loss of society damages under Louisiana law).

91. *Yamaha*, 516 U.S. at 210 ("[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law.").

92. *See*, *e.g.*, *In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1424–28 (11th Cir. 1997) (concluding that federal law governed the liability standards for punitive damages whereas state law under *Yamaha* provided only a remedial measure); *see also* Choat v. Kawasaki Motors Corp., 675 So. 2d 879, 884–86 (Ala. 1996) (utilizing *Yamaha* to hold that a nondependent could recover for loss of society and punitive damages under state law).

93. *See* discussion *supra* Part II.A on *Miles*'s impact.

94. *See* Galligan & Bush, *supra* note 50, at 7 ("*Exxon Shipping Co. v. Baker* began a *renaissance* in general maritime law punitive damages recovery.") (emphasis added).

implications depends on the resolution of two questions, both requiring more thorough analyses of *Yamaha*, *Baker*, and *Townsend*.

First, although it is now clear that punitive damages are available under general maritime law in at least some cases, the Supreme Court has not directly addressed whether they are available for non-seamen who are injured or killed in state territorial waters. Second, if such damages are available, the question remains as to whether recovery of punitive damages in non-seamen maritime tort cases requires national uniformity and thus excludes state law application under the maritime preemption analysis.[95]

A. Availability of General Maritime Law Punitive Damages in Non-Seamen Maritime Torts in Territorial Waters

Initially, it is necessary to determine whether a cause of action for punitive damages exists in a non-seaman's maritime tort case occurring within state territorial waters. If the cause of action does not exist, there is no need to perform a maritime preemption analysis to determine if state law may be given effect.[96] This initial inquiry warrants a return to the Supreme Court's recent decisions in *Baker* and *Townsend*.[97]

1. Examination of the Court's Decisions in Baker *and* Townsend

Baker involved a host of civil cases brought by "commercial fishermen, Native Alaskans and landowners," some of whom sought punitive damages for extensive loss of property and livelihood, caused by the 1989 Exxon Valdez oil spill in the Prince William Sound.[98] Exxon argued that the Clean Water Act's ("CWA") detailed regime of civil and criminal penalties for water pollution displaced judicially-created remedies under general maritime law, including punitive damages.[99] The Court held, in part, that the CWA did not displace maritime punitive damages.[100]

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95. The *Yamaha* Court did not clarify whether state remedies could extend to non-seamen personal injuries in territorial waters, but "[n]either logic nor maritime history supports restricting *Yamaha* to only fatal injury claims." *Kelly*, 17 F. Supp. 2d at 599. This issue will be explored below in the maritime preemption analysis. *See* discussion *infra* Part III.B.2.

96. *See* discussion *supra* Part I.

97. *See generally* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

98. *See Baker*, 554 U.S. at 479.

99. *Id*. at 488.

100. *Id*.

The CWA included an explicit savings clause that preserved claims for damage to private property from the discharge of oil. To Exxon's dismay, the Court rejected the notion that the statute preserved maritime law claims in general but somehow severed punitive damages.[101] Ultimately, the Court saw "no clear indication of congressional intent to occupy the entire field of pollution remedies."[102] The Court held also that the availability of maritime punitive damages to vindicate private harms did not threaten to frustrate the CWA's remedial scheme, unlike common law nuisance claims, which produced liability standards different from the statute.[103]

Baker may be interpreted as a broad acknowledgment of the availability of punitive damages under general maritime law.[104] For example, the Court termed maritime punitive damages "a common-law principle."[105] Pursuant to the admiralty grant, such principle fell within the sphere of a federal admiralty court's lawmaking authority.[106] The punitive damage award, therefore, was upheld solely based on general maritime law.[107] In addition to Exxon's preemption argument, *Baker* addressed two issues that circumstantially support the existence of maritime law punitive damages.[108]

Initially, the Court considered whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial

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101. *Id*. at 488–89 ("[N]othing in the statutory text points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action.").

102. *Id*. at 489.

103. *Id*. at 489 n.17 (distinguishing *Baker* from two other cases).

104. For example, see David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 476 (2010) (arguing that *Baker* reaffirmed maritime law's recognition of punitive damages).

105. *Baker*, 554 U.S. at 489 ("In order to abrogate a *common-law principle*, the statute must speak directly to the question addressed by the common law.") (citing United States v. Texas, 507 U.S. 529, 534 (1993)) (emphasis added).

106. *Id*. at 489–90 (recognizing that the issue of punitive damages in maritime law "falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result").

107. *Id*. at 489.

108. *Id*. at 481–82 ("We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents . . . and whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law.").

agents.[109] Although the question was ultimately left unanswered, the Court discussed *The Amiable Nancy*, which is often cited as one of the earliest affirmations of maritime punitive damages.[110] After ruling on the preemption issue, the Court considered whether the punitive damage award was excessive as a matter of maritime law.[111] The Court held that a 1:1 ratio of compensatory to punitive damages was a "fair upper limit" in maritime cases in which the conduct was not intentional or malicious and was without behavior driven primarily by desire for gain.[112] It would have been unnecessary for the Court to create a ratio if punitive damages were altogether unavailable under general maritime law.[113]

Exxon did not challenge the general existence of maritime punitive damages in *Baker* and requested only consideration of whether such damages were preempted by the CWA.[114] The Court specifically noted that this argument was not made.[115] *Baker*, therefore, clarified that courts may impose punitive damages in at least some maritime cases but failed to identify the cases in which it is appropriate.[116] Although *Baker*

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109. *Id*. at 480 ("[A]n employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.") (citing *In re* Exxon Valdez, 236 F. Supp. 2d 1043 (D. Alaska 2002) ("Phase I")).

110. *Id*. at 482–83 (citing The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558–59 (1818)). Scholars and commentators have shown no reluctance in interpreting *The Amiable Nancy* as a case in which the Court supported the award of punitive damages in maritime law. *See, e.g.*, Robertson, *supra* note 64, at 95. On the derivative liability question, however, the Court split four-to-four, resulting in no precedential value. *See Baker*, 554 U.S. at 484. The discussion is nonetheless informative of the status of general maritime law punitive damages. *Id.*

111. *Baker*, 554 U.S. at 490.

112. *Id*. at 512–13.

113. *See, e.g.*, Kunz v. Defece, 538 F.3d 667, 678 (11th Cir. 2008) ("In *Exxon*, the Court held that as a matter of federal common law, a punitive damages award *in an admiralty case* may not exceed the compensatory award (that is, a 1:1 ratio is the upper limit *for this class of cases*).") (emphasis added).

114. In the Ninth Circuit proceedings, Exxon presented the broader argument that maritime punitive damages were simply unavailable. *In re* Exxon Valdez, 270 F.3d 1215, 1226 (9th Cir. 2001).

115. *Baker*, 554 U.S. at 490 ("Other than its preemption argument, [Exxon] does not offer a legal ground for concluding that maritime law should never award punitive damages").

116. *See id.* Even before the clarification of punitive damages in *Baker*, it was clear that federal maritime law included a punitive damages remedy for tortious property damage when the conduct was egregious enough. *See*, *e.g.*, CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995). Before *Townsend*, one could have argued

weakened *Miles* by distinguishing between statutory remedies and general maritime law remedies, *Baker* offered little insight on how far courts may extend *Miles* to confine punitive damages in other maritime cases.[117] The Court, nevertheless, provided further guidance on this particular issue in *Townsend*.[118]

Townsend involved the issue of an injured seaman's recovery of punitive damages under general maritime law resulting from his employer's willful and wanton failure to pay maintenance and cure.[119] The defendant-employer argued that the Jones Act applied and controlled the availability of punitive damages pursuant to the Court's decision in *Miles*.[120] The Court rejected the defendant-employer's displacement argument and held that such damages were permissible, for two primary reasons.[121] First, punitive damages were historically available under general maritime law.[122] Second, the Jones Act did not eliminate the pre-existing remedies for separate common law actions based on maintenance and cure.[123]

The Court further emphasized that the Jones Act did not provide the exclusive remedy for injured seamen, as the Act explicitly permitted a choice between remedies under the statute and pre-existing general maritime law.[124] In the Court's view, the Jones Act was enacted to

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that *Baker* merely confirmed the availability of punitive damages in cases of property damage or economic loss with no applicability in injury and death cases.

117. In oral argument, Justice Scalia invoked the spirit of *Miles* and observed that perhaps "one of the factors [the Court] ought to take into account in deciding whether modern admiralty law in this situation permits punitive damages is the existence of the Clean Water Act." Transcript of Oral Argument at 1:07:55.966, Exxon Shipping Co. v. Baker, No. 07-219 (Feb. 27, 2008). Further, although *Baker* chipped away at *Miles*, the Court did reaffirm its viability. *Baker*, 554 U.S. at 508 n.21 ("To be sure, 'Congress retains superior authority in these matters,' and '[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance.'") (citing Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990)).

118. *See generally* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

119. *Id*. at 407–08.

120. The Jones Act, 46 U.S.C. § 30104, provides a seaman with a negligence action against his employer and does not speak to maintenance and cure or punitive damages. An employer's negligent denial of maintenance and cure, however, could give rise to a Jones Act claim. *Townsend*, 557 U.S. at 407, 415–18 (discussing the Jones Act at length).

121. *Townsend*, 557 U.S. at 423.

122. *Id*. at 407.

123. *Id*. at 415–16.

124. *Id*. at 415 (citing 46 U.S.C. § 30104(a)).

enlarge—not narrow—protection of seamen, and it did not demonstrate an express intent to change general maritime law.[125] Further, reliance on *Miles* uniformity to bar punitive damages under general maritime law was "far too broad" a reading.[126] The notion of uniformity alone did not require the Court to limit available damages in a pre-existing maritime law claim simply for the sake of conforming with permissible damages in a separate, statutory cause of action.[127]

Townsend is broadly interpreted to stand for the proposition that a pre-existing general maritime law remedy remains available unless clearly abrogated by a subsequent statute.[128] To the contrary, some courts are not convinced that the decision's impact is so extensive.[129] Although the *Townsend* Court emphasized the historical availability of punitive damages under general maritime law, it did not expressly overrule any portion of *Miles* that limited punitive damage awards.[130] The Court in *Townsend* actually discussed *Miles* with approval, stating that "[t]he reasoning of *Miles* remain[ed] sound."[131] Consequently, it remains uncertain what value should be attributed to the massive body of case law that relied on *Miles* to disallow maritime punitive damages.[132]

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125. *Id*. at 417. Congress has previously abrogated the right to recover for maintenance and cure, thus when it speaks, it does not do so implicitly. *Id*. at 416 (citing 46 U.S.C. § 30105(b) and § 50504(b)).

126. *Id*. at 419.

127. *Id*.

128. *See*, *e.g.*, Lobegeiger v. Celebrity Cruises, Inc., No. 11-21620-CIV, 2011 WL 3703329, at *6 (S.D. Fla. Aug. 23, 2011) ("The opinion in [*Townsend*] indicated punitive damages are available as damages in all actions under general maritime law unless specifically limited by Congress."); *see also* Doe v. Royal Caribbean Cruises Ltd., No. 11-23323-CIV, 2012 WL 920675 (S.D. Fla. Mar. 19, 2012); Rowe v. Hornblower Fleet, No. C-11-4979, 2012 WL 5833541 (N.D. Cal. Nov. 16, 2012); Boney v. Carnival Corp., No. 08-22299-CIV, 2009 WL 4039886, *1 n.1 (S.D. Fla. Nov. 20, 2009).

129. *See*, *e.g.*, Hackensmith v. Port City S.S. Holding Co., 938 F. Supp. 2d 824, 829 (E.D. Wis. 2013) (concluding that "*Townsend* did not address anything other than maintenance and cure claims"); *see also* Snyder v. L & M Botruc Rental, Inc., 924 F. Supp. 2d 728 (E.D. La. 2013).

130. *Townsend*, 557 U.S. at 409–10.

131. *Id*. at 420.

132. For example, a district court in Florida wrestled with the continued viability of *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997)—which foreclosed a plaintiff's right to seek punitive damages in a personal injury case under general maritime law—in the face of *Townsend*. Ultimately, the district court concluded that *Amtrak* was no longer good law, though it has not been expressly overruled otherwise. *See Lobegeiger*, 2011 WL 3703329, at *7.

2. Baker *and* Townsend *as Applied to Non-Seamen Maritime Torts in Territorial Waters*

Any uncertainty surrounding the precedential reaches of *Baker* and *Townsend* is unlikely to affect non-seamen, particularly those who are killed or injured in territorial waters. When a maritime tort suit involves seamen, federal maritime statutes such as the Jones Act and DOHSA are implicated, triggering the potential application of *Miles* and forcing a court to wade through the muddied waters that *Townsend* overlooked.[133] In the context of non-seamen maritime torts in territorial waters, however, there are no similar bars to recovery of maritime punitive damages, and *Miles* is not implicated.[134] The Court in *Yamaha* emphasized that no applicable congressional tort recovery scheme posed an obstacle and thereby dismissed concerns generated by *Miles*.[135] As a result, the broader interpretation of *Townsend*—requiring a pre-existing general maritime law remedy and an absence of express revocation by Congress—may be used to determine punitive damage availability for non-seamen maritime torts in territorial waters.[136]

The satisfaction of the *Townsend* framework is easily accomplished in maritime personal injury cases involving non-seamen in territorial waters; punitive damages were historically available under general maritime law for non-seamen's personal injuries, and Congress has not legislated on this particular issue.[137] Non-seamen deaths in territorial waters likely warrant further analysis. The second prong of *Townsend*, which focuses on an absence of congressional abrogation, is easily met; DOHSA is the only maritime statute pertaining to non-seamen and does not apply to wrongful

133. *See generally* Stevan C. Dittman, *Amiable or Merry? An Update on Maritime Punitive Damages*, 89 TUL. L. REV. 1059 (2015) (comparing cases to illustrate the quandary, even after *Townsend*, with respect to a seaman's punitive damages claim).

134. *See In re* Deepwater Horizon, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011) ("As explained in *Townsend*, neither the Jones Act nor the Death on the High Seas Act speak to negligence claims asserted by non-seamen under general maritime law, and punitive damages have long been available at common law.").

135. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 215 (1996) ("But Congress has not prescribed remedies for the wrongful deaths of [non-seamen] in territorial waters.") (distinguishing *Miles*).

136. *See Townsend*, 557 U.S. at 409–10; *see also* Doyle v. Graske, 579 F.3d 898, 906 (8th Cir. 2009) (adopting the *Townsend* approach, though dealing with loss of society damages and mentioning punitive damages only in dicta).

137. *See* Robertson, *supra* note 64, at 134, 158–59.

deaths in territorial waters.[138] On the other hand, the first prong, which focuses on historical availability, may present an issue.[139]

Until *Moragne* in 1970, general maritime law afforded no wrongful death action to a decedent's survivors, whether the death occurred in territorial waters or on the high seas.[140] The decedent's survivors were left without a cause of action, unless the death occurred on the high seas, where DOHSA applied, or in territorial waters, if the state's law specifically permitted.[141] Even if the state provided a wrongful death action, theories of recovery and available remedies were likewise determined by state law.[142] Therefore, general maritime law historically did not permit punitive damages for the wrongful deaths of non-seamen.[143] Nevertheless, two explanations satisfy the first prong of *Townsend*.

First, although the *Townsend* Court emphasized the historical longevity of punitive damages in general maritime law, the Court intended the "pre-existing" language to distinguish the situation presented in *Townsend* from that of *Miles*.[144] In *Miles*, the Court emphasized that the *Moragne* wrongful death action under general maritime law existed only because of congressional action—namely, the Jones Act and DOHSA.[145] The extent of available remedies under general maritime law then necessarily depended on what remedies were available in the applicable

138. Section 7 of DOHSA provides, in pertinent part, that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C. § 767 (1982). Section 7 has been interpreted as showing special deference to state law by specifically stopping DOHSA from displacing state law in territorial waters. *Yamaha*, 516 U.S. at 215–16.

139. *See* discussion *supra* Part I.B.

140. Miles v. Apex Marine Corp., 498 U.S. 19, 23 (1990); *see also* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 212 (1986).

141. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393–94 (1970) ("For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful-death statutes by allowing recovery whenever an applicable state statute favored such recovery. Congress acted in 1920 to furnish the remedy denied by the courts for deaths beyond the jurisdiction of any State, by passing . . . the Death on the High Seas Act . . . .") (citation omitted).

142. *Offshore Logistics*, 477 U.S. at 212.

143. *See generally Moragne*, 398 U.S. 375.

144. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 420 (2009) ("Furthermore, 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; until then, there was no general common-law doctrine providing for such an action.").

145. *Miles*, 498 U.S. at 24–27.

pre-existing maritime statutes.[146] *Townsend* did not present an overlap between statutes and general maritime law because both the cause of action and remedy existed prior to the Jones Act.[147] In non-seamen wrongful deaths in territorial waters, an overlap issue is not even possible; there is no applicable, subsequent statute for the remedy to preexist, and thus, recovery is likely allowed.[148]

Second, the denial of maritime punitive damages to non-seamen killed in territorial waters may generate various policy issues.[149] The Court in *Baker* allowed non-seamen to recover maritime punitive damages for property loss, and the Court in *Townsend* revived punitive damages for non-seamen personal injury cases.[150] If general maritime law punitive damages were not available in non-seamen wrongful death cases, it would be difficult to justify their availability in property loss cases. Likewise, if such damages were available to an injured non-seaman claimant, it would make little sense to deny recovery to that same claimant when the injury is fatal. This result would place more value on commercial interests than human life and effectively reward the wrongdoer-defendant for killing, rather than merely injuring, the claimant.[151]

Pursuant to the broadest understanding of *Baker* and *Townsend*, punitive damages should be available under general maritime law for all non-seamen maritime torts in territorial waters.[152] Despite such availability, however, *Yamaha* provided an additional avenue for non-

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146. *Id*. at 31 ("[W]hen [the maritime statute] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.") (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

147. *Townsend*, 557 U.S. at 419.

148. *See* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 215–16 (1996)

149. Specifically, the policy concerns pertain to fairness and, most importantly, uniformity. Scholars commonly observe that one of the goals and unique virtues of admiralty law is uniformity. *See generally* SCHOENBAUM, *supra* note 35, § 3-2, at 60.

150. Exxon Shipping Co. v. Baker, 554 U.S. 471, 488 (2008); *Townsend*, 557 U.S. at 421 (noting the established availability of punitive damages for maintenance and cure actions and the absence of a statute that casts doubt on such availability).

151. Similar policy arguments are notably applicable to the possible unavailability of punitive damages to seamen. *See generally* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 394 (5th Cir. 2014). It is certainly unfair that the "wards of admiralty" are not able to recover punitive damages, whereas non-seamen may, but the better view is that *Miles* is applicable in the seamen scenario, and those uniformity concerns trump issues of fairness.

152. *See Baker*, 554 U.S. 471; *see also Townsend*, 557 U.S. 404.

seamen to recover punitive damages.[153] Whether *Yamaha* remains applicable to punitive damages in the wake of *Baker* and *Townsend* is the next question addressed.

B. Availability of State Punitive Damage Remedies in Non-Seamen Maritime Torts in Territorial Waters

The Court in *Yamaha* held that state law remedies may supplement a *Moragne* wrongful death action when the death involves a non-seaman and the accident occurs in state territorial waters.[154] The Court framed the issue as one of preemption, noting that generally, "with admiralty jurisdiction . . . comes the application of substantive admiralty law," but also recognized that state law is not automatically ousted.[155] Despite this language, the Court did not cite to *Jensen*, its landmark choice-of-law decision.[156] The extent of *Yamaha*'s connection to maritime preemption rests on the contours of the Court's rationale—namely, status of the claimant as a non-seaman and the situs of the incident in state territorial waters.[157]

By focusing on the status of the claimant as a non-seaman, the Court distinguished between the uniformity issues that prompted it to create the *Moragne* action and those that concerned *Yamaha*.[158] Absent from the

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153. *See Yamaha*, 516 U.S. at 216.

154. *Id*.

155. *Id*. at 205–06. The Court explained and rejected *Yamaha*'s view that the *Moragne* wrongful death action was a uniform, maritime rule of decision, thereby displacing state law and "supply[ing] the exclusive remedy in cases involving the deaths of [non-seamen] in territorial waters." *Id.*

156. *See generally Yamaha*, 516 U.S. 199; *see also* Robertson, *The Applicability of State Law in Maritime Cases After* Yamaha Motor Corp. v. Calhoun, *supra* note 31, at 100. Though *Jensen* is not explicitly cited in the opinion, the *Yamaha* Court cited *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921), which quotes the *Jensen* criteria verbatim, in explaining the compatibility of state wrongful death statutes with maritime policies. *Yamaha*, 516 U.S. at 200, 207.

157. *See*, *e.g.*, Attilio M. Costabel, *Maritime Law Uniformity and Federalism After* Yamaha V *and DOHSA Amendment: For Whom the Bell Tolls?*, 13 ST. THOMAS L. REV. 446, 466 (2001) ("What is troublesome in the Yamaha saga . . . is that no explicit, clear, convincing reason is supplied of why, *in the factual pattern at large*, state law should apply without even making an attempt to check is there is any interest of general maritime law to balance.") (emphasis added).

158. *Yamaha*, 516 U.S. at 202, 211 ("*Moragne* did not [involve concerns] that state monetary awards in maritime wrongful-death cases were excessive, or that variations in the remedies afforded by the State threatened to interfere with the harmonious operation of maritime law."). *Moragne* sought to achieve uniform

Moragne Court's discussion were any fears that state awards were excessive or that variations in available state remedies threatened the "harmonious operation of maritime law," which begged the Court's holding in *Yamaha*.[159]

Some courts have used the *Yamaha* Court's reference to non-seamen in an overly broad manner.[160] For example, a lower district court in *Kelly v. Bass Enterprise Production Co.* went as far as to conclude that the maritime uniformity doctrine was not a barrier to the application of state law when non-seamen were involved.[161] Specifically, the court held that "[w]here [non-seamen were] involved, the likelihood that maritime commerce interests would be paramount [was] remote, and when those [non-seamen were victims of accidents] in state territorial waters, maritime commerce concerns [were] even less affected and state interests easily outweigh[ed] the need for uniformity."[162] Such a status-based approach is consistent, to some extent, with the Court's opinion in *Yamaha*.[163] On the other hand, it is wholly inconsistent with the underlying premise of *Moragne*—namely, that the availability of an unseaworthiness claim should not depend on the victim's occupational status.[164] The status-

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availability of unseaworthiness—a uniquely maritime doctrine—as a basis of recovery for all maritime workers who served ships. *Id*. at 213 ("The anomalies described in *Moragne* relate to ships and the workers who serve them, and to a distinctly maritime substantive concept—the unseaworthiness doctrine.").

159. *Id*. at 202, 211. *See generally* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

160. *See generally* Gary T. Sacks & Derrick S. Kirby, (in Symposium: Maritime Casualties and the Limitation of Liability Act) Note, *Wrongful Death: Maritime Standards for Liability to the Estates of Nonseafarers*: Calhoun v. Yamaha Motor Corp., U.S.A., 216 F.3d 338, 2000 AMC 1863 (3d Cir. 2000), 32 J. MAR. L. & COM. 339 (2001).

161. Kelly v. Bass Enters. Prod. Co., 17 F. Supp. 2d 591, 595 (E.D. La. 1998). According to the district court, *Yamaha* "noted that the well-established principle of uniformity was not problematic because the decedent [in the case] was a [non-seamen] and the thrust of uniformity was to prevent inequities or even differences in the nature and scope of remedies applicable to seafarers." *Id*.

162. *Id*.

163. Ugo Colella, *The Secret Dissent in* Yamaha Motor Corp. v. Calhoun-*Never Before Published!*, 71 TUL. L. REV. 203, 207 (1996). *See generally Yamaha*, 516 U.S. 199; *Kelly*, 17 F. Supp. 2d 591.

164. Because state law governed longshore workers' claims, such workers could bring an unseaworthiness claim provided the laws of the state allowed. Yet, the Jones Act barred seamen from utilizing the easier standard of liability that unseaworthiness offered. *Moragne*, 398 U.S. at 395 (recognizing that the Jones Act only provides a negligence standard of liability for wrongful death).

of-the-party logic is likewise not supported by the Court's pre-*Yamaha* case law, which made no distinction between non-seamen and seamen.[165] Consequently, the Court's attention to the claimant's status as a non-seamen was limited to its consideration of whether *Moragne* preempted state law remedies and should not be viewed in a categorical lens.[166]

The *Yamaha* Court also emphasized the accident's situs in state territorial waters for primarily two reasons. First, although admiralty generally seeks to "give rather than to withhold the remedy,"[167] and *Moragne* likewise "centered on the extension of relief," the Court understood that it could not expand available remedies if Congress had already spoken on such issue.[168] Congress, however, had not prescribed a comprehensive tort recovery scheme for wrongful deaths of non-seamen in territorial waters.[169] In fact, Congress expressly preserved application of state law for wrongful deaths in territorial waters.[170] The Court was thus not required, as it had been in the past, to defer to statutorily provided damages out of respect for the uniform congressional voice.[171]

Second, the Court expressly recognized the interest of a state in regulating maritime affairs within its territorial waters, noting that "[f]ederal maritime law has long accommodated [such interests]."[172] Given the absence of a congressional barrier, the Court saw no "disparity

165. Colella, *supra* note 163, at 215 (citing Just v. Chambers, 312 U.S. 383, 391–92 (1941) (involving guests of the owners of a yacht); W. Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921) (involving "maritime workers"); Old Dominion S.S. Co. v. Gilmore, 207 U.S. 398, 402 (1907) (involving chief mate, crew, and passengers); Steamboat Co. v. Chase, 83 U.S. 522, 530 (1872) (involving a decedent who was riding in a sailboat)).

166. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 (1996).

167. *Id*. at 213.

168. *Id*. (noting *Moragne*'s recollection that "it better becomes the humane and liberal character of proceedings in admiralty to given than to withhold the remedy, when not required to withhold it by established and inflexible rules" and recognizing that the *Moragne* Court left the plaintiff's state law negligence claim untouched, despite the availability of a new claim under general maritime law) (citing *Moragne*, 398 U.S. at 387).

169. *Id*. at 215.

170. *Id*. at 215–16 (noting that Section 7 of DOHSA stops preemption of state law in territorial waters).

171. *Id*. at 215 (distinguishing *Miles*, *Tallentire*, and *Higginbotham*).

172. *Id*. at 215 n.13 (citing cases).

between adequate federal [remedies] and *superior* state [remedies]" and willingly accommodated the state interest at hand.[173]

Like the status-based approach, some courts have interpreted *Yamaha* to "embod[y] an unspoken rule that state interests must always trump competing admiralty principles when the two collide in state territorial waters."[174] This conclusion is wholly inconsistent with the Court's opinions in both *Yamaha* and *Moragne*.[175] Although the *Yamaha* Court noted that variations in state remedies "had long been deemed compatible with federal maritime interests," it also recognized that where such remedies proved incompatible with maritime law, they "must yield to the needs of a uniform federal maritime law."[176] *Yamaha* certainly supported the notion that state regulation of maritime activity within its territorial waters is permissible but must nonetheless conform with federal maritime principles and policies.[177]

Further, the Court in *Moragne* rejected such a comprehensive disregard for federal maritime interests.[178] Specifically, the defendant argued that DOHSA's non-application within three nautical miles of shore and the express reservation of this area for state law manifested Congress's desire that only state law would govern in territorial waters.[179] The Court disagreed, finding the deduction of such a broad purpose from DOHSA's savings clause misplaced.[180] It was unnecessary for Congress to fashion a remedy under DOHSA for territorial waters because such remedies would be available under state law.[181]

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173. *Id*. at 215 (citing Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 724 (1980), which allowed a state worker's compensation statute to apply to land-based injuries otherwise falling within the purview of the LHWCA).

174. *In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1425 n.4 (11th Cir. 1997) (criticizing those courts who support such a restrictive view of *Yamaha*).

175. *See Yamaha*, 516 U.S. 199; *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

176. *Yamaha*, 516 U.S. at 210 n.8.

177. *Id*. at 215 n.13.

178. *Moragne*, 398 U.S. at 398.

179. *Id*. at 397–98.

180. *Id*. at 398.

181. *Id*. Wrongful death actions were traditionally left to the states. *Id*. at 377 ("All members of the Court [in The Tungus, which interpreted The Harrisburg] agreed that where a death on state territorial waters is left remediless by the general maritime law and by federal statutes, a remedy may be provided under any applicable state law giving a right of action for death by wrongful act."). State law later became inadequate only because of the unseaworthiness doctrine's more generous standard of liability. *Id*. at 401 n.15 ("The incongruity of forcing the

Accordingly, no absolute rule exists that requires the unlimited application of state law to all cases involving non-seamen maritime torts occurring within state territorial waters.[182] Rather, *Yamaha* was meant to permit state law remedies in wrongful death actions when such application did not conflict with federal maritime law, reaffirming the principles announced in *Jensen* and its progeny.[183]

IV. TIME TO CALM THE WATERS THROUGH IMPLEMENTATION OF A UNIFORM SYSTEM OF MARITIME PUNITIVE DAMAGES

Yamaha illustrates an increased willingness to apply state law in admiralty disputes, but the modest nature of the Court's inquiry and subsequent analysis supports only the use of state law as a supplemental *remedial* measure.[184] The Court focused on whether actual conflict existed between the policies embodied in *Moragne* and state wrongful death law.[185] The divergence in potential recoveries under state and maritime law, however, presented only a false conflict, as the *Moragne* Court did

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States to provide the sole remedy to effectuate duties that have no basis in state policy [referring to the duty of seaworthiness] is highlighted in this case. . . . Federal law, rather than state, is the more appropriate source of a remedy for violation of the federal imposed duties of maritime law.").

182. For example, a district court refused to apply state law, despite the fact that the case involved non-seamen killed in state territorial waters, because such application would have denied any and all recovery of damages—a result inconsistent with federal maritime principles and policies. *In re* Antill Pipeline Const. Co., Inc., 866 F. Supp. 2d 563, 567 (E.D. La. 2011).

183. *In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1424 (11th Cir. 1997) (finding that "the *Yamaha* Court, while aware that its decision would create, to some extent, unavoidable conflict between state law and federal maritime law, did not intend to wholly sacrifice long-standing admiralty principles at the altar of states' rights").

184. *See* Calhoun v. Yamaha Motor Corp., 216 F.3d 338, 348–51 (3d Cir. 2000). *See also* O'Hara v. Celebrity Cruises, Inc., 979 F. Supp. 254, 256 (S.D.N.Y. 1997) ("The thrust of *Yamaha* is to argue that considerations of uniformity in federal maritime wrongful actions require only that standards of liability be exclusively determined by federal law and that, one such liability has been shown, there is no antagonism to such a policy in supplementing federal maritime remedies with those available under otherwise applicable state statutes."); *but see* Robertson, *The Applicability of State Law in Maritime Cases After* Yamaha Motor Corp. v. Calhoun, *supra* note 31, at 89–97 (tabulating 53 Supreme Court decisions since 1917 to demonstrate an increase in state law application).

185. *See* Young, *supra* note 47, at 354 (citing Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 210 n.8, 211–12 (1996)).

not seek to limit plaintiffs' recoveries and intentionally declined to define recoverable damages.[186]

The *Yamaha* Court also did not address whether the relevant states' wrongful death statutes conflicted with federal maritime principles and policies because both state statutes were based upon compensatory damages.[187] Further, the statute that allowed punitive damages required a showing of conduct akin to wanton and willful misconduct.[188]

As a result, the Court avoided fashioning a "grand synthesis or reconciliation of [its] precedent."[189] *Yamaha* simply allowed plaintiffs to fill their *Moragne* basket with additional state law remedies that general maritime law did not provide, but it failed to answer the more fundamental question of which substantive law would govern liability for the now-available state remedies.[190] The Court explicitly "left open" this question and gave no guidance on how to answer it.[191] *Yamaha* is likely of little practical use, therefore, when actual conflict exists between state and general maritime law, particularly relating to punitive damages.

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186. *See id*. at 355 (citing *Moragne*, 398 U.S. at 408).

187. *See Yamaha*, 516 U.S. at 216 n.14. *See also Amtrak*, 121 F.3d at 1425 n.4 (pointing out that *Yamaha* never addressed whether a conflict existed with maritime law because both state statutes at issue "were primarily remedial in nature" and thus, did not threaten federal maritime principles or policies); *In re* San Juan Dupont Plaza Hotel Fire Litig., 745 F. Supp. 79, 84 (D.P.R. 1990).

188. *See Yamaha*, 516 U.S. at 216 n.14; *see also* Burke v. Maassen, 904 F.2d 178, 181 (3d Cir. 1990).

189. *Yamaha*, 516 U.S. at 210 n.8.

190. *See generally Yamaha*, 516 U.S. 199. This Comment assumes that separation of the remedy from its governing rules is permissible yet recognizes that a previous Supreme Court decision has been interpreted to mean that state law must sometimes govern in toto when it applies and that it still technically remains "good law," as it was never expressly overruled. The Tungus v. Skovgaard, 358 U.S. 588 (1959); *see also Yamaha*, 516 U.S. at 209 (stating that *Moragne* noted issues with *The Tungus*, but ultimately focused on the unsoundness of *The Harrisburg*). Such an interpretation is likely inaccurate, however, considering the historical context of the decision and subsequent Supreme Court case law which substantially undercut its foundation. *See* Calhoun v. Yamaha Motor Corp., 216 F.3d 338, 348–52 (3rd Cir. 2000) (disagreeing with the broader interpretation of *The Tungus*); *see generally* David R. Lapp, *Admiralty and Federalism in the Wake of* Yamaha Motor Corp., U.S.A. v. Calhoun: *Is* Yamaha *a Cry by the Judiciary for Legislative Action in State Territorial Waters?*, 41 WM. & MARY L. REV. 677 (2000) (arguing that *The Tungus* did not approve of such an expansive role for state law).

191. *Yamaha*, 516 U.S. at 216 n.14 ("The Court of Appeals also left open, as do we, the source—federal or state—of the standards governing liability, as distinguished from the rules on remedies.").

Because *Baker* and *Townsend* support the recovery of punitive damages under general maritime law for all non-seamen maritime torts in territorial waters, claimants in such cases do not have a need for state punitive damages, unless other aspects of state law—such as a more generous standard of liability or a higher statutory damage cap—are also available.[192] Not surprisingly, conflict often accompanies these attractive features, which "must be resolved with a healthy regard for the needs of a uniform maritime law."[193] *Yamaha*'s utility in the punitive damages context now hinges on a court's completion of the maritime preemption analysis, as applied to each individual issue that state substantive law raises about punitive damages.[194]

A. Synopsis of Potential Issues Raised by State Law Punitive Damages Under the Maritime Preemption Analysis

Determining the *availability* of punitive damages as a remedy—under general maritime law or state law—is separate from proving *entitlement* to and the specific *amount* of such damages.[195] For purposes of the maritime preemption analysis, the state has a strong interest in regulation of tortious activity within its own territorial waters.[196] The question then

192. *See generally* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

193. *See In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1425 (11th Cir. 1997).

194. *Yamaha*, 516 U.S. at 210 n.8 (recalling that state law "must yield to the needs of a uniform federal maritime law"). Indeed, although the Court stressed that states may continue to regulate many facets of maritime activity within their territorial waters, such regulations must "be consistent with federal maritime principles and policies." *Id*. at 215 n.13.

195. Burdens and standards of proof are matters of substantive law that affect the rights and liabilities of the parties. *See*, *e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 454 (1994) (emphasizing that burden of proof is "a matter of substance"); *see also* James v. River Parishes Co., 686 F.2d 1129, 1133 (5th Cir. 1982) (same); Lancer Arabians, Inc. v. Beech Aircraft Corp., 723 F. Supp. 1444, 1446 (M.D. Fla. 1989) (standard for recovery of punitive damages is matter of substantive law); *cf*. Fogarty v. Greenwood, 724 F. Supp. 545, 546 (N.D. Ill. 1989) (referring to standard for recovery of punitive damages as "substantive"); Reed v. Ford Motor Co., 679 F. Supp. 873, 878 (S.D. Ind. 1988) (same). As a result, courts have applied the admiralty law standard when the state law standard is inconsistent. *See*, *e.g.*, Delta Marine, Inc. v. Whaley, 813 F. Supp. 414, 416–17 (E.D.N.C. 1993).

196. *See*, *e.g.*, *Yamaha*, 516 U.S. at 215 n.13.

becomes whether the general maritime law rule at issue requires uniformity amongst the states.[197]

Several issues may arise if a claimant seeks to utilize substantive state law on punitive damages. Each issue should be individually assessed under the maritime preemption test espoused in *Jensen*.[198]

1. Degree of Culpable Conduct Required

Generally, punitive damages are available in admiralty disputes when the defendant engaged in wanton, willful, or outrageous conduct—the level of culpable conduct necessary to obtain damages at common law.[199] This particular standard of liability is consistent with the primary objectives of punitive damages, which are retribution and deterrence of harmful conduct.[200] A conflict arises between state law and federal maritime law when the state law impermissibly deviates from this standard.[201]

The Eleventh Circuit addressed such a conflict in *In re Amtrak "Sunset Limited" Train Crash* ("*Amtrak*"), which involved a passenger train that derailed into Alabama territorial waters after a tow of heavy barges hit a railroad bridge and caused a portion of the track to misalign.[202] Alabama's sole available remedy for wrongful death was punitive damages, which, in contrast to general maritime law, were available upon a showing of simple negligence.[203] This disparity created a conflict in the standard of liability

197. *See generally* S. Pac. Co. v. Jensen, 244 U.S. 205 (1917).

198. *See* discussion *supra* Part I.B.

199. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 409, 411 (2009) (explaining the standard of liability required for imposition of punitive damages at common law and thereafter, confirming that common law punitive damages extended to maritime law).

200. *Id*. at 411.

201. The *Baker* Court recognized that courts generally limit punitive damages to cases "where a defendant's conduct is 'outrageous,' owing to 'gross negligence,' 'willful, wanton, and reckless indifference for the rights of others,' or behavior even more deplorable." Exxon Shipping Co. v. Baker, 554 U.S. 471, 493 (2008). A state standard within this range is likely not an impermissible deviation.

202. *In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421 (11th Cir. 1997).

203. *Id*. at 1423. Alabama law presented another conflict—not unique to punitive damages—in that it precluded apportionment of fault among joint tortfeasors and contribution between them, while federal maritime law requires apportionment and allows contribution in the context of collisions and allisions. *Id*. at 1423–24.

for the recovery of punitive damages and thus threatened substantive admiralty rights.[204]

The *Amtrak* court balanced the state and federal interests in having each body of law apply.[205] Federal interests in uniformity and harmony were particularly strong because of the involvement of maritime actors in a traditional maritime locale and the potential disruption to maritime commerce.[206] Application of state law to allow punitive damages for mere negligence was too great a deviation from substantive admiralty rights.[207] As a result, *Amtrak* held that Alabama law would govern the measure of recovery, but to obtain an award, the claimants would have to show that the defendants' conduct met the standard for imposition of punitive damages under maritime law.[208]

Perhaps in a recreational boating accident, like *Yamaha*, uniformity concerns would not have required strict adherence to the maritime rule on punitive damage liability. Such a conclusion, however, is unlikely to be warranted often. The *Amtrak* court stressed "[t]hat substantive admiralty law rights . . . being threatened . . . [were] a critical factor in considering the relative weight of federal maritime interests," and held that "where substantive admiralty principles [were] placed at risk by the potential application of state law, there [was] no leeway for variation or supplementation by state law."[209] On remand from *Yamaha*, the United States Court of Appeals for the Third Circuit likewise held that federal maritime standards governed the measurement of a defendant's putative

204. *Id*. at 1426–27.

205. *Id*. *Amtrak* used the Circuit's comparative interest balancing test, developed in *Steelmet, Inc. v. Caribe Towing Corp*., to resolve the conflict. The conflict must be identified first, and if one is found, the comparative interests must then be considered: "they may be such that admiralty shall prevail . . . or if the policy underlying the admiralty rule is not strong and the effect on admiralty is minimal, the state law may be given effect . . . ." Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986). The *Steelmet* test is just another rendition of the maritime preemption analysis.

206. *Amtrak*, 121 F.3d at 1426. The court also interpreted an applicable, maritime jurisdictional statute, the Admiralty Extension Act, to indicate congressional intent for displacement of state law in vessel allisions with objects on shore. Given that this is simply an interpretation, and the federal interests would have likely prevailed regardless, it is without matter here. *Id*.

207. *Id*. at 1427.

208. *Id*. at 1428.

209. *Id*. at 1426–27 (quoting Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 210 (1996)).

liability. The Third Circuit based its decision solely on the need for uniform rules of conduct and liability in admiralty.[210]

2. Permissibility of Vicarious Punitive Damages

Unlike the "willful and wanton" standard applicable to the liability determination, maritime law is unclear as to the appropriate measure by which a court may hold a shipowner vicariously liable for punitive damages for his agent's conduct.[211] The Supreme Court failed to address the vicarious liability issue in *Baker*,[212] and thus, the question still remains open.

When there exists no single, binding maritime rule, a conflict between state law and judicially-created maritime law is less likely to occur in a preemption analysis, and it may be more appropriate to apply state law.[213]

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210. Calhoun v. Yamaha Motor Corp., 216 F.3d 338, 351 (3d Cir. 2000) ("If we were to adopt the view that the substantive standards by which an admiralty defendant's liability is adjudged is governed by the law of the state in which the alleged injury occurred, there would be no uniformity in such standards.").

211. *See* Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985) (adopting RESTATEMENT (SECOND) OF TORTS § 909 as standard for vicarious liability of shipowner under general maritime law and upholding award of punitive damages against owner based upon managerial employee's reckless conduct); *but see* CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (rejecting wholesale adoption of § 909(c) but allowing award of punitive damages against shipowner for actions of agent acting in managerial capacity and in the scope of employment where accompanied by some showing of fault by the principal); *In re* P & E Boat Rentals, Inc., 872 F.2d 642, 651–53 (5th Cir. 1989) (reversing award of punitive damages against owner of vessel where no showing that owner authorized or ratified acts of master either before or after accident); United States Steel Corp. v. Fuhrman, 407 F.2d 1143, 1146–48 (6th Cir. 1969) (same).

212. Exxon argued that a principal could be liable for punitive damages only if it authorized or ratified reckless or wanton acts by the agent ("*The Amiable Nancy-Lake Shore* approach"), while the plaintiffs argued that an award could be based solely on the wrongful conduct of the ship's captain, a "managerial employee" ("the Restatement approach"). Exxon Shipping Co. v. Baker, 554 U.S. 471, 484 (2008) ("[T]hough it should go without saying that the disposition here [4–4 split] is not precedential on the derivative liability question."). Justice Souter's majority opinion also does not leave room for drawing inferences on how to resolve the issue—namely, who was inclined to uphold the Ninth Circuit and who agreed that more than a master's reckless conduct was required to impose punitive damages on a shipowner. *Id*. at 481–84.

213. *See, e.g.*, Byrd v. Byrd, 657 F.2d 615, 617 (4th Cir. 1981) ("Admiralty law, at times, looks to state law, either statutory or decisional, to supply the rule

Even when a state law would not contravene a judicially-created maritime law, however, it will not be applied where its adoption would nonetheless frustrate national interests in uniformity.[214]

At present, the maritime decisions of lower federal courts on vicarious liability for punitive damages are divided into three categories: (1) the *Amiable Nancy-Lake Shore* approach, which holds that a ship-owner is not liable for punitive damages for the egregious misconduct of its operational employees; (2) the Restatement's "managerial agent" approach, under which an employer is liable for punitive damages based on the misconduct of a managerial agent; and (3) the middle ground between the two, requiring "some level of culpability" on the part of the employer.[215]

As argued to the Supreme Court in *Baker*, the existence of three different standards impairs uniformity because the imposition of vicarious punitive damages turns on facts such as where the accident occurs or where the plaintiff chooses to file suit.[216] State law embraces an even wider range of positions, however, and these variations may further undermine the uniformity of general maritime law.[217] Liability, if any, should thus be determined as a matter of federal maritime law, and state law should be preempted.[218]

3. Ratio of Compensatory to Punitive Damages

To pass constitutional muster, a punitive damage award must not be "excessive."[219] The Supreme Court addressed the constitutionality of state law punitive damage awards based on the outer limits allowed by due

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of decision when there is no admiralty rule on point.") (citing Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)); *see also* Windsor Mount Joy Mut. Ins. Co. v. Giragosian, 57 F.3d 50, 54 (1st Cir. 1995) ("State law may supplement maritime law when maritime law is silent . . . .").

214. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 402 (1970).

215. Michael F. Sturley, *Vicarious Liability for Punitive Damages*, 70 LA. L. REV. 501, 511–13 (2010) (reviewing the three categories of lower federal court decisions and citing cases).

216. *See generally* Brief of Am. Commercial Lines Inc. as Amicus Curiae in Support of Petitioners, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (No. 07-219).

217. Sturley, *supra* note 215, at 513–14 (listing the many approaches of the states).

218. *See*, *e.g.*, Calhoun v. Yamaha Motor Corp., 216 F.3d 338, 350–51 (3rd Cir. 2000).

219. *See*, *e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

process.[220] In *Baker*, however, the Court adopted an additional test for judging the excessiveness of punitive damages under general maritime law.[221]

In exercising its maritime lawmaking authority, the Court considered three approaches, all drawn from state sources.[222] Ultimately, the Court chose an approach common among several states, which required "pegging punitive to compensatory damages using a ratio or maximum multiple," and the final numerical measure was based partly on a rejection of ratios adopted by the several states.[223] The *Baker* Court then established an admiralty ratio of 1:1 between punitive and compensatory damages as a "fair upper limit."[224]

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220. The Court has recognized that states have "considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases," and "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to [a state's legitimate] interests does it enter the zone of arbitrariness that violates" due process. BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996). The Court also articulated three "guideposts" when determining whether a punitive damages award comports with due process: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

221. *See* Mendez-Matos v. Municipality of Guaynabo, 557 F.3d 36, 54 n.14 (1st Cir. 2009) ("In [*Exxon*], the Court established a 1:1 ratio of punitive to compensatory damages under federal maritime law."); JCB, Inc. v. Union Planters Bank, 539 F.3d 862, 876 n.9 (8th Cir. 2008) ("[T]he Supreme Court determined that a 1:1 ratio of compensatory to punitive damages was appropriate in a maritime case."); PAM, S.p.A. v. United States, 582 F.3d 1336, 1341 (Fed. Cir. 2009) ("The [*Exxon*] Court ultimately settled on a rule where the appropriate upper limit ratio for punitive to compensatory damages in maritime cases was 1:1."); Jurinko v. Med. Protective Co., 305 F. App'x 13, 27 n.15 (3d Cir. 2008) ("The Supreme Court recently found that a punitive damages award may not exceed a 1:1 ratio in the context of maritime law.").

222. In contrast to the due process review featured in *BMW* and *State Farm*, this was "an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court . . . ." Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008). The approaches were a verbal formulation for discretionary review; a "hard dollar cap"; or a "ratio" or "maximum multiple" of compensatory damages. *Id.* at 503–07.

223. *Id*. at 506–07, 513 (explaining that many states adopted a ratio of 3:1 to be applied across the board but declining to adopt such ratio).

224. *Id*. at 513.

An important rationale that the Court expressed for linking compensatory damages to punitive damages in admiralty cases is the need for uniformity and consistency in damage awards.[225] In *Norfolk & Portsmouth Belt Line Railroad Co. v. M/V MARLIN* ("*Norfolk*"), the federal court, sitting in admiralty, noted that while the *Baker* Court suggested that the appropriate ratio of punitive damages to compensatory damages would be 0.65:1 or less, in many cases, it could be higher; but even in the "most extreme cases, the maximum permissible ratio is likely 1:1."[226] A conflict arises, therefore, in application of a state punitive damages ratio that exceeds the limit espoused in *Baker*, and the balancing of any legitimate, competing state interests is not necessary in this context.[227]

The *Norfolk* court recognized that a Virginia statute—which automatically provided for treble damages when a defendant's willful or grossly negligent conduct caused damage to the property of a public service corporation—was "strict and inflexible," conflicting with *Baker*'s 1:1 ratio.[228] In addition to conflicting with general maritime law, allowing triple the compensatory damages "impinge[d] upon uniformity of the general maritime law in an area that require[d] uniformity."[229] Therefore, the court preempted the state statutory 3:1 ratio in favor of *Baker*'s 1:1 ratio.[230]

A minority of courts have concluded that *Baker* did not intend to issue a generally applicable rule for punitive damages in maritime cases, but instead, sought only to address the facts of the case before it.[231] Such an

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225. *Id*. at 499 ("The real problem, it seems, is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. The available data suggest it is not.").

226. Norfolk & Portsmouth Belt Line R.R. Co. v. M/V MARLIN, 2009 WL 1974298, at *3 (E.D. Va. 2009).

227. *See Baker*, 554 U.S. at 497–99.

228. *Norfolk*, 2009 WL 1974298, at *3.

229. *Id*. *See also Baker*, 554 U.S. at 502 ("And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.").

230. *Norfolk*, 2009 WL 1974298.

231. *See*, *e.g.*, Clausen v. Icicle Seafoods, Inc., 272 P.3d 827 (Wash. 2012); McWilliams v. Exxon Mobil Corp., 111 So. 3d 564 (La. Ct. App. 2013), *writ denied*, 125 So. 3d 452 (La. 2013). The majority of courts and scholars, however, interpret *Baker* as limiting punitive damage awards in maritime cases, with the potential for even broader application. *See*, *e.g.*, Duckworth v. United States, 418

assumption not only undermines the significance of the Court's federal maritime lawmaking authority, but also ignores the rather lengthy review it engaged in to determine the appropriate limit.[232]

Assuming a higher ratio is possible in admiralty, preventing the possibility of unpredictable and unnecessary awards and reducing disruptive legal costs is paramount.[233] *Baker* clarified that maritime law requires punitive damage awards to balance the needs of predictability and fairness with the goals of achieving punishment and deterrence.[234] This balance may only be accomplished if state law is prohibited from disrupting the uniformity of general maritime law, potentially creating the kind of "outlier" awards that the *Baker* Court sought to prevent in the first place.[235]

When state punitive damage ratios apply, the only limit on the size of an award is due process, and accordingly, the vague, multi-factor test previously articulated by the Supreme Court.[236] The maintenance of a uniform maritime law, subject to a quantified ratio, will create additional

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Fed. App'x 2, 3 (D.C. Cir. 2011) (unpublished) ("In [*Baker*], the Supreme Court addressed 'punitive damages in maritime law' . . . and held that a jury's award of punitive damages may not exceed the amount of compensatory damages in a federal maritime case." (quoting *Baker*, 554 U.S. at 489–90); Hayduk v. City of Johnstown, 580 F. Supp. 2d 429, 484 n.46 (W.D. Pa. 2008) ("Although [*Baker*] is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application."); Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers:* Exxon Shipping Co. v. Baker, 18 SUP. CT. ECON. REV. 259, 259 (2010) ("The U.S. Supreme Court decision in Exxon Shipping Co. v. Baker is a landmark that establishes an upper bound ratio of punitive damages to compensatory damages of 1:1 for maritime cases, with potential implications for other types of cases as well."); Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 882 (2009) ("Will state courts view the [*Baker*] decision as solely limited to the field of federal maritime law, or will the high court's powerful reasoning broadly influence state courts struggling to cabin in 'outlier' punitive damage verdicts?").

232. The *Baker* Court explained that when a case falls within admiralty jurisdiction, a court should review the award's conformity with maritime law, which precedes, and should obviate any need to apply, the due process standard. *Baker*, 554 U.S. at 502.

233. *Id*. at 513.

234. *Id*. at 493–94, 506 (instructing that punitive awards in maritime cases should be "pegg[ed] . . . to compensatory damages" in a manner suited to the circumstances of the case).

235. *See Baker*, 554 U.S. at 506; *see also Clausen*, 272 P.3d at 837–40 (J.M. Johnson, J., dissenting).

236. BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996).

certainty and predictability by avoiding repeated constitutional attacks. If a higher award is otherwise appropriate, federal admiralty courts should instead invoke traditional lawmaking authority to adopt the highest ratio considered appropriate by the *Baker* Court in cases "involving . . . the most egregious conduct."[237]

B. Observation: State Law is Inapplicable to Maritime Punitive Damages After Baker *and* Townsend

In view of the wide array of state laws authorizing recovery of punitive damages, meeting the maritime preemption analysis is substantially difficult.[238] As a result, courts need a uniform system of maritime punitive damages, excluding state law application.[239] Development and implementation of substantive maritime rules on punitive damages is a task that requires national uniformity of paramount federal interests, such as consistency, predictability, and avoiding undue burdens on maritime commerce.[240]

CONCLUSION

The breadth of both *Baker* and *Townsend* has eradicated any need for *Yamaha* in the context of maritime punitive damages.[241] As the *Townsend* Court noted, "punitive damages have long been an accepted remedy under general maritime law," and such remedy is available to non-seamen injured or killed in territorial waters.[242]

Further, *Yamaha*'s holding may not be logically or practically extended to allow plaintiffs to "supplement" maritime law with substantive state rules, such as standards of liability or recovery caps.[243] Those rules are appropriately applied only if not preempted under *Jensen*.[244] Uniformity demands that general maritime law determine the

237. *Baker*, 554 U.S. at 510.

238. *Id*. at 495–96 (reviewing varying state regulation of punitive damages, including ratios of punitive to compensatory damages ranging from 1:1 to 5:1).

239. *See generally* S. Pac. Co. v. Jensen, 244 U.S. 205 (1917).

240. For a discussion that reiterates these concepts with regard to insurability of punitive damages after *Baker* and *Townsend*, see Adam N. Davis, *Insurance Coverage for Punitive Damages – Time for a Uniform Rule Under General Maritime Law*, 12 LOY. MAR. L.J. 156 (2013).

241. *See* discussion *supra* Part III.A.

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

243. *See* discussion *supra* Part III.B.

244. *See* discussion *supra* Part III.B.

proper measure of liability and financial responsibility attributable to a defendant.[245]

Availability of punitive damages in maritime law remains replete with ongoing development, uncertainty, and inconsistency.[246] To foster uniformity, a court presiding over a maritime matter that involves an issue of punitive damages should apply existing substantive maritime rules.[247] If there is no maritime rule on point, then the court should invoke its traditional lawmaking authority and craft substantive maritime law.[248]

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245. *See* discussion *supra* Part IV.
246. *See* discussion *supra* Part II.
247. *See* discussion *supra* Part IV.
248. *See* discussion *supra* Part IV.

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