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Cleaning Up Punitive Damages: A Statutory Solution for Unguided Punitive-Damages Awards in Maritime Cases

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NOTES

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I. INTRODUCTION

Intentionally destroying property-boundary markers by sawing down the posts.[1] Causing environmental disasters.[2] Fraudulently refusing to settle insurance claims within coverage limits.[3] Bad-faith dealing in big oil contracts.[4] Hiding mild weather damage to new vehicles.[5] Creating and marketing cigarettes while knowing about their carcinogenic risks.[6] Contributing to automobile accidents.[7]

No, these are not items on some nefarious villain's to-do list. These are all examples of cases where courts have awarded punitive damages against the tortfeasors on top of their compensatory liability. While each tort is unquestionably wrong, some certainly appear more wrong than others.

In recent years, punitive damages have become a fashionable topic in the legal community—and unsurprisingly so, given their prevalence and gaudy statistics. After all, civil plaintiffs in state courts of general jurisdiction win over $40 billion *each year* in punitive-damages awards,[8] and this figure doesn't even include money

1. Newport Harbor Ass'n, Inc. v. Dicello, No. CV03-495284, 2005 WL 3750697 (Ohio Ct. App. Apr. 8, 2005).

2. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

3. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

4. State v. Exxon Corp., No. CV 99-2368, 2001 WL 1116835 (Ala. Cir. Ct. May 3, 2001), *rev'd* Exxon Mobil Corp. v. Ala. Dep't of Conservation and Natural Res., 986 So. 2d 1093, 1118 (Ala. 2007).

5. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

6. Williams v. Philip Morris, Inc., 176 P.3d 1255 (Or. 2008).

7. Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1002–03 (6th Cir. 1983) (applying Tennessee law, affirming an award of punitive damages where the defendant driver was a habitual user of amphetamines and had been without sleep for forty hours before the accident).

8. There were 5,935,804 cases filed in state courts of unified or general jurisdiction in the year 2005, the most recent year with reported data. ROBERT C. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS, 2006: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 12 (National Center for State Courts, 2007), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1277. Surveys from the previous decade indicate that around 7.2 percent of all civil cases filed in state courts end in either a bench or jury trial. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 509 tbl.5 (2004) (reporting data from ten states from 1992 through 2002 and finding that anywhere from 5.6 percent to 8.7 percent of all filed cases ended in either a bench or jury trial).

recovered in federal court. Needless to say, such high figures draw attention. Commentators, judges, and even nonlawyers have all pointed to punitive-damages awards as evidence of a runaway judicial system that throws out fiscal penalties like Monopoly money.

First to respond were the state legislatures. As of 2005, twenty-nine states have instituted statutory caps on punitive-damages recovery, and thirty-four states have amended their state codes to reduce the magnitudes and frequencies of punitive-damages awards.[9] Most of these limitations were implemented within the last twenty years.[10]

The Supreme Court has also noticed the trend in punitive-damages awards. In a series of decisions from 1991 to 2003, the Court implemented procedural- and substantive-due-process restrictions on punitive-damages awards, culminating in a holding that punitive-damages awards more than nine times the magnitude of compensatory rewards would rarely satisfy due process requirements.[11] More recently, in the litigation stemming from the *Exxon Valdez* oil spill, the Court used its common-law-making authority to place a more stringent ratio cap of one-to-one for punitive-to-compensatory damages in maritime cases.[12]

Of the cases ending in trial, the plaintiffs won approximately 55 percent to 56.4 percent of the time. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2005, at 4 tbl.5 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf; THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 1 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ctcvlc01.pdf. Approximately 5 percent of the plaintiffs' successes at trial included punitive-damages awards. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 268 (2006). The average punitive damage award in the surveyed cases was $2,557,262. *Id.* at 269 tbl.1.

Multiplying this estimated number of cases filed each year (5,935,804) times the percentage of cases ending in trials (7.2 percent) times the likelihood of the plaintiff prevailing (average 55.7 percent) times the percentage of plaintiffs' awards including punitive damages (5 percent) times the average award amount ($2,557,262) creates an estimated per-year amount of $31,530,662,161 in 2001 dollars. Assuming a modest inflation rate of 3 percent, that translates into over $41,140,362,456.05 in 2010 dollars.

9. Ronen Avraham, *Database of State Tort Law Reforms (DSTLR 2nd)* 8 tbl.1 (Nw. Law & Econ. Working Paper Series, Research Paper No. 06-08, 2006), *available at* http://ssrn.com/abstract=902711.

10. *See id.* (recording the enactment and striking down of medical malpractice related reforms and the number of changes from 1980 to 2005).

11. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). For an overview of the Court's due process jurisprudence on punitive-damages awards, see LINDA L. SCHLUETER, 5 PUNITIVE DAMAGES § 3.4 (2005).

12. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 (2008).

Despite the legislative and judicial changes to punitive-damages jurisprudence, the doctrine remains in a state of disarray. Some commentators call for the abolition of punitive damages altogether,[13] while others bemoan the restrictions imposed by the Court and the state legislatures.[14] It's easy to be pessimistic about the prospects of establishing a predictable, rational, and efficient system for awarding the damages.

The real problem with punitive-damages jurisprudence is that neither the courts nor the political branches have decided what the damages stand for. Do they make up for the legal limits on a wronged plaintiff's compensation for his injuries? Are they meant to impose criminal-like sanctions on the wrongdoer that go beyond eye-for-an-eye justice? Without a theory that defines the basic purpose for the damages, it has proven impossible to provide a reliable framework for calculating and limiting them.

In this Note, I argue that the proper role—the only role—for punitive damages is to disincentivize tortfeasors from engaging in socially harmful conduct that would otherwise go undeterred. In order to establish this role for punitive damages, Congress should use its power to craft subject-matter jurisdiction over maritime law to establish a comprehensive, meaningful, and useful system for calculating punitive-damages awards to maximize effective deterrence in admiralty cases. While maritime law only encompasses a small portion of all punitive-damages jurisprudence, it is the ideal nesting ground for doctrine reform. Congress can transfer the authority to award punitive damages in maritime cases from juries to judges. Once judges are shown to be more competent and more consistent administrators of an organized, deterrent-maximizing punitive-damages framework in maritime cases, the states will follow suit by placing the power of awarding punitive damages solely in the hands of the judiciary.

Part II of the Note lays out background information about Congress's power to make maritime law and the historical role of punitive damages in maritime cases. It then demonstrates how confusion over the role of punitive damages in maritime cases has

13. Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1 (2004); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998).

14. *See* Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 172; Lori Woodward O'Connell, *The Case for Continuing to Award Punitive Damages*, 36 TORT TRIAL & INS. PRAC. L.J. 873, 874 (2001) ("[A]rtificial caps on punitive damages will fail to rectify the putative problems.").

contributed to the current disarray of the doctrine. Finally, it presents the three potential roles that punitive damages can possibly play.

Part III.A provides the first part of the thesis: deterrence is the only function of punitive damages that is fair and efficient. This defined deterrent role gives sufficient theoretical foundation for a meaningful and coherent doctrine of punitive damages. The other two potential roles for the damages—retribution and compensation—do not serve goals of efficiency or fairness under the law.

The field of maritime law presents Congress with the ideal jumping-off point in establishing a deterrence-maximizing system of awarding punitive damages. Part III.B argues that Congress should use its power to enact maritime law in order to create a national scheme of awarding punitive damages that could not otherwise exist because of structural limitations on federal power. Congress's power to grant exclusive jurisdiction to federal courts, combined with the Seventh Amendment's failure to require jury trials in maritime cases, would prevent forum shopping by litigants seeking plaintiff-friendly punitive-damages awards by juries in state courts. Using empirical evidence, I address and refute Justice Stevens's implied claim that a statutory plan for awarding punitive damages should account for an alleged compensatory role they currently serve due to unique restrictions of maritime law.

In order to reach the optimal value for a punitive damage award, the calculations should be performed by a judge who follows a set of instructions designed to maximize deterrence—and only deterrence. The first section of Part IV presents evidence that judges are better at making efficient choices in awarding punitive damages than juries. It also explains the instructions that the judges should follow in order to reach an optimal award.

To implement a deterrence-maximizing mechanism of awarding punitive damages, Congress must pass legislation that amends the existing statutory grant of jurisdiction for maritime cases, thereby creating new substantive law. Part IV.B outlines what this new legislation should include.

I conclude with a brief overview of the impact of establishing a meaningful punitive-damages framework in maritime cases. While a statutory approach to punitive damages in maritime cases is not the final solution for this divisive and controversial issue, it can serve as an example for other legislatures and common-law-making courts to follow.

II. OVERVIEW OF MARITIME LAW AND PUNITIVE DAMAGES

There are three separate, but related, issues that deserve attention before analyzing the possible roles of punitive damages. First, the unique allocation of maritime law-making power among Congress, the states, and the federal courts merits a brief explanation. Second, the existing maritime laws on punitive damages present a framework that any congressional legislation would abrogate. Finally, the existing punitive-damages jurisprudence in admiralty cases sets up an introductory discussion of the three primary roles that punitive damages can serve in litigation.

A. Congressional Authority to Create Maritime Law

Maritime law in the United States is an amalgamation of federal common law and federal statutes, with a few state laws thrown into the mix.[15] As a general matter, admiralty and maritime jurisdiction extends to torts stemming from occurrences on navigable waterways and to contracts formed in regard to shipping or other matters related to the use of the navigable waterways.[16] Congress has broad legislative power to make laws governing the seas and navigable waterways, but the federal courts have retained common-law-making authority where Congress has not previously acted. The states reserve some power to craft remedies for injured parties in maritime cases because the savings clause granting "exclusive jurisdiction" to the federal courts allows state courts to hear *in personam* maritime cases where "suitors" are entitled to other remedies.[17]

Congress has the power to make rules of decision governing admiralty cases under both the Constitution's Necessary and Proper Clause[18] and the Interstate Commerce Clause.[19] When Congress exercises this authority and speaks on a matter of maritime law, the

15. International trade agreements also play an important role in governing maritime disputes. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 87–88 (4th ed. 2001).

16. *See* SCHOENBAUM, *supra* note 15, at 2–12 (providing an overview of admiralty jurisdiction).

17. 28 U.S.C. § 1333(1) (2000).

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. I, § 8, cl. 18. Because the Constitution vests the federal courts with jurisdiction over admiralty law, U.S. CONST. art. III, § 2, Congress has the power to craft the rules of decision for those cases.

19. U.S. CONST. art. I, § 8, cl. 3.

federal courts must defer to its judgment.[20] Legislation such as the Jones Act[21] and the Longshore and Harbor Workers' Compensation Act[22] provide important statutory foundations for a great deal of modern maritime law.

Despite the congressional grant of authority, the Framers recognized that the Supreme Court needed the authority to implement and develop the "General Maritime Law," a common-law body of concepts and rules that ensured uniform application of laws across the states.[23] Accordingly, the Constitution grants the federal courts jurisdiction over matters of maritime law.[24] Congress implemented this subject-matter jurisdiction in a statute granting these courts jurisdiction over "any civil case of admiralty or maritime jurisdiction."[25] At one time, common law was the dominant law governing maritime cases, but the legislature has since overtaken it as the primary source of maritime rules of decision.[26] Even with the recent expansion of statutory rules governing maritime cases, however, the federal courts have retained a good bit of power to create new law.[27] Federal maritime law can preempt state law when the need for uniformity among the courts trumps the state's interest in upholding its own common law or legislation.[28]

The states have retained very limited lawmaking authority in cases involving the navigable waterways. State legislation is not valid

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20. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) ("Congress retains superior authority in these matters [of maritime law], and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.").

21. 46 U.S.C. § 30104 (2000). Formally known as "The Merchant Marine Act of 1920," the Jones Act codified the rights of workers employed on vessels at sea to recover damages against an employer, captain, or co-worker for negligence.

22. 33 U.S.C. §§ 901–950 (2000). The Longshore and Harbor Workers' Compensation Act codifies rights for " 'longshoremen,' land-based workers who perform a variety of tasks for, on, and around vessels" similar to those of seamen under the Jones Act. SCHOENBAUM, *supra* note 15, at 326.

23. The Lottawanna, 88 U.S. (21 Wall.) 558, 575–76 (1874).

24. U.S. CONST. art. III, § 2, cl. 1. Congress implemented this grant of subject-matter jurisdiction in the First Judiciary Act of 1789, and the statute has remained almost unchanged. 28 U.S.C. § 1333 (2006).

25. 28 U.S.C. § 1333 (2000).

26. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990); SCHOENBAUM, *supra* note 15, at 87 ("[F]ederal legislation is now the dominant source of substantive admiralty law.").

27. *See* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979) ("Admiralty law is judge-made law to a great extent."). For a discussion of the survival of federal common-law in admiralty matters after *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), see SCHOENBAUM, *supra* note 15, § 3-1, at 106–09.

28. *See* AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1002 (11th Cir. 2007) (recognizing that the "the federal interest in uniformity" can cause courts to choose federal common law over state law); Mink v. Genmar Indus., Inc., 29 F.3d 1543, 1548 (11th Cir. 1994).

"if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law . . . ."[29] While Congress always has authority to preempt state laws under the Supremacy Clause,[30] special concerns support this broad preference in favor of federal preemption in matters of admiralty law. The very reason for federal jurisdiction over admiralty law is the need for uniformity across the states.[31] Accordingly, the Supreme Court has acknowledged that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."[32] Although state laws may prevail in narrow circumstances in which the states have a strong interest in the subject matter and the laws do not call for uniformity,[33] implementing consistent punitive damage standards is a matter that requires national uniformity and presents a matter of strong federal interests, giving Congress the last word in this area of the law.

B. Punitive Damages in Maritime Cases

Courts have divided over whether maritime law permits parties to recover punitive damages. As early as 1818, the Supreme Court indicated its willingness to award "exemplary" and "vindictive" damages in maritime cases.[34] While not called "punitive" at the time, these damages now are recognized as tantamount to the doctrine as currently understood by the federal courts.[35]

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29. S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

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

31. The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874).

32. *S. Pac. Co.*, 244 U.S. at 215.

33. Kossick v. United Fruit Co., 365 U.S. 731, 739 (1961); Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 317–18 (5th Cir. 1987).

34. The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818). The Court did not distinguish between the two types of damages in the case, but Justice Story had earlier explained that "vindictive compensation" was only appropriate when "the misconduct has been very gross, and left destitute of all apology," while exemplary damages had a lower standard. The Lively, 15 F. Cas. 631, 632 (C.C.D. Mass. 1812). For an in-depth explanation of these terms, see David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 88–95 (1997). Other scholars have not shown any reluctance in interpreting *The Amiable Nancy* as a case where the Supreme Court supported the award of punitive damages in maritime law. SCHOENBAUM, *supra* note 15, § 3-17, at 170–71. Commentators have erroneously observed that damages had not been awarded in federal courts before 1859 in *Gallagher v. The Yankee*, 9 F. Cas. 1091 (N.D. Cal. 1859), *aff'd*, 30 F. Cas. 781 (N.D. Cal. 1859). *See* Byron Boeckman, *Punitive Damages in Admiralty*, 18 HASTINGS L.J. 995, 997 (1967).

35. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620 (2008) (presenting a history of punitive damages in admiralty and noting that common law punitive damages were sometimes called "exemplary damages").

Despite persisting relatively unchanged for more than 150 years, this jurisprudence veered suddenly in 1990 when the Court decided *Miles v. Apex Marine Corporation*.[36] Plaintiffs in *Miles*, the family of a seaman killed as a result of the unseaworthiness of his employer's vessel, sought recovery of damages for loss of consortium and companionship, and for future earnings forfeited.[37] The Court held that no recovery was possible, noting that neither the Jones Act nor the Death on the High Seas Act ("DOHSA") permitted such recovery. Determining that Congress had effectively spoken on the issue, the Court declined to exercise its own maritime authority to allow the decedent's family to recover for loss of consortium and companionship and for forfeited future earnings—typical categories of compensatory damages.[38]

On the surface, it would appear that the *Miles* decision had no direct impact on federal maritime common law in regard to punitive damages.[39] The lower federal courts, however, broadly interpreted the decision as creating an "analytical framework" that indicated a changing tone in maritime law for the awarding of punitive damages.[40] Some courts interpreted *Miles* to mean only that nonpecuniary damages—damages for which there is no easily discernible monetary value, like damages for the loss of a seaman's consortium—were not available under the Jones Act.[41] Other courts interpreted the holding more broadly, holding that *Miles* precludes a seaman from recovering any type of non-economic damages—damages meant to do more than simply compensate the seaman for his injuries, including any punitive damage—against his employer for failure to pay maintenance and cure.[42] Finally, some courts read the *Miles* decision broadly enough to bar a plaintiff from recovering punitive damages in any maritime case at all.[43]

In light of this confusion, the Supreme Court recently provided a needed clarification on the availability of punitive damages in

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36. 498 U.S. 19, 32–33 (1990).

37. *Id.* at 21–22.

38. *Id.* at 36.

39. *See* Robertson, *supra* note 34, at 139 ("*Miles* did not involve or discuss punitive damages.").

40. Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1505–06, 1510 (5th Cir. 1995).

41. *See* Robertson, *supra* note 34, at 139 n.376 (collecting cases).

42. "Maintenance and cure" is "compensation provided to a sailor who becomes sick or injured while a member of a vessel's crew." BLACK'S LAW DICTIONARY 822 (8th ed. 2004).

43. *See* Robertson, *supra* note 34, at 140 n.379 (collecting cases). Professor Schoenbaum reads the *Miles* decision similarly, as prohibiting a seaman's recovery of punitive damages against his employer for any reason, not just for failing to pay maintenance and cure. SCHOENBAUM, *supra* note 15, § 3-17, at 171.

maritime cases. In *Atlantic Sounding Co. v. Townsend*, a five-vote majority held that punitive damages were available to claimants in maritime actions generally and also in maintenance-and-cure cases specifically.[44] The Court claimed that the *Miles* decision remained alive and well, explaining that it simply stood for the proposition that there was no existing cause of action for wrongful death under general maritime law. The *Townsend* Court concluded that the existing legislative signals indicated that it should not create a new cause of action.[45]

So, as the law stands today, punitive damages are still a prospect—or possibly a threat—for litigants in maritime cases. As a result, maritime cases provide the perfect laboratory for testing a new approach to punitive-damages jurisprudence as a whole.

C. Possible Roles Served by Punitive-Damages Awards

The difficulties the courts have had in determining the availability of punitive damages under maritime law illustrates the more general problem of defining the role or purpose of punitive damages. As a general rule, admiralty courts follow the general trend of the federal courts in nonmaritime cases, viewing punitive damages as serving the dual roles of deterring others from engaging in socially harmful conduct and of punishing—or, in language often used taking "retribution" against—the defendant.[46] At the same time, the most stringent limitation on recovering punitive damages in maritime cases comes from drawing an analogy between punitive damages and compensatory damages for loss of society, which are both precluded by the Jones Act and the DOHSA.[47]

In other words, neither the courts nor the legislature has decided the proper function of punitive damages in maritime cases. Not surprisingly, the same problem exists for punitive-damages jurisprudence as a whole, where courts will alternatively claim to adopt one or two of the purposes, but then fail to lay a theoretical foundation for a meaningful system of recovery. The only area of agreement is that punitive damages should serve at least one of the three roles commonly noted: (1) a deterrence function that discourages similarly situated defendants from engaging in the same socially

44. 129 S. Ct. 2561, 2569–70 (2009).

45. *Id.* at 2572.

46. SCHOENBAUM, *supra* note 15, § 3-17, at 170 & nn.4–6.

47. Miles v. Apex Marine Corp., 498 U.S. 19, 37 (1990).

harmful behavior; (2) a retribution function that punishes a tortfeasor for the moral blameworthiness of its action; or (3) a compensation function that helps to make up for the tort victims injury in a way that normal compensatory damages cannot. Part III.A analyzes each of these possible roles.

III. MAXIMIZING DETERRENCE IN MARITIME PUNITIVE DAMAGES

The major source of conflict over how to set punitive damages is a severe lack of theoretical groundwork that should leave legal scholars shaking their heads in disbelief. In order to craft a meaningful method for punitive-damages awards, we first need to adopt a shared understanding of the doctrine's *raison d'être.*

A. Punitive Damages Should Only Serve to Deter Tortfeasors from Socially Harmful Conduct

As noted above, courts and commentators generally agree about the three possible functions punitive damages can serve. But they disagree on which function—or functions—represents the most efficient way for using punitive damages to maximize social welfare. After analyzing each function, this Part concludes that deterring wrongful conduct by forcing defendants to internalize costs they otherwise pass on to society is the only proper function of punitive damages in tort law.

1. Deterrence

Courts generally recognize deterrence, along with retribution, as one of the two main goals of punitive-damages awards.[48] This recognition accords with the historical development of punitive damages in tort cases. The awards originally were recognized to be "exemplary" damages that served as a warning to other potential tortfeasors.[49]

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48. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 & n.9 (2008) (citing cases).

49. Wilkes v. Wood, Lofft 1, 18, 98 Eng. Rep. 489, 498 (1763) (K.B.) (Lord Chief Justice Pratt). The majority opinion in *Baker* explains that the term "exemplary" refers to the damages' punishing—or what I call retributive—purpose. *Exxon Shipping Co.*, 128 S. Ct. at 2620. According to Webster's Revised Unabridged Dictionary, "exemplary" means "serving as a warning; monitory; as, exemplary justice, punishment, or damages." WEBSTER'S REVISED UNABRIDGED DICTIONARY 529 (MICRA 1996) (1913). This definition clearly fits the use of the term in context and describes a use of damages that warns future potential tortfeasors of the consequences of misconduct.

The basic theory behind deterrence is that punitive-damages awards force social actors to incorporate all the costs they impose on society, including those for which they might otherwise not be held liable.[50] This allows the actors to make efficient decisions about whether to undertake an action. If it causes a net gain to society, they will act; if it causes a net loss, they will not act.[51] Scholars have widely accepted this theory to justify harsh criminal penalties in cases where the criminals are unlikely to be caught.[52]

In practical terms, punitive-damages awards that optimize social efficiency have two variables. Under the first variable, a decisionmaker must calculate the actual harm done to society by each instance of an actor's conduct. In our tort system, this type of compensation is reflected by compensatory damages, which consist of the money that an actor is forced to pay to another person to make up for the harm it inflicted.[53] The second variable is the possibility that the tortfeasor is repeating this conduct without paying compensatory damages to all those harmed by it. In this case, a deterrent theory of punitive damages would include a multiplier that corresponds to the likelihood that a defendant is getting away with misconduct.[54]

This concept is easy to demonstrate. Suppose a bank overcharged its customers $1 on each ATM transaction made in the state of Tennessee. Assuming that the bank takes no remedial action, a set of plaintiffs consisting of those who made ATM withdrawals within a certain period of time could form a class-action lawsuit and recover compensatory damages that represent the full harm to the plaintiff-class. For this example, assume there are 10,000 class members with five transactions apiece, for a total of $50,000.

Suppose, however, that evidence shows that this bank has followed this practice for years in other states, but had never been caught before. Perhaps the statutes of limitations have run for such claims, or the evidence is not strong enough to prove individual cases,

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50. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 977 (2007); *see also* Jeremy Bentham, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 365, 401–02 (John Bowring ed., 1962) (1838–43) (laying out the basic utilitarian theory that serves as the foundation for efficient deterrence goals).

51. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 878–87 (1998).

52. *Id.* at 877 n.14.

53. The idea that compensatory damages encompass all of an injured party's harm is a legal fiction, but it is a necessary one in order to develop a meaningful deterrent function for punitive damages. As I'll discuss below, a system that presumes that compensatory damages make the tort victim completely restored leaves open an incentive for courts and legislatures to constantly reevaluate whether the compensatory damages satisfy that goal.

54. Polinsky & Shavell, *supra* note 51, at 889.

so no other class has recovered. The jury, however, is convinced that the bank knew it only risked a 50 percent chance of getting caught when it chose to engage in this practice. In effect, the bank is profiting economically by realizing the gains of its actions and passing the costs on to society. Even though it was only caught in one case and had to return the $50,000 to society, it still profits from those instances in which it escaped detection.

In this case, a jury should award punitive damages of $50,000 to accompany the $50,000 in compensatory damages, totaling $100,000: the net sum of economic profits the bank realized through its illegal practices.[55] This recovery amount removes the incentive for the defendant to engage in this misconduct; even though it only incurs liability in court half the time, it pays out the full value it receives from overcharging.[56] Once forced to incorporate the costs it imposed on society into its calculus, the defendant will choose the efficient result of not overcharging in the first place.

There is a strong case for using punitive damages to deter actors from imposing costs on society; the difficulty arises in the actual method used. For now, it is enough simply to identify deterrence as a valid goal for punitive damages.

2. Retribution

Scholars and judges have reached near unanimity in declaring retribution a proper goal of punitive-damages awards. By "retribution," these commentators indicate that one role of punitive-damages awards is to levy a fine on defendants for their moral blameworthiness in imposing costs on society or certain individuals.[57] On its face, this claim is uncontroversial; after all, the awards are "punitive," so shouldn't they serve a "punishing" role?

Efficient use of punitive damages, however, should not incorporate a retributive role for punishing tortfeasors. Commentators accepting retributive theories of punitive damages have taken their usefulness at face value, leading to undertheorization of retribution as an appropriate goal for punitive damages to serve. Upon closer

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55. The one-to-one ratio of punitive damages to compensatory damages in this example is unfortunate, as it mirrors the ratio the Supreme Court arrived at as a cap in *Exxon Shipping Co. v. Baker* through other means. 128 S. Ct. 2605, 2634 (2008). The proper multiplier of damages is not a constant, but entirely dependent on the defendant's chance of evading liability. Polinsky & Shavell, *supra* note 51, at 889–90.

56. This system also assumes that litigation is costless, which is obviously a legal fiction. But, at least in this example, it guarantees that the defendant will not engage in the action because the net profit will be negative ($0 minus litigation costs).

57. Polinsky & Shavell, *supra* note 51, at 948–50.

analysis, the rationale underpinning retribution as a goal for punitive damages becomes much less convincing.

There are two parts to this analysis. First, punitive damages levied against corporations—the typical target for punitive-damages awards[58]—fail to assign moral blameworthiness to the correct actor while penalizing numerous innocent ones in the process. Second, courts should not use punitive damages for retributive purposes because doing so blurs the distinction between civil liability and criminal culpability.

First, whom do courts punish when they levy punitive damages against corporations? It doesn't make sense to punish the company itself. Corporations do not have souls and cannot incur moral culpability. They are not part of the social contract of society, but merely a construction of law. As Professors Mitchell Polinsky and Steven Shavell point out, they are inanimate objects that can be manipulated by human actors.[59] It makes no more sense to punish a corporation as an entity for wrongdoing than it does to punish a tree for falling over on someone.[60] Instead, the more reasonable objective is either to punish the people in the corporation who actually caused the harm, or at least to give the company the incentive to punish them itself.

When courts levy punitive damages against corporations in order to punish individual actors, a host of innocent actors are caught in the crossfire. Shareholders, many of whom are mere traders with no long-term interests in the company, will bear the brunt of a significant punitive-damages award.[61] While it may be reasonable to penalize active shareholders who have control over the company's actions, it does not follow that passive investors should share in moral culpability, particularly when passive or diffuse shareholders are unable to control or punish the culpable actors themselves.[62]

Similarly, large punitive-damages awards will be passed on to customers. These customers have little or no direct control over the corporation's actions, and few people would suggest that they share moral blameworthiness for the company's deeds.[63] While it might make sense from an efficient-deterrence standpoint to spread costs to customers, it can't be justified from a retributive perspective.

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58. F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 FLA. L. REV. 349, 387 (2008).

59. Polinsky & Shavell, *supra* note 51, at 949.

60. *Id.*

61. *Id.* at 951–52.

62. *Id.*

63. *Id.* at 952.

Even if the need to use the corporation to punish the blameworthy individuals actually engaging in the harmful conduct is important enough to allow such collateral damage, punitive damages will not necessarily meet this need. Corporations may be unable to identify the blameworthy actors.[64] If they do, these employees can escape internal discipline simply by quitting their jobs.[65] In either case, the punitive damages will not serve any retributive function because the penalty won't be levied on the blameworthy individual.

Second, allowing courts to punish conduct for its blameworthiness blurs the distinction between criminal and civil sanctions. The current system of punitive-damages awards affords great discretion to the decisionmaker,[66] which can lead to culpability for moral blameworthiness that would not exist under criminal law. Allowing punitive damages to undermine the complex mechanism for determining moral blameworthiness is an abuse of a tort system designed to make injured plaintiffs whole,[67] not to punish wrongful conduct—the domain of criminal law.

Professor Anthony Sebok proposes a hybrid use for punitive-damages awards that is closely related to a retributive theory.[68] According to Sebok's interpretive theory of punitive-damages awards, the awards represent some form of personal revenge and retribution against the tortfeasor for injuries to the victim's private rights—or, as Sebok puts it more bluntly, for the "insult."[69] Sebok concludes that this way of understanding punitive damages better comports with reality than claiming an efficient deterrence rationale.[70]

Although Sebok's theory is engaging, it does not serve as a workable framework for a normative proposal for utilizing punitive damages. Quantifiable harms to a person—whether they are physical, emotional, or mental—should be classified as compensatory damages and factored into tort law accordingly. Punitive damages should be left to their deterrent role—one that Sebok acknowledges is valid, but argues is rarely achieved under the current system.[71] This is precisely the reason why a new implementation of punitive-damages jurisprudence is timely and appropriate.

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64. Viscusi, *supra* note 13, at 383 (citing Polinsky & Shavell, *supra* note 51, at 950–51).

65. *Id.*

66. George L. Priest, *The Problem and Efforts to Understand It*, *in* PUNITIVE DAMAGES 1, 4 (Cass L. Sunstein et al. eds., 2002).

67. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

68. Sebok, *supra* note 50, at 1006.

69. *Id.* at 1023.

70. *Id.* at 1036.

71. *Id.* at 978–79.

3. Compensation

The theory that punitive-damages awards should compensate for the injuries done to victims who have brought suit that are not otherwise recoverable has long pervaded punitive damage jurisprudence.[72] Most commentators and judges agree that, for some time in American history, punitive damages served a compensatory purpose.[73] The Supreme Court has expressed this opinion in several different cases.[74] But, each time in recent history, the Court also has noted that the need for compensatory punitive damages has diminished to the point that it no longer exists, given that courts and legislatures have expanded recovery of simple compensatory damages.[75] According to the Court, allowing damages for nonpecuniary harms like emotional distress has displaced the old compensatory functions of punitive damages.[76]

Despite the Court's insistence that the law has evolved past its crude stage of using punitive damages to compensate tort victims, the theme comes up repeatedly in both academic circles and the Court's own dealings with statutory damage multipliers. Despite the scholarly commentary and Supreme Court jurisprudence, compensation should be left to the realm of compensatory damages. Compensation, simply put, is not a proper function for punitive damages.

As a broad proposition, the idea that punitive damages should serve a compensatory function in some cases receives support from academic writers. Scholars often support the use of punitive damages to compensate tort victims for injuries from which victims could otherwise not recover, such as litigation expenses or emotional harms not included in tort recovery. While scholars share this basic premise,

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72. Unlike deterrence goals, all of the victims of misconduct seeking punitive damages for a compensatory purpose are present in court and not barred from recovery; the only limits on their damages come from legal constructions, not the defendant's ability to get away with wrongdoing. When punitive damages are used to compensate for social harms rather than litigants in court, they are being used in a deterrent—not compensatory—way, as discussed below.

73. *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262–64 & nn.17–23 (1976) (describing the history of punitive damages).

74. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437–38 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time.").

75. *Id.*

76. *Id.* (citing Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 (1957)). Not all scholars agree that the Court's interpretation of the law is an accurate reflection of reality. See Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 204 (2003), for a different perspective.

they vary widely in the types of injuries that they think should be compensated. Professor Richard W. Wright interprets all punitive damages as serving the purpose of compensating a plaintiff for her "discrete dignitary injury."[77] Punitive damages make up for the personal indignity suffered by a tort victim whose rights have been ignored or trampled. The breadth of this interpretation becomes clear from Wright's declaration that "all of the remedies in tort law, criminal law, and contract law are compensatory or rectificatory in nature."[78]

Other scholars make a more concrete assertion based on the history of this country's case law. Early American courts did not claim that the sole purpose of punitive damages was to compensate for injuries to the victim's dignity.[79] Instead, Professors Martin Redish and Andrew Matthews argue that punitive damages served the dual functions of compensating for some of the tort victims' injuries and punishing the defendant for his deeds.[80] In this sense, compensation is a proper role for punitive damages to serve when they are also used in retribution against the tortfeasor.

When confronted with the issue, the Supreme Court has acknowledged that statutory treble-damage awards are punitive in nature, but nevertheless still serve some compensatory goals. The Court has shown a willingness to affirm punitive-damage-like awards because of their compensatory nature. The False Claims Act ("FCA") offers a prime example. Congress first passed the FCA in 1863, creating civil liability for "any person . . . who knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval."[81] In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court held that the FCA's phrase "any person" did not create civil liability for the states.[82]

One basis for this holding came from the statute's damage multiplier: the original statute provided for double damages, while the contemporaneous version, enacted in 1982, provided treble damages. While the Court previously had recognized that a damage multiplier of

77. Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1431 (2003). Wright echoes the statements of Thomas B. Colby in *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 613–36 (2003).

78. Wright, *supra* note 77, at 1433 (2003).

79. Sebok, supra note 76, at 180.

80. Redish & Mathews, *supra* note 13, at 1.

81. 31 U.S.C. § 3729(a) (2000).

82. 529 U.S. 765, 768 (2000).

two was not a punitive award, it held in *Stevens* that treble damages were in fact punitive in nature.[83] This holding provided support for the idea that the statute did not create liability for the states, given the presumption against an interpretation that would allow punitive damages against governmental entities.[84]

The Court's next rendezvous with the FCA produced an interesting twist on this doctrine. In *Cook County v. United States ex rel Chandler*, a unanimous Court held that municipalities were liable for treble damages under the FCA.[85] Although the Court relied on the FCA's definition of "person" as including corporations and municipalities, it picked up the question of how the statute's punitive nature affected whether it applied to municipalities.

The Court softened its stance on the statute's punitive design by acknowledging that ostensibly punitive statutes could also serve compensatory goals: "[I]t is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives."[86] The Court had no problem allowing the treble damages that it had previously described as "not [meant] to ameliorate the liability of wrongdoers"[87] to make up for the costs imposed on the federal government by the party in violation.[88]

In contrast to the arguments for punitive damages to make up for damages incurred by the individual tort victims, a second theory justifies punitive damages as compensating for harms to society as a whole. In separate instances, and by separate methods, Judge Guido Calabresi and Professor Catherine Sharkey argue the general proposition that punitive damages should compensate societal losses.[89] In situations where society suffers harms that cannot be recovered in

83. *Id.* at 785–86 (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.")); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 550 (1943) (noting that double damages in the original FCA were not punitive, but suggesting that treble damages, such as those in the antitrust laws, would have been).

84. Newport v. Fact Concerts, Inc., 453 U.S. 247, 262–63 (1981).

85. 538 U.S. 119, 134 (2003).

86. *Id.* at 130 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635–36 (1985); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982)).

87. *Tex. Indus.*, 451 U.S. at 639.

88. *Chandler*, 538 U.S. at 130–31.

89. Ciraolo v. City of New York, 216 F.3d 236, 245–46 (2d Cir. 2000) (Calabresi, J., concurring); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

a tort action, punitive damages allow individual litigants to recover them and create an efficient deterrent effect.[90]

Despite its many faces, the basic argument for using punitive damages for compensatory purposes comes in two forms: (1) we should make up for injuries to victims that otherwise are unaccounted for in the legal system; or (2) we should compensate for the social harms that tortfeasors inflict. Neither of these arguments offers a compelling rationale for adopting a compensatory role for punitive damages.

First, Polinksy and Shavell offer a persuasive argument against using punitive damages to compensate plaintiffs.[91] They posit that if the law deems it appropriate to exclude certain types of losses from the plaintiff's recovery because courts are unable to price the loss, then those losses will not be accurately priced by punitive damages.[92] Moreover, if the loss can be calculated by a court and is of the type society would generally consider recoverable, only allowing that loss to manifest itself as punitive damages would prevent wronged victims from recovering for the injury the vast majority of the time.[93] In other words, if these losses are real and tangible, why should the law create the high hurdle of reprehensibility or other restrictions on punitive damages to bar their recovery?

Their point is this: if courts hide calculable compensatory damages under the cover of punitive damages, they invariably create a hybrid system that no court can handle effectively. Either the damages should be recoverable by a plaintiff free from the burden of proving reprehensibility and other bars, or these damages should be understood as not truly compensatory in nature.

Second, the argument that punitive damages should compensate for social harms is not compelling because it is in fact a *deterrence* rationale, not a compensatory one. Efficient deterrence posits that punitive damages will be awarded to make up for the tortfeasor's ex ante determination of the probability it will be forced to pay damages for the harms its actions impose on others. Calabresi's and Sharkey's basic theories simply turn the question into an ex post consideration of how much harm the defendant has inflicted on society. In practice, this should lead to the same result either way. But, at heart, this is an efficient deterrence rationale.

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90. *See also* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 306 (2008) (arguing that using punitives is good when it provides deterrence, even if this is closer to a compensatory goal).

91. Polinsky & Shavell, *supra* note 51, at 869.

92. *Id.* at 940.

93. *Id.*

Deterrence is the only valid role for punitive damages to serve. Allowing punitive damages to serve retributive or compensatory functions both undermines their predictability and effectiveness and inhibits the development of the law in ways that actually punish conduct that society will condemn as criminal, or that compensate victims for harms suffered in order to make them whole.

B. The Field of Maritime Law Presents the Ideal Opportunity to Begin Reforming Punitive-Damages Jurisprudence

Congress should begin crafting a deterrence-optimizing punitive-damages doctrine by passing legislation to create a statutory framework for punitive-damages awards in maritime cases. This sort of legislation would establish a nationwide standard for awarding punitive damages that the states could emulate. Unique parts of Congress's maritime-law-making authority make this area more appealing than just a framework for awarding damages in general district-court legislation.

1. Plaintiffs Cannot Forum Shop around the Framework

Congress has the power to make the federal courts the exclusive forum for maritime cases.[94] This power is an important part of maritime jurisdiction because the substantive maritime laws crafted by Congress and the federal courts might not govern *in personam* suits involving maritime cases filed in state court. 28 U.S.C. § 1333, the statute granting the federal courts jurisdiction over matters of maritime law, includes a savings clause that reserves states' courts' jurisdiction to hear *in personam* maritime cases where "suitors" are entitled to other remedies.[95] In effect, this means that plaintiffs in admiralty cases can bring ordinary civil actions in state court; state rules might then allow the plaintiff a jury trial.[96] Even in cases where Congress creates substantive maritime law that establishes a deterrence-maximizing framework, there remains the possibility that state courts would not follow it effectively; appellate review of the federal claims might mitigate, but would not eliminate, this concern.

The allure of state courts applying different—and possibly more plaintiff-friendly—punitive-damages award mechanisms in cases

94. *See* FALLON, MANNING, MELTZER & SHAPIRO, HART & WESCHLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 25–26, 535 (6th ed. 2009).

95. 28 U.S.C. § 1333(1) (2000).

96. *See* Lavergne v. W. Co. of N. Am., Inc., 371 So. 2d 807, 809 (La. 1979).

would create an incentive for forum shopping. Because defendants only can remove maritime cases to federal court when the federal court has separate grounds for subject-matter jurisdiction other than the maritime nature of the case,[97] plaintiffs will control which court decides the case in many instances. By exercising its power to make maritime jurisdiction exclusive, Congress would eliminate forum-shopping concerns to an extent that it could not in any other area of law.[98]

2. Maritime Cases Are Not Required to Be Tried by a Jury

Congress can implement a solution that does not involve a jury determination because plaintiffs do not have a right to a trial by jury of a civil admiralty claim.[99] The Constitution only requires a jury to decide questions of criminal law and suits at common law.[100] The Federal Rules of Civil Procedure recognize explicitly that juries do not try admiralty claims.[101] This freedom would let Congress create a framework without even considering the implications of the Seventh Amendment.

3. Courts Do Not Use Punitive Damages for Compensatory Purposes in Maritime Cases

Justice Stevens's dissent in *Baker* offers a different perspective on punitive damages in maritime cases. Stevens claimed that punitive damages served as a way of compensating maritime plaintiffs for injuries that were not fully redressed under maritime tort law.[102] This assertion is significant: if Stevens is correct, then a system of awarding damages premised solely on deterrence will lead to undercompensated plaintiffs. In that case, Congress should either

97. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 371–72 (1959).

98. Congress obviously could not constitutionally pass legislation that called for a specific mechanism for awarding punitive damages in all tort cases because it would lack authority under Article I of the Constitution. If it established a punitive-damages framework that applied to all federal causes of action, forum shopping would remain a serious problem as plaintiffs would file their claims under applicable state law causes of action, or seek out state courts that applied the federal law in a more lenient manner.

Congress has already conferred exclusive admiralty jurisdiction in the federal courts in suits under the Limitation of Shipowners' Liability Act, the Ship Mortgage Act, the Suits in Admiralty Act, the Public Vessels Act, and for actions to foreclose preferred ship mortgages. SCHOENBAUM, *supra* note 15, at 101.

99. SCHOENBAUM, *supra* note 15, at 1100.

100. U.S. CONST. amend. VI; *id.* amend. VII.

101. FED. R. CIV. P. 38(e).

102. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2636–37 (2008) (Stevens, J., dissenting).

eliminate the need to use punitive damages in this fashion or make accommodations for them.

As it turns out, the empirical data suggest that Stevens is incorrect. Maritime courts do not use punitive damages to make up for limits on compensation in tort recovery. As a result, maritime law remains a prime candidate for congressional action to create a deterrence-maximizing system of awarding punitive damages.

Testing Stevens's hypothesis requires two steps. First, the alleged restrictions on compensatory recovery in maritime cases must be identified. Second, these restrictions must be sought in a pool of verdicts and settlements in order to determine whether there is any evidence supporting his claim.

First, what exactly are the bogeymen that keep maritime plaintiffs from proper recovery? Justice Stevens referred to two major restrictions: (1) the unavailability of damages for negligent infliction of purely emotional distress, and (2) the *Robins Dry Dock* doctrine that limits recovery "for purely 'economic losses . . . absent direct physical damage to property or a proprietary interest.' "[103] Presumably, there is a third type of restriction: a decedent-plaintiff's representative cannot recover for loss of society damages or for future earnings in a wrongful death maritime case after *Miles v. Apex Marine Corp.*[104] Each of these restrictions merits a more detailed explanation.

First, the rule that purely emotional injuries are not recoverable in maritime law is nuanced. In *Gough v. Natural Gas Pipeline Co. of America*, the Fifth Circuit noted that the assertion "that the maritime law does not permit recovery for purely emotional damages" was "too broad."[105] Instead, the correct rule is that "purely emotional injuries will be compensated when maritime plaintiffs satisfy the physical injury or impact rule."[106] This holding makes the maritime rule the same as the once-commonplace tort rule for emotional-damages recovery: plaintiffs can only recover for emotional damages when they can first show that they were physically affected by the defendant's actions. Although this rule has fallen out of favor for general tort law in most jurisdictions, it appears much less likely that courts would use punitive damages to compensate for a "restriction" on recovery that appeared in almost every tort case in the country only a few decades ago. Nonetheless, there is a possibility that

103. *Id.* (quoting 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 14-7, at 124 (4th ed. 2004)).

104. 498 U.S. 19, 36 (1990).

105. 996 F.2d 763, 765 (5th Cir. 1993).

106. *Id.* (citation and internal quotation marks omitted).

this "outdated" rule has remained in place even after most scholars have concluded that it is unfair to tort victims, and courts have adjusted accordingly by granting larger punitive-damages awards to compensate.

Second, Justice Stevens pointed to the general maritime rule that plaintiffs cannot recover for purely economic losses without "physical damage to property or a proprietary interest."[107] This limitation stems from *Robins Dry Dock & Repair Co. v. Flint*, a 1927 Supreme Court decision.[108] In *Robins Dry Dock*, an individual chartered the use of a steamship for a period of two years, subject to docking at least once every six months. While the ship was docked, the charter was suspended, as was any payment for it. The docking company negligently allowed the ship's propeller to be damaged, extending the amount of time that the vessel remained in port. The chartering individual then sued the dock for its negligence, claiming that loss of the use of the ship resulted in economic damages.

Writing for the Court, Justice Holmes focused on the issue of standing and third-party liability.[109] Because the dock had not breached a duty owed to the plaintiff in contract or in tort, Justice Holmes wrote, the plaintiff did not have a cause of action against the dock. In a short, terse opinion, the Court denied the plaintiff recovery.[110]

Third, maritime law does not allow for a decedent's survivor to recover for the decedent's lost earnings or the loss of her companionship.[111] In *Miles*, the Court stated its intention to follow the "uniform plan of maritime tort law Congress created in DOHSA and the Jones Act" by creating this limitation for maritime common law.[112] It is not obvious why Congress would choose to limit recovery in this context, as this situation is one in which maritime law departs from standard tort law in a way that appears facially unfair to plaintiffs. It is also difficult to discern why Justice Stevens would not mention this limitation on a plaintiff's compensatory recovery in maritime torts. Nonetheless, it is clearly a limitation, and it is plausible—and even

107. *Baker*, 128 S. Ct. at 2637 (Stevens, J., concurring in part and dissenting in part) (quoting SCHOENBAUM, *supra* note 103, at 124).

108. 275 U.S. 303 (1927).

109. *Id.* at 309.

110. *Id.* How this straightforward case became a tenet of maritime law is a more complicated story. Then-Judge Breyer's opinion in *Barber Lines A/S v. M/V Donau Maru* offers a useful explanation. 764 F.2d 50, 51–52 (1st Cir. 1985).

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

112. *Id.* at 37.

likely—that a judge or jury could use punitive damages to get around it.

Given these identified restrictions on recovery, the availability of empirical data on maritime jury verdicts and settlements offers a convenient means for investigating Justice Stevens's second argument. The Westlaw database reveals 1,090 reported settlements and jury verdicts from federal and state courts.[113] Out of these cases, there were fifteen reports of the court specifically setting aside part of the damages as "punitive" in nature,[114] and six reports of settlements strongly indicating that the defendant feared liability for punitive damages in court.[115] These data indicate that anywhere from 1.4 to 1.9 percent of the total number of reported verdicts and settlements took punitive damages into account. Although this number seems low, it presents a ratio of punitive-damages awards per a number of cases that is consistent with other empiricists' findings.[116]

The results are striking. From this empirical example, it appears that Justice Stevens was dead wrong in his description of

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113. Using Westlaw's Maritime Combined Jury Verdicts and Settlement Summaries database (abbreviated "MRT-JV"), which consolidates data from reporters across the country, I found verdicts from courts in Alaska, California, Florida, Georgia, Kentucky, Louisiana, Michigan, New York, Ohio, and Texas.

114. Drake v. Long, No. 204-CV-00002-JEG, 2006 WL 3827038 (S.D. Ga. July 7, 2006); Baker v. Exxon Shipping Co., Nos. CV-89-0085-HRH, CV-89-0095-HRH, 2004 WL 573919 (D. Alaska Jan. 28, 2004) (trial court verdict); Dearmond v. Southwire, No. 99 CV 219, 2002 WL 32171120 (W.D. Ky. Feb. 12, 2002); Hague v. Celebrity Cruises, Inc., No. 95 Civ 4648, 2001 WL 1829675 (S.D.N.Y. June 7, 2001); Motts v. M/S Green Wave, 1999 WL 33492057 (S.D. Tex. Feb. 22, 1999); Schotanus vs. Dragon Fishing Co., No. CV950294, 1997 WL 638893 (C.D. Cal. May 29, 1997); Thoms v. Kelly-Ryan, Inc., No. 3AN-93-3055, 1994 WL 682852 (Alaska Super. Ct. Aug. 22, 1994); King v. Wright, No. RG0L1162125, 2006 WL 2325300 (Cal. Super. Ct. May 15, 2006); Taibl v. Juno Marine Agency, Inc., No. 88-45327 CA 22, 1998 WL 355212 (Fla. Cir. Ct. Feb. 23, 1998); Segui v. Kloster Cruise, Ltd., No. 91-11110 CA 06, 1994 WL 865088 (Fla. Cir. Ct. Mar. 22, 1994); Siliato v. Carnival Cruise Lines, No. 89-31781 CA 19, 1990 WL 630147 (Fla. Cir. Ct. Dec. 1990); Andersen v. Sky Cruises, Ltd., No. 87-8892, 1990 WL 630243 (Fla. Cir. Ct. Jan. 1990); Anslem v. Gulf Oil Corp., No. 83-2265, 1984 WL 318070 (Unknown La. state court, Nov. 1984); Muthana v. Am. Steamship Co., 87-721690-NO, 1989 WL 988612 (Mich. Cir. Ct. June 1, 1989); Newport Harbor Ass'n v. Dicello, No. CV03-495284, 2005 WL 3750697 (Ohio Ct. C.P. April 8, 2005).

I also found one case where a court awarded punitive damages for a contractual claim, but I did not include it in the results. Chi Shun Hua Steel Co. v. Crest Tankers, Inc., No. C89-2905 SAW, 1990 WL 10080476 (N.D. Cal. 1990).

115. Calderon v. Freels, No. C86-1081R, 1988 WL 428018 (W.D. Wash. 1988); Witherow v. Omm, Inc., No. 02-09668 Div. E, 2005 WL 3030126 (Fla. Cir. Ct. July 23, 2005); Edenfield v. Hendry Corp., No. 94-02350, 1994 WL 865382 (Fla. Cir. Ct. Dec. 12, 1994); Schleifman v. P.C. Hotel Mgmt. Ltd., No. BER-L-04121-01, 2003 WL 21712142 (N.J. Super. Ct. June 27, 2003); Sanders v. Penrod Drilling Co., No. 90CV0053, 1990 WL 465087 (Tex. Dist. Ct. July, 1988); Ogaard v. Crowley Maritime Corp., No. 92-2-19380-9, 1994 WL 242115 (Wash. Super. Ct. Mar. 14, 1994).

116. Eisenberg et al., *supra* note 8, at 275.

courts' use of punitive damages to make up for restrictions on compensatory damages in maritime cases. In fact, there was not a single instance from the group sampled in which this was the case.

The *Robins Dry Dock* doctrine never played any role in the cases in which punitive damages were awarded, including cases in which the plaintiffs settled a punitive-damages claim. In each case, the plaintiff could claim a real, physical injury as the basis for liability; the claims of pure economic injury barred by the doctrine never led to a punitive-damages award. This result is unsurprising: punitive-damages awards are usually based on a recognized, underlying physical harm. If a defendant is protected from liability for compensatory damages by the doctrine, then it will never incur punitive liability.

Justice Stevens's example only works if a defendant suffered great economic damages as well as trivial direct damages that were unconnected to the economic ones. If a court awarded significant punitive damages for the defendant's direct damages claim, it is possible to assume that such an award served a compensatory role for the unrecoverable damages. This situation was not found in any case in the Westlaw sample, however.

Similarly, none of the cases in the Westlaw sample involved purely emotional injuries to the defendant. If a defendant is barred from recovering compensatory damages for his emotional injuries because there is no physical harm, then the court will not have an opportunity to award punitive damages. A situation similar to the hypothetical for economic damages would be necessary for such an opportunity to occur. A defendant would have to suffer a purely emotional injury as well as a trivial direct injury that did not directly give rise to his emotional damages claim. In that case, if the court awarded large punitive damages, it might be fair to conclude that it was compensating for the defendant's unrecoverable injuries. Based upon the results of the study, however, this situation is not occurring.

Finally, the possibility that a court used punitive damages to make up for the Jones Act's restrictions on recovery for loss of consortium and lost future wages was the closest call, but it still was not borne out in the data. There were eight cases in which the plaintiffs appeared to have grounds for a loss-of-consortium claim. Of these eight, five of the jury verdicts included recovery for loss of consortium on statutory or state-law grounds; the punitive-damages awards could not be compensatory, as the loss-of-consortium damages were explicitly included in the compensatory recovery. Of the remaining three cases, two were decided before the Supreme Court's

decision in *Miles* that limited recovery for loss of consortium damages in those jurisdictions that allowed such recovery.

The one remaining report is of the most recent case, *Drake v. Long*.[117] Mr. Drake was a commercial fisherman hired by the plaintiffs to guide a trip in 2003. He injured his back lifting an eighty-pound bag of shrimp and sued the ship's owners under the Jones Act, claiming that the defendants were negligent and that the vessel was not seaworthy. Mr. Drake also claimed that the defendants attempted to conceal their liability by driving the ship onto a jetty and destroying the evidence. The defendants admitted liability, and a jury awarded Mr. Drake $250,000 in compensatory damages and an additional $250,000 in punitive damages, presumably based on the defendants' attempt to conceal their wrongdoing.

The defendants' conduct appeared to be sufficient to merit punitive liability, without the need for further compensation. The best solution was to mark this case as unclear. Thus, Stevens's theory remains without any empirical evidence.

* * *

Maritime law presents Congress with the perfect opportunity to pass legislation reforming the system of awarding punitive damages. The legislature can act in a way that prevents forum shopping and precludes any concerns about the Seventh Amendment, all the while without unraveling a system of awards that serves an additional compensatory purpose.

IV. LEGISLATIVE REFORM

Congress should pass legislation establishing a framework where judges, not juries, award punitive damages in maritime cases. The judges should be guided by a comprehensive set of guidelines that optimizes the deterrent value of the award. Installing this sort of system would provide a coherent model for punitive-damages doctrine that would serve as an example that the states and courts could adopt.

A. Why Judges?

In *Punitive Damages: An Economic Analysis*, Polinsky and Shavell argue that proper jury instructions can correct most of the problems with current punitive-damages jurisprudence.[118] Polinsky and Shavell provide a model for these instructions that outlines the

117. No. 2:04-CV-00002-JEG, 2006 WL 3827038 (S.D. Ga. July 7, 2006).

118. Polinsky & Shavell, *supra* note 51, at 957–62.

proper considerations in cases of claims for tort damages against individuals and corporations.[119]

The complicating factor of these model instructions is that they include an allowance for the punitive-damages awards to serve a "punishing function." As discussed above, this function is not optimal in terms of economic benefit.[120] Polinsky and Shavell seem to recognize this reality, and the allowance of punitive damages for "punishment" appears to be a concession to the wide acceptance of this role for punitive damages in the federal courts.[121]

Professor W. Kip Viscusi tests these instructions with a questionnaire distributed to citizens in the Austin, Texas area.[122] He concludes that juries are significantly unwilling or unable to use the instructions in developing optimal punitive-damages awards to accomplish deterrence.[123] But Viscusi's study offers hope for a judicial answer to the inquiry. He notes that "[i]n situations in which the median juror had sound judgment and was able to properly interpret the punitive damages instruction, the jury performance was quite good . . . ."[124] He also concludes that levels of education directly correspond with the numbers of correct answers.[125]

In the concluding chapter of the book *Punitive Damages: How Juries Decide*, Professor Cass Sunstein offers two alternative solutions to resolve the current unpredictability and inefficiency of punitive-damages awards. Either judges should take a "firmer role" in the award process, or the courts should adopt a more-rigid damage schedule in order to produce optimal award amounts.[126] In essence, this Note proposes that Congress can impose a solution that incorporates both of these elements. For maritime cases, Congress can, and should, create a statutory mechanism that ensures punitive-damages awards are calculated by trained, educated judges who rely on mandatory guidelines to create awards that optimize deterrence.

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119. *Id.*

120. *See supra* Part III.A.2.

121. Polinsky & Shavell, *supra* note 51, at 948.

122. W. Kip Viscusi, *Deterrence Instructions: What Juries Won't Do*, *in* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 142–65 (Univ. of Chicago Press 2002).

123. *Id.* at 162–64.

124. *Id.* at 164.

125. *Id.* at 162.

126. Cass R. Sunstein, *What Should Be Done?*, *in* CASS R. SUNSTEIN ET AL., *supra* note 122, at 242.

B. Substantive Text of the Proposed Legislation

The legislation this Note proposes does not need to be a detailed plan of action in order to accomplish the goal of implementing a new method for awarding punitive damages. The bill only needs four basic parts.

1. Purpose Section

First, Congress should include an explicit purpose section in the bill. Legislation that abrogates a Supreme Court holding—even one that is only based on common-law authority—always carries the risk of unfavorable judicial interpretation. Congress should specifically target the *Baker* holding: "This Bill is designed to institute a workable framework for limiting punitive-damages awards under maritime law. This Act should be read as setting the federal standard in all maritime cases filed after the day of its enactment."

Second, Congress also should establish its system for awarding punitive damages in maritime cases as the sole, mandatory, and uniform federal law on the matter. This stated purpose would work in conjunction with the operational part of the bill, which will abrogate the states' abilities to assign punitive damage claims to juries.

In sum, the purpose section would satisfy two requirements. First, it would provide a future Court with a clear indication of congressional intent helpful in abrogating the *Baker* holding's limit on punitive damages. Second, this clear exercise of federal lawmaking authority would erase any doubts about the Court's common-law authority and the states' residual authority under maritime law, at least with regard to punitive damages in maritime cases.

2. Findings Section

Along with this purpose, Congress should include a findings section that includes two provisions. First, it should declare, "In order for punitive damages to serve their proper purpose and deter defendants from imposing costs on society, they must be awarded in a predictable and consistent fashion." Second, Congress should find, "Because awarding punitive damages under maritime law concerns important matters that transverses the states' borders and affect interstate commerce, the appropriate response should be in the form of federal legislation, not state responses."

The first finding serves two different purposes. First, it sets the goal of punitive damages as deterring tortfeasors from current and

future conduct that imposes social costs. Deterrence is the only proper goal for punitive damages, and the one that allows for issuance of the most predictable and consistent awards.[127] While it would be ideal for Congress to reject outright the use of punitive damages to compensate plaintiffs or add extra punishment to the defendant's liability, this finding would work with the operational section of the statute to that effect without the political mess that would accompany a rejection of the compensating or punishing roles.

Second, the finding that punitive damages should be predictable acknowledges the substantive concerns expressed by corporations that punitive damages are awarded haphazardly and without connection to actual conduct. The new punitive-damages award system is inherently "fair" in that it is calibrated to prevent actors from passing on costs to those not responsible for them. Instead of a doctrine of punitive damages that relies on the outrageousness of the defendant's conduct or the magnitude of its revenue, this finding represents the new framework's direct relation to the defendant's conduct.

Finally, the finding that the issue of punitive damages demands the enactment of appropriate federal legislation would satisfy the doctrinal requirements necessary to effect the preemption of state law by federal maritime law. State laws are preempted in maritime cases if they "contravene a clearly established rule of general maritime law," or if they "impair the principle of national uniformity that underlies the federal and maritime admiralty statutes."[128] Declaring the uniformity concerns of punitive-damages jurisprudence would make it clear that the operational provisions removing jurisdiction of maritime cases from state courts and making federal judges the decisionmakers would preempt any contrary state laws.[129]

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127. *See supra* Part III.A.1.

128. SCHOENBAUM, *supra* note 15, § 2-2, at 91 (citing Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974)).

129. The Findings Section might also be helpful in gathering political support for the new law. Congress recently passed the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), to re-write the statutory filing deadline for Title VII discrimination cases after the Supreme Court gave it a narrow interpretation in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). The Act included a Findings Section that capitalized on the unpopular nature of the Court's decision. Lilly Ledbetter Fair Pay Act § 2.

3. Operational Section

The bill should include a separate operational section that implements the major changes in the law. This section would establish the comprehensive framework for adjudicating maritime punitive-damages claims in either federal or state court.

Congress should first make a judge the ultimate decisionmaker on the issue of punitive damages. In order to mandate bench trials for punitive-damages claims, Congress will need to take two steps. First, it should include a provision amending 28 U.S.C. § 1333 by including a new subsection (3): "No state court shall have jurisdiction over 'suitors in all cases all other remedies to which they are otherwise entitled' if the claims are for punitive damages." Second, Congress must pass a new statute stating that "all claims for punitive damages in maritime cases are to be decided by a judge, not a jury."

Congress should then issue uniform instructions for a federal judge to consider in determining an award of punitive damages. These instructions should mirror the ones proposed by Polinksy and Shavell, with one major exception: there should not be a provision for awarding punitive damages for retributive purposes. As discussed above, socially optimal use of punitive damages precludes such use.

The deterrent portions of the model instructions seem well-suited to promoting optimal awards for deterrence, as evidenced by their acceptance by several scholars. Congress should also include Polinsky and Shavell's multiplier as a key part of this framework, as it provides the basis for the efficient deterrence rationale.

4. Effect on Other Statutes

In the fourth section, Congress should explain the bill's effect on related federal laws. Congress should expand the limit imposed to the bill to punitive-damages awards under the Jones Act and the Longshore and Harbor Workers' Compensation Act. There is no reason why the protections afforded to seamen and longshoremen should be different from those offered to other maritime plaintiffs. Congress should recognize that in this bill.

This simple legislative move would eliminate a substantial area of confusion among the circuit courts stemming from the *Miles* decision. In setting a limit for punitive damages in cases brought under these acts, Congress also would be able to clarify that punitive damages are available for those cases as well.

V. CONCLUSION

Punitive-damages jurisprudence has reached a critical stage. At this point, it seems unlikely that the courts will implement any new restrictions on damage awards based on constitutional due process. The areas where the courts retain common-law-making authority have dwindled to a tiny set of subjects, precluding judicial intervention of the type the Supreme Court exercised in *Baker*. Most states have fought the legislative battle to create limitations on punitive-damages recovery and aren't eager to reopen the issue. As a whole, punitive-damages doctrine has reached an uneasy stalemate that no one is happy with.

It is time to adopt a meaningful framework for defining the role and magnitude of damages in tort cases. Awarding punitive damages in a way that maximizes efficient deterrence is the only function that promotes social welfare and creates incentives for legislatures to better define tort laws. By taking bold action in the field of maritime law, Congress can set the gold standard for developing a meaningful and coherent punitive-damages jurisprudence.

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