View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Louisiana State University: DigitalCommons @ LSU Law Center

Louisiana Law Review

Volume 70 | Number 2
Symposium on Punitive Damages
Winter 2010

Vicarious Liability for Punitive Damages

Michael F. Sturley

Repository Citation

Michael F. Sturley, *Vicarious Liability for Punitive Damages*, 70 La. L. Rev. (2010)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol70/iss2/6

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Vicarious Liability for Punitive Damages

Michael F. Sturley[*]

It was a personal pleasure for me to participate in this impressive symposium on punitive damages. Not only did I appreciate the opportunity to share views with new friends and old during my visit to Baton Rouge, but the student members of the *Louisiana Law Review* did a superb job organizing the symposium, and I thank them for their hospitality.

I. DISCLOSURES

To put my comments into perspective, I should begin with three disclosures. Most importantly, I am not a fan of punitive damages law as currently administered in the United States. Although this position puts me in the company of many of my conservative friends, I nevertheless consider it one of my liberal views. Accepting the current premise that punitive damages are intended to punish those who are guilty of particularly egregious misconduct (and thus to deter others from similar misconduct),[1] I believe that punishment should be imposed only when suitable safeguards are in place to protect the accused wrongdoer. We do

---

Copyright 2010, by MICHAEL F. STURLEY.

* Stanley D. and Sandra J. Rosenberg Centennial Professor of Law, University of Texas at Austin; B.A., J.D., Yale University; M.A. (Jurisprudence), Oxford University. I was a member of the legal team representing the Exxon interests in *Exxon Shipping Co. v. Baker* (*Exxon*), 128 S. Ct. 2605 (2008), which is discussed in this Article. But I write here solely in my academic capacity, and the views I express are my own. They do not necessarily represent the views of, and they have not been endorsed or approved by, my former clients or my former co-counsel.

An earlier version of this Article was delivered at a symposium on punitive damages held at the LSU Paul M. Hebert Law Center in Baton Rouge, Louisiana, on April 17, 2009, which was jointly sponsored by the *Louisiana Law Review* and the LSU Center for Continuing Professional Development.

1. This premise is often expressed in modern cases. Historically, punitive damages appear to have served a compensatory function, effectively allowing plaintiffs to receive more adequate compensation than was then available under unduly restrictive tort doctrines at the time. The argument is still made today that punitive damages serve a valuable role by supplementing inadequate compensatory damages. Indeed, some of the amicus briefs filed at the Supreme Court in *Exxon*, 128 S. Ct. 2605, made that argument. But the "extra compensation" argument is less commonly accepted today. In any event, I do not find the argument persuasive. If compensatory damages are still inadequate, that problem should be addressed directly so that it can be corrected in all cases—not only in those rare cases in which a defendant is found to be guilty of egregious misconduct.

not permit the state to fine a criminal defendant under a preponderance-of-the-evidence standard,[2] or for misconduct that has not been clearly defined in advance.[3] Criminal fines are subject to a host of constitutional, statutory, and procedural safeguards. In my view, the policy concerns that support these important safeguards do not disappear simply because we categorize punitive damages as part of the "civil" law rather than the "criminal" law.[4] To the extent that you believe that the views I express here on the state of the law of vicarious liability for punitive damages may

---

2. States are divided on the standard of proof required for the imposition of punitive damages. *Compare, e.g.*, Myers v. Workmen's Auto Ins. Co., 95 P.3d 977, 983 (Idaho 2004) (applying preponderance-of-the-evidence standard to impose punitive damages), *with, e.g.*, Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986) (requiring clear and convincing evidence because punitive damages are "only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind," thus making it "appropriate to impose a more stringent standard of proof"). It appears that only Colorado requires a plaintiff to meet the criminal standard—proof beyond a reasonable doubt—to impose punitive damages. *See* COLO. REV. STAT. ANN. § 13-25-127(2) (West 2005).

The Supreme Court has described the "clear and convincing" standard under state law as "an important check against unwarranted imposition of punitive damages." Honda Motor Co. v. Oberg, 512 U.S. 415, 433 (1994). But in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991), the Court held that the lower preponderance-of-the-evidence standard did not violate the Due Process Clause.

In *In re Exxon Valdez*, 270 F.3d 1215, 1232–33 (9th Cir. 2001), *rev'd on other grounds*, 128 S. Ct. 2605 (2008), the Ninth Circuit held that federal maritime law permitted punitive damages under a preponderance-of-the-evidence standard even though that award would not have been permitted in any of the coastal states in the Ninth Circuit. *See* ALASKA STAT. § 09.17.020(b) (2006) (requiring clear and convincing evidence); CAL. CIV. CODE § 3294(a) (West 1997 & Supp. 2009) (same); OR. REV. STAT. § 31.730(1) (West 2003 & Supp. 2008) (same); Masaki v. Gen. Motors Corp., 780 P.2d 566, 573–75 (1989) (same). Washington does not permit punitive damages except as authorized by statute. *See, e.g.*, Fisher Props., Inc. v. Arden-Mayfair, Inc., 726 P.2d 8, 23 (Wash. 1986).

3. If a criminal statute authorized the imposition of criminal fines under the same standards that courts have used to describe the circumstances in which punitive damages can be awarded, it would be void for vagueness. *See generally, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 2.3 (4th ed. 2003) (describing the "void for vagueness" doctrine in criminal law).

4. I recognize that, under U.S. law, a great deal turns on the historical accident that we categorize punitive damages as part of the "civil" law rather than the "criminal" law. *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc. (*Browning-Ferris*), 492 U.S. 257, 262–76 (1989) (holding that the Eighth Amendment constrains the state's exercise of its criminal authority and does not apply to an award of punitive damages in a civil law dispute between private parties). Of course, *Browning-Ferris* addressed an issue of constitutional interpretation, not the wisdom of imposing punitive damages without meaningful safeguards.

have been influenced by my wider views on punitive damages generally (as I believe that judges' views on the subject are likely to be influenced by their wider views about punitive damages), you may wish to discount my conclusions accordingly.

Secondly, I must also note what might be seen as a personal financial interest in the subject. I was retained by Exxon Mobil Corporation to assist in its presentation of *Exxon Shipping Co. v. Baker* (*Exxon*) before the United States Supreme Court.[5] One issue in that case was vicarious liability for punitive damages. You may believe that this representation colored my current conclusions. My own belief is that my current views were already well-formed before Exxon retained me, but you can decide for yourself. I hasten to add that the views I express here are entirely my own. I do not speak here for any of my former clients or co-counsel, and they may or may not agree with what I say.

Finally, I should explicitly mention what is already clear from my resume: my relevant expertise lies in the field of maritime law rather than general tort law. I will discuss tort law as it has been applied in the states, but I will focus much more on maritime law than one who specializes primarily in torts might do. Although it may seem odd for the organizers of this symposium to invite a maritime specialist to address an issue that is so central to general tort law, particularly when punitive damages are so rarely awarded in maritime cases,[6] I see the logic in their choice. Not only is maritime law the field in which the most interesting recent developments on vicarious liability have occurred,[7] it is also the field in which future developments are most likely to be broadly influential.[8]

---

5. 128 S. Ct. 2605.

6. Professor Robertson's exhaustive research documenting all of the U.S. maritime cases in which punitive damages were discussed found only about a dozen examples of actual punitive damages awards during the preceding two centuries. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997). And even with such a small sample, some have questioned whether all of those few cases in fact involved punitive awards. *See, e.g.*, Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2571–79 (2009) (Alito, J., dissenting).

7. *See infra* notes 53–57 and accompanying text (noting the Supreme Court's recent decision (or non-decision) in *Exxon*, 128 S. Ct. 2605).

8. *See infra* notes 128–45 and accompanying text (discussing the impact that a maritime decision on vicarious liability for punitive damages, particularly by the Supreme Court, might have outside of maritime law).

II. INTRODUCTION AND DEFINITION OF THE ISSUE

The extent to which an employer, principal, or master[9] is liable for punitive damages based on the egregious misconduct of an employee, agent, or servant[10] has been a contentious issue for most of the nation's history. The Supreme Court first addressed the question almost two centuries ago in *The Amiable Nancy*.[11] Less than two years ago, the Court agreed to revisit the issue when it granted certiorari in *Exxon*.[12] The *Exxon* Court divided equally on the vicarious liability question, however, and was thus unable to render any decision (and no Justice addressed the issue in an opinion).[13] In the 190 years between *The Amiable Nancy* and *Exxon*, a number of different approaches developed and endured, with the result that no single solution to the problem is accepted today.

It may be helpful to focus on exactly what is at stake here, and a simplified hypothetical based on the *Exxon* facts may serve as a useful illustration. Suppose that a corporate shipowner employs a captain to operate a supertanker on voyages between Alaska and California. The company complies with industry standards in the hiring and training of the entire crew, including the captain, and also establishes and enforces appropriate policies for the operation of its vessels. The captain nevertheless violates the company policy and leaves the bridge while the ship is sailing through the environmentally sensitive waters of Prince William Sound. That action leaves only one officer on the bridge (a violation of the company's explicit two-officer policy), and that remaining officer lacks the Coast Guard license necessary to navigate the vessel in

---

9. The terms "employer," "principal," and "master" have been popular at different times in our legal history and to some extent in different contexts. In the nineteenth century, the law commonly spoke of "master" and "servant." For the last several decades, those terms have been generally replaced by "principal" and "agent" (which has a somewhat different meaning) or "employer" and "employee." In the present context, we are almost always concerned with employers and employees.

10. The terms "employee," "agent," and "servant" have been popular at different times in our legal history and to some extent in different contexts. *See supra* note 9.

11. 16 U.S. (3 Wheat.) 546 (1818).

12. *See* Exxon Shipping Co. v. Baker, 552 U.S. 989 (2007) (granting certiorari to *In re* Exxon Valdez, 490 F.3d 1066 (9th Cir. 2007)). The vicarious liability issue was raised in the first "question presented" in the petition for certiorari.

13. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2614–16 (2008).

those waters.[14] After a disaster ensues, the jury concludes that the captain acted recklessly in leaving the bridge and holds him personally liable for a modest punitive damages award. The five billion dollar question—the issue on which I focus here—is whether the company may also be held liable for punitive damages based solely on the captain's misconduct.[15]

To some extent, this is simply a problem in line-drawing. Like most employers today (or at least like most employers against whom plaintiffs seek substantial punitive damages awards), our hypothetical shipowner is a corporation that can act only through its agents. If the board of directors passed a resolution directing the company's captains to abandon the bridge at key times, that resolution would be an act of the corporation for which otherwise appropriate sanctions could be imposed without considering vicarious liability. Most would agree that the misconduct does not need to rise to the level of a board resolution; at least some employees' actions should be imputed to the corporation. If the president of the company happened to be on board the vessel at the fateful time, and in the course of her employment she had ordered the captain to leave the bridge (perhaps to meet with her to discuss company business), the president's decision would presumably be imputed to the corporation.[16] But how far down the corporate structure should we go? Suppose that the captain had radioed the

14. The facts in my hypothetical may differ from the popular perception of the *Exxon Valdez* facts (based on media reports), but they are essentially the facts that were properly before the Supreme Court. Although the *Exxon* jury heard hotly disputed testimony that would have supported the conclusion that Exxon management had acted recklessly and that the captain had been intoxicated at the time of the accident, no jury (in the immediate case or in any of the related litigation) ever made either finding. The *Exxon* jury also heard testimony sufficient to support the conclusion that Exxon management had acted properly and that the captain had not been intoxicated at the time of the accident. If the *Exxon* jury had been asked to address the issue and had found that the corporate employer had acted recklessly in its own right, the vicarious liability issue would never have arisen.

15. There is no question here regarding the corporate employer's liability for compensatory damages based on the reckless actions of its employees. The sole issue is the employer's vicarious liability for punitive damages.

16. If this variation of the hypothetical seems too improbable, perhaps we could imagine a new passenger liner sailing across the north Atlantic in April on her maiden voyage from Southampton to New York with the company president on board. Despite reports of icebergs in the area, the company president might recklessly instruct the captain to sail full speed ahead in order to reach New York in record time. *Cf.* DAVID RITCHIE, SHIPWRECKS: AN ENCYCLOPEDIA OF THE WORLD'S WORST DISASTERS AT SEA 219–20 (1999) (noting that the Titanic was proceeding at an unsafe speed, "possibly in response to pressure to make a record crossing," and explaining that the company's president was "perceived as a villain in the aftermath of the sinking").

vice president responsible for overseeing the operations of the company's fleet and had asked for permission to leave the bridge. If that permission had been recklessly granted, would it have been enough? Or is the captain's decision by itself enough to impose liability on his employer? If the captain had been blameless but the third mate had acted recklessly, would that have been enough? If all of the officers had acted properly but the helmsman had recklessly failed to execute their orders, would that have been enough? If everyone on the bridge had acted properly but the lookout had recklessly failed to perform her duties, would that have been enough to impose liability on the corporate owner for punitive damages?

As a theoretical matter, the law could establish a rule selecting just about any point along the spectrum. As a practical matter, the three most likely results are (1) the employee in question must be one who is responsible for setting company policy,[17] (2) the employee must be one who acts in a "managerial" capacity,[18] or (3) the employee must be acting within the scope of his or her employment.[19]

III. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES IN THE SUPREME COURT

The Supreme Court has addressed an employer's liability for punitive damages for the wrongful conduct of an employee several times in somewhat different contexts. In the admiralty context, which (in the absence of a statute) gives the Court broad discretion to formulate the appropriate legal standard,[20] *The Amiable Nancy* involved an armed privateer's plundering of a neutral vessel during the War of 1812.[21] The Court affirmed the shipowner–employer's responsibility to pay compensatory damages to the owners of the neutral vessel but expressly recognized the unfairness of holding the employer vicariously liable in punitive damages for the

17. This appears to be the majority rule under general maritime law, which has generally rejected an employer's liability in punitive damages for the wrongdoing of lower level employees (including those who would be considered "managerial"). *See infra* notes 58–74 and accompanying text.

18. This is the position taken by the relevant Restatements. *See infra* notes 81–87 and accompanying text. It might also be the majority rule among the states. *See infra* note 79 and accompanying text. *But see infra* note 76 and accompanying text.

19. This may be the majority rule among the states. *See infra* note 76 and accompanying text. *But see infra* note 79 and accompanying text.

20. *See infra* notes 88–92 and accompanying text.

21. 16 U.S. (3 Wheat.) 546 (1818).

wrongful conduct of the employees aboard the ship.[22] It concluded that the employer was not liable for punitive damages when the employer did not direct, countenance, or participate "in the slightest degree" in the wrong.[23] As Justice Story, writing for the unanimous Court, explained:

> [T]his is a suit against the owners of the privateer . . . . They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the [plaintiffs], but they are not bound to the extent of vindictive [i.e., punitive] damages.[24]

Although Justice Story directly addressed the vicarious liability issue, the authority of *The Amiable Nancy* on this point is nevertheless open to question. The relevant statement is dictum,[25] and the case could be distinguished on its facts from any case that is likely to arise today.[26] Many subsequent courts have

---

22. *Id.* at 558–59.
23. *Id.* at 559.
24. *Id.* at 558–59.
25. All of the *Amiable Nancy* statements about punitive damages are dicta. The district court had not awarded punitive damages, and the Supreme Court's opinion explicitly declared that "the only inquiry will be, whether any of the items allowed by the district court were improperly rejected by the circuit court." *Id.* at 559. The issue of punitive damages was not before the Court.
26. The *Amiable Nancy* Court appeared to put at least some weight on the privateering context in which the case arose—a context that has been irrelevant for a century and a half. That emphasis appears in one of the secondary rationales that Justice Story included to support the Court's holding:

> While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burthening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders.

Id. at 559. This secondary rationale may have been completely unnecessary—Justice Story's effort to pound yet another nail into a coffin that was already tightly sealed. But if this rationale was a serious part of the Court's motivation to adopt its position (even in dicta), then the argument against vicarious liability would be at least somewhat less compelling outside of the privateering context. The broad language in *Lake Shore & Michigan Southern Railway Co. v. Prentice* (*Lake Shore*), 147 U.S. 101 (1893), *see infra* at notes 35–42 and accompanying text, would suggest that at least the *Lake Shore* Court did not find the privateering context to be particularly relevant in *The Amiable Nancy*.

nevertheless treated Justice Story's statement of the rule as strong authority for limiting vicarious liability for punitive damages.[27] Indeed, just a decade ago the Supreme Court itself cited *The Amiable Nancy* for the proposition that the Court had "historically . . . endorsed" the view that "agency principles limit vicarious liability for punitive awards."[28] And in one of its most recent decisions, the Court attached considerable weight to *The Amiable Nancy*'s recognition that punitive damages are available under the general maritime law.[29]

The Amiable Nancy is also of limited help in the line-drawing process noted above.[30] Although the case is often cited to support the proposition that a shipowner is not liable in punitive damages for the misconduct of a ship's captain while at sea, the principal wrongdoer was in fact a more junior officer.[31] The privateer's captain did not lead the boarding party that discovered that their target was a neutral vessel (and nevertheless plundered her).[32] The guilty actor was the first lieutenant,[33] an officer less likely to be considered an employee who acts in a "managerial capacity."[34] But at the very least, *The Amiable Nancy* represents a rejection (in dictum) of the respondeat superior standard.

Despite the potential problems with *The Amiable Nancy*, the Supreme Court subsequently applied the same rule in *Lake Shore & Michigan Southern Railway Co. v. Prentice* (*Lake Shore*), which held under (pre-*Erie*) federal common law that an injured passenger could not recover punitive damages from a railroad based on the misconduct of a conductor on a train.[35] Justice Gray,

---

27. *See infra* notes 58–65 and accompanying text.

28. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 541 (1999) (citing *The Amiable Nancy*, 16 U.S. (3 Wheat.) at 558–59). The *Kolstad* Court also cited *Lake Shore*, 147 U.S. at 114–15, which is discussed *infra* at notes 35–42 and accompanying text.

29. *See* Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2567 (2009). The *Amiable Nancy* Court's recognition that punitive damages are available under the general maritime law was every bit as much dictum as its declaration of the limits on punitive damages in the context of vicarious liability. *See supra* note 25.

30. *See supra* text at notes 16–19.

31. *The Amiable Nancy*, 16 U.S. (3 Wheat.) at 547–48, 550–51.

32. *Id.* at 550–51.

33. *Id.* at 547.

34. Given the ambiguity of the phrase "managerial capacity," *see infra* notes 86–87 and accompanying text, it is difficult to say how the first lieutenant should be characterized. He did have command of an armed boat and the boarding party, which reflects at least some level of "managerial" authority, albeit less than the captain's.

35. 147 U.S. 101 (1893).

writing for the unanimous Court,[36] explained the rule and the rationale as follows:

> Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*. . . .[37]

The *Lake Shore* Court continued with a long quotation from *The Amiable Nancy* explaining that the "rule thus laid down is not peculiar to courts of admiralty."[38] Rather, it is a rule "of general jurisprudence"[39] that applies not only in maritime cases but also in any other context in which federal common law governs.

Lake Shore is also of limited precedential value now that federal common law governs less often than it did before *Erie*.[40] General maritime law is a species of federal common law, and it remains important (as *Exxon* demonstrates),[41] but outside of the maritime context there is little left for federal common law. *Lake Shore* is even less helpful than *The Amiable Nancy* on the line-drawing process. Even if the case establishes that a railroad is not liable in punitive damages for the egregious misconduct of a conductor on a train,[42] the possibility remains that the actions of

---

36. Three Justices did not participate in the decision. *See id.* at 117.
37. *Id.* at 107–08.
38. *Id.* at 108.
39. *Id.* at 106.
40. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
41. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).
42. Some have criticized *Lake Shore* on the ground that it was wrong even by the standards of its own time. Indeed the Supreme Court itself has noted that "the [*Lake Shore*] Court may have departed from the trend of late 19th-century decisions." Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 n.14 (1982). This criticism strikes me as misguided. There is no requirement, or even expectation, that federal common law should necessarily be consistent with state decisions. Indeed those who are most likely to reject the *Lake Shore* rule on vicarious liability for punitive damages are also most likely to applaud admiralty's rejection of the common law contributory negligence rule (at a time when most states barred a contributorily negligent plaintiff from any recovery). *See generally, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408–09 (1953) (contrasting maritime law and common law contributory negligence rule).

more senior employees may be attributed to the corporate employer. *Lake Shore*'s holding nevertheless represents a clear rejection of the respondeat superior standard.

Moving into the modern era (and the context of constitutional review), the Court held in *Pacific Mutual Life Insurance Co. v. Haslip* (*Haslip*) that state law may award vicarious punitive damages under the respondeat superior standard without offending the Constitution's Due Process Clause.[43] Because *Haslip* was concerned with the outer limits of constitutional due process, the decision is of limited relevance to the issue of what the law permits when the Court has the power to determine it (let alone what the law should permit).[44] But to the extent that language in *Haslip* can be read to suggest that the normal respondeat superior standard for tort liability is appropriate in the punitive damages context,[45] it could be viewed as some authority for broad vicarious liability for punitive damages.[46]

Turning to the context of statutory interpretation, the Court in *Kolstad v. American Dental Association* (*Kolstad*)[47] rejected the possibility of vicarious punitive damages under Title VII of the Civil Rights Act.[48] *Kolstad* is also of limited relevance to the broader, general issue because it turned on the interpretation of the governing statute. Moreover, the opinion sent decidedly mixed messages. It recognized that "agency principles limit vicarious liability for punitive awards"[49] but treated "[t]he common law as codified in the [*Restatement (Second) of Torts*]" as "a useful starting point for defining" the relevant principles.[50] That approach

43. 499 U.S. 1, 12–15 (1991).

44. *Cf. infra* notes 88–92 and accompanying text.

45. The Court noted that the state's common law rule held a corporation liable for both compensatory and punitive damages based on the fraudulent acts of an employee acting within the scope of his employment. *Haslip*, 499 U.S. at 14. Because it "[could not] say that this does not rationally advance the State's interest in minimizing fraud," the Court concluded that it "[could not] say this is a violation of Fourteenth Amendment due process." *Id.*

46. In *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2569–75 (2009), the Court seemed to endorse the availability of punitive damages in the context of maintenance and cure in large measure because they were (and had long been) a normal part of the general maritime law.

47. 527 U.S. 526, 539–46 (1999).

48. Title VII explicitly authorizes punitive damages. *See* 42 U.S.C. § 1981a(b)(1) (2006) ("A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.").

49. *Kolstad*, 527 U.S. at 541.

50. *Id.* at 542.

would support the view that an employer could be vicariously liable in punitive damages for the acts of a managerial employee.[51] The Court then rejected the *Restatement* approach because it would be inconsistent with Title VII's objectives.[52] Strictly speaking, that analysis is limited to the Title VII context, but the policy arguments on which the Court relied would apply as strongly in just about any non-constitutional context that the Court is likely to face. *Kolstad* could easily be read to support limiting vicarious liability for punitive damages whenever a court is free to consider the underlying policy goals (rather than being limited to constitutional review).

Last year the Supreme Court had an opportunity to address the vicarious liability issue in the admiralty context again, but it was unable to reach a conclusion. In *Exxon*, Exxon argued that it was not liable to pay punitive damages for the *Exxon Valdez* oil spill based solely on the wrongful conduct of the captain of the ship.[53] Exxon contended that the *Amiable Nancy–Lake Shore* approach represented the appropriate standard while the plaintiffs defended the *Restatement*'s "managerial employee" standard[54] that the lower court had applied.[55] The Court was equally divided on the issue (with Justice Alito not participating),[56] thus leaving the question open.[57]

IV. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES IN THE LOWER FEDERAL COURTS UNDER GENERAL MARITIME LAW

In the lower courts, the maritime law decisions on vicarious liability for punitive damages are divided into three camps. Most circuits follow the *Amiable Nancy–Lake Shore* approach to hold that a shipowner is not liable for punitive damages for the egregious misconduct of its operational employees.[58] In *In re P&E Boat Rentals*,[59] for example, a jury awarded substantial punitive

51. *See infra* notes 81–87 and accompanying text.
52. *Kolstad*, 527 U.S. at 544–46.
53. Exxon Shipping v. Baker, 128 S. Ct. 2605, 2615–16 (2008).
54. *See infra* notes 81–87 and accompanying text.
55. *See infra* note 74 and accompanying text.
56. *Exxon*, 128 S. Ct. at 2615–16. Presumably Justice Alito did not participate in the decision because he owns Exxon Mobil stock.
57. Indeed, the Court went out of its way to stress that it was not resolving the vicarious liability issue. *See id.* at 2616 ("[I]t should go without saying that the disposition here is not precedential on the derivative liability question.").
58. *See, e.g.*, *In re* P & E Boat Rentals, Inc., 872 F.2d 642, 652 (5th Cir. 1989); U.S. Steel Corp. v. Fuhrman, 407 F.2d 1143, 1148 (6th Cir. 1969); The State of Missouri, 76 F. 376, 380 (7th Cir. 1896).
59. *In re* P & E Boat Rentals, 872 F.2d 642.

damages against Chevron because its field foreman had acted recklessly in ordering the captain of a crewboat to make a trip to a work facility at high speed in heavy fog.[60] On appeal, the Fifth Circuit explained that admiralty courts "generally hold that the principal is liable in punitive damages [for the acts of an agent] only if it authorizes or ratifies wanton actions of an agent,"[61] discussed *The Amiable Nancy* and *Lake Shore*,[62] noted the relevant decisions in other circuits,[63] and concluded that the law's "objectives are not achieved when courts drop the punitive damage hammer on the principal for the wrongful acts of the simple agent or lower echelon employee."[64]

The Ninth Circuit rejected the *Amiable Nancy–Lake Shore* approach in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*,[65] a case involving a land-based employee, to adopt the *Restatement*'s "managerial agent" rule (under which an employer is liable for punitive damages based on the misconduct of a managerial agent).[66] The court did not mention *The Amiable Nancy* but remarkably asserted that "[t]he Restatement standard largely follows the earlier teaching of [*Lake Shore*]."[67] The true basis for its conclusion seems to have been the belief that "the standard of the Restatement (Second) of Torts better reflects the reality of modern corporate America"[68] and is more consistent with the rule followed in most states.[69] The Ninth Circuit later reaffirmed and extended this holding in the *Exxon Valdez* litigation, where it held that the jury was properly instructed that the reckless act of a managerial employee "is held in law to be the reckless act . . . of the corporation."[70]

The First Circuit adopted a middle ground in *C.E.H., Inc. v. F/V Seafarer*, in which the owner of a fishing trawler was held liable for punitive damages based on the crew's deliberate misconduct in destroying the plaintiff's lobster traps.[71] The court

60. *Id.* at 645–46.
61. *Id.* at 650.
62. *Id.* at 650–51.
63. *Id.* at 651–52.
64. *Id.* at 652.
65. 767 F.2d 1379 (9th Cir. 1985).
66. *See infra* notes 81–87 and accompanying text.
67. *Protectus Alpha*, 767 F.2d at 1386.
68. *Id.*
69. *Id.* at 1386–87.
70. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2614 (2008) (quoting jury instructions at Phase I of *In re* The Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001)).
71. 70 F.3d 694, 705 (1st Cir. 1995).

required "some level of culpability" on the part of the employer.[72] It feared "that strict adherence to the [*Amiable Nancy–Lake Shore*] complicity approach would shield a principal, who, though not guilty of direct participation, authorization, or ratification in his agent's egregious conduct, nevertheless shares blame for the wrongdoing."[73] But it stopped "short of wholesale adoption of the *Restatement* because section 909(c), read literally, could impose liability in circumstances that do not demonstrate any fault on the part of the principal."[74]

V. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES UNDER STATE LAW

Under state law, an even wider range of different positions exist. At one extreme are those states that either do not permit an award of punitive damages or else limit punitive damages to very narrow circumstances.[75] When punitive damages are simply unavailable, the vicarious liability issue does not even arise.

At the opposite extreme, the majority rule (or at least the plurality rule) may be that the normal respondeat superior standard for tort liability also applies to the imposition of punitive damages,[76] meaning that an employer can be liable in punitive damages for the misconduct of any employee acting in the scope of his or her employment—without any complicity whatsoever. As the Supreme Court of Oklahoma declared almost eighty years ago, "the legal malice of the servant is the legal malice of the corporation."[77]

---

72. *Id.*

73. *Id.*

74. *Id.*

75. *See, e.g.*, N.H. REV. STAT. ANN. § 507:16 (1997) (punitive damages permitted only when authorized by statute); Miller v. Kingsley, 230 N.W.2d 472, 474 (Neb. 1975) ("It is a fundamental rule of law in this state that punitive, vindictive, or exemplary damages are not allowed."); Fisher Props., Inc. v. Arden-Mayfair, Inc., 726 P.2d 8, 23 (Wash. 1986) (punitive damages permitted only when authorized by statute).

76. *See* 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 4.4(B)(1) (5th ed. 2005). The Supreme Court itself has (in dicta) described the respondeat superior standard as the majority rule. *See* Am. Soc'y of Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 n.14 (1982) ("A majority of courts . . . have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification."). But other sources declare that the *Restatement* approach, *see infra* notes 81–87 and accompanying text, is the majority rule. *See infra* note 80 and accompanying text.

77. Mayo Hotel Co. v. Danciger, 288 P. 309, 313 (Okla. 1930). Although the *Mayo Hotel* Court declared that it was following the majority rule in the state courts, it recognized that "[m]any of the state courts and a majority of the

At least two distinct positions exist in the middle ground between the two extremes. Some states have followed the *Amiable Nancy–Lake Shore* approach and limited responsibility for punitive damages to those who were guilty of the misconduct, without vicarious liability.[78] Other states—perhaps even a majority of the states[79]—have adopted the approach reflected in the Restatements of tort and agency law, under which an employer is liable for punitive damages based on the misconduct of a managerial agent.[80]

VI. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES UNDER THE RESTATEMENTS

The *Restatement (Second) of Torts*,[81] incorporating equivalent provisions that had originally been adopted in the earlier *Restatement (Second) of Agency*,[82] takes a position between the *Amiable Nancy–Lake Shore* strict complicity approach and the respondeat superior standard followed in many states. Section 909 provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if, but only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.[83]

---

federal courts expressly adhere to" the doctrine "that a corporation cannot be subjected to exemplary damages because of the malicious, fraudulent, or oppressive tortious acts of its agents and servants where such acts are not authorized or afterwards ratified by the corporation." *Id.* at 312.

78. *See, e.g.*, Curtis v. Siebrand Bros. Circus & Carnival Co., 194 P.2d 281, 292–93 (Idaho 1948).

79. *See* 2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 24.02, at 2 (1988) ("the majority of jurisdictions follow some form of the Restatement rule"). *See also id.* (declaring that "a substantial minority of the jurisdictions" follow the respondeat superior standard).

80. *See infra* notes 81–87 and accompanying text.

81. RESTATEMENT (SECOND) OF TORTS § 909 (1977).

82. RESTATEMENT (SECOND) OF AGENCY § 217C (1958).

83. RESTATEMENT (SECOND) OF TORTS, *supra* note 81, § 909.

The key provision for vicarious liability is section 909(c).[84] It recognizes that most employers today are corporations that can act only through their employees and that at least some employees' actions should be imputed to the corporation. Rather than limiting the class of such employees to those responsible for setting policy, section 909(c) expands the class to those "employed in a managerial capacity."[85]

The *Restatement (Second) of Torts* does not provide much guidance to identify managerial employees. Indeed, the *Kolstad* Court declared that "no good definition of what constitutes a "managerial capacity" has been found."[86] In *Exxon*, the jury was instructed that an "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."[87]

VII. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES: THE FUTURE IN MARITIME LAW

The Supreme Court is completely free to follow its own views of public policy in setting general maritime law. This is true not only as a practical matter[88] but also as a theoretical matter. The Court is *supposed* to oversee the development of the general maritime law following its own views of good public policy. The Court's own recognition of this role has waned and waxed over the years. Some scholars argued that the Court should abandon this role,[89] and many thought that the Court had, in fact, abandoned its

84. *Id.* § 909. Subsections (a) and (d) apply when an employer makes the offending employee's act its own—either authorizing it (§ 909(a)) or ratifying or approving it (§ 909(d)). Subsection (b) holds the employer responsible for its own reckless behavior. Of course, subsections (a), (b), and (d) also impose liability on the basis of the acts of a managerial agent, thus implicitly incorporating the key element of subsection (c).

85. *Id.* § 909(c).

86. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 543 (quoting GHIARDI & KIRCHER, *supra* note 79, § 24.05, at 14).

87. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2614 (2008) (quoting jury instructions at Phase I of *In re* The Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001)).

88. As a practical matter, the Court is free to follow its own views of public policy in resolving almost any legal dispute—and it often does. When the Court substitutes its own views for Congress' in the interpretation of a federal statute, Congress will sometimes pass a new statute and overrule the prior decision. But this is still a rare event. As a general matter, the only check on the majority's power is self-restraint (perhaps in the face of a critical dissent).

89. *See, e.g.*, Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999).

policy-setting role in the 1990s.[90] But in recent years the Court's decisions in *Exxon*[91] and *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*[92] have reasserted the traditional role. Most recently in *Atlantic Sounding Co. v. Townsend* (*Townsend*), which did not change the general maritime law, the Court recognized its power to formulate general maritime law even in the face of a federal statute that was arguably inconsistent.[93]

A. The Policy

At the moment, we can only speculate on what the majority of the Court would consider to be the appropriate public policy for vicarious liability in the punitive damages context. In my view, the Court should recall the most basic principles of punitive damages. Punitive damages are not part of a plaintiff's compensation. A plaintiff accordingly has no entitlement to recover punitive damages. They exist, as the name implies, to be "punitive," to punish the defendant for egregious behavior. Like other forms of punishment under criminal law, they also deter others from engaging in the sort of behavior that justifies an award of punitive damages. To be effective, however, punitive damages must punish and deter the right person. If punitive damages punish someone who is not guilty of any misconduct they do not accomplish their stated purpose. They instead resemble the punishment imposed on the whipping boys of the European royal courts in the fifteenth and sixteenth centuries.[94] Similarly, unless they punish the person

90. *See, e.g.*, John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 249 (1993) (accusing the Supreme Court of "abandon[ing] its Constitutional duty of enunciating maritime law").

91. *See Exxon*, 128 S. Ct. at 2629–30 & n.21. Even the three Justices who disagreed with the Court's exercise of its power to change the general maritime law agreed that the Court possessed that power. *See id.* at 2638 (Stevens, J., dissenting in part) ("I do not question that the Court possesses the power to craft the rule it announces today."); *id.* at 2639 (Ginsburg, J., dissenting in part) ("beyond question" that the Court has the power to change the general maritime law); *id.* at 2640 (Breyer, J., dissenting in part) (generally agreeing with the Court's exercise of the power to change the general maritime law but arguing for a "limited exception").

92. 543 U.S. 14, 23 (2004).

93. *See* Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2569–75 (2009).

94. *See, e.g.*, MARK TWAIN, THE PRINCE AND THE PAUPER 169–72 (Shelley Fisher Fishkin ed., Oxford Univ. Press 1996) (1882) (conversation between Tom Canty, the pauper, and Humphrey Marlow, the prince's whipping boy). In theory, the prince whose whipping boy was punished in his place would feel some remorse as a result. It is less clear whether a reckless employee will feel any remorse when his or her innocent employer is punished, but the employer at

guilty of misconduct they do not deter the person who might be tempted to commit similar misconduct.

The *Amiable Nancy–Lake Shore* rule ensures that punitive damages do not punish the wrong person. If someone does not direct the relevant misconduct, countenance it, or participate in it in the slightest degree, that person has done nothing to justify punishment. It is logical for that person to pay the plaintiff compensatory damages because society's interest in ensuring that the innocent victim of the misconduct is fully compensated outweighs any unfairness. For punitive damages, however, compensation has nothing to do with the analysis. The entire focus should be on the defendant who has, by definition, done nothing wrong whenever the *Amiable Nancy–Lake Shore* rule applies.

Of course a Justice who wishes to apply the *Amiable Nancy–Lake Shore* rule need not address the underlying policy arguments. He or she could simply apply the rule of those cases, as they are the Court's two directly relevant, long-standing precedents. Although both decisions could be distinguished in any case that is likely to come before the Supreme Court today,[95] and would likely be distinguished by any Justice who wishes to impose vicarious liability for punitive damages, the fact remains that they are the Court's two decisions that directly address the relevant issue as a matter of judge-made federal law.[96] Both are unanimous[97] decisions written by well-respected members of the Court,[98] and both unambiguously declare that punitive damages may not be vicariously imposed on someone who "neither directed [the underlying wrong], nor countenanced it, nor participated in it in the slightest degree."[99] A simple application of established precedent may not compel the application of the *Amiable Nancy–Lake Shore* rule today, but it certainly points in that direction.

---

least has a greater ability to impose adverse consequences on the reckless employee.

95. *See supra* notes 25–26 and accompanying text (explaining how *The Amiable Nancy* could be distinguished). *See supra* notes 40, 42 and accompanying text (explaining how *Lake Shore* could be distinguishable).

96. Moreover, *Kolstad* reaches the same result in the context of federal statutory law. *See supra* notes 47–52 and accompanying text discussing *Kolstad.*

97. *Cf. supra* note 36.

98. Indeed, "well-respected" is a glaring understatement for Justice Story, the author of *The Amiable Nancy.*

99. The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 559 (1818). *Accord* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 108 (1893) (quoting *The Amiable Nancy*, 16 U.S. (3 Wheat.) at 559).

B. Arguments for a Special Rule in Maritime Law

Even if the Court does not agree with my policy analysis, it might retain the *Amiable Nancy–Lake Shore* approach in the maritime context based on the distinctive history of the maritime industry. The courts and Congress have long recognized that the industry is unique. Historically, shipowners had little control over ships' captains,[100] who were accordingly given unprecedented authority and independence. The Carriage of Goods by Sea Act (COGSA)[101] and the Harter Act,[102] for example, both provide that in certain circumstances a shipowner is not liable at all (even for compensatory damages) when a loss is caused by the actions of the ship's captain and crew at sea. Thus section 4(2)(a) of COGSA excuses the shipowner from liability for its employees' acts "in the navigation or in the management of the ship,"[103] and section 4(2)(b) excuses the shipowner from liability for fire unless the owner was personally at fault.[104] Even if a shipowner does not

100. The force of the historical argument is clearly weaker today than it was in the nineteenth century when the law's special protection for shipowners first developed. A shipowner no longer sends a ship to sea with no chance for communication until the end of the voyage. Today a ship's captain is in regular contact with shore-based management through a wide range of technologies that permit instantaneous voice, text, visual, and fax communication (not to mention shore-monitoring of a ship's instruments). *Cf.* Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. MAR. L. & COM. 1, 13 (1983) (describing the situation over twenty-five years ago).

101. Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (previously codified at 46 U.S.C. app. §§ 1300–1315 (2000)).

102. *See* Harter Act, ch. 105, 27 Stat. 445 (1893) (codified as amended at 46 U.S.C. §§ 30701–30707 (2006)).

103. Carriage of Goods by Sea Act § 4(2)(a) (previously codified at 46 U.S.C. app. § 1304(2)(a) (2000)). The Harter Act similarly excuses the shipowner for errors "in the navigation or management of the vessel." *See* 46 U.S.C. § 30706(a) (2006). The force of this argument would be considerably weakened if the United States ratifies the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008), Annex [hereinafter Rotterdam Rules]. Article 17 reverses the policy choice of COGSA § 4(2)(a) and makes the shipowner liable for crew errors in the navigation or management of the vessel.

104. Carriage of Goods by Sea Act § 4(2)(b) (previously codified at 46 U.S.C. app. § 1304(2)(a) (2000)). The so-called "Fire Statute," which was originally enacted in 1851 (*see* ch. 43, 9 Stat. 635), similarly excuses the shipowner from liability for fire in the absence of the owner's personal fault. *See* 46 U.S.C. § 30504 (2006). The force of this argument would be considerably weakened if the United States ratifies the Rotterdam Rules, *supra* note 103. Article 17(3)(f) & (4)(a) reverses the policy choice of COGSA § 4(2)(b) and makes the shipowner liable for fire due to crew errors.

deny liability for crew negligence, the analogy to section 4(2)(a)–(b) still illustrates why it should not be liable for punitive damages for the actions of a captain at sea when it neither directed, nor countenanced, nor participated to the slightest degree in any of his misconduct. It would be anomalous indeed to hold a shipowner vicariously liable for punitive damages based on the actions of the captain or a member of the crew when section 4(2)(a)–(b) excuses the shipowner from liability even for compensatory damages for loss or damage caused by their actions (so long as the shipowner itself was not at fault).

The maritime industry is also among the world's most dangerous. Despite today's improved safety standards, a shipowner puts its assets at risk in ways that few other businesses can imagine. Both Congress and the courts have recognized that these risks, coupled with the need to encourage investment in such a vital industry, justify limiting a shipowner's liability in ways that do not exist for land-based businesses. The issue here is not whether a defendant may escape liability for compensatory damages—although maritime law permits shipowners in other contexts to escape liability even for compensatory damages. But the principle of limited liability, which pervades all of maritime law,[105] could justify the limits that the Supreme Court recognized almost two centuries ago in *The Amiable Nancy*.

Finally, and most importantly, the maritime industry differs from land-based industries in its peripatetic nature. A given vessel is likely to call at ports in dozens of different jurisdictions every year. Unlike a purely local business, which can adjust its conduct to comply with whatever the rules of that locality may require, a shipowner faces different rules in every port. To the extent that

105. The maritime law's historic reliance on limited liability is admittedly different today than it once was. In the middle of the nineteenth century, a shipowner might need the protection of the Limitation Act to be able to incur the risks involved in sending a ship to sea. In today's world, a shipowner generally protects itself from undue risk by purchasing insurance in a sophisticated market that has developed to meet practically every imaginable need. The current market, however, is nevertheless structured on the assumption of limited liability. In any event, it would be unwise to impose vicarious liability for punitive damages on the assumption that the insurance market will necessarily solve any problems that might be created. Under the infamous *Wilburn Boat* doctrine, marine insurance issues are generally determined by state law. *See* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). *See, e.g.*, Taylor v. Lloyd's Underwriters of London, 972 F.2d 666 (5th Cir. 1992) (holding that state law rather than federal maritime law determines whether punitive damages are insurable). In many states, insurance for punitive damages is unavailable as a matter of public policy. *See, e.g.*, Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962) (Wisdom, J.).

those rules can be uniform, the maritime industry operates more efficiently.[106] This explains the need to create a uniform maritime rule to apply without regard to the countless variations in state law.[107] For maximum efficiency, the rule should be uniform not only within the United States but internationally as well.[108] Because most other nations do not recognize punitive damages at all,[109] it would make sense for the Court to limit the availability of punitive damages to the extent possible in the maritime industry.

C. Arguments for Vicarious Liability

Despite the strong arguments pointing in favor of the Supreme Court's reaffirmation of the *Amiable Nancy–Lake Shore* approach, there is no shortage of contrary arguments on which the Court could rely if it chose to reach the opposite result. The Court—in the absence of an established rule of general maritime law—regularly draws on the experience of state law in formulating the general maritime law.[110] If the Court wishes to follow what it once characterized as the majority rule from the states in this context,[111] it could hold that the normal respondeat superior standard for tort liability also applies to the imposition of punitive damages.[112]

The Supreme Court might also wish to follow state common law to retain as much uniformity as possible between state law and general maritime law.[113] Under the so-called "saving to suitors" clause,[114] state courts are often called upon to resolve maritime tort

---

106. *See generally, e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553, 556–59 (1995).

107. *See, e.g.*, Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 28–29 (2004).

108. *See, e.g.*, United States v. Locke, 529 U.S. 89 (2000).

109. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2623–24 (2008).

110. *See, e.g.*, Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 838–39 (1996); E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65 (1986). This approach is admittedly less likely when the states themselves follow a wide range of different approaches. *See supra* notes 75–80 and accompanying text.

111. *See supra* note 76.

112. *See supra* notes 76–77 and accompanying text.

113. This approach is less likely when the states themselves follow a wide range of different approaches, thus making uniformity with the states impossible. *See supra* notes 81–87 and accompanying text. Moreover, the desire to obtain uniformity with state law must be balanced against the benefits (which are particularly strong in the maritime context) to obtain greater uniformity with the laws of other nations where ships travel.

114. 28 U.S.C. § 1333(1) (2006).

cases. To the extent that the two bodies of law are consistent, this can be done more efficiently.

Finally, the Court in the past has often looked to the Restatements (particularly the *Restatement (Second) of Torts*) as a source of maritime law.[115] The Court might similarly adopt the section 909(c) standard.[116]

I do not find any of these arguments favoring vicarious liability to be particularly persuasive. It is far more likely that a Justice would be persuaded that punitive damages serve a valuable function and that this function would be undermined if employers are not vicariously liable for punitive damages imposed as a result of employee misconduct. It is undoubtedly true that fewer plaintiffs would seek punitive damages if they could recover only from employees (who are less likely to have the resources to pay the damages).[117] Because punitive damages should focus on punishing the truly guilty, not over-compensating their victims,[118] I do not find this argument persuasive either. But if a Justice supported wider availability of punitive damages as a matter of policy, the arguments mentioned here might be used to justify the desired result.

D. Predictions

Any prediction about the future action of the Supreme Court is notoriously difficult.[119] If the Court is eager to resolve the vicarious liability issue soon, however, prediction may be at least somewhat easier. If the *Exxon* Court without Justice Alito was

---

115. *See, e.g.*, Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 132 (1997) (citing RESTATEMENT (SECOND) OF TORTS, *supra* note 81, § 924 cmt. d); Saratoga Fishing Co. v. J. M. Martinac & Co., 520 U.S. 875, 879 (1997) (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 cmt. d (Proposed Final Draft, Preliminary Version) (Oct. 18, 1996)); McDermott, Inc. v. AmClyde, 511 U.S. 202, 208–09 (1994) (citing RESTATEMENT (SECOND) OF TORTS, *supra* note 81, § 886A).

116. *See supra* notes 81–87 and accompanying text.

117. One must be careful not to overstate the significance of this common sense observation. Because an employer would in any event be liable for compensatory damages that result from its employee's egregious misconduct, *cf. supra* note 15 and accompanying text, one would expect plaintiffs to abandon otherwise meritorious suits only when little harm was done (meaning that compensatory damages would be too small to justify the suit) and it is clear that the employer was not itself at fault.

118. *Cf. supra* note 1 and accompanying text.

119. I doubt many observers would have predicted that Justice Thomas would write the opinion upholding punitive damages in *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009), particularly when the rest of the Court's conservative bloc was in dissent.

equally divided,[120] then Justice Alito would presumably have had the deciding vote if the issue had come before the Court during the 2008 Term (before Justice Souter's retirement). Because the issue has not yet returned to the Court, it will be necessary to speculate about the views not only of Justice Alito but also of at least Justice Souter and Justice Sotomayor.

Assuming that the *Exxon* Court was in fact equally divided,[121] it seems likely that four of the five Justices in the majority favored the *Amiable Nancy–Lake Shore* approach and that all three of the dissenting Justices would have rejected that approach. Of the five Justices in the majority, most observers would predict that Justice Souter would have been the most likely to have rejected the *Amiable Nancy–Lake Shore* approach.[122] Justice Sotomayor has not yet faced this issue in her judicial career,[123] but most observers would also predict that she would be more likely to reject the *Amiable Nancy–Lake Shore* approach. If all of these predictions are accurate,[124] and no one has a change of heart,[125] then Justice

120. It is at least possible that the Court was not as equally divided as it claimed. Under the procedural posture in *Exxon*, reversing the Ninth Circuit on the vicarious liability issue would have required a new trial in which the new jury would have been required to decide whether Exxon's own actions (as opposed to its captain's) were sufficiently blameworthy to justify punitive damages—a result that the Court may have hesitated to reach in such a high-profile case. Motivated by a desire to end the long-running litigation, one of the Justices who in fact opposed vicarious liability may have been willing to "switch sides" and resolve the case on the remaining issues, or the eight participating Justices may even have agreed to divide equally without taking a formal vote.

121. *Cf. supra* note 119.

122. The fact that Justice Souter wrote the majority opinion in *Exxon* offers some support for this view. If Chief Justice Roberts had perceived Justice Souter to be the "weak vote" in the case, he would have been more likely to assign the majority opinion to him to ensure that he did not change his vote after the opinions were circulated within the Court. Such a last-minute change would have deprived the majority of its essential fifth vote and resulted in the Ninth Circuit's entire judgment being affirmed by an equally divided Court.

123. Earlier in her judicial career, Justice Sotomayor participated in several cases in which punitive damages were at issue, e.g., Motorola Credit Corp. v. Uzan, 509 F.3d 74 (2d Cir. 2007), including at least one case in which she awarded punitive damages. *See* Linkers (Far East) Pte., Ltd. v. Int'l Polymers, Inc., No. 94 CIV. 9226 (SS), 1996 WL 412854, at *4–5 (S.D.N.Y. July 23, 1996).

124. Of course, if Justice Sotomayor accepts the *Amiable Nancy–Lake Shore* approach and Justice Souter did not, then there would be a majority for that approach regardless of Justice Alito's views. Conversely, if Justice Sotomayor rejects the *Amiable Nancy–Lake Shore* approach and Justice Souter accepted it, then there would be a majority for at least some form of vicarious liability regardless of Justice Alito's views.

125. It is entirely possible that one of the *Exxon* dissenters, although unwilling to see the company avoid punitive damages for the *Exxon Valdez* spill,

Alito would still have the deciding vote (until another member of the *Exxon* majority retires).

Justice Alito has not yet expressed his views on vicarious liability for punitive damages, but he has signaled his more general dislike of punitive damages. His dissent in *Townsend* bends over backwards to deny punitive damages in the context of maintenance and cure.[126] To justify that result, he would have expanded the reach of *Miles v. Apex Marine Corp.*[127] and taken a very restricted view of the history of punitive damages in maritime law.[128] The

---

might be willing to support the *Amiable Nancy–Lake Shore* approach in a different case. Justice Breyer (unlike the other two *Exxon* dissenters) agreed with the Court's general approach to limiting punitive damages, disagreeing only with the application of that approach to the specific facts. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2640 (2008) (Breyer, J., dissenting in part). It is instructive to note the basis for Justice Breyer's disagreement with the Court's result. He explained:

> [T]his was no mine-run case of reckless behavior. The jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case. Given that conduct, it was only a matter of time before a crash and spill like this occurred.

Id. The problem, of course, is that this rationale for rejecting the Court's result is inconsistent with the basis for the Court's opinion. The standard was not what "[t]he jury could reasonably have believed" but what the jury, following its instructions, actually found. If the jury had actually found that Exxon had "knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through [Prince William Sound]," then there would have been no question of vicarious liability.

If Justice Breyer dissented from the Court's ultimate holding because he believed (despite the absence of a jury finding) that the company itself had acted recklessly, it is plausible to imagine that this belief might also have influenced his views on the vicarious liability issue. Perhaps the *Amiable Nancy–Lake Shore* approach would be more appealing to him in a case in which he accepted that the employer was in fact innocent of any wrongdoing.

126. Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2575–79 (2009) (Alito, J., dissenting).

127. 498 U.S. 19 (1990). In *Miles*, the Court held that it would not recognize remedies under a cause of action that it had created under the general maritime law when Congress had not provided those remedies in prior analogous statutes. *See id.* at 30–36. Justice Alito argued that the Court should withhold a remedy that has long been recognized as available under the general maritime law because Congress subsequently provided an additional cause of action for the same wrong that in his view did not provide that remedy. *See Townsend*, 129 S. Ct. at 2575–79 (Alito, J., dissenting).

128. The central basis for the Court's holding in *Townsend* was that punitive damages have long been an available remedy at common law and under the general maritime law, and nothing in maritime law undermines the general rule in the context of maintenance and cure. *See Townsend*, 129 S. Ct. at 2569.

Townsend Court was, to be sure, facing a very different issue than the vicarious liability question that is our focus here. But it strikes me as extremely unlikely that a Justice who was so opposed to awarding punitive damages at all in that context (when the historical argument in their favor was strong enough to persuade Justice Thomas) would be sympathetic to holding an employer vicariously liable for punitive damages (when the Court's prior precedents point clearly in the opposite direction).

VIII. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES: THE FUTURE IN GENERAL LAW

Although I see no reason to predict any independent new developments on the subject under general tort law, it is quite plausible to believe that there may soon be new developments on vicarious liability for punitive damages in maritime law.[129] The Supreme Court seems to have been particularly fond of punitive damages cases in recent years,[130] and one of the best indications that the Court is likely to grant certiorari on a particular issue is that it previously agreed to decide that issue but was for some reason unable to resolve it.[131] But what influence would a Supreme

---

Indeed, lower court decisions from the relevant time "appear to contain at least some punitive element" in the maintenance and cure context. *Id.* Justice Alito, on the other hand, finds this reasoning "flawed" because none of the early decisions clearly award punitive damages in the maintenance and cure context. *See id.* at 2578–79 (Alito, J., dissenting). Yet he offers no reason to distinguish maintenance and cure from other maritime law contexts in which he does not dispute that punitive damages were available.

129. Even if the Supreme Court does not itself revisit the vicarious liability issue in the near future, the prominence given to the issue in *Exxon* may well bring the issue before the lower courts more frequently. And the Court's treatment of the issue may well encourage the lower courts to explore the issue more deeply.

130. In the two decades since *Browning-Ferris Industries of Vermont., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Supreme Court has agreed to hear over a dozen punitive damages cases. Although that is already a remarkable frequency, the pace seems, if anything, to be accelerating. In the last two terms, the Court has granted certiorari in three punitive damages cases. In addition to *Exxon Shipping Co. v. Baker* and *Atlantic Sounding Co. v. Townsend*, both of which are discussed above, the Court granted certiorari in *Philip Morris USA v. Williams*, 128 S. Ct. 2904 (2008) (granting certiorari to 176 P.3d 1255 (2008)), but dismissed the writ after oral argument.

131. *See, e.g.*, EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE § 6.31(b), at 480 (9th ed. 2007). The single biggest obstacle to the Court's deciding the vicarious liability question, it seems, is the availability of a

Court admiralty[132] decision on the subject have outside of the maritime field?

As a technical matter, such a decision would be binding only in future maritime cases.[133] It would not bind state or federal courts addressing punitive damages questions under state law—which is, of course, the context in which most punitive damages questions arise. As a practical matter, it seems unlikely that the lower courts would ignore the decision. A state supreme court considering whether a defendant is vicariously liable for a punitive damages award under state common law would be in essentially the same position as the United States Supreme Court in a maritime case (assuming that no statute is relevant). Even if such a state supreme court is not bound by the federal decision, it could still find the opinion persuasive and thus follow its reasoning as a matter of state common law.

If state courts do follow the federal precedent (when it is eventually decided), it would not be the first time that prominent decisions in admiralty have influenced the wider development of the law. Admiralty courts led the way, for example, in breaking down the old common law contributory negligence rule.[134] Judge Learned Hand's now-famous B<PL "formula"[135] was announced in *United States v. Carroll Towing Co.*,[136] an admiralty case. It now lies at the heart of negligence law in most states. The seminal decision for the economic loss rule in general tort law is *Robins Dry Dock & Repair Co. v. Flint*,[137] another admiralty case.

---

suitable case. Judging from the reported decisions in the lower courts, the issue does not arise that frequently.

132. For the Court to rule on the validity of vicarious liability for punitive damages as a matter of general principle, the case would almost certainly have to arise under maritime law. If a case arose under state law, the Court could address only the constitutionality of the state's rule—and the Court has already ruled that it does not violate due process to vicariously impose punitive damages on an employer. *See supra* notes 43–46 and accompanying text.

133. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (limiting holding to admiralty context).

134. *See generally, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408–09 (1953) (contrasting maritime law and common law contributory negligence rules).

135. The B<PL formula addresses whether particular conduct is negligent by asking whether the *burden* of precautions to avoid an accident (B) would have been less than the expected *loss* from the accident (L) discounted by the *probability* of the accident's occurrence (P).

136. 159 F.2d 169, 173 (2d Cir. 1947). A decade and a half earlier, Judge Hand had foreshadowed the B<PL formula in *The Glendola*, 47 F.2d 206 (2d Cir. 1931), another admiralty case.

137. 275 U.S. 303 (1927).

To take a more recent example, in the years before *The Bremen v. Zapata Offshore Co.*,[138] forum selection clauses were almost universally disfavored.[139] But *The Bremen* and two subsequent maritime decisions upholding forum selection clauses[140] have resulted in a complete sea change, ultimately persuading the courts of almost every state to routinely enforce forum selection clauses. Even though the *Bremen* Court explicitly limited its holding to federal courts sitting in admiralty,[141] lower courts applied the decision much more expansively.[142]

Even more recently, the Supreme Court's decision in *McDermott, Inc. v. AmClyde*[143] has defined how the legal system calculates the liability of nonsettling defendants in the context of joint and several liability after a plaintiff accepts a partial settlement in a case.[144] Prior to the Court's decision, views were sharply divided over whether the nonsettling defendants' liability should be calculated with reference to the jury's allocation of proportionate responsibility or by giving them a dollar-for-dollar credit for the amount of the settlement.[145] But once the *McDermott* Court chose the proportionate share approach, the legal system largely followed suit.[146]

---

138. *The Bremen*, 407 U.S. 1.

139. *See generally, e.g.*, Ingrid M. Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law*, 8 INT'L LAW. 83, 93–95 (1974); James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 11–13 (1976); Note, *Validity of Contractual Stipulation Giving Exclusive Jurisdiction to the Courts of One State*, 45 YALE L.J. 1150, 1150 & n.2 (1936).

140. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

141. *The Bremen*, 407 U.S. at 10.

142. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 293–96 (1988).

143. 511 U.S. 202 (1994).

144. *See, e.g.*, Martin Davies, McDermott v. AmClyde*: The Quiet Achiever—The Eighth Nicholas J. Healy Lecture on Admiralty Law—Admiralty's Greatest Hits May 3rd, 2007*, 39 J. MAR. L. & COM. 11, 11–12 (2008) (noting the influence of *McDermott v. AmClyde* "outside of maritime law").

145. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, *supra* note 81, § 886A (describing three alternative approaches—two of which involved a dollar-for-dollar credit for the settlement amount and one of which turned on the jury's allocation of proportionate responsibility—but declining to take a position on the issue).

146. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 16 cmt. c (2000) (arguing that the proportionate share approach is preferable and noting that the "United States Supreme Court, after thoroughly canvassing the respective advantages and disadvantages of these two systems, chose a comparative-share credit for Admiralty cases").

It is, of course, premature to predict how influential a hypothetical future Supreme Court decision may be. Many factors would undoubtedly influence the prediction. In the meantime, however, we may have some clue of what future developments might be in store when we see how state courts react to *Exxon*.[147] If state courts find *Exxon* an influential decision in limiting the size of punitive damages awards, it seems likely that they would also find an opinion accepting or rejecting the *Amiable Nancy–Lake Shore* approach to be influential.

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