

Making Sense of *Batterton*: The Supreme Court’s Shifting Treatment of Punitive Damages Under the General Maritime Law

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I. PROLOGUE

When Jeffrey invited me to speak at a faculty colloquium as a memorial to our late friend and colleague, David Robertson, I readily accepted. Before I had finished reading Jeffrey’s invitation, I already had a topic in mind. Although David thought and wrote about a wide range of topics over the course of his half-century-long career, the single subject on which he most frequently worked during the second half of that illustrious career was the availability of punitive damages for injured maritime workers. In addition to his academic writings on the topic,¹ he regularly sought to influence the courts directly through his advocacy.² Indeed, David’s last oral argument was on February 8, 2017, before the Ninth Circuit in a case addressing the availability of punitive damages in an action under the general maritime law for unseaworthiness³ — *Batterton v. Dutra Group*.⁴ David won that

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¹ See, e.g., David W. Robertson, *Punitive Damages in U.S. Maritime Law*: Miles, Baker, and Townsend, 70 LA. L. REV. 463 (2010); David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997).

² David’s most important briefs on the subject, in chronological order, were Petition for Writ of Certiorari, *Guevara v. Maritime Overseas Corp.*, 516 U.S. 1046, 1996 AMC 2999 (1996) (No. 95-676) (filed Oct. 24, 1995) (available at 1995 WL 17048156) (urging the Supreme Court to review *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1995 AMC 2409 (5th Cir. 1995) (en banc), and uphold the availability of punitive damages in maintenance-and-cure actions); Brief of American Association for Justice as Amicus Curiae in Support of Respondent, *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009) (No. 08-214) (filed Jan. 26, 2009) (available at 2009 WL 216164) (arguing in favor of the availability of punitive damages in maintenance-and-cure actions); En Banc Brief for Appellants, *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc) (No. 12-30714) (filed Mar. 26, 2014) (available at 2014 WL 1315283) (arguing in favor of the availability of punitive damages in unseaworthiness actions); Brief of Plaintiff-Appellee Christopher Batterton, *Batterton v. Dutra Group*, 880 F.3d 1089, 2018 AMC 1 (9th Cir. 2018) (No. 15-56775) (filed Jun. 17, 2016) (available at 2016 WL 3462980) (arguing in favor of the availability of punitive damages in unseaworthiness actions).

³ One of the memorial tributes to David tells the story of that last oral argument. See John R. Hillsman, *The Last Tango in Pasadena*, 43 TUL. MAR. L.J. xi, xii-xvi (2019). The video recording of the oral argument is available on the Ninth Circuit’s web site at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010915.

⁴ 880 F.3d 1089, 2018 AMC 1 (9th Cir. 2018), *rev’d*, 139 S. Ct. 2275, 2019 AMC 1521 (2019).

case in the Ninth Circuit, but on December 7, 2018, less than three weeks before David's death, the Supreme Court granted certiorari to review the decision.⁵

When I received Jeffrey's invitation, the Supreme Court had not yet heard oral argument in *Batterton*. Like many others (on both sides of the docket), I assumed that the Court would affirm the Ninth Circuit's decision, perhaps by the same 5-4 margin that we had seen when it ruled for the plaintiff in *Atlantic Sounding Co. v. Townsend*,⁶ but maybe by as much as a 7-2 margin (depending on whether Justices Gorsuch and Kavanaugh — who each replaced a conservative justice who had dissented in *Townsend* — followed the originalist approach that Justice Thomas had adopted in his *Townsend* majority opinion or the pro-business approach that Justice Alito had adopted in his *Townsend* dissent). When I accepted Jeffrey's invitation, I believed that *Batterton* would provide an ideal vehicle for a memorial tribute to David, a celebration of the Supreme Court's vindicating his views on a subject that was particularly near and dear to his heart.

Predicting Supreme Court decisions is often a risky business. Sometimes we are delighted when our predictions of an impending loss are wrong.⁷ I doubt that David (or many others in the plaintiffs' bar) expected the plaintiff to win in *Townsend*, and they were delighted when Justice Thomas adopted an originalist approach to uphold the availability of punitive damages in maintenance-and-cure actions under the general maritime law. But sometimes it goes the other way, and we are disappointed when our predictions of victory prove wrong. In *Batterton*, Justice Thomas switched sides, and joined Justice Alito's pro-business approach to deny punitive damages in unseaworthiness actions under the general maritime law. That untimely switch has accordingly redefined my faculty colloquium. Rather than a celebration, the tone will more closely resemble a post-mortem examination. But in keeping with the spirit of optimism that enabled David to persist for years before *Townsend*, I will include a note of hope for the views he advocated.

⁵ See *Dutra Group v. Batterton*, 39 S. Ct. 627 (2018) (granting cert. to 880 F.3d 1089, 2018 AMC 1 (9th Cir. 2018)).

⁶ 557 U.S. 404, 2009 AMC 1521 (2009).

⁷ In the Supreme Court Clinic, for example, I was delighted when our client, on the eve of oral argument, was able to settle *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 571 U.S. 1020 (2013) (dismissing cert. pursuant to Rule 46). I did not expect Justice Kennedy to provide the fifth vote to hold that disparate-impact claims are cognizable under the Fair Housing Act, 42 U.S.C. § 3604(a). But in *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), which the Court agreed to hear shortly after *Mount Holly* settled, he provided that fifth vote and wrote the majority opinion.

II. BACKGROUND

Punitive damages have attracted the modern Supreme Court's attention for three decades.⁸ In a flurry of constitutional decisions beginning with *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁹ the Court seemed to be searching for an opportunity to rein in what many believed were excessive punitive damages awards,¹⁰ but the narrow scope of the Court's constitutional review limited its ability to enforce any policy preferences that a majority of the justices might have favored.¹¹ Maritime cases would give the Court more freedom.

A. *Exxon Shipping Co. v. Baker*

Exxon Shipping Co. v. Baker,¹² addressing the punitive damages award against Exxon as a result of the *Exxon Valdez* oil spill, finally gave the Court the opportunity it may have been seeking. Because that case arose under the general maritime law, the justices were free to follow their own policy preferences with no deference to state law. Indeed, in its petition for certiorari, Exxon pitched the case as one in which the Court would

⁸ In an earlier era, the Supreme Court was already discussing punitive damages over two centuries ago. See *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818). In the intervening years, the Court continued to address punitive damages from time to time. See, e.g., *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101 (1893); *Barry v. Edmunds*, 116 U.S. 550 (1886); *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489 (1876); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1852). See also cases cited *infra* notes 175, 178-179, and accompanying text.

⁹ 492 U.S. 257 (1989). For earlier signals that the Court was interested in punitive damages, see, e.g., *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (declining to address claims that a punitive damages award violated the Due Process, Contract, and Excessive Fines Clauses because those claims were not raised and passed upon in the state court).

¹⁰ See *Williams v. Philip Morris, U.S.A.*, 549 U.S. 346 (2007); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Industries, Inc. v. Leatherman Tool Corp.*, 532 U.S. 424 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

¹¹ For Justices Scalia and Thomas, in particular, the posture of the constitutional cases constrained their freedom to express whatever views they might have had about punitive damages. Each of them believed that the Due Process Clause did not limit the size of punitive damages awards under state law. See, e.g., *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 429-430 (Thomas, J., dissenting); *Gore*, 517 U.S. at 599 (Scalia, J., joined by Thomas, J., dissenting).

¹² 554 U.S. 471, 2008 AMC 1521 (2008).

have the freedom to announce what it thought the law should be. The first page of the petition noted that the award in question was “[u]nlike all the other punitive awards [the] Court ha[d] reviewed” because the previous awards had arisen “under state law,” whereas the Court could now review an “award [that] is purely the product of judge-made federal law.”¹³ Moreover, the case “raise[d] important federal questions *not* limited to whether the amount exceeds the boundaries of due process.”¹⁴ The petition went on to explain that “federal judges have responsibility to declare and shape [maritime law] in the same manner that state courts declare and shape the common law of their states.”¹⁵ In short, the “[Supreme] Court is the ultimate arbiter” of maritime law, and *Baker* therefore provided an opportunity that the earlier constitutional cases had not.¹⁶

The Court recognized its opportunity. It began its analysis of the reasonability of the punitive damages award with the observation that it had “jurisdiction to decide [the issue] in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.”¹⁷ But in the end, the Court rejected Exxon’s arguments for radically restricting the availability of punitive damages in maritime law,¹⁸ and instead imposed a limit that appears very similar to the constitutional limit it had previously suggested in a state-law case. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court had declared that “[w]hen compensatory damages are substantial” (and the compensatory damages in *Baker*, which exceeded half a billion dollars, were unquestionably “substantial”) then “perhaps” punitive damages could not exceed the level of compensatory damages without “reach[ing] the outermost limit of the due process guarantee.”¹⁹ In *Baker*, the Court similarly ruled that punitive damages “in such maritime cases” should not exceed compensatory damages.²⁰ In explaining what “such” a case was, the Court commented on the lack of “intentional or malicious conduct, and without

¹³ Petition for a Writ of Certiorari at 1, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 2008 AMC 1521 (2008) (No. 07-219) (filed Aug. 20, 2007) (available at 2007 WL 2383784).

¹⁴ *Baker* Petition at 1.

¹⁵ *Baker* Petition at 2.

¹⁶ *Baker* Petition at 2.

¹⁷ 554 U.S. at 489-490; *see also, e.g.*, 554 U.S. at 501-502 (explaining how the maritime-law case before the Court differed from the previous state-law constitutional cases). Even the dissenters on the issue agreed that the Court had the power to announce new maritime law rules governing punitive damages, *see id.* at 522 (Stevens, J., concurring in part and dissenting in part); *id.* at 523 (Ginsburg, J., concurring in part and dissenting in part), even though they disagreed with the new rule that the majority adopted.

¹⁸ *See* [Exxon Brief in *Baker*] at ____.

¹⁹ 538 U.S. 408, 425 (2003).

²⁰ 554 U.S. at 513.

behavior driven primarily by desire for gain,” the magnitude of the harm (and thus the amount of the compensatory damages), and the likelihood that the fault would be discovered.²¹ In other words, the 1:1 ratio announced in *Baker* may well apply only in circumstances in which the constitutional limit would also require a 1:1 ratio. The *Baker* Court explicitly recognized that similarity, and quoted the relevant passage from *Campbell* in support of its conclusion.²² Its bottom line was that “[i]n this case, then, the constitutional outer limit may well be 1:1.”²³ In short, the Court may not have taken advantage of the increased freedom that it had under maritime law.

B. *Atlantic Sounding Co. v. Townsend*

The Supreme Court quickly had a second chance to address the availability of punitive damages under the general maritime law. In *Atlantic Sounding Co. v. Townsend*,²⁴ the Court was called on to resolve a circuit conflict on the availability of punitive damages for the “willful and wanton” failure to pay maintenance and cure to an injured seaman.²⁵ The en banc Fifth Circuit had ruled in *Guevara v. Maritime Overseas Corp.*²⁶ that punitive damages were categorically unavailable in maintenance-and-cure cases.²⁷ The court of appeals reached that conclusion through the following five steps:

- (1) Under the Supreme Court’s 1913 decision in *Michigan Central Railroad Co. v. Vreeland*,²⁸ the Federal Employers’ Liability Act (FELA),²⁹ which gave injured railroad

²¹ 554 U.S. at 514-515.

²² See 554 U.S. at 515 (quoting *Campbell*, 538 U.S. at 425).

²³ 554 U.S. at 513 n.28.

²⁴ 557 U.S. 404, 2009 AMC 1521 (2009).

²⁵ Under the general maritime law, an employer is required to pay maintenance (room and board) and cure (medical expenses) to an injured member of a vessel’s crew without regard to fault. See generally, e.g., *Warren v. United States*, 340 U.S. 523, 1951 AMC 416 (1951).

²⁶ 59 F.3d 1496, 1995 AMC 2409 (5th Cir. 1995) (en banc), cert. denied, 516 U.S. 1046, 1996 AMC 2999 (1996), overruled, *Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009).

²⁷ See also, e.g., *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1496, 1995 AMC 2022 (9th Cir. 1995), cert. denied, 516 U.S. 1046, 1996 AMC 2998 (1996), overruled, *Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009).

²⁸ 227 U.S. 59 (1913).

²⁹ 45 U.S.C. §§ 51-60. At common law, railroad workers — unlike seamen, see *The Osceola*, 189 U.S. 158, 175 (1903) — could sue their employers for negligence. See *infra* notes 163-166 and accompanying text. Those suits often failed because of the “unholy trinity” of affirmative defenses: assumption of risk, contributory negligence, and fellow servant. FELA gave railroad workers greater rights than they had at common law,

workers a statutory negligence cause of action against their employers, only “pecuniary”³⁰ damages are available.³¹

- (2) When Congress passed the Jones Act,³² it incorporated FELA by reference,³³ so injured seamen suing for negligence under the Jones Act can similarly recover only pecuniary damages.³⁴
- (3) Because punitive damages are non-pecuniary,³⁵ injured seamen cannot recover punitive damages under the Jones Act.³⁶
- (4) Under the Supreme Court’s 1990 decision in *Miles v. Apex Marine Corp.*,³⁷ an injured seaman cannot recover more under the general maritime law than could be recovered under the Jones Act under comparable circumstances.³⁸
- (5) Punitive damages are therefore unavailable in maintenance-and-cure actions under the general maritime law.³⁹

primarily by eliminating those three defenses, but also by creating a federal wrongful-death remedy. *See infra* notes 184-190 and accompanying text.

³⁰ It is unclear what is meant by “pecuniary” in this context. *See also infra* note 35.

³¹ *See Guevara*, 59 F.3d at ____.

³² 46 U.S.C. § 30104. The Jones Act gave injured seamen a statutory cause of action for negligence, thus partially overruling *The Osceola*, 189 U.S. at 175.

³³ *See Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924).

³⁴ *See Guevara*, 59 F.3d at ____.

³⁵ The assertion that punitive damages are non-pecuniary is controversial. *See, e.g.*, David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 LA. L. REV. 463, 473-475 (2010); David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, ____ (1997).

³⁶ *See Guevara*, 59 F.3d at ____.

³⁷ 498 U.S. 19 (1990).

³⁸ *See Guevara*, 59 F.3d at ____.

³⁹ *See Guevara*, 59 F.3d at ____.

In reaching that conclusion, the Fifth Circuit also overruled prior decisions⁴⁰ holding that punitive damages are available in unseaworthiness actions on the ground that unseaworthiness and maintenance-and-cure actions, both of which arise under the general maritime law, were indistinguishable for purposes of the *Miles* analysis.⁴¹

When the Eleventh Circuit adhered to pre-*Miles* decisions⁴² upholding an injured seaman's right to seek punitive damages for the willful and wanton failure to pay maintenance and cure,⁴³ the Supreme Court granted certiorari to resolve the conflict. Many in the plaintiffs' bar pessimistically assumed that the Court had agreed to hear the case so that it could exercise its power as an admiralty court to categorically bar a category of punitive damages claims under the general maritime law. But once again the Court declined the opportunity to rein in punitive damages.

Justice Thomas wrote the majority opinion for a 5-4 Court in *Townsend* affirming the Eleventh Circuit. His reasoning process was completely different than the Fifth Circuit's *Guevara* approach. The analysis began by documenting how "[p]unitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct."⁴⁴ That general common-law rule "extended to claims arising under federal maritime law."⁴⁵ "Although punitive damages awards were rarely upheld on judicial review, . . . that fact does not draw into question the basic understanding that punitive damages were considered an available maritime remedy."⁴⁶ And "[n]othing in maritime law undermines the applicability of this general rule in the maintenance and cure context."⁴⁷ The only plausible statutory basis for departing from the common-law rule was the Jones Act, "but it did not eliminate pre-existing remedies available to seamen for the

⁴⁰ See, e.g., *In re: Merry Shipping, Inc.*, 650 F.2d 622, 1981 AMC 2839 (5th Cir. Unit B 1981).

⁴¹ See *Guevara*, 59 F.3d at 1504 ("[E]ven though *Merry Shipping* dealt with punitive damages in an unseaworthiness context, the analysis . . . was wholly applicable to maintenance and cure cases as well . . ."), *id.* at 1507 n.10 (explaining why the result in a maintenance-and-cure case should be the same as in an unseaworthiness case).

⁴² See, e.g., *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1988 AMC 1721 (11th Cir. 1987).

⁴³ See *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282, 2007 AMC 2009 (11th Cir. 2007), *aff'd*, 557 U.S. 404, 2009 AMC 1521 (2009).

⁴⁴ *Townsend*, 557 U.S. at 409.

⁴⁵ *Townsend*, 557 U.S. at 411.

⁴⁶ *Townsend*, 557 U.S. at 412 n.2.

⁴⁷ *Townsend*, 557 U.S. at 412.

separate common-law cause of action based on a seaman's right to maintenance and cure."⁴⁸

The *Townsend* Court rejected the defendant employer's argument, based directly on the Fifth Circuit's decision in *Guevara*, that *Miles* limited the availability of punitive damages under the general maritime law, including in maintenance-and-cure cases. That "reading of *Miles* [wa]s far too broad."⁴⁹ The *Miles* Court did not address maintenance and cure or punitive damages; it was focused on "whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness."⁵⁰ Prior to the Jones Act, the general maritime law had not recognized any cause of action for wrongful death.⁵¹ *Miles* recognized that new cause of action in the unseaworthiness context, but in deciding what remedies should be available it looked to the remedies that Congress had provided by statute in comparable circumstances. In that limited respect, "[t]he reasoning of *Miles* remains sound."⁵² But *Miles* did not apply in *Townsend* because "both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act."⁵³ "The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action."⁵⁴

The *Townsend* Court's analysis relied heavily on the availability of punitive damages at common law⁵⁵ and "the basic understanding that punitive damages were considered an available maritime remedy," even if they "were rarely upheld on judicial review,"⁵⁶ but it did not rely heavily on any history of actual awards of punitive damages in maintenance-and-cure cases. The most the Court could say was that "the failure of a vessel owner to provide proper medical care for seamen has provided the impetus for damages awards that appear to contain at least some punitive element."⁵⁷ In support, it

⁴⁸ *Townsend*, 557 U.S. at 415-416.

⁴⁹ *Townsend*, 557 U.S. at 419.

⁵⁰ *Townsend*, 557 U.S. at 419.

⁵¹ See *The Harrisburg*, 119 U.S. 199 (1886). The Supreme Court finally recognized a wrongful-death cause of action under the general maritime law (and overruled *The Harrisburg*) in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 1970 AMC 967 (1970). Prior to 1920, the only causes of action for wrongful death in the maritime context were under state law.

⁵² *Townsend*, 557 U.S. at 420.

⁵³ *Townsend*, 557 U.S. at 420.

⁵⁴ *Townsend*, 557 U.S. at 424.

⁵⁵ *Townsend*, 557 U.S. at 409-410; see *supra* note 44 and accompanying text.

⁵⁶ *Townsend*, 557 U.S. at 412 n.2; see *supra* notes 45-46 and accompanying text.

⁵⁷ *Townsend*, 557 U.S. at 414.

cited two district court decisions — *The City of Carlisle*⁵⁸ and *The Troop*.⁵⁹ The Court admitted that those early cases “do not definitively resolve the question of punitive damages availability in such cases,” but it treated them as illustrations confirming the general rule permitting punitive damages in maritime cases.⁶⁰

Because nothing in *Miles* or the Jones Act would preclude the availability of punitive damages for the withholding of maintenance-and-cure payments, the *Townsend* Court did not address the argument that punitive damages are unavailable under the Jones Act.⁶¹ The general maritime law permitted punitive damages for the withholding of maintenance-and-cure payments regardless of whether they were available under the Jones Act.

Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Kennedy, dissented. He recognized the power of the Court “to continue the development of maritime law ‘in the manner of a common law court.’”⁶² But in exercising that power, he argued that the Court should follow the broad reading of *Miles* that the Fifth Circuit had adopted in *Guevara*. Because a maintenance-and-cure claim justifying punitive damages would necessarily involve the employer’s serious fault, the seaman’s claim could be brought under the general maritime law or the Jones Act.⁶³ “The *Miles* uniformity principle therefore weighs strongly in favor of a rule that applies uniformly under general maritime law and the Jones Act.”⁶⁴

Because Justice Alito would not permit the general maritime law to award more than the Jones Act, he needed to address the question (which the majority had avoided⁶⁵) whether punitive damages were available under the Jones Act. Relying primarily on dicta in two Supreme Court FELA cases and one Jones Act case addressing compensatory damages, he concluded that it was “reasonable to assume that only compensatory damages may be recovered under the Jones Act.”⁶⁶

⁵⁸ 39 F. 807, 809, 810-812, 817 (D. Ore. 1889).

⁵⁹ 118 F. 769, 770-771, 773 (D. Wash. 1902).

⁶⁰ *Townsend*, 557 U.S. at 414 n.4.

⁶¹ *Townsend*, 557 U.S. at 424 n.12.

⁶² *Townsend*, 557 U.S. at 425 (Alito, J., dissenting) (quoting *Baker*, 554 U.S. at 489-490).

⁶³ *Townsend*, 557 U.S. at 426-427 (Alito, J., dissenting).

⁶⁴ *Townsend*, 557 U.S. at 427 (Alito, J., dissenting).

⁶⁵ See *Townsend*, 557 U.S. at 424 n.12; see also *supra* note 61 and accompanying text.

⁶⁶ *Townsend*, 557 U.S. at 428 (Alito, J., dissenting).

Justice Alito also challenged the Court’s reasoning in two other respects. He recognized that “the Jones Act was not meant to preclude general maritime claims or remedies,” but he argued that the Jones Act still permitted “the development of general maritime law by the courts.”⁶⁷ And the courts should be guided by Congress in that development. Because Congress, in his view, did not permit punitive damages under the Jones Act, the courts should follow that example under the general maritime law.⁶⁸ Justice Alito also challenged the Court’s discussion of the history. He did not find two “obscure” cases to be sufficient evidence that punitive damages were available for the withholding of maintenance and cure prior to the Jones Act, and he did not agree that the two cases on which the Court relied necessarily included an award of punitive damages.⁶⁹ Other cases cited by the plaintiff and a supporting amicus — cases on which the Court chose not to rely — were even weaker.⁷⁰ “In sum, the search for maintenance and cure cases in which punitive damages were awarded yields strikingly slim results. The cases found are insufficient in number, clarity, and prominence to justify departure from the *Miles* uniformity principle.”⁷¹

C. The Lower Courts’ Reaction to *Townsend* — *McBride* to *Batterton*

The Supreme Court’s decision in *Townsend* settled one question: punitive damages are available under the general maritime law for the “willful and wanton disregard of the maintenance and cure obligation.”⁷² But *Townsend* expressly left open the question whether punitive damages are available under the Jones Act⁷³ and it did not address whether punitive damages are available for a breach of the vessel owner’s warranty of seaworthiness.

⁶⁷ *Townsend*, 557 U.S. at 429 (Alito, J., dissenting).

⁶⁸ *Townsend*, 557 U.S. at 429 (Alito, J., dissenting).

⁶⁹ *Townsend*, 557 U.S. at 429-431 (Alito, J., dissenting). Even the Court seemed unsure whether the two cited cases actually included an award of punitive damages. It conceded that “these cases do not refer to ‘punitive’ or ‘exemplary’ damages,” but relied on the fact that “scholars have characterized the awards authorized by these decisions as such.” 557 U.S. at 414 n.3 (citing David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 103-105 (1997); Paul Edelman, *Guevara v. Maritime Overseas Corp.: Opposing the Decision*, 20 TUL. MAR. L.J. 349, 351 & n.22 (1996)). The Court claimed only that the two cases “appear to contain at least some punitive element.” 557 U.S. at 414; *see also supra* notes 57-60 and accompanying text.

⁷⁰ *Townsend*, 557 U.S. at 431 (Alito, J., dissenting).

⁷¹ *Townsend*, 557 U.S. at 431 (Alito, J., dissenting).

⁷² *Townsend*, 557 U.S. at 424.

⁷³ *See Townsend*, 557 U.S. at 424 n.12; *see also supra* note 61 and accompanying text.

Before *Townsend*, most lower courts had held that punitive damages are not available under the Jones Act.⁷⁴ Those decisions can all be traced back to the Sixth Circuit's questionable decision in *Kozar v. Chesapeake & Ohio Railway Co.*,⁷⁵ which held that punitive damages are not available under FELA. No appellate court revisited the issue in light of *Townsend* until the en banc Fifth Circuit was required to address it in conjunction with an unseaworthiness claim.⁷⁶

On the unseaworthiness issue, district courts initially took conflicting positions.⁷⁷ Ultimately, three appellate courts set the stage for the Supreme Court's resolution of the issue in *Dutra Group v. Batterton*.⁷⁸ The Fifth Circuit was the first, ultimately going en banc to deny punitive damages in unseaworthiness cases in *McBride v. Estis Well Service, L.L.C.*⁷⁹ Then in *Tabingo v. American Triumph LLC*,⁸⁰ the Washington Supreme Court unanimously reached the opposite conclusion. Finally, the Ninth Circuit, in *Batterton v. Dutra Group*,⁸¹ also held that punitive damages are available in an unseaworthiness case.

In *McBride*, four workers were injured (one fatally) when a drilling rig on a barge collapsed. The ensuing actions under the Jones Act and the unseaworthiness doctrine were consolidated for trial. When the district court dismissed the plaintiffs' claims for punitive damages,⁸² it certified the decision for immediate appeal and the Fifth Circuit agreed to

⁷⁴ See, e.g., *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1454-59 (6th Cir. 1993); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984).

⁷⁵ 449 F.2d 1238, 1240-43 (6th Cir. 1971). The Sixth Circuit based its conclusion on the remarkable assertion that “the right to recover punitive damages at common law” was not “a ‘common law remedy.’” 449 F.2d at 1240. That assertion was simply wrong. In *Townsend*, the Supreme Court explicitly described punitive damages as “an available remedy at common law,” 557 U.S. at 409; “an available maritime remedy,” *id.* at 411, 412 n.2; a “remedy . . . well established before the passage of the Jones Act,” *id.* at 420; a “general maritime remedy,” *id.* at 422; and “an accepted remedy under general maritime law,” *id.* at 424. Simply put, it is no longer possible to dismiss punitive damages on the ground that they are not a “remedy.”

⁷⁶ See *infra* note 88 and accompanying text.

⁷⁷ Compare, e.g., _____ with, e.g., _____.

⁷⁸ 139 S. Ct. 2275, 2019 AMC 1521 (2019).

⁷⁹ 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc).

⁸⁰ 188 Wash. 2d 41, 391 P.3d 434, 2017 AMC 1139 (Wash. 2017).

⁸¹ 880 F.3d 1089, 2018 AMC 1 (9th Cir. 2018), *rev'd*, 139 S. Ct. 2275, 2019 AMC 1521 (2019).

⁸² See *McBride v. Estis Well Service, L.L.C.*, 872 F. Supp. 2d 511, 2012 AMC 1674 (W.D. La. 2012), *aff'd*, 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc).

hear the case.⁸³ A three-judge panel initially reversed and remanded. Applying the Supreme Court's *Townsend* analysis, it ruled that punitive damages are available in an action for unseaworthiness,⁸⁴ and thus it was unnecessary to decide whether they were also available under the Jones Act.⁸⁵ The full court then granted en banc review and, rejecting the panel's analysis, affirmed the district court's judgment.⁸⁶ A seven-judge plurality, focusing on the one wrongful-death claim, reasoned that it was "on all fours" with the facts in *Miles*,⁸⁷ and that *Townsend* was distinguishable. It read *Miles* broadly to cover punitive damages, concluded that punitive damages are unavailable under the Jones Act,⁸⁸ and therefore found punitive damages unavailable at least in wrongful-death cases. The plurality then disposed of the personal-injury claims in a single sentence: "Appellants have suggested no reason this holding and analysis would not apply equally to the plaintiffs asserting claims for personal injury."⁸⁹ Two judges concurred in the judgment, agreeing with the plurality's analysis of the wrongful-death claim but rejecting the *Miles* analysis for the personal-injury claims.⁹⁰ Six judges (including the three judges on the original panel) dissented, arguing that *Townsend* was controlling.⁹¹ The Supreme Court denied

⁸³ See 28 U.S.C. § 1292(b).

⁸⁴ *McBride v. Estis Well Service, L.L.C.*, 731 F.3d 505, 513-518, 2013 AMC 2409 (5th Cir. 2013), *superseded*, 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc).

⁸⁵ 731 F.3d at 518 n.16.

⁸⁶ See *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc).

⁸⁷ 768 F.3d at 386.

⁸⁸ 768 F.3d at 388, 390-391.

⁸⁹ 768 F.3d at 391.

⁹⁰ 768 F.3d at 401-404 (Haynes, J., concurring in the judgment).

⁹¹ 768 F.3d at 404-419 (Higginson, J., dissenting); *see also* 768 F.3d at 419-424 (Graves, J., dissenting) (joining Judge Higginson's dissent in full but writing separately to explain why the plurality's wrongful-death analysis does not extend to the personal-injury claims).

certiorari.⁹² Some district courts followed *McBride*,⁹³ but the focus quickly shifted to two appellate courts on the west coast.

In *Tabingo*, a deckhand trainee was injured while working aboard a fishing trawler when a hatch closed on his hand, leading to the amputation of two fingers. In the ensuing litigation, he sought punitive damages on his unseaworthiness claim. The trial court, following the Fifth Circuit's en banc decision in *McBride*, dismissed the punitive damages claim,⁹⁴ and the plaintiff appealed to the Washington Supreme Court. That Court, applying the federal Supreme Court's three-part test from *Townsend*, unanimously reversed. Both the unseaworthiness cause of action and the punitive damages remedy existed before the Jones Act, and nothing in the Jones Act deprives injured seamen of their pre-existing rights.⁹⁵ The court declined to follow *McBride* because its "rationale misinterprets both *Miles* and its interaction with *Townsend*."⁹⁶ The defendant petitioned for certiorari, but the federal Supreme Court denied the petition,⁹⁷ presumably because it lacked jurisdiction to review a state court's interlocutory decision.⁹⁸ After the Ninth Circuit's decision in

⁹² In fact, the Supreme Court twice denied certiorari. Directly after the Fifth Circuit's en banc decision on the interlocutory appeal, three of the plaintiffs petitioned for Supreme Court review. (The fourth had settled his claim before the panel's decision. See 731 F.3d at 507 n.2.) The Court denied that petition. *McBride v. Estis Well Service*, 135 S. Ct. 1310 (2015). The case then returned to the district court for trial, where the two remaining plaintiffs recovered substantial damages. (Another plaintiff had already settled by then.) The defendant then appealed that judgment to the Fifth Circuit, and the two remaining plaintiffs cross-appealed to preserve the punitive damages issue for Supreme Court review. The Fifth Circuit affirmed the award, *McBride v. Estis Well Service*, 853 F.3d 777, 2017 AMC 945 (5th Cir. 2017), explaining in a footnote that it was bound by the earlier en banc decision on the cross-appeal, 853 F.3d at 780 n.1. One personal-injury plaintiff petitioned for Supreme Court review, and the Court denied that petition. *Touchet v. Estis Well Service*, 138 S. Ct. 644 (2018). That decision may well have been influenced by the defendant's refusal — despite an order from the Court — to file a response to the petition. See David W. Robertson, Michael F. Sturley & Matthew H. Ammerman, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 43 TUL. MAR. L.J. 367, 379-380 (2019).

⁹³ See, e.g., *In re: Brennan Marine, Inc.*, 123 F. Supp. 3d 1134, 1142-45 (D. Minn. 2015).

⁹⁴ *Tabingo v. American Triumph LLC*, 2016 WL 6407582 (Wash. Super. Feb. 22, 2016) (No. 15-2-17089-9).

⁹⁵ *Tabingo*, 391 P.3d at ____, 2017 AMC at 1142-46.

⁹⁶ *Tabingo*, 391 P.3d at ____, 2017 AMC at 1147.

⁹⁷ *American Triumph LLC v. Tabingo*, 138 S. Ct. 648 (2018).

⁹⁸ See 28 U.S.C. § 1257; see also Robertson, Sturley & Ammerman, *supra* note 92, at 379-380.

Batterton,⁹⁹ the *Tabingo* parties concluded a “high-low” settlement, pursuant to which the plaintiff would be entitled to a lower amount if the Supreme Court reversed the Ninth Circuit or a higher amount if the Supreme Court denied certiorari or affirmed in *Batterton*.

Batterton, like *Tabingo*, also involved a deckhand who was injured by a hatch cover. Dutra employed Christopher Batterton on its vessel, the *SCOW 3*, in waters off the California coast. When a hatch cover blew open as a result of pressurized air that had been allowed to build up in the compartment below, it crushed his left hand, leaving him permanently disabled and in need of ongoing medical care. He sued Dutra in federal district court (rather than state court¹⁰⁰), alleging negligence under the Jones Act,¹⁰¹ breach of the duty to provide maintenance and cure, and breach of the duty to provide a seaworthy vessel. On the unseaworthiness count, he alleged that Dutra “willfully, wantonly and callously breached the [] warranty of seaworthiness” and requested punitive damages.¹⁰²

Relying on *Miles*, Dutra moved to strike or dismiss the request for punitive damages. The district court denied the motion, following Ninth Circuit precedent holding that “punitive damages are available in unseaworthiness claims under general maritime law.”¹⁰³ The district court then certified the issue for immediate appeal under 28 U.S.C. § 1292(b), and the Ninth Circuit accepted the interlocutory appeal.

The Ninth Circuit affirmed. It explained that it was bound by its prior decision in *Evich v. Morris*,¹⁰⁴ which “squarely held that ‘[p]unitive damages are available under general maritime law for claims of unseaworthiness’”¹⁰⁵ Rejecting Dutra’s argument that *Miles* had overruled *Evich*, the court reasoned that limitations on recoveries by family members for wrongful death, which the *Miles* Court addressed, have no application to general-maritime-law claims by living seamen for injuries to themselves.¹⁰⁶ In addition,

⁹⁹ See *infra* notes 100-112 and accompanying text.

¹⁰⁰ If Batterton had filed suit in state court, the U.S. Supreme Court would not have had jurisdiction to review the case until after final judgment. See 28 U.S.C. § 1257. Because he did not have a strong case on the facts for punitive damages, it is unlikely that any punitive damages would actually have been awarded, and thus it is unlikely that the U.S. Supreme Court would ever have had an opportunity to review the punitive damages issue.

¹⁰¹ 46 U.S.C. § 30104.

¹⁰² Batterton did not seek punitive damages on the Jones Act count. The Ninth Circuit had previously held that punitive damages are unavailable under the Jones Act. See *Kopczynski*, 742 F.2d at 560-561.

¹⁰³ See *Evich v. Morris*, 819 F.2d 256, 1988 AMC 74 (9th Cir. 1987).

¹⁰⁴ 819 F.2d 256, 1988 AMC 74 (9th Cir. 1987).

¹⁰⁵ *Batterton*, 880 F.3d at 1091 (quoting *Evich*, 819 F.2d at 258).

¹⁰⁶ 880 F.3d at 1096.

the court questioned the premise that rejecting recovery of non-pecuniary damages should necessarily preclude punitive damages. “[I]t is not apparent,” the court stated, “why barring damages for loss of society” — a form of compensatory damages — “should also bar punitive damages.”¹⁰⁷ “That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners and operators deserve punishment for callously disregarding the safety of seamen.”¹⁰⁸ The Ninth Circuit also held that, under *Townsend*, it would reach the same conclusion that *Evich* did, even if *Evich* were not binding. The court of appeals cited the *Townsend* Court’s recognition that, “[h]istorically, punitive damages have been available and awarded in general maritime actions”¹⁰⁹ and that “‘nothing in *Miles* or the Jones Act eliminates that availability.’”¹¹⁰ Because “[u]nseaworthiness is a general maritime action long predating the Jones Act,”¹¹¹ the court saw “no persuasive reason to distinguish maintenance and cure actions” addressed in *Townsend* “from unseaworthiness actions with respect to the damages awardable.”¹¹² In light of *Townsend*, the Ninth Circuit perceived no inconsistency between permitting punitive damages for unseaworthiness claims and denying them for Jones Act claims.

The Supreme Court, after having denied petitions raising precisely this issue three times in the previous four years,¹¹³ granted certiorari in *Batterton* on December 7, 2018, heard oral argument on March 25, 2019, and announced its decision on June 24, 2019.

III. THE SUPREME COURT’S DECISION IN *BATTERTON*

By a 6-3 vote, the Supreme Court reversed the Ninth Circuit. Writing for the majority, Justice Alito noted that, as this was an admiralty case, the Court sat “‘in the manner of a common law court.’”¹¹⁴ When Congress has not prescribed specific rules, the federal courts must develop the general maritime law to govern the situation. But in deciding how to develop the general maritime law, he claimed, the courts should look to Congress for guidance.¹¹⁵ He characterized *Townsend* as a departure from Congress’s

¹⁰⁷ 880 F.3d at 1094.

¹⁰⁸ 880 F.3d at 1094.

¹⁰⁹ 880 F.3d at 1091, 1095, 1096 n.78 (each time quoting *Townsend*, 557 U.S. at 407).

¹¹⁰ 880 F.3d at 1095, 1096 n.78 (each time quoting *Townsend*, 557 U.S. at 407).

¹¹¹ 880 F.3d at 1095.

¹¹² 880 F.3d at 1096.

¹¹³ See *supra* notes 92, 97-98 and accompanying text.

¹¹⁴ 139 S. Ct. at 2278 (quoting *Baker*, 554 U.S. at 489-490).

¹¹⁵ 139 S. Ct. at 2278 (citing *Miles*).

policies justified by “centuries of relevant case law.”¹¹⁶ Punitive damages were unavailable in *Batterton* “[b]ecause there is no historical basis for allowing punitive damages in unseaworthiness actions.”¹¹⁷

Justice Alito made a number of arguments in favor of his conclusion. “[U]nseaworthiness . . . grew out of causes of action unrelated to personal injury,”¹¹⁸ and it was not until “the late 1940s” that “the Court transformed the old claim of unseaworthiness . . . into a strict-liability claim.”¹¹⁹ Claims under the Jones Act and the doctrine of unseaworthiness are substantially alternative remedies for the same injury.¹²⁰ There is no evidence that punitive damages were historically awarded for unseaworthiness.¹²¹ Punitive damages are not available under the Federal Employers’ Liability Act (FELA)¹²² or the Jones Act.¹²³ And as a matter of policy, punitive damages are not justified in unseaworthiness actions. Vessel owners already have adequate incentives to ensure that their vessels are seaworthy.¹²⁴ “Allowing punitive damages on unseaworthiness claims would also create bizarre disparities in the law.”¹²⁵ Punitive damages would be available for personal-injury claims but not for wrongful-death claims

¹¹⁶ 139 S. Ct. at 2278; *see also id.* at 2282 (noting “the established history of awarding punitive damages for . . . maintenance and cure”). A decade before, Justice Alito had argued strenuously that history provided virtually no support for the availability of punitive damages in the maintenance and cure context. *See Townsend*, 557 U.S. at 430-431 (Alito, J., dissenting); *see also supra* notes 69-71 and accompanying text.

¹¹⁷ 139 S. Ct. at 2278.

¹¹⁸ 139 S. Ct. at 2279.

¹¹⁹ 139 S. Ct. at 2281. It is unclear why a post-1920 “transform[ation] . . . of unseaworthiness . . . into a strict-liability claim” could possibly be relevant in the present context. As Justice Alito himself clearly explained a decade earlier, “the prevailing rule in American courts does not permit punitive damages without a showing of fault.” *Townsend*, 557 U.S. at 427 (Alito, J., dissenting). Thus any unseaworthiness claim in which punitive damages might be awarded would be one in which the defendant was at fault (indeed, seriously at fault). *Cf. id.* (making essentially the same point in the maintenance-and-cure context). Punitive damages could not be awarded when a defendant was liable for unseaworthiness on a strict-liability/no-fault basis.

¹²⁰ 139 S. Ct. at 2282; *see also id.* at 2286 (“a claim for unseaworthiness . . . serves as a duplicate and substitute for a Jones Act claim”).

¹²¹ 139 S. Ct. at 2283-84.

¹²² 45 U.S.C. §§ 51-60.

¹²³ 139 S. Ct. at 2284-85.

¹²⁴ 139 S. Ct. at 2286-87.

¹²⁵ 139 S. Ct. at 2287.

(based on the assertion that *Miles* bars punitive damages for wrongful-death claims).¹²⁶ Punitive damages would be available against a vessel owner but not against the vessel operator, who in fact has more control over the condition of the vessel.¹²⁷ Punitive damages would be available in the United States but not in civil-law countries, which “would place American shippers [*sic*; presumably “shipowners” or “carriers” was intended] at a significant competitive disadvantage and would discourage foreign-owned vessels from employing American seamen.”¹²⁸

Justice Ginsburg, joined by Justices Breyer and Sotomayor, dissented. She carefully analyzed the Court’s prior decisions in *Miles* and *Townsend*, explained why nothing in *Miles* precluded punitive damages for unseaworthiness,¹²⁹ and applied the framework in *Townsend* to conclude that punitive damages should be available in an unseaworthiness action.¹³⁰ Although she did not address whether punitive damages are available under the Jones Act,¹³¹ she argued that nothing in the Jones Act precludes an award of punitive damages in an unseaworthiness case.¹³² Finally, she disagreed with the majority’s policy arguments. She saw no evidence that punitive damages would interfere with maritime commerce, and she did not consider the majority’s asserted “disparities” to be “bizarre.”¹³³ “If there is any ‘bizarre disparit[y],’ it is the one the Court today creates: Punitive damages are available for willful and wanton breach of the duty to provide maintenance and cure, but not for similarly culpable breaches of the duty to provide a seaworthy vessel.”¹³⁴

IV. ANALYSIS OF THE SUPREME COURT’S DECISION IN *BATTERTON*

Batterton undoubtedly represents a retreat from the Court’s decision in *Townsend*. While the *Batterton* majority adhered to the narrow holding in *Townsend* — punitive damages are still available in the maintenance-and-cure context — important aspects of the *Townsend* reasoning are now questionable. Most obviously, the *Townsend* Court put the

¹²⁶ 139 S. Ct. at 2287.

¹²⁷ 139 S. Ct. at 2287.

¹²⁸ 139 S. Ct. at 2287. It might be interesting to see how many U.S. seamen are employed on foreign-owned vessels now that the Supreme Court has freed those foreign employers from the specter of punitive damages for unseaworthiness.

¹²⁹ 139 S. Ct. at 2289-90 (Ginsburg, J., dissenting).

¹³⁰ 139 S. Ct. at 2290-93 (Ginsburg, J., dissenting).

¹³¹ In a footnote, Justice Ginsburg suggested that the availability of punitive damages under the Jones Act was still an open question. See 139 S. Ct. at 2291 n.5 (Ginsburg, J., dissenting).

¹³² 139 S. Ct. at 2291-93 (Ginsburg, J., dissenting).

¹³³ 139 S. Ct. at 2293 (Ginsburg, J., dissenting).

¹³⁴ 139 S. Ct. at 2293 (Ginsburg, J., dissenting).

burden on the party seeking to deny a traditional common-law remedy — the defendant — to show that the remedy was unavailable in the particular context.¹³⁵ The *Batterton* Court instead put the burden on the party asserting the traditional remedy — the plaintiff — to show that it had previously been awarded in the particular context.¹³⁶ That shift in the burden was dispositive.¹³⁷ Dutra offered no evidence to support the assertion that punitive damages were not available in unseaworthiness actions, and the Court did not cite any pre-Jones Act decisions holding that punitive damages were categorically unavailable in unseaworthiness actions. If the Court had applied the *Townsend* burden, it would have reached the opposite conclusion.

Batterton similarly rejected *Townsend*'s narrow reading of *Miles*. *Townsend* had explicitly rejected the defendant's broad reading (which had tracked the Fifth Circuit's *Guevara* approach), and instead limited *Miles* to cases in which the Court was deciding which remedies would be available for a new cause of action.¹³⁸ It declared that "[t]he laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action."¹³⁹ *Batterton* gave *Miles* a much broader reading, using it to limit the available remedies for an established cause of action. The *Batterton* majority seemed much more comfortable with a lowest-common-denominator approach.

It is no surprise that Justice Alito would be willing to jettison the *Townsend* framework in favor of a more business-friendly approach. He wrote a vigorous dissent in *Townsend*, and would probably have been happy to overrule it entirely. Maybe Chief Justice Roberts, who joined the *Townsend* dissent, and Justices Gorsuch and Kavanaugh, who were not on the Supreme Court when *Townsend* was decided, would also have been willing to overrule *Townsend*. But Justice Thomas's vote was most likely needed to form the majority,¹⁴⁰ and he was presumably unwilling to overrule a decision in which he had

¹³⁵ See 557 U.S. at 414-415 ("there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule"), 418 ("[Defendants] do not . . . identify any cases establishing that [punitive] damages were historically unavailable for breach of the duty of maintenance and cure.").

¹³⁶ See 139 S. Ct. at 2283-84 (discussing and rejecting plaintiff's arguments that punitive damages were available before 1920 in unseaworthiness cases without addressing any evidence whatsoever that punitive damages were not available).

¹³⁷ Cf. 139 S. Ct. at 2284 ("The lack of punitive damages in traditional maritime law cases is practically dispositive.").

¹³⁸ *Townsend*, 557 U.S. at 419; see *supra* note 49 and accompanying text.

¹³⁹ 557 U.S. at 424.

¹⁴⁰ Like Justices Gorsuch and Kavanaugh, Justice Kagan joined Justice Alito's majority opinion in *Batterton* and was not on the Supreme Court when *Townsend* was decided. (She was the Solicitor General when *Townsend* was decided.) But it seems less likely that she would have been willing to overrule *Townsend*. Indeed, it seems unlikely

written the majority opinion. The great mystery is why he was willing to largely abandon his originalist approach and join an opinion that implicitly rejected the framework that he had established in *Townsend*.

One explanation for Justice Thomas’s change of position may be that Justice Alito’s *Batterton* opinion does not fully correspond to the reasoning that actually produced the decision. Broadly speaking, the Court had two plausible routes that it might have followed to reverse the Ninth Circuit. As the ultimate arbiter of maritime law, acting “in the manner of a common law court,”¹⁴¹ it could simply have adopted its own policy preferences and held that punitive damages are unavailable in unseaworthiness actions because it has the power to decide how the general maritime law should develop. Alternatively, it could have followed the Fifth Circuit’s *Miles*-based reasoning and held that it was constrained by Congress’s decision in an analogous area. Although the *Miles* constraint is one of the Court’s own making, that alternative approach has at least the appearance of shifting some of the responsibility for the decision to Congress. The *Batterton* opinion appears to rely most heavily on the *Miles* approach, but it shows signs of each approach. And there is ample reason to think that the policy approach may have been the more important.

A. The *Miles* Approach

On its face, *Batterton* appears to be primarily an application of *Miles*, and it is understandable why Justice Alito might have preferred to write the opinion that way. Most obviously, the Court is often sensitive to the criticism that its decisions are based on the justices’ own policy preferences rather than on “the law.” That criticism is not particularly relevant in the context of the general maritime law, a field in which the Court is charged with deciding what “the law” should be, “subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.”¹⁴² But it is understandable that the justices might prefer not to hear the criticism at all. With the *Miles* approach, the Court could appear to be following established law (and giving effect to the policy established by Congress).

Despite the preference for the *Miles* approach, in *Batterton* it could well have been merely the ostensible rationale for the decision, and not the actual driving force behind the decision. In the post-*Townsend* context of the case, the *Miles*-based reasoning was particularly weak, and the majority opinion does not even make a serious effort to justify each step of the *Miles* reasoning. For example, one essential step in the reasoning would be that punitive damages are unavailable under FELA and thus under the Jones Act. The Court forthrightly admits that “because of the absence of historical evidence to support

that she would have joined Justice Alito’s majority opinion in *Batterton* if Justice Thomas — the author of *Townsend* — had argued that *Townsend* required the Court to affirm the Ninth Circuit.

¹⁴¹ *Baker*, 554 U.S. at 489-490; see *supra* note 17 and accompanying text.

¹⁴² *Exxon*, 554 U.S. at 490.

punitive damages” in the unseaworthiness context it will not examine “this question of statutory interpretation.”¹⁴³ Instead the Court simply asserts, on the basis of questionable lower-court decisions and secondary authority,¹⁴⁴ that punitive damages are unavailable under the Jones Act. As explained below,¹⁴⁵ that assertion does not comport with Congress’s likely intent.

There are other significant weaknesses in the *Miles*-based reasoning. In order to apply *Miles* in the unseaworthiness context while adhering to *Townsend*’s holding that *Miles* does not apply in the maintenance-and-cure context, the *Batterton* majority had to explain how those two general-maritime-law causes of action are different. To do so, it relies heavily on the assertion (advocated by the defendant) that claims for unseaworthiness and negligence are substantially the same while the maintenance-and-cure claim at issue in *Townsend* was substantially different. The Court seems to miss that the suit in *Townsend* was not to recover maintenance and cure for an injury (which might not fully overlap with a Jones Act claim) but rather to recover damages for the failure to pay maintenance and

¹⁴³ 139 S. Ct. at 2285.

¹⁴⁴ The *Batterton* majority cites some language discussing compensatory damages in Supreme Court cases in which punitive damages were not at issue. See 139 S. Ct. at 2284-85 (citing *American R. Co. of P. R. v. Didricksen*, 227 U.S. 145, 149 (1913); *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U.S. 173, 175 (1913); *Vreeland*, 227 U.S. at 68; *Seaboard Air Line R. Co. v. Koennecke*, 239 U.S. 352, 354 (1915); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 134 (1928); *Miles*, 498 U.S. at 32). The only cited authorities that actually address whether punitive damages are available under FELA or the Jones Act are lower-court decisions, and most of those decisions simply assert without analysis that punitive damages are unavailable. See 139 S. Ct. at 2285 (citing *Miller*, 989 F.2d at 1457; *Wildman v. Burlington No. R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987); *Kozar*, 449 F.2d at 1243; *McBride*, 768 F.3d at 388; *Guevara*, 59 F.3d at 1507 n.9; *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Kopczynski*, 742 F.2d at 560). The *Batterton* majority also cites two secondary sources. See 139 S. Ct. at 2285 n.7 (citing 2 M. ROBERTS, FEDERAL LIABILITIES OF CARRIERS § 621, at 1093 (1918); 1 *id.*, § 417, at 708; 5 J. BERRYMAN, SUTHERLAND ON DAMAGES § 1333, at 5102 (4th ed. 1916)). The majority does not cite the *Townsend* Court’s acknowledgement that the availability of punitive damages under the Jones Act was still an open question. See 557 U.S. at 424 n.12; see also *supra* note 61 and accompanying text. Nor does it cite any of the lower court decisions or secondary authority in favor of the availability of punitive damages under FELA or the Jones Act. See, e.g., _____; David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 LA. L. REV. 463, ____ (2010); David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, ____ (1997). See also *supra* note 75 and accompanying text.

¹⁴⁵ See *infra* notes 162-200 and accompanying text.

cure. And it certainly ignores *Cortes v. Baltimore Insular Line, Inc.*,¹⁴⁶ in which the Court permitted a suit under the Jones Act for the negligent withholding of maintenance and cure. In other words, the overlap between the *Townsend* claim and the Jones Act is much greater than the overlap between the *Batterton* claim and the Jones Act. As Justice Alito himself explained a decade earlier, the *Townsend* claim undoubtedly could have been filed under the Jones Act.¹⁴⁷ Only in some cases could an unseaworthiness claim also be filed as a negligence claim under the Jones Act.¹⁴⁸

Another weakness going to an essential step of the *Miles* reasoning was the *Batterton* Court's unsupported assertion that "our holding in *Miles* . . . limited recovery to compensatory damages in wrongful-death actions."¹⁴⁹ Although a broad reading of *Miles* could arguably support that conclusion, it was certainly not the Court's holding. Indeed, the relevant portion of the *Miles* opinion held that the plaintiff could *not* recover a particular category of compensatory damages — loss-of-society damages. And strong arguments suggest that the *Miles* reasoning would not support a withholding of punitive damages.¹⁵⁰

B. The Policy Approach

The *Batterton* opinion also shows signs of a policy approach. In the first ten lines of the opinion, Justice Alito writes:

By granting federal courts jurisdiction over maritime and admiralty cases, the Constitution implicitly directs federal courts sitting in

¹⁴⁶ 287 U.S. 367 (1932). A decade before, Justice Alito had certainly been aware of *Cortes*. See *Townsend*, 557 U.S. at 427 (Alito, J., dissenting) (citing *Cortes*).

¹⁴⁷ See *Townsend*, 557 U.S. at 427 (Alito, J., dissenting) ("[A]ny personal injury maintenance and cure claim in which punitive damages might be awarded could be brought equally under either general maritime law or the Jones Act.").

¹⁴⁸ Under the Jones Act, an injured seaman brings a negligence action against his or her employer. See 46 U.S.C. § 30104 ("A seaman . . . may elect to bring a civil action . . . against the employer. . .") (emphasis added). The defendant in an unseaworthiness action is the owner or operator of the unseaworthy vessel. See, e.g., _____. Those two are often the same, as they were in *Batterton*, thus permitting an injured seaman to make both a Jones Act claim and an unseaworthiness claim in a single suit. See, e.g., *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 18 (1963) ("confirming that seamen may "join in one complaint their Jones Act, unseaworthiness, and maintenance and cure claims when all the claims . . . grow out of a single transaction or accident."). But in the modern world, the members of a vessels crew might well be employed by a third party, such as a manning agency.

¹⁴⁹ 139 S. Ct. at 2287.

¹⁵⁰ See, e.g., David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 139-155 (1997).

admiralty to proceed “in the manner of a common law court.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489–490 (2008). Thus, where Congress has not prescribed specific rules, federal courts must develop the “amalgam of traditional common-law rules, modifications of those rules, and newly created rules” that forms the general maritime law. *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U. S. 858, 864–865 (1986).¹⁵¹

In other words, the Court has broad authority to define the general maritime law in any way it wishes (so long as five justices agree with the result). Because Congress has said nothing relevant about punitive damages in unseaworthiness actions, the majority was free either (1) to follow the traditional common-law and general-maritime-law rule that generally recognizes the availability of punitive damages in tort cases when the defendant’s conduct is sufficiently egregious or (2) to develop a new rule denying their availability. The majority agreed to follow the latter course.

In the last few pages of the opinion, Justice Alito gives a better idea of what probably motivated the decision: the Court’s view that denying punitive damages is the better policy. *Dutra* based a large portion of its argument on the assertion that punitive damages are bad for the economy, bad for the environment, and bad for national security.¹⁵² A host of top-side amicus briefs reinforced those arguments.¹⁵³ And the majority apparently found those arguments persuasive. In three key paragraphs, the majority accepted the defense bar’s arguments:

Unlike a claim of maintenance and cure, which addresses a situation where the vessel owner and master have “just about every economic incentive to dump an injured seaman in a port and abandon him to his fate,” in the unseaworthiness context the interests of the owner and mariner are more closely aligned. *McBride, supra*, at 394, n. 12 (Clement, J., concurring). That is because there are significant economic incentives prompting owners to ensure that their vessels are seaworthy. Most obviously, an owner who puts an unseaworthy ship to sea stands to lose the ship and the cargo that it carries. And if a vessel’s unseaworthiness threatens the crew or cargo, the owner risks losing the protection of his insurer (who may not cover losses incurred by the owner’s negligence) and the work of the crew (who may refuse to serve on an unseaworthy vessel). In some instances, the vessel owner may even face criminal penalties. See, *e.g.*, 46 U. S. C. § 10908.

¹⁵¹ 139 S. Ct. at 2278.

¹⁵² See _____.

¹⁵³ See, *e.g.*, _____.

Allowing punitive damages on unseaworthiness claims would also create bizarre disparities in the law. First, due to our holding in *Miles*, which limited recovery to compensatory damages in wrongful-death actions, a mariner could make a claim for punitive damages if he was injured onboard a ship, but his estate would lose the right to seek punitive damages if he died from his injuries. Second, because unseaworthiness claims run against the owner of the vessel, the ship's owner could be liable for punitive damages while the master or operator of the ship—who has more control over onboard conditions and is best positioned to minimize potential risks—would not be liable for such damages under the Jones Act. See *Sieracki*, 328 U. S., at 100 (The duty of seaworthiness is “peculiarly and exclusively the obligation of the owner. It is one he cannot delegate”).

Finally, because “[n]oncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries,” *Exxon Shipping*, 554 U. S., at 497, allowing punitive damages would place American shippers [*sic*] at a significant competitive disadvantage and would discourage foreign-owned vessels from employing American seamen. See Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 396, n. 24 (2004) (listing civil-law nations that restrict private plaintiffs to compensatory damages). This would frustrate another “fundamental interest” served by federal maritime jurisdiction: “the protection of maritime commerce.” *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U. S. 14, 25 (2004) (internal quotation marks omitted; emphasis deleted).¹⁵⁴

Although counter-arguments are readily available, at the end of the day they are all empirical, economic, and other policy arguments — not legal arguments. And the Supreme Court has the power to make those policy choices for the general maritime law.

Whether or not denying punitive damages to seamen injured by an unseaworthy vessel is good policy, the policy approach is at least defensible. And it could also explain why Justice Thomas came to a different result in *Batterton* than he did in *Townsend*. He could well have believed that denying medical care to an injured seaman (as in *Townsend*) is often likely to be an egregious action. The employer has a no-fault obligation to pay, and very few reasons can justify the failure to do so.¹⁵⁵ Deciding not to pay maintenance

¹⁵⁴ 139 S. Ct. at 2286-87.

¹⁵⁵ Perhaps the most plausible excuse would be that the person claiming maintenance and cure does not qualify as a seaman. Despite frequent attempts, the Supreme Court has not provided very clear guidance on who is a “seaman.” See, e.g., *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997); *Chandris Inc. v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). Employers often raise an

and cure would be an act of land-based management after an opportunity for at least some reflection (and consultation with lawyers), not an error of a lower-level employee at sea. Most unseaworthiness, in contrast, arises as the result of simple negligence. Sometimes a vessel may be unseaworthy despite the owner's complete lack of negligence.¹⁵⁶ Of course, an injured seaman would have no plausible claim to recover punitive damages in those cases, and the fact that unseaworthiness *usually* arises in simple negligence cases does not mean that it can *never* arise in cases of wanton and willful misconduct. But Justice Thomas may have believed that punitive damages were less important in unseaworthiness cases because the facts of most cases would not justify them. He may also have been influenced by the factual weakness of *Batterton*'s claim for punitive damages, even though *Dutra* was arguing much more broadly for their categorical unavailability.

Once Justice Thomas agreed to reverse the Ninth Circuit, it would have been normal for him to accord considerable deference to the justice assigned to write the opinion. Of course he could have noted his disagreement if the majority opinion had said something with which he fundamentally disagreed,¹⁵⁷ but apparently he did not feel that strongly about the *Townsend* framework. As long as Justice Alito preserved the holding of *Townsend*, Justice Thomas was apparently willing to acquiesce in aspects of the opinion with which he may not have fully agreed.¹⁵⁸ Although this is necessarily speculation, it better explains

“intentional concealment” defense. *See, e.g.,* *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547, 548-549 (5th Cir. 1968).

¹⁵⁶ *See, e.g.,* *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 AMC 1503 (1960).

¹⁵⁷ *See, e.g.,* _____ (Thomas, J., concurring in part).

¹⁵⁸ Justice Thomas may not have been the only one holding his nose when he joined the *Batterton* majority. In *Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 2019 AMC 631 (2019), which was decided just over three months before *Batterton*, Justice Kavanaugh wrote the majority opinion. One of his principal arguments in favor of ruling for the widows of two Navy sailors was that “[m]aritime law has always recognized a ‘special solicitude for the welfare’ of those who undertake to ‘venture upon hazardous and unpredictable sea voyages.’” 139 S. Ct. at 995 (quoting *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 285 (1980)) (internal quotation marks omitted by *DeVries* Court). Justice Gorsuch, in a dissent joined by Justice Alito, viewed that argument as one of the principal bases for the decision. *See* 139 S. Ct. at 1000 (Gorsuch, J., dissenting) (“[T]he Court acknowledges that it has created its new standard in part because of the ‘solicitude for sailors’ that is a unique feature of our maritime jurisdiction. . . . [T]his means, of course, that nothing in today’s opinion compels courts operating outside the maritime context to apply the test announced today.”) The *Batterton* opinion, in contrast, dismisses the special solicitude doctrine as one with its “roots in the paternalistic approach taken toward mariners by 19th century courts.” Because sailors today are better protected than they were in the nineteenth century, according to Justice Alito, “the special solicitude to sailors has only a small role to play in contemporary maritime law.” 139 S. Ct. at 2287.

the result than the *Miles* approach — which would require Justice Thomas to have been persuaded by an analytical framework that he had rejected in one of his earlier opinions.

V. IMPLICATIONS FOR PUNITIVE DAMAGES UNDER FELA OR THE JONES ACT

Does it make any difference whether the *Batterton* Court actually followed the *Miles* approach or the policy approach? Whatever the true rationale, the fact remains that an injured seaman can claim punitive damages for an employer's willful and wanton failure to pay maintenance and cure but may not claim punitive damages in an unseaworthiness case no matter how egregious the vessel owner's fault. That apparently means that if a shipowner makes a deliberate, callous decision to send a doomed — but over-insured — rust-bucket to sea because the anticipated insurance proceeds will exceed the compensatory damages payable to crewmembers or families of crewmembers who are injured or killed in the inevitable sinking, the shipowner will face no exposure to any liability for punitive damages. And that questionable result follows regardless of the rationale for the *Batterton* decision.

In at least one respect, however, the choice of approach could make a significant difference. If the Court's decision was based on its authority to determine the general maritime law, then it remains open for a future court to consider whether punitive damages are available under FELA or the Jones Act — both questions that should turn on the intent of Congress rather than the policy preferences of the justices. Although the *Batterton* Court asserted that punitive damages are unavailable under FELA and the Jones Act, the only authority supporting that assertion that Justice Alito cited was a handful of questionable lower-court decisions and secondary sources.¹⁵⁹ The Court offered no analysis whatsoever of anything that Congress said or did. That was not an oversight. The majority considered it unnecessary to discuss what Congress actually intended “because of the absence of historical evidence to support punitive damages” in the unseaworthiness context.¹⁶⁰

Whether nineteenth- and early-twentieth-century courts awarded punitive damages in unseaworthiness actions could not plausibly have any bearing on whether Congress intended railroad workers to be able to claim punitive damages in negligence actions, and it is hard to see how it could have any bearing on Congress's intent when passing the Jones Act. What the Court appears to be saying, therefore, is that “the absence of historical evidence to support punitive damages” in the unseaworthiness context precludes their current availability regardless of what Congress intended. Even if punitive damages are properly available under the Jones Act, the Court will not permit them in an unseaworthiness action. In other words, the so-called *Miles* uniformity principle — which requires the same result under the general maritime law as under the Jones Act — was actually irrelevant to the Court's conclusion. More importantly, when a court considers the availability of punitive damages in a context in which the “historical evidence to

¹⁵⁹ See *supra* note 144 and accompanying text.

¹⁶⁰ 139 S. Ct. at 2285.

support punitive damages” is substantial, it would be appropriate to examine “this question of statutory interpretation.”¹⁶¹ Thus if a railroad worker is injured as a result of the willful and wanton misconduct of her employer, and she brings a FELA negligence action, it would be appropriate to ask whether Congress intended injured railroad workers to be allowed to claim the punitive damages remedy that is ordinarily available in negligence actions.

FELA itself says nothing about punitive damages, but *Consolidated Rail Corp. v. Gottshall*¹⁶² held that FELA should be construed by reference to common-law principles when deciding issues that the statute does not explicitly address. In *Townsend*, the Court adopted a very similar analytic framework. Turning to the common-law decisions in the years before Congress enacted FELA, it is abundantly clear that punitive damages were available in negligence actions.

Prior to FELA, injured railroad workers as a practical matter rarely recovered from their employers in personal-injury actions because railroads usually escaped liability under one of three harsh common-law rules denying recovery in many typical situations — the fellow-servant rule, the contributory-negligence rule, and the assumption-of-the-risk rule.¹⁶³ Despite those barriers to recovery, however, before FELA the Supreme Court regularly recognized that injured railroad workers could bring common-law negligence actions against their employers. In *Santa Fe Pacific Railroad Co. v. Holmes*,¹⁶⁴ for example, an engineer injured in a head-on collision recovered for his employer’s negligence in sending approaching trains on the same track. In *Texas & Pacific Railway Co. v. Swearingen*,¹⁶⁵ an injured switchman recovered for his employer’s negligence in placing a scale box too close to the track. And in *Choctaw, Oklahoma & Gulf Railroad Co. v. Holloway*,¹⁶⁶ an injured fireman recovered for his employer’s failure to equip an engine with brakes.

¹⁶¹ 139 S. Ct. at 2285.

¹⁶² 512 U.S. 532 (1994).

¹⁶³ In *Northern Pacific Railway Co. v. Dixon*, 194 U.S. 338 (1904), for example, a fireman was killed in a head-on collision between two trains that occurred because a local telegraph operator had negligently informed the dispatcher that one of the trains had not yet passed his station when in fact it had passed the station while the operator was asleep. The Supreme Court ruled that “it is obvious that the local operator was a fellow servant with the fireman,” *id.* at 343, and thus the railroad was not liable for the fireman’s death. See also, e.g., *New England Railroad Co. v. Conroy*, 175 U.S. 323, 327-347 (1899) (fellow-servant rule); *Southern Pacific Co. v. Seley*, 152 U.S. 145, 154-156 (1894) (assumption-of-the-risk rule); *id.* at 156 (contributory-negligence rule) (alternate holding).

¹⁶⁴ 202 U.S. 438 (1906).

¹⁶⁵ 196 U.S. 51 (1904).

¹⁶⁶ 191 U.S. 334 (1903).

Although the plaintiffs in *Holmes*, *Swearingen*, and *Holloway* did not seek punitive damages, other pre-FELA cases establish that punitive damages were then available at common law, available in common-law negligence actions, available against railroads, and in fact awarded against railroads (including in actions for injuries to railroad employees).

The *Townsend* Court documented that “[p]unitive damages have long been an available remedy at common law,”¹⁶⁷ and the *Batterton* Court agreed.¹⁶⁸ Indeed, before the enactment of FELA, the Supreme Court explicitly recognized the general availability of punitive damages. In *Day v. Woodworth*,¹⁶⁹ for example, the Court explained:

It is a well established principle of the common law, that in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.¹⁷⁰

The availability of punitive damages was not limited to cases of intentional misconduct, as in *Day v. Woodworth*. The Supreme Court’s pre-FELA cases also recognized that punitive damages were available in appropriate cases in which the plaintiff had brought a negligence action. In *Milwaukee & St. Paul Railway Co. v. Arms*,¹⁷¹ for example, the Court explicitly noted that the punitive-damages rule it had recognized in *Day v. Woodworth* “is equally applicable to suits for personal injuries received through the negligence of others” if the defendant’s misconduct was serious enough.¹⁷²

Railroads were regularly subject to the general rule recognizing the availability of punitive damages. In *Lake Shore & Michigan Southern Railway Co. v. Prentice*,¹⁷³ a passenger sued a railroad for unlawful arrest, and the jury awarded punitive damages. The Court explained that the availability of punitive damages was “well settled”:

¹⁶⁷ 557 U.S. at 409 (citing U.S. and English cases dating back to colonial times).

¹⁶⁸ See 139 S. Ct. at 2283 (“By the time the claim of unseaworthiness evolved to remedy personal injury [in the late nineteenth century], punitive damages were a well-established part of the common law.”).

¹⁶⁹ 54 U.S. (13 How.) 363 (1852).

¹⁷⁰ *Id.* at 371; see also, e.g., *Barry v. Edmunds*, 116 U.S. 550, 562 (1886) (“[A]ccording to the settled law of this court, [a plaintiff] might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions.”).

¹⁷¹ 91 U.S. 489 (1876).

¹⁷² 91 U.S. at 493.

¹⁷³ 147 U.S. 101 (1893).

In this court the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations¹⁷⁴

Not only did *Prentice* itself involve an action against a railroad, but the *Prentice* Court cited eight of its prior decisions in support of the quoted proposition — and five of them were actions against a railroad.¹⁷⁵

The railroads' exposure to punitive damages in the pre-FELA era was not an abstract principle. The courts in fact ordered railroads to pay punitive damages in appropriate cases. In *Fell v. Northern Pacific Railway Co.*,¹⁷⁶ for example, the court upheld a jury verdict awarding punitive damages to a passenger who had been forced to jump from a moving train. In *Brown v. Memphis & Charleston Railroad Co.*,¹⁷⁷ the court upheld a jury verdict awarding punitive damages to a passenger who had wrongfully been excluded from the "ladies' car." And in *Denver & Rio Grande Railway Co. v. Harris*,¹⁷⁸ the Supreme Court affirmed an award that included "punitive or exemplary damages."¹⁷⁹

Prior to the enactment of statutory regimes obligating employers to pay workers' compensation to injured employees, there was no conceptual distinction between employees' tort actions against the railroads that employed them and actions by other plaintiffs against those railroads. With the enactment of FELA, of course, employees had a unique statutory remedy against their employers, unhampered by the harsh defenses that had so often denied recovery under the common law.¹⁸⁰ But until FELA entered into force,

¹⁷⁴ *Id.* at 107.

¹⁷⁵ *See, e.g., Arms*, 91 U.S. at 492 ("well settled . . . that exemplary damages may in certain cases be assessed"); *Philadelphia, Wilmington & Baltimore Railroad Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) ("Whenever the injury complained of has been inflicted maliciously or wantonly . . . the jury are not limited to the ascertainment of a simple compensation for the wrong . . .").

¹⁷⁶ 44 F. 248, 252-253 (C.C.D.N.D. 1890).

¹⁷⁷ 7 F. 51, 63-64 (C.C. W.D. Tenn. 1881).

¹⁷⁸ 122 U.S. 597, 609-610 (1887).

¹⁷⁹ *Cf. Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 522-523 (1885) (affirming an award of statutory double damages as analogous to punitive damages).

¹⁸⁰ In other contexts, employees were eventually covered by workers' compensation regimes that limited their ability to bring tort actions against their employers. *See, e.g., Longshore and Harbor Workers' Compensation Act* § 5(a), 33 U.S.C. § 905(a)

an employee's action against a railroad was subject to the same principles as applied in *Fell, Brown, and Harris* (discussed in the previous paragraph).

Despite the harsh common-law defenses that made it particularly difficult for injured railroad employees to recover even compensatory damages prior to FELA,¹⁸¹ some plaintiffs succeeded in obtaining a punitive-damages award against a railroad for injuries suffered by an employee. In *Turner v. Norfolk & Western Railroad Co.*,¹⁸² for example, a 16-year-old railroad employee was killed when an engine collided with the hand car on which he was riding. On appeal, West Virginia's highest court upheld the award, explaining "that the measure of damages in the case of a man's death is not limited to the pecuniary value of his life to his estate; but may be exemplary, punitive, and given as a solatium."¹⁸³

When Congress enacted FELA, the statute's primary purpose was to expand the negligence action by eliminating the harsh defenses that so often denied recovery,¹⁸⁴ and by creating a federal wrongful-death cause of action for railroad workers. Three sections of the Act accomplish those goals. Section 1¹⁸⁵ expanded the common law in two ways. It eliminated the fellow-servant rule, which had allowed employers to escape liability "for injuries sustained by one employee through the negligence of a coemployee."¹⁸⁶ And it provided that railroads engaged in interstate commerce "shall be liable in damages . . . , in case of the death of [an injured] employee, to his or her personal representative." Section 3¹⁸⁷ modified the contributory-negligence rule, under which a plaintiff's negligence had been a complete bar to recovery, and instead provided that "damages shall be diminished . . . in proportion to the amount of negligence attributable to [the]

(providing that an employer's liability under the statute "shall be exclusive and in place of all other liability of such employer to the employee") (originally enacted in 1927).

¹⁸¹ Although the contributory-negligence rule could apply in virtually any context, the assumption-of-the-risk rule was more likely to apply in the workplace context and the fellow-servant rule by its nature was a workplace doctrine.

¹⁸² 40 W. Va. 675, 22 S.E. 83 (1895).

¹⁸³ 22 S.E. at 87. See also, e.g., *Brickman v. Southern Railway*, 74 S.C. 306, 54 S.E. 553, 557 (1906) (affirming a jury verdict that included punitive damages for the death of a railroad employee in a train wreck); cf. *Ennis v. Yazoo & Mississippi Valley Railroad Co.*, 118 Miss. 509, 79 So. 73, 74-75 (1918) (upholding a jury verdict that apparently included punitive damages for the death of a railroad employee — and explicitly approving the jury instruction authorizing an award of punitive damages — in a case that was not subject to FELA and was accordingly governed by pre-FELA law).

¹⁸⁴ see *supra* note 163 and accompanying text.

¹⁸⁵ 45 U.S.C. § 51.

¹⁸⁶ S. Rep. No. 60-460, at 1 (1908).

¹⁸⁷ 45 U.S.C. § 53.

employee.”¹⁸⁸ Finally, section 4¹⁸⁹ eliminated the assumption-of-the-risk rule, which had allowed employers to avoid liability if the employee had accepted the job with knowledge of the unsafe work conditions.¹⁹⁰

When enacting FELA to give *greater* rights and remedies to injured railroad workers who sued their employers for negligence, Congress did not intend to deprive injured workers of any of the rights and remedies that they had already enjoyed under the common law prior to FELA. The Senate Judiciary Committee explained that point emphatically in the course of describing the proposed 1910 amendments to FELA:

In considering the advisability of amending [the original FELA of 1908], it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employees. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by [the common] law to [railroad] employees *No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act.*¹⁹¹

Congress intended not only to provide more compensation to railroad workers but also to “greatly lessen personal injuries”¹⁹² During the late nineteenth century, railroad work was extraordinarily dangerous.¹⁹³ “In 1888 the odds against a railroad

¹⁸⁸ See, e.g., S. Rep. No. 60-460, at 2 (“It is the purpose of this measure to modify the law of contributory negligence.”).

¹⁸⁹ 45 U.S.C. § 54.

¹⁹⁰ FELA originally eliminated the assumption-of-the-risk defense only when “the violation . . . of any statute enacted for the safety of employees contributed to the injury or death of such employee.” Act of Apr. 22, 1908, ch. 149, § 3, 35 Stat. 65, 66. Then, in 1939, Congress completely eliminated the defense. Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 1404.

¹⁹¹ S. Rep. No. 61-432 (1910), *reprinted in* 45 Cong. Rec. 4040, 4044 (1910) (emphasis added).

¹⁹² H.R. Rep. No. 60-1386, at 2 (1908).

¹⁹³ Although conditions have improved, railroad work remains dangerous. See, e.g., Dino Drudi, *Railroad-Related Work Injury Fatalities*, MONTHLY LAB. REV., July/Aug. 2007, at 17 (available at <http://www.bls.gov/opub/mlr/2007/07/art2full.pdf>) (noting that railroad industry has “fatal injury rate more than twice the all-industry rate”).

brakeman's dying a natural death were almost four to one," and "the average life expectancy of a switchman in 1893 was seven years."¹⁹⁴ President Benjamin Harrison called it "a reproach to our civilization" that rail workers were "subjected to a peril of life and limb as great as that of a soldier in time of war."¹⁹⁵ Congress accordingly sought to induce railroads "to exercise the highest degree of care . . . for the safety of [all employees] in the performance of their duties."¹⁹⁶ Congress would have recognized that the threat of punitive damages for egregious misconduct contributed to those goals, for it was understood then (as now) that one of the purposes of punitive damages is to "teach the tortfeasor the necessity of reform."¹⁹⁷ The threat of both punitive and compensatory damages provides a greater incentive for railroads to operate safely than would the threat of compensatory damages alone.

It is implausible that Congress, in its effort to provide incentives for railroads to improve safety standards, would eliminate *sub silentio* a well-established common-law remedy that created a powerful incentive to improve safety standards. In *Exxon Shipping Co. v. Baker*,¹⁹⁸ the Supreme Court addressed essentially the same situation. When Exxon — relying on *Miles* and the Fifth Circuit's en banc decision in *Guevara* — argued that the penalties for water pollution under section 311 of the Clean Water Act¹⁹⁹ displaced its liability to pay punitive damages following the *Valdez* spill, the Court summarily (and unanimously) rejected the argument:

[W]e find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.²⁰⁰

It is, if anything, even harder to conclude that FELA, a statute expressly geared to protecting railroad workers and improving their remedies, was intended to eliminate *sub silentio* the railroads' corresponding liability to pay punitive damages for the breach of their common-law duties to refrain from injuring their employees.

¹⁹⁴ *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964).

¹⁹⁵ *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 19 (1904).

¹⁹⁶ H.R. Rep. No. 60-1386, at 2.

¹⁹⁷ *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (No. 8,815) (C.C.N.D. Cal. 1856).

¹⁹⁸ 554 U.S. 471, 488-489 (2008).

¹⁹⁹ 33 U.S.C. § 1321.

²⁰⁰ 554 U.S. at 488-489.

In sum, the *Batterton* Court was undoubtedly giving effect to a policy preference against permitting injured workers to claim punitive damages for an employer's willfully, wantonly, and callously breaching the obligation to provide a safe place to work, but it was the policy preference of the justices in the majority. No plausible evidence suggests that the Congress that enacted FELA — or the Congress that enacted the Jones Act — shared that policy preference.

VI. CONCLUSION

We will need to wait to see what kind of impact *Batterton* will have. In the years following *Miles*, defendants argued vigorously for a broad reading that limited the availability of a wide range of damages for a wide range of plaintiffs. A number of courts accepted those arguments, extending *Miles* beyond the loss-of-society and lost-future-income damages that were actually at issue in the case, and beyond the narrow class of injured workers covered by the Jones Act to maritime plaintiffs generally. Until *Batterton*, the Supreme Court did not accept any of those broad arguments. Indeed, in *Townsend* the Court explicitly rejected a too-broad reading of *Miles*.²⁰¹ If *Batterton* signals the Court's hostility to maritime plaintiffs' traditional remedies, then we may see the case broadly applied to limit other plaintiffs' remedies.

Alternatively, *Batterton* may turn out to be a decision that was largely driven by its facts and the justices' policy preferences based on those facts. It would then be limited to its particular context. Because the facts before the *Batterton* Court presented such a weak case for punitive damages, Justice Thomas — in the belief that the facts before him were typical of unseaworthiness cases generally — may have been influenced to conclude that punitive damages were unwarranted in that context. And if Justice Thomas, the author of *Townsend*, was prepared to retreat from the principles announced in *Townsend*, that very likely influenced Justice Kagan's decision to vote with the majority. But suppose a railroad worker is seriously injured in an accident due to the willful, wanton, and reckless misconduct of her employer railroad, and she seeks punitive damages in her FELA action. Although the *Batterton* Court was unwilling to consider the proper interpretation of FELA (or the Jones Act) in the unseaworthiness context “because of the absence of historical evidence to support punitive damages” in that context,²⁰² ample historical evidence supports punitive damages in the negligence context and the railroad context. Justice Thomas might well decide the case in line with his *Townsend* decision, and hold that punitive damages are available under FELA after all. And that would almost inevitably mean that punitive damages would be available under the Jones Act. That would not necessarily require overruling *Batterton*. The Court could admit that it was simply making its own policy choice, not applying the “*Miles* uniformity principle” to give effect to Congress's policy choice. But it would leave *Batterton* as a relatively narrow decision.

²⁰¹ *Townsend*, 557 U.S. at 419; see *supra* note 49 and accompanying text.

²⁰² 139 S. Ct. at 2285.