CHILDREN OF A LESSER JONES: PUNITIVE DAMAGES IN UNSEAWORTHINESS

Attilio M. Costabel[1]

I. Preamble

The title of the famous stage play and movie, *Children of a Lesser God*, comes from a stanza of Alfred Lord Tennyson's, *Idylls of the King*, which reads as follows, "As if some lesser

[1] Adjunct Professor of Law, St. Thomas University School of Law; J.D., University of Miami Law School, 1987; J.D., University of Genoa School of Law; 1962; Professor Costabel teaches Admiralty Law as an adjunct professor at St. Thomas University School of Law, Miami, Fla., where he also teaches Admiralty Procedure, Marine Insurance Law, Transnational Litigation, and International Business Transactions.

god had made the world, but had not force to shape it as he would."[2] Like Tennyson's lesser God, Congress enacted the Jones Act,[3] but did not have the force to shape it as it was supposed to be.[4] On the contrary, it allowed the courts to interpret, twist and abuse it to the furthest limits, well beyond even the questionable ones imposed by *Miles v. Apex Marine*.[5] The consequence is that seamen, once considered the wards of the court,[6] are still struggling to get remedies routinely enjoyed by other plaintiffs who did not have the fortune (or misfortune?) of a statute enacted to expand, not contract, their rights. This article attempts an assessment of the contemporary standing of Jones seamen, focusing on one single, specific, and very narrow issue: whether punitive damages may be awarded in seamen's claims for injuries or death caused by a ship's unseaworthiness.

---

[2] *From Idylls of the King: The Passing Arthur*, POETRY FOUNDATION, http://www.poetryfoundation.org/poem/174592 (last visited Feb. 29, 2016); *see* CHILDREN OF A LESSER GOD (Paramount Pictures 1986).

[3] *See generally* 46 U.S.C. § 30104 (2012) (explaining how an injured seaman may bring a civil action against his employer if the injury took place during the course of employment).

[4] *Id.*; *see generally* 46 U.S.C. §30302 (2006) (defining wrongful death actions for individuals who die overseas and the causes of action immediate family members may bring); *see* Miles v. Apex Marine Corp., 498 U.S. 19 (1990). In 1920, Congress enacted the Jones Act, which created a wrongful death action for most maritime deaths, and the Death of the High Seas Act ("DOHSA"), which created a similar action for the personal representative of anyone killed on the high seas. *Id.* at 24.

[5] *See Miles*, 498 U.S. at 36–37 (holding that: (1) there is a general maritime cause of action for the wrongful death of a seaman; (2) damages recoverable in a general maritime cause of action for the wrongful death of a seaman do not include loss of society; and (3) a general maritime survival action cannot include recovery for decedent's lost future earnings); *see also* Attilio M. Costabel, *Waiting for Gaudet Charting a Course After Atlantic Sounding Co. v. Townsend*, 24 ST. THOMAS L. REV. 502, 503–06 (2012); Daniel W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 162–63; Ann K. Wooster, *Validity, Construction, and Application of Jones Act, 46 App. U.S.C.A § 688—Supreme Court Cases*, 170 A.L.R. Fed. 587, § 10 (2001) (summarizing Supreme Court decisions regarding the validity, construction, and application of the Jones Act, including post–*Miles* decisions).

[6] *See* Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047); *see also* Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) (referring to Justice Story's opinion in Harden). Justice Story provides the reasons for the rule:

> The protection of seamen, who, as a class, are poor, friendless and improvident from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.

Calmar S.S. Corp., 303 U.S. at 528.

II. The *McBride* Saga

In the wake of *Atlantic Sounding Co., Inc. v. Townsend*,[7] a panel of the Fifth Circuit held in *McBride v. Estis Well Service, L.L.C.*, that punitive damages could be awarded in seamen's actions in unseaworthiness.[8] Upon rehearing en banc, the Fifth Circuit reversed, holding that under the *Miles* doctrine, punitive damages may not be awarded in unseaworthiness actions, whether for wrongful death or personal injury, because punitive damages are non-pecuniary and non-compensatory.[9] The Supreme Court denied certiorari, leaving an open conflict on an issue of relevant importance. This article aims at proving that *McBride II* is wrong both on its own reasons, and mostly because punitive damages have been grossly mischaracterized and equivocated.[10]

III. A Fiction For Analysis

"The *Stuyvesant* sailed on its [sic] maiden voyage in late July 1977. On December 11 of that year, as the ship was about to enter the Port of Valdez, Alaska, steam began to escape from the casing of the high-pressure turbine."[11] This is the beginning of the real facts in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[12]

Now let a fiction begin:

- Fiction 1: the steam severely injured the Chief Engineer, who died as a consequence of the burns.
- Fiction 2: the manufacturer of the turbine was not only aware of severe and dangerous defects of the turbine, but was actively advertising the same on media and at major trade fairs, concealing the defects to the public.

---

[7] Atlantic Sounding Co., Inc., et al., v. Townsend, 557 U.S. 404 (2009).
[8] *See* McBride v. Estis Well Serv., L.L.C., 731 F.3d 505, 518 (5th Cir. 2013) [hereinafter *McBride I*]; *see also Townsend*, 557 U.S. 404 ("[P[unitive damages have been available and awarded in general maritime actions, including some in maintenance and cure.").
[9] *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 391 (5th Cir. 2014) [hereinafter *McBride II*] (en banc).
[10] *See* discussion *infra* Part V; *see also* Robertson, *supra* note 5, at 157–62 (providing a historical detail of punitive damages in maritime law, and criticizing courts' reluctance to award punitive damages).
[11] East River S.S. Corp. v. Transam. Delaval, Inc., 476 U.S. 858, 860 (1986).
[12] *Id.*

- Fiction 3: the manufacturer of the turbine knowingly and intentionally supplied the turbine for the *Stuyvesant* and even conspired with the buyer ship-owner to conceal the defects during inspections in order to make the sale.

- Fiction 4: the ship-owner, fully aware of the defects, eagerly proceeded to the purchase and installation, after negotiating with the manufacturer a substantially discounted price and covertly agreeing and conspiring to conceal, with intentional and wanton disregard of safety.

- Fiction 5: the Chief Engineer's estate sues the manufacturer in product liability, and the employer ship-owner in unseaworthiness, adding a count of punitive damages in both actions.

- Fiction 6: the case reaches the United States Court of Appeals for the Fifth Circuit.

Question: how would the Fifth Circuit rule on the issue of punitive damages?

Here is the possible, credible answer: punitive damages would be allowed against the manufacturer, but denied against the Jones Act employer. The turbine did not only injure itself, it physically injured a third party, thus a cause of action in product liability against the manufacturer is available under *East River S.S. Corp.*[13] A cause of action is also available against the employer ship-owner in unseaworthiness under general maritime law.[14] Punitive damages are available in product liability actions,[15] and also in admiralty actions.[16] However, the Fifth Circuit has ruled, in *McBride II*, that punitive damages are not available in a general maritime claim based on unseaworthiness.[17]

The conclusion is that two wrongdoers who committed identical extreme and outrageous acts, and even conspired, would receive disparate treatment: the manufacturer may be punished in the millions, while the co-conspirator ship-owner would escape punishment.[18] And if punitive

[13] *See East River S.S. Corp.*, 476 U.S. at 866.
[14] The Osceola, 189 U.S. 158, 171 (1903).
[15] *See, e.g.*, James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L. J. 351, 369 (1983).
[16] *See, e.g.*, Robertson, *supra* note 5, at 86, 122–23.
[17] *McBride II*, 768 F.3d 382, 391 (5th Cir. 2014).
[18] *See* Robertson, *supra* note 5, at 122–23 (resulting in the same manner under *McBride II*).

damages are meant to deter extreme and outrageous conduct, the message of the court to the manufacturer would be a strong alert of dissuasion, while the message to the employer ship-owner would be to never mind safety: "at worst, you will respond only for the pecuniary damages that a poor seaman's family may prove."[19]

IV. Of Windmills and Unhappy Endings

Tales often depend on the storyteller. If the fictional Chief Engineer's family had taken this case to the Second, the Ninth, or the Eleventh Circuit, the tale likely would have had a happy ending.[20] In fact, it was a matter of timing. Even the Fifth Circuit itself would have initially awarded plaintiff punitive damages in the unseaworthiness claim, but like Cinderella at midnight, the magic vanished with *McBride II*.[21]

Here is the story of how the magic slowly built up, how and why it suddenly disappeared, and how we may try restore it, which may happen only by gaining awareness of the correct perspective on punitive damages, and stopping the Quixotic tilting at *Miles*, a windmill mistaken for a giant.

A. Miles away from "*Miles*" and back.

The history of punitive damages in admiralty law is long and filled with misuses of doctrines, misunderstandings and misnomers that led to a cycle of reverse fortunes and much serious confusion.[22]

A landmark article by Professor Daniel W. Robertson[23] supplies a complete history and analysis of punitive damages in admiralty law in chronological order, and dissected in minute

[19] This result would obtain under *McBride II*. *See McBride II*, 768 F.3d at 390 (explaining recovery of pecuniary damages is limited to that which is proven to be an actual pecuniary loss to compensate living relatives).
[20] Apologies for the procedural metaphor. A wrongful death case may hardly be called to have a "happy ending."
[21] *See McBride II*, 768 F.3d at 384 (holding seamen cannot recover punitive damages for unseaworthiness claims).
[22] *See* Robertson, *supra* note 5, at 76.
[23] *Id.* at n.a1.

details.[24] Beginning from the ancient origins,[25] the article presents and analyzes cases of punitive damages pre-Jones, after Jones, pre-*Miles*, after *Miles*, and ends with the negation of punitive damages in Admiralty by *Guevara v. Maritime Overseas Corp.*,[26] which was the law in 1997 when the article was written. This was twelve years before *Guevara* was overruled by *Townsend*.[27]

In his conclusion, Professor Robertson muses about an imaginary scholar who would fall asleep before, and then wake up after, *Miles*, wondering what the scholar would think about admiralty-related punitive damages in a landscape so changed and confused. The confusion of the sleepy scholar would have been caused by the wild and indiscriminate use that many courts had made of *Miles*, applied to issues and factual situations beyond its own holding.[28] Professor Robert Force[29] alerted of the danger of this misuse calling it a "curse."[30]

Exxon Shipping Co. v. Baker[31] and *Townsend*[32] came along in 2008 and 2009, respectively, supplying some help to the sleepy scholar, and some hope of exorcism from *Miles*. The *Baker* court upheld the criticism of Professor Robertson and Professor Force, stating that,

---

[24] *See id.* at 78–79.
[25] *See id.* at 88–89. (citing to twenty-five significant reported decisions preceding Day v. Woodworth, 54 U.S. 636 (1851), and to Justice Story's decision in Chamberlain v. Chandler, 5 F. Cas. 413 (C.C.D. Mass. 1823) (No. 2,575)).
[26] 59 F.3d 1496, 1513 (5th Cir. 1995) ("punitive damages should no longer be available in cases of willful nonpayment of maintenance and cure under the general maritime law"); *see* Robertson, *supra* note 5, at 148.
[27] *See* Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404, 408, 425 (2009).
[28] *See* Costabel, *supra* note 5, at 503–06; Robertson, *supra* note 5, at 162–63.
[29] *See* Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 745 n.a1 (1995).
[30] *See id.* at 798 (explaining how the curse of Miles v. Apex Marine Corp., has caused some courts to abandon their role as admiralty judges). Professor Force wrote:

> The approach used by the Court in *Miles* is beginning to exert an hypnotic effect on some federal judges, leading them to forsake substance for form. The lure of "uniformity" has drawn and will continue to draw courts to a mechanical, rather than a reasoned, approach to the resolution of issues. Congressional legislation has become talisman; and, worse yet, "deference to legislative intent," both real and imagined, has enticed some federal judges into abandoning their unique, important, and constitutional responsibility in declaring the general maritime law.

Id.
[31] Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).
[32] *Townsend*, 557 U.S. 404.

> The case at bar can be distinguished from *Miles* on several grounds. . . . Nevertheless . . . [s]everal lower federal courts have used what they term the "analytical framework" of *Miles* to deny punitive damages in maritime law cases. . . . To put an end to this confusion this Court should reiterate the limited parameter of *Miles*.[33]

Townsend followed, allowing punitive damages for wanton and egregious failure to pay maintenance and cure benefits.[34] Once again, it was argued that the *Miles* court limited recovery in maritime cases involving death or personal injury to the remedies available under the Jones Act and Death on the High Seas Act,[35] which only consisted of pecuniary damages. The *Townsend* court disagreed and held that this reading of *Miles* was far too broad.[36]

The history of cases post-*Townsend* and pre-*McBride I* is filled with the approach of leaving *Miles* undisturbed on its own limited holding, and denying the extension of its reasons beyond that.[37]

Baker and *Townsend* gave the illusion that the availability of punitive damages in general maritime law was an issue that had finally been laid to rest, but this was far from the case. Both *Townsend* and *Baker* took distance from *Miles*, but did not supply a final solution to the punitive damages issue; on the contrary, these cases sowed the seeds of an ongoing confusion. The reason is that both cases distinguished *Miles*, but reaffirmed its validity on its own terms.[38]

---

[33] Brief of Professor Thomas J. Schoenbaum as Amicus Curiae Supporting Respondents, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (No. 07-219), 2008 WL 261200, at *28–29.
[34] *Townsend*, 557 U.S. at 424–25.
[35] *Id.* at 418.
[36] *Id.* at 419.
[37] *See, e.g.*, Snyder v. L & M Botruc Rental, Inc., 924 F. Supp. 2d 728, 735–37 (E.D. La. 2013); Scott v. Cenac Towing Co., L.L.C., No. 12-811, 2012 WL 4372515, at *2 (E.D. La. Sept. 24, 2012); Barrette v. Jubilee Fisheries, Inc., No. C10-01206 MJP, 2011 WL 3516061, at *5 (W.D. Wash. Aug. 11, 2011).
[38] *See Townsend*, 557 U.S., at 419–20 ("By providing a remedy for wrongful death suffered on the high seas or in territorial waters, the Jones Act and DOHSA displaced a general maritime rule that denied any recovery for wrongful death. . . . The reasoning of *Miles* remains sound."); *see also Miles*, 498 U.S. 19, 23–34 (1990). However, the *Townsend* court added: "But application of that principle here does not lead to the outcome suggested by petitioners or the dissent . . . [because] the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Townsend*, 557 U.S. at 420.

A. *McBride I*—Departure from *Miles*.

McBride I[39] was decided October 2, 2013 by a panel of the Fifth Circuit over a consolidated case arising out of an accident aboard a drilling rig barge. A crane mounted on the barge capsized, one worker died, and three others suffered injuries. The estate for the deceased worker and the three injured workers filed separate lawsuits, stating causes of action for unseaworthiness under general maritime law, negligence under the Jones Act, and seeking compensatory, as well as "punitive and/or exemplary" damages.[40] The cases were consolidated, the Magistrate Judge dismissed all claims for punitive damages, and the court granted plaintiffs' motion to certify the judgment for immediate appeal, which followed, and produced the opinion in *McBride I*. The court held that "punitive damages remain available to seamen as a remedy for the general maritime law claim of unseaworthiness,"[41] based not on the historical reconstruction of the pre-1920 law, but on the fact that Congress had not spoken directly on punitive damages and that *Miles* could not be used to foreclose punitive damages. In closing, the panel made a distinction between punitive damages and what we call "non-pecuniary" damages.[42] This point is central to the scope of this article, as explained in the parts that follow.

B. *McBride II* (en banc)—*Miles* returns with a vengeance.

In *McBride II*,[43] the Fifth Circuit sat en banc and reversed *McBride I* with a sharp, unconditioned return to the full logic of *Miles*. Writing for a divided court,[44] Circuit Judge W. Eugene Davies held that:

---

[39] *McBride I*, 731 F.3d at 505.
[40] *Id.* at 507.
[41] *Id.* at 518 (citing to *Townsend*, 557 U.S. 404).
[42] *See id.* at 517.
[43] *McBride II*, 768 F.3d 382, 382 (5th. Cir. 2014).
[44] *See id.* at 384, 391, 401, 404, 419 (showing that W. Eugene Davis, Circuit Judge, wrote the opinion; Edith Brown Clement, Circuit Judge, filed a concurring opinion, in which Jolly, Jones, Smith, and Owen, Circuit Judges, joined; Haynes, Circuit Judge, filed an opinion concurring in the judgment, in which Elrod, Circuit Judge, joined; Higginson, Circuit Judge, filed a dissenting opinion, in which Stewart, Chief Judge, Barksdale, Dennis, Prado, and

> [T]his case is controlled by the Supreme Court's decision in *Miles v. Apex Marine Corp.*, which holds that the Jones Act limits a seaman's recovery to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness. Because punitive damages are non-pecuniary losses, punitive damages may not be recovered in this case.[45]

Judge Davies found support in *Townsend* itself, holding that, "The Supreme Court, in *Townsend*, did not overrule *Miles*. Rather, it took pains to distinguish that maintenance and cure case from *Miles* and confirmed that '[t]he reasoning of *Miles* remains sound.'"[46] Interesting to note, the opinion and concurrence did not just prohibit punitive damages for the wrongful death claim, but also extended the prohibition to the claims of the injured workers. To make sure that *Townsend* would not keep setting *Miles* aside on historical grounds, the concurrence took pains to challenge the existence of punitive damages in the pre-Jones era.[47] It would be interesting to analyze this opinion in the conflicting light of the work of Professor Robertson and many other opposite views, but it would require a large article of its own, and this issue is not central to the scope of this article. More on point and relevant, instead, is the dissent.

Are damages for loss of society any less compensatory in nature than damages for pain and suffering, questioned the dissent?[48] The dissent went on to say,

> For example, pain and suffering is not a financial loss and is difficult to reduce to a monetary amount; thus it is not a pecuniary damage according to the definition incorporated into FELA. Yet there can be no question that injured seamen can seek recovery for their own pain and suffering under the Jones Act and the general maritime law.[49]

Graves, Circuit Judges, joined; James E. Graves, Jr., Circuit Judge, filed a dissenting opinion, in which Dennis, Circuit Judge, joined).

[45] *Id.* at 384 ("Punitive damages, which are designed to punish the wrongdoer rather than compensate the victim, by definition are not pecuniary losses.").

[46] *Id.* at 390.

[47] *Id.* at 391–92 (Clement, J., concurring) ("While I join the majority opinion, I write separately to further explain the historical background mandating this result.").

[48] *See id.* at 424 (Graves, J., dissenting).

[49] *McBride II*, 768 F.3d at 424.

After this serious challenge of the majority opinion on the specific issue of punitive damages for injuries caused by unseaworthiness, the dissent, penned by Circuit Judge Graves,[50] and joined by Circuit Judge Dennis,[51] had the proper vision of the real problem in this whole saga: the labeling of punitive damages as "non-pecuniary" and "compensatory" damages.[52] We will expand on this point momentarily. Now, a conclusion on the *McBride* saga is in order.

B. A Silent State of the Disunion Address

Three months after *McBride II,* on Christmas Eve 2014, a petition for certiorari was filed; the Court denied certiorari without opinion, although the conflict among the circuits is real, and the issue is of considerable importance.[53] It is possible to guess why. Among other things, *McBride II* extended the "pecuniary damages limitation" of *Miles* to seamen's injuries under the Jones Act, thus making a direct attack to Jones Act damages.[54]

This time, no creative exercise of circumventing the abused *Miles* doctrine could be used. Resolution of the questions posed for certiorari would have almost inevitably taken to overruling either *Miles*, or the steady movement of the circuits containing the *Miles* doctrine.[55] Since the Supreme Court was the only one that could get the job done, yet seemed unwilling to do so, it is

---

[50] *Id.* at 419.
[51] *Id.*
[52] *See id.* at 423.
[53] *See* McBride v. Estis Well Serv., L.L.C., 135 S. Ct. 2310 (2015) [hereinafter *McBride (U.S.)*] ("Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied."); Petition for a Writ of Certiorari at *i, McBride v. Estis Well Serv., L.L.C., 135 S. Ct. 2310 (2015) (No. 14-761), 2014 WL 7474141. McBride proposed the following questions:

> The principal question presented is whether seamen may recover punitive damages for their employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel, as held by the Ninth and Eleventh Circuits, or are punitive damages categorically unavailable in an action for unseaworthiness, as held by the First, Fifth, and Sixth Circuits and the Texas Supreme Court.
>
> The case also offers the Court an opportunity (but would not require the Court) to resolve a subsidiary question that was explicitly left open in Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 424 n.12 (2009)—whether the Jones Act, 46 U.S.C. § 30104, "prohibits the recovery of punitive damages in actions under that statute."

Id. at *i.
[54] *See McBride II*, 768 F.3d at 383.
[55] *See* Costabel, *supra* note 5, at 503–06; Robertson, *supra* note 5, at 162–63.

fair to wonder what moral can be found in the *McBride* saga, and whether this is the end of the road. The moral is that *Miles* appears to be untouchable, at least in the Fifth Circuit, but that *McBride II* may not be the end of the road. In fact, *McBride II* could be overruled whether the *Miles* doctrine applies or not. Upon deeper scrutiny, the real issue in *McBride* is not *Miles*, but the characterization of punitive damages.

V. The History of Punitive Damages

Punitive damages have a story of their own in admiralty law. That happened, once again, compliments of the *Miles* doctrine. The historical rendering by Professor Robertson clearly shows that the problems with punitive damages in admiralty began only when *Miles* was stretched to order that all non-pecuniary damages should be banned outright from the world of admiralty, whether in Jones Act, Death in the High Seas Act ("DOHSA"), general maritime law, or even for "non-Jones" claimants.[56] The only way to exorcise *Miles* is to adjust the fire: *Miles* is not the target, it is the pecuniary damage that needs to be defined.

Many cases that denied punitive damages have attached the non-pecuniary label to punitive damages. For example, *Hackensmith v. Port City S.S. Holding Co*., refers to punitive damages as "punitive, loss of consortium, or other non-pecuniary damages."[57] In another instance, *Rowe v. Hornblower Fleet* recited, without further explanation, that "many courts—including district courts in this [Ninth] Circuit—concluded that because punitive damages are non-pecuniary, they too were unavailable on unseaworthiness claims."[58]

Anderson v. Texaco, Inc.,[59] gets more precise, saying:

---

[56] *See* Robertson, *supra* note 5, at 139.
[57] *See, e.g.*, Hackensmith v. Port City S.S. Holding Co., 938 F. Supp. 2d 824, 829 (E.D. Wis. 2013); Rowe v. Hornblower Fleet, 2013 A.M.C. 873, 891 (N.D. Cal. 2012).
[58] *See Rowe*, 2013 A.M.C. at 891.
[59] Anderson v. Texaco, Inc., 797 F. Supp. 531, 532 (E.D. La. 1992).

> There can be little doubt that punitive damages are nonpecuniary in character. Pecuniary damages are awards designed to restore "material loss which is susceptible of a pecuniary valuation." Punitive damages, on the other hand, do not compensate for a loss, but rather, are imposed to punish and deter by virtue of the gravity of the offense.[60]

The *Anderson* court further explained, "Punitive damages are awards given 'having in view the enormity of [the] offense rather than the measure of compensation to the plaintiff.'"[61]

The *Anderson* court disallowed punitive damages in a Jones Act case, ironically using an argument that supports the opposite conclusion. To disallow punitive damages because they are "other than compensatory" takes them out of reach of the *Miles* doctrine.

The work of Professor Robertson opens with a section titled "Terminology,"[62] addressing the various meanings attached to the term "punitive damages."[63] The section highlights that maritime cases have been occupied classifying punitive damages either as pecuniary or nonpecuniary, but that this distinction has no useful purpose in the debate.[64] The dissent of Judge Graves, joined by Judge Dennis in *McBride II*, raises the same criticism, holding that the terms "pecuniary" and "compensatory" are not coextensive, with the former being "far narrower" than the latter.[65]

The opinion by Judge Davies might be read to characterize "pecuniary damages" as losses of money, more precisely, actual money losses.[66] The dissent by Judge Graves responded

---

[60] *Id.* at 534 (quoting Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59, 71 (1913)).
[61] *Id.* (quoting Molzoff v. United States, 502 U.S. 301, 306 (1992)); *see* Bergen v. F/V St. Patrick, 816 F.2d 1345, 1347 (9th Cir. 1987) ("Punitive damages are non-pecuniary damages . . . ."); *see also* Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 434 n.2 (5th Cir.1962) ("The Restatement of Torts defines punitive damages as damages other than compensatory or nominal damages awarded against a person to punish him for his outrageous conduct.") (internal citations omitted); *In re* Waterman S.S. Corp., 780 F. Supp. 1093, 1095 (E.D. La. 1992) ("There is much authority that punitive damages are pecuniary in nature.").
[62] *See* Robertson, *supra* note 5, at 73, 80.
[63] *See id.* at 80–83.
[64] *See id.* at 80 (citing Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 777 (1995)).
[65] *McBride II*, 768 F.3d 382, 423 (5th Cir. 2014) (Graves, J., dissenting).
[66] *See id.* at 384 (majority opinion); *see also id.* at 419 (Graves, J., dissenting).

that the definition found in *Vreeland*[67] is different: "A pecuniary loss or damage must be one which can be measured by some standard," that is, one susceptible of estimation in monetary terms, not just loss of actual money.[68]

Before engaging in a review of the terminology issue, it is useful to clear the table from the "pecuniary damages" issue. The dissent in *McBride II* correctly noted that non-pecuniary damages are allowed and dispensed routinely in Jones Act claims.[69] Damages for pain and suffering have been, and still are allowed in actions both under the Federal Employer's Liability Act ("FELA"), and the Jones Act.[70] Damages for negligent infliction of emotional distress are likewise allowed in both types of action.[71] There is no question that these damages are nonpecuniary.

This argument alone should dispose of the whole debate over punitive damages. If non pecuniary damages are allowed in the FELA and Jones Act, how can punitive damages be disallowed on the assumption that they are nonpecuniary? Since the argument has not overcome the obstinate extension of *Miles*, however, it is proper to continue our review on the assumption that "nonpecuniary" damages are an issue, beginning with the topic of terminology. Terminology is the key, as predicted by Professor Robertson, which requires analysis way deeper

---

[67] Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59 (1913).
[68] *McBride II*, dissent, 768 F.3d at 423 (quoting *Michigan Cent. R. Co.*, 227 U.S. at 71).
[69] *See id.* at 424.
[70] *See* Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 140–41 (2003) (holding that mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos); *see also* Johnson v. Offshore Exp., Inc., 845 F.2d 1347, 1357 (5th Cir. 1988) (awarding $370,000 to injured seaman in an unseaworthiness and Jones Act case for past and future pain and suffering where seaman suffered severe, constant, and permanent pain, and would continue to experience similar pain for remainder of her life based upon arachnoiditis); *In re* Moran Towing Corp., 984 F. Supp. 2d 150, 182 (S.D.N.Y. 2013) (explaining that a maritime wrongful death claimant in an unseaworthiness and Jones Act case is entitled to recover for the conscious pain and suffering decedent experienced prior to death, so long as there is some evidence that decedent had, at some level, an awareness of what he was going through).
[71] *See* Ray v. Consolidated Rail Corp., 938 F.2d 704, 705 (1991) (explaining that emotional injury must result from physical contact or threat of physical contact for injury to be compensable under FELA).

than ever before.[72] In fact, etymology[73] and semantic[74] analysis should be used, which leads to the conclusion that punitive damages are actually not even damages, and if they were, they would definitely be pecuniary.

A. Civil or Criminal?

The distinction between criminal law and civil law is too well-known to be repeated here, but it is in the area of punitive damages that the distinction has generated the most intense debates. An *Essay On The Civil-Criminal Distinction With Special Reference To Punitive Damages*, published in the Journal of Contemporary Legal Issues in the Spring of 1996,[75] analyzed punitive damages against the backdrop of the civil-criminal distinction. The author goes beyond the basic distinction of purposes (civil law aims at compensation, criminal law aims at punishment), noting that civil law always requires a party claiming an injury, while criminal law does not require this.[76] In fact, criminal law frequently applies to activities considered "victimless" per se,[77] or considered victimless on their facts.[78] "[C]ivil Law," the author posits, "needs an alleged victim; criminal law needs an alleged wrongdoer. The simple compensation/punishment distinction cannot account for the rest of the differences in the basic structure of the two bodies of law."[79] In fact, the difference between the two systems is not only

---

[72] *See* Robertson, *supra* note 5, at 80–84 (describing the faults of the terminology currently being used and the importance of determining what the terminology being used actually means).
[73] *See Etymology*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/etymology (last visited Jan. 20, 2016) ("an explanation of where a word came from: the history of a word").
[74] *See* Thomas K. Landauer, Peter W. Foltz & Darrell Laham, *An Introduction to Latent Semantic Analysis*, 25 DISCOURSE PROCESSES 1, 2 (1998) ("Latent Semantic Analysis (LSA) is a theory and method for extracting and representing the contextual-usage meaning of words by statistical computations applied to a large corpus of text."), http://lsa.colorado.edu/papers/dp1.LSAintro.pdf.
[75] *See* Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43 (1996).
[76] *See id.* at 48.
[77] *See id.* (e.g., gambling and prostitution).
[78] *See id.* (e.g., reckless endangerment and attempt).
[79] *Id.*

on their goals and purposes, but first and foremost, on their sanctioning and enforcement policies.[80]

B. The People versus . . . .

We all know that the plaintiffs in criminal cases are "The People" or the "U.S.," and we know who their attorneys of record are in the criminal courtroom, but we forget—or do not attach importance to—the fact that regular citizens in possession of bar licenses, and not elected or appointed government officials, may be asked to perform the duties of a public prosecutor in a criminal case.[81]

A very interesting study by Professor Roger A. Fairfax, Jr.,[82] reminds us that government lawyers never had a monopoly on criminal prosecution, but that the government has made recourse to the use of private lawyers to represent public interests in prosecutorial functions, a practice that is still alive and well today.[83] Arguing that this practice is troubling or inappropriate, and suggesting ways to mitigate concern, Professor Fairfax provides valuable insight to what he calls "prosecution outsourcing,"[84] a concept that is the departing point of our review of punitive damages. The article explains some reasons given for this practice, which are cost-saving and efficiency.[85]

The same reasons, and more, are found in an article originally presented as a paper at the George Washington University School of Law Conference on Private Enforcement of

---

[80] *See id.* at 57 (showing the differences between civil law and criminal law).
[81] *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 415–16 (2009); *cf.* Craig S. Denney, *How Do You Become an Assistant U.S. Attorney?*, AM. BAR. ASS'N, http://www.americanbar.org/publications/tyl/topics/mentoring/how-do-you-become-assistant-united-states-attorney.html (last visited Feb. 21, 2016) (providing different requirements and classifications for a federal prosecutor).
[82] *See* Fairfax, *supra* note 81, at 411.
[83] *Id.* at 415–16.
[84] *Id.* at 416–19.
[85] *Id.* at 417.

Competition Law on February 28, 2009.[86] In this article, Professor Edward D. Cavanagh[87] studies the origins and values of the treble damages remedy in antitrust actions. Calling them a "centerpiece of private antitrust enforcement," the author explains that Congress created this remedy because Government resources are limited, and private parties are better equipped to detect violations.[88] Giving private parties treble damages served as an incentive to press judicial actions, which the private parties might not have been induced to do if the only damages they were allowed to receive were *actual damages*.[89] The author addresses the mounting criticism of the private antitrust remedy,[90] and concludes that the system, though not perfect, is "in many respects salutary."[91]

C. The "Middleground" Between Criminal and Civil.

From a 1992 Symposium of the Yale Law School, the Yale Law Journal published an article written by Professor Kenneth Mann[92] on "punitive civil sanctions," calling them a "middle ground between criminal and civil law."[93] The article focuses on those sanctions that are "state-imposed" and in which "an administrative agency is the moving party."[94] The author

---

[86] *See* Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons From the American Experience*, 41 LOY. U. CHI. L.J. 629, n.a1 (2010).
[87] *See id.* at 629; *see also Edward Cavanagh*, ST. JOHNS, http://www.stjohns.edu/academics/bio/edward-d-cavanagh (last visited Jan. 21, 2016) (providing a description of Edward Cavanagh).
[88] *See* Cavanagh, *supra* note 86, at 629.
[89] *See id.* at 631.
[90] *See id.* at 629; *see also* Tim Reuter, *Private Antitrust Enforcement Revisited: The Role of Private Incentives to Report Evidence to the Antitrust Authority* (U. of Konstanz, Working Paper No. 2012-04, 2012), http://www.uni-konstanz.de/FuF/wiwi/workingpaperseries/WP_Reuter_4-12.pdf. A similar analysis was made by Professor Tim Reuter, of the University of Konstanz (Germany) in the wake of the introduction, by the European Commission, of legislation allowing private parties to pursue antitrust violations in civil courts. *See* Reuter, *supra*, at 2. The European legislation, dating 2003, is a very late alignment with the American model, and Professor Reuter engages in a scientific analysis of the effects of the model, using complicated statistical and mathematical formulas. *See generally id.*
[91] *See* Cavanagh, *supra* note 86, at 640.
[92] Kenneth Mann, Symposium, *Punitive Civil Sanction: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).
[93] *Id.* at 1799 (explaining that punitive damages provide the middle ground between the purely compensatory nature of civil law, and the severity and harshness of criminal law).
[94] *Id.* at 1800.

concludes, advocating a shrinking of criminal law contemporaneously to an expansion of punitive civil sanctions.[95]

In so doing, the article discusses the "paradigmatic" differences between the criminal and the civil systems.[96]

> Describing the law of the fourteenth and fifteenth centuries, Holdsworth observed that it was "in this period that the foundations of our present law as to Wrongs criminal and civil [were] laid." The differences apparently became quite well[-]entrenched. In 1776 Lord Mansfield said, "Now there is no distinction better known, than the distinction between *civil* and *criminal law*; or between *criminal prosecutions* and *civil actions*." Out of this historic division between the two main categories of legal process emerged the deeply ingrained language distinguishing criminal penalties from civil remedies. . . . Thus, a sanction may be viewed within the criminal law paradigm as a penalty, or within the civil law paradigm as a remedy.[97]

Notice that Professor Mann's article does not deal with the issue of the civil punitive damages claimed by private litigants and allowed in a civil court, but only with the punitive sanctions levied and enforced by administrative agencies.[98] However, the article contains precious leads for the characterization of "private punitive damages."[99] These works are relevant to our analysis of civil punitive damages because they show how some functions of prosecutions have

---

> What is the role of full-fledged criminal sanctions in a legal system increasingly characterized by punitive civil sanctions? If a process labeled "civil" metes out punitive sanctions, should criminal-type procedural protections apply? How much can the "punitiveness" of sanctions imposed in civil proceedings be increased to strengthen law enforcement tools without turning to the criminal law? . . . Should legislation encourage private punitive proceedings to take an increasingly large part of the law of sanctions out of the hands of the state?

Id. at 1802.

[95] *See id.* at 1802.

[96] *See id.* at 1803.

[97] *Mann*, *supra* note 92, at 1803–04.

[98] *Id.* at 1800, 1802–03 (identifying the focus of the article to state-imposed punitive damages, especially those by administrative agencies).

[99] *See id.* at 1867–69; *but see* Franklin E. Zimring, Symposium, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 Yale L.J. 1901 (1992) (explaining, in an article stemming from the same Symposium, that Professor Mann left many terms not clearly defined). Professor Zimring concluded that since the number and kind of criminal sanctions are expanding, punitive civil remedies are acceptable on the comparative advantage of agency-managed enforcement efforts. Zimring, *supra*.

shifted from their natural enforcers to other actors, and this helps us put the activity of private parties seeking punitive damages in the proper perspective.

D. On The Road To Private Public Prosecutors

The excursus will ultimately take us from public prosecutors to "private public prosecutors,"[100] but so far, we have traveled only half the road: from State Attorneys to administrative agencies. What happened at this halfway stage is also relevant.

Professor Mann's study explains the increased role of punitive civil sanctions.[101] "Punitive civil sanctions," consisting in forfeitures and multiple damages, began to be legislatively adopted in the middle of the Twentieth Century with a rapid development, due to an expansion of sanctioning and a changed philosophy of sanctioning.[102] The "utilitarian theory,"[103] inspired by the works of Jeremy Bentham,[104] led to the development of the "deterrence theory,"[105] which viewed obligations to pay an injured party as a disincentive to causing injury, a form of justice different from "compensatory justice."[106] "Where damages failed to promote better behavior, the solution was to augment the size of the civil money payment."[107] Professor Man continues:

> With the development of deterrence ideology, the difference between the

---

[100] *See* Zimring, *supra* note 99, at 1905–06 (discussing the sanctioning power held by administrative agencies and prosecutors, and the limits placed on the power distribution amongst them).
[101] *See generally* Mann, *supra* note 92, at 1844–61 (explaining how Congress has been actively involved in the imposition and increased role of punitive civil sanctions).
[102] *See id.* at 1844 (identifying the factors that have contributed to the increased role of punitive civil sanctions, including: a changed philosophy of sanctioning, reforms in the procedural rules, growth of the administrative state, and a general expansion in sanctioning).
[103] *See id.* at 1845 (explaining how the foundation of Jeremy Bentham's utilitarian theory is based in behavioral science, which established the legal theory premised on the manipulation of pain and pleasure, with the goal of achieving the greatest good).
[104] *See* Mann, *supra* note 92, at 1845 (highlighting Jeremy Bentham's contributions to the law of sanctions thanks to his creation of the utilitarian theory); *see also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Publ'g Co. 1948).
[105] Mann, *supra* note 92, at 1845 (explaining that the deterrence theory is based on the notion that the more severe a sanction, the greater the deterrent).
[106] *See id.* at 1845–46 (explaining the difference between deterrence theory and "compensatory justice").
[107] *Id.* at 1846.

> purposes of criminal and civil law decreased. . . .
>
> Utilitarianism thus brought jurists and scholars to a new awareness of the middleground; the theory highlighted the possibility of controlling parties by placing costs on them in the civil law. The awareness of this possibility coincided with the development of tort law as a form of legitimate coercion rather than as a legal tool for righting a wrong through compensation.[108]

In fact, the creation of civil penalties raised possible constitutional problems of double jeopardy.[109] In *United States v. Halper*,[110] the issue arose as to whether the Double Jeopardy Clause is a bar to civil sanctions following criminal punishment for the same offense.[111] In *Halper*, a civil money sanction that far exceeded the costs to the government was imposed on the defendant after the defendant's criminal conviction and punishment.[112] Finding so, the Court held that the civil fine was a second punishment prohibited by the Double Jeopardy Clause.[113] The uncertainty of the *Halper* test caused novel double jeopardy claims of such a wide variety that raised concerns, which led to the Supreme Court overruling *Halper* eight years later.[114]

In *Hudson v. United States*,[115] the Supreme Court overruled *Halper* criticizing the method used by *Halper* in order to assess the nature of a penalty; however, *Hudson* is useful to our analysis because it clarifies the issue of "denominations."[116] The Court addressed factors of a statutory scheme that are so punitive to "transform what has been denominated as civil remedy into criminal penalty" for double jeopardy purposes.[117] In this middle ground, the

---

[108] *Id.*
[109] *See, e.g.*, United States v. Halper, 490 U.S. 435, 441 (1989) (discussing how the creation of civil penalties raised possible constitutional problems of double jeopardy).
[110] *Id.* at 435.
[111] *See id.* at 446.
[112] *Id.* at 452.
[113] *Id.*
[114] *See* Debra Marie Ingraham, *Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject* Healy*?*, 54 WASH. & LEE L. REV. 1183, 1184–86 (1997).
[115] Hudson v. United States, 522 U.S. 93 (1997).
[116] *See id.* at 101.
[117] *Id.* at 100.

metamorphosis from criminal sanction to civil penalty or remedy is under way to its ultimate destination: the civil punitive remedy.

E. The Other End of the Spectrum.

Double jeopardy had a lesser history and coverage with civil punitive damages. The general consensus is that awards of these damages do not trigger Fifth Amendment protections.[118] Under the blessing of the Supreme Court in *Halper*, courts have found no double jeopardy violation on the rationale that punitive damages are not "essentially criminal" in nature,[119] because they are not part of "essentially criminal" proceeding,[120] or because they simply follow *Halper*.[121]

The double jeopardy issue in punitive damages has been raised mostly in connection with mass tort asbestos litigation.[122] It was argued, among other grounds, that the multitude of asbestos-related claims nationwide would make the defendant subject to multiple punitive damage awards for a single conduct, thus violating the fundamental fairness requirement of the Due Process Clause of the Fourteenth Amendment.[123] Reading these cases together with *Hudson* and *Halper*, it appears that civil penalties and punitive damages are tied by a common bond: neither is convincingly what it should be by their names. Both are essentially punitive. However, civil penalties may become criminal when excessively punitive, while punitive

[118] *See, e.g.*, United States v. Stoller, 78 F.3d 710, 724 (5th Cir. 1996); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1042 (5th Cir. 1984); Irvine v. 233 Skydeck, LLC, 597 F. Supp. 2d 799, 804–05 (N.D. Ill. 2009); 21st Century Ins. Co. v. Superior Court, 26 Cal. Rptr. 3d 476, 485–86 (Cal. Ct. App. 2005) (stating that punitive damages do not trigger *ex post facto* protection).
[119] *See* Jines v. Seiber, 549 N.E.2d 964, 966 (Ill. App. Ct. 1990).
[120] *See Hansen*, 734 F.2d at 1042.
[121] *See, e.g.*, Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 287 (D.N.J. 1989); *21st Century Ins. Co.*, 26 Cal. Rprt. 3d at 484–86.
[122] *See*, *e.g.*, *Leonen*, 717 F. Supp. at 284–86.
[123] *See id.* at 285–86. The court expressly rejected this argument in *Leonen*. *Id.*

damages are not essentially criminal, even when excessive.[124] When both are just punitive and not criminal, the difference between the two is the way they are administered and the entity that collects them: administrative agencies on one side, and private parties on the other.[125] A third remedy has entered the punitive arena: the "treble damages" remedy, which has once more stirred debate, but supplies hints for a final solution to the nature of punitive damages.[126]

F. Enter Treble Damages

In 1890, Congress passed the Sherman Antitrust Act, for the protection of interstate commerce and competition in the marketplace.[127] In pursuit of this goal, the statute imposed stiff criminal sanctions, but it soon became evident that the criminal justice system alone did not have the resources for finding, identifying, and pursuing the ends of justice. Criminal prosecutions could not even reach perpetrators abroad; however a civil court of law could, reaching foreign persons or entities by long-arm statutes and personal jurisdiction based on effects and contacts.

Congress then decided to amend the Sherman Antitrust Act to give it stronger teeth, and passed the Clayton Act in 1914.[128] The greater innovation of the Clayton Act was to allow private parties to pursue antitrust violations in a civil court of law, for violations that caused those private parties damages, which would be automatically trebled.[129] The Clayton Act is one of the most famous treble damages statutes, but was neither the first, nor the last. "Trial courts

---

[124] *See* Hudson v. United States, 522 U.S. 93, 99 (1997) (stating when the statutory scheme was so punitive, a civil penalty can be transformed into a criminal penalty).
[125] *See id.* at 103 (allowing damages to be awarded to administrative agencies); Unites States v. Halper, 490 U.S. 435, 447, 451 (1989) (allowing damages to be awarded to private parties).
[126] *See* 18 U.S.C. § 1964(c) (2015) (stating that "Any person injured . . . shall recover threefold the damages he sustains . . . .").
[127] *See* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2015); *see also Sherman Antitrust Act*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/antitrust (last visited Feb. 28, 2016).
[128] *See* Clayton Act, 15 U.S.C. §§ 12–27 (2015); *Sherman Antitrust Act*, *supra* note 127.
[129] *See* 15 U.S.C. § 15(a).

had statutory discretion to enhance damages for patent infringement since 1836."[130] While the patent infringement statutes gave juries and courts discretion to apply "up to" three times the amount of actual damages, the Clayton Act makes this multiplier mandatory.[131]

The most famous and discussed follower of the Clayton Act is the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[132] passed in 1970 to curb organized crime's infiltration of legitimate business operations affecting interstate or foreign commerce. RICO provides substantial criminal penalties, divestiture of interests, restrictions on future investment activities, all of which may be sought by the government,[133] and treble damages, which must be sought by the private parties as a private right of action given to anyone injured in his or her business or property, against individuals and entities who engage in racketeering activity in violation of the Act.[134] Punitive damages are also allowed in actions under Title VII of the Civil Rights Act of 1964.[135]

G. Conclusion of History of Punitive Damages

The history of punitive damages shows that Congress, in the wake of ancient and consistent common law use of punitive damages, not only gave punitive damages a seal of approval, but found it proper and expedient to outsource to private litigators the task of making

---

[130] *In re* Seagate Technology, LLC, 497 F.3d 1360, 1368 n.3 (Fed. Cir. 2007) (citing 35 U.S.C. § 284 (2000)); *see also* 35 U.S.C. § 285 (2015); Patent Act of 1870, ch. 230, 16 Stat. 198–217 § 59 (1870) ("[T]he court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."); Patent Act of 1836, ch. 357, 5 Stat. 117 § 14 (1836) ("[I]t shall be in the power of the court to render judgment for any sum above the amount found by such verdict . . . not exceeding three times the amount thereof, according to the circumstances of the case . . . .").

[131] *See* 15 U.S.C. § 15(a).

[132] *See* 18 U.S.C. §§ 1961–68 (2015).

[133] *See id.* § 1963.

[134] *See id.* § 1964(c).

[135] *See* Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award without an Accompanying Compensatory or Nominal Award: Further Unifying The Federal Civil Rights Laws*, 89 KY. L.J. 581, 583 (2001) (noting courts are split as to what circumstances entitle a plaintiff to punitive damages).

retributive justice.[136] In order to deter and punish violations of public and societal interest and values, as well as outrageous behaviors by tortfeasors, private litigators are allowed sums of money that are not meant to make them whole or to be restitution of losses, but are sums that tortfeasors must pay the prevailing plaintiffs, because of, and assessed upon, the extent of the outrageous conduct or the nature of the violation.[137] As such, punitive damages have a nature and mission of their own.

VI. The True Nature of Punitive Damages

A. Function

The Restatement (Second) of Torts, Section 908, defines punitive damages as:

> [D]amages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.[138]

An ocean of writing has poured over the nature and function of punitive damages, and the virtually unanimous consensus is in accordance with the Restatement's definition.[139] *Exxon Shipping Co. v. Baker* is a good summary of all the ink: "punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[140] Scholars have

---

[136] *See McBride I*, 731 F.3d 505, 509–10 (5th Cir. 2013) (discussing the history of punitive damages).

[137] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 11 HARV. L. REV. 869, 873 (1998) (stating the purpose of punitive damages is to deter and punish).

[138] RESTATEMENT (SECOND) OF TORTS § 908 (1979). The comment to Section 908 explains that:

> The purposes of awarding punitive damages, or "exemplary" damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future . . . .
>
> . . . .
>
> Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime.

Id. § 908 cmt.

[139] Polinsky & Shavell, *supra* note 137, at 896.

[140] Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008). The Court went on to say:

consistently adhered to this concept. An excerpt from Professor Robertson's work is a wholesome compendium: "Punitive damages have three main goals. . . . [P]unitive damages serve the purposes of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example."[141]

B. The Nature of Punitive Damages

In fact, a theory of punitive damages as "societal damages" has also been propounded.[142] The idea that punitive damages may also have a compensatory function, however, applies to society as a whole, not to individual private plaintiffs. It has been correctly pointed out:

> individual plaintiffs have no vested entitlement or right to punitive damages, as opposed to compensatory damages. Indeed, the state can take away a portion of the punitive damages award for use in the treasury or a specified fund; punitive damages, moreover, are taxed, whereas compensatory damages are not[143]

Thus only a doctrine of societal nature of punitive damages could justify "punitive-damages-only class actions."[144]

The treble damages provisions of the Clayton Act are a statutory confirmation of the dichotomy: compensatory/punitive damages.[145] Treble damages are composed of three parts:

> This consensus informs the doctrine in most modern American jurisdictions, where juries are customarily instructed on twin goals of punitive awards. *See, e.g.*, Cal. Jury Instr., Civil, No. 14.72.2 (2008) ("You must now determine whether you should award punitive damages against defendant[s] ... for the sake of example and by way of punishment"); N.Y. Pattern Jury Instr., Civil, No. 2:278 (2007) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby to discourage the defendant . . . from acting in a similar way in the future"). The prevailing rule in American courts also limits punitive damages to cases of what the Court in *Day* [*v. Woodworth*] . . . spoke of as "enormity," where a defendant's conduct is "outrageous," 4 Restatement § 908(2), owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others," or behavior even more deplorable, 1 Schlueter § 9.3(A).

Id. at 492–93.

[141] *See* Robertson, *supra* note 5, at 74–75.

[142] *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 353 (2003) ("The possibility that punitive damages might serve, among other things, to compensate society has been suggested by two federal judges and mentioned in passing in several pieces addressing split-recovery statutes.").

[143] Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 50 (2009).

[144] *See id.* at 26.

one part is the "actual damages" suffered by the plaintiff, and two parts are the punishment of the defendant.[146] In claims under the Clayton Act, punitive damages are statutorily predetermined, and for this reason, no punitive damages could be awarded in excess of the treble measure; also, it would be a duplicative award.[147]

Under RICO, however, punitive damages have seldom been awarded together and in addition to treble damages.[148] In *Banderas v. Banco Cent. del Ecuador,* for example, Florida's Third District Court of Appeal awarded punitive damages in addition to treble damages because treble damages award was insufficient to do justice.[149] In *Com-Tech Associates v. Computer Associates International, Inc.*,[150] the United States District Court for the Eastern District of New York permitted a punitive damages claim to stand together with a treble damage claim, based on the uncertainty of whether punitive damages were remedial or punitive, and following the Supreme Court's view that "civil RICO is primarily remedial in nature and only secondarily punitive."[151] Then, what are punitive damages, really?

C. The Windfall Label

The windfall label has been used so often with punitive damages that citations are not needed. The nickname is appropriate, but without its usual denigratory connotation that makes it synonymous of unearned and undeserved. Punitive damages, on the contrary, are earned and deserved, as the just reward for the mission of the plaintiff, the "private public prosecutor"

---

[145] *See* Judith A. Morse, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 527–28 (1986).
[146] Lowry v. Tile, Mantel & Grate Ass'n of California, 106 F. 38, 46 (C.C.N.D. Cal. 1900).
[147] *See e.g.*, McDonald v. Johnson & Johnson, 722 F.2d 1370, 1382–83 (8th Cir. 1983); Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580, 582 (8th Cir. 1945); Bowden v. Caldor, Inc., 710 A.2d 267, 282 (Md. 1998); Nat. Design, Inc. v. Rouse Co., 485 A.2d 663, 678 (Md. 1984).
[148] Morse, *supra* note 145, at 547.
[149] *See* Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265, 272 (Fla. Dist. Ct. App. 1985).
[150] Com-Tech Assocs. v. Comput. Assocs. Int'l, Inc., 753 F. Supp. 1078 (E.D.N.Y. 1990).
[151] *Id.* at 1093; *see* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 239–40 (1987).

appointed to the task of redressing anti-social actions by common law and statutes alike.[152] "The self-interest 'windfall' of punitive damages thus provides the motive power to induce plaintiffs to bring suits that would otherwise not be brought."[153] The outsourcing to private parties of measures of retribution and dissuasion would not be possible without incentives, and no incentive is better than a windfall.

D. The View of the "Tax Man"

Title 26 of the United States Code[154] contains Section 104(a)(2), titled "Compensation for injuries or sickness," which excludes from taxable income "the amount of any damages (*other than punitive damages*) received . . . on account of personal physical injuries or physical sickness."[155] The rationale behind the exclusion of personal injury damages from taxation and the inclusion of punitive damages is the "return of capital."[156] "Personal-injury damage awards are seen as making the human whole again, thus returning the 'human capital' lost to the injury.

---

[152] David G. Owen, Symposium, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 380 (1994). Professor Owen explains that:

> Punitive damages are frequently criticized for allowing "windfalls" to plaintiffs in addition to compensation for the losses that were actually sustained. Yet, this objection overlooks the important fact that it is the very existence of a prospective windfall that helps to motivate reluctant victims to press their claims and enforce the rules of law. In so energizing the law through increased enforcement, punitive damage assessments serve instrumentally to promote each of the underlying substantive objectives of punitive damages—education, retribution, deterrence and compensation. Thus, punitive damages have a vital procedural function, which may be termed "law enforcement," in providing the mechanism for achieving the other substantive objectives of the doctrine.

Id.

[153] Michael L. Rustad, Symposium, *Access to Justice: Can Business Co-Exist with the Civil Justice System?: The Closing of Punitive Damages' Iron Cage*, 38 LOY. LA. L. REV. 1297, 1354 n.315 (2005) (quoting Thomas F. Lambert, Jr., *The Case for Punitive Damages (Including Their Coverage by Liability Insurance)*, 35 ATLA L.J. 164, 171 (1974)).

[154] 26 U.S.C. §§ 1–9834 (2014).

[155] *Id.* § 104(a)(2) (emphasis added).

[156] *See* Mark W. Cochran, *Should Personal Injury Damage Awards Be Taxed?*, 38 CASE W. RES. 43, 45 (1988) (explaining the return of capital rationale).

Under this 'return of human capital' doctrine, personal injury awards are similar to a return of financial capital, and therefore are not considered income."[157]

The Supreme Court addressed the issue of taxation of punitive damages in this context in *Commissioner v. Glenshaw Glass Co.*,[158] where it asked whether punitive damages, characterized as "windfalls" flowing from the culpable conduct of third parties, were or were not within the scope of Section 104.[159] Holding that punitive damages are "undeniable accessions to wealth, clearly realized . . . . The mere fact that the payments were extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income to the recipients," the Court ruled that punitive damages are not exempt from taxation.[160] In other words, punitive damages are not "return of capital" because they are not compensation of lost "human capital"; rather, they are a windfall unconnected with the tort injury, and hence, a plain "accession to wealth" in the form of a windfall.

E. But What the Lord Giveth . . . .

Before characterizing punitive damages as a windfall, we should remember that the money from Heaven might not fall on the plaintiff alone. Plaintiffs in some states know well that punitive damages may be split between them and other entities or charities, thanks to the practice of "split-recovery" punitive damages.[161] Some states have passed statutes that apportion punitive damages at certain percentages between prevailing plaintiffs and either the state or charitable

[157] G. Christopher Wright, Comment, *Taxation of Personal Injury Awards: Addressing the Mind/Body Dualism That Plagues § 104(A)(2) of the Tax Code*, 60 CATH. U. L. REV. 211, 215 (2010) (citing O'Gilvie v. United States, 519 U.S. 79, 86 (1996)).
[158] *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955).
[159] *See id.* at 427.
[160] *Id.* at 431–33.
[161] *See* Bethany Rabe, Note, *The Constitutionality of Split-Recovery Punitive Damage Statutes: Good Policy But Bad Law*, 2008 UTAH L. REV. 333, 333, 341 (2008) (noting that "split-recovery statutes" require that a portion of punitive damages awarded to a plaintiff go to the state).

organizations.[162] California, for example, passed Senate Bill 1102 on August 16, 2004,[163] mandating that seventy-five percent of any punitive damages award be allocated to a Public Benefit Trust Fund controlled by the state.[164] The reason for these statutes is that, "since the purpose of punitive damages is to punish and deter—a societal objective—it is logical for society at large to benefit from a punitive damage award."[165]

These considerations also carry another logical follow-up. Punitive damages are not owed to plaintiffs as a matter of right. Punitive damages are awarded to plaintiffs not because of their injury—to which they should *not* be commensurate—but become a right of the plaintiffs to collect them only when and after a jury has deliberated them. In fact, in some states, plaintiffs are not allowed to plead punitive damages in their original complaint without court authorization.[166]

F. Punitive Damages are "Derivative"

Derivative actions are creatures of corporate law.[167]

> When a corporation is injured by a wrongful act, but the board of directors is unable or refuses to seek relief, a shareholder can . . . sue the wrongdoer on behalf of the corporation in the derivative suit . . . . The cause of action belongs to the

---

[162] *See id.* at 333.

[163] *See* S.B. 1102, 2003, Reg. Sess. (Cal. 2004).

[164] *See* William O'Connor, *New California Law Allows for Split-Recovery of Punitive Damages Awards*, MORRISON FOERSTER (Apr. 1, 2005), http://www.mofo.com/resources/publications/2005/04/new-california-law-allows-for-split_recovery-of-__.

[165] Rabe, *supra* note 161, at 333.

> The plaintiff has been fully compensated for the wrongs done to her through compensatory damages; after all, academics, laypersons, and Supreme Court Justices alike have complained for years that awarding punitive damages to a fully compensated plaintiff is nothing more than allowing that person to win the lottery. The state, on the other hand, could put the money to a beneficial use, such as restitution for crime victims, better social programs, or even simply reducing the amount a state must collect from its residents to maintain a balanced budget.

Id.

[166] *See* Rhett Traband, *An Erie Decision: Should State Statutes Prohibiting the Pleading of Punitive Damages Claims Be Applied in Federal Diversity Actions?*, 26 STETSON L. REV. 225, 227–28 (1996) (explaining that certain states require parties to obtain leave of court before pleading punitive damages).

[167] *See* Jonathan Shub, Comment, *Distinguishing Individual and Derivative Claims in the Context of Battles for Corporate Control: Lipton v. News International, Plc*, 13 DEL. J. CORP. L. 579, 581–83 (1988) (explaining that a derivative action is a suit brought on behalf of the corporation by its stockholders, and historically was created to allow stockholders to assert corporate rights against the directors of the corporation).

> corporation, which is the real party in interest, the shareholder being only a nominal plaintiff.[168]

Punitive damages closely resemble derivative actions. The outrageous conduct of the tortfeasor injures society, but society is unwilling (maybe even unable) to pursue redress of the societal injury.[169] However, common law and statutes (both federal and state) have outsourced this task to private litigants, who rise to the function of private public prosecutors, when the private litigants also suffer damages from the tortfeasor's behavior.[170]

The difference between derivative actions and punitive damages is only apparent. In derivative actions, a damage to the shareholder is not required,[171] while this requirement is commonly said to be a prerequisite for punitive damages.[172] This, however, is the source of most confusion about punitive damages. The target of derivative actions is implementing measures for the protection of rights of the corporation, in view of inaction of corporate organs.[173] The

---

[168] Alan J. Jacobs, *Nature and Purpose of Derivative Action*, *in* FEDERAL PROCEDURE 157–58 (Francis M. Dougherty & Julie R. Cataldo eds. 2007) (citing Abbey v. Modern Afr. One, LLC, 305 B.R. 594 (D.D.C. 2004) and Ross v. Bernhard, 396 U.S. 531 (1970)); *see* Shub, *supra* note 167, at 581–82.

[169] *See* Sharkey, *supra* note 142, at 359 ("[Tortfeasors] sometimes are not made to pay the full expected cost of harms caused by their conduct simply because many of those injured will never sue or will not prevail in their suits for reasons aside from the merits. Punitive damages are thus appropriate . . . ."); *see also* Brittan J. Bush, *The Overlooked Function of Punitive Damages*, 44 RUTGERS L.J. 161 (2014). Brittan Bush explains the role that punitive damages play in society as follows:

> By only subjecting [the tortfeasor] to compensatory liability, society fails to place reckless or intentional tortfeasors on equal footing with others in society. Thus, punitive damages, in conjunction with compensatory recovery, can reestablish social equality by not only restoring the social status of injured parties but also the tortfeasor whose actions caused their injuries.

Bush, *supra*, at 164–65.

[170] *See* Traband, *supra* note 166, at 227–28; *see also* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1028 (2007) (explaining that private litigants are allowed to pursue redress if the states permit).

[171] *See* John A. Gebauer, Annotation, *Action in Own Name by Shareholder of Closely Held Corporation*, 10 A.L.R.6th 293 § 2 (2006) (explaining that the same basis for a derivative action by the corporation will not necessarily defeat the right of the shareholder to bring a direct action).

[172] *See, e.g.*, Richard C. Tinney, Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages—Modern Cases*, 40 A.L.R.4th 11 § 2[a] (1985) (stating that, generally, "punitive damages may not be awarded unless the party seeking them has sustained damage").

[173] *See* Jay M. Zitter, Annotation, *Propriety of Termination of Properly Initiated Derivative Action by "Independent Committee" Appointed by Board of Directors Whose Actions (or Inaction) are Under Attack*, 22 A.L.R.4th 1206 § 2 (1983) ("A derivative suit . . . is an action brought by one or more stockholders of a corporation to enforce a corporate right, or to prevent or remedy a wrong to the corporation, where the corporation . . . fails or refuses to take appropriate action for its own protection.").

target of punitive damages is implementation of punishment of outrageous and anti-social behavior, which society is not equipped to do by itself with traditional means. Punitive damages do not address the tort violation, which receives separate redress through compensation, but makes retribution of outrageous and anti-social behavior.[174] It is a tenet that in civil law and procedure, outrageous conduct without damaging consequences does not produce liability.[175] Consequently, civil law and procedure cannot allow remedies without consequences for private parties.

In fact, there has been debate whether punitive damages may be awarded even if the plaintiff has suffered no damage.[176] The general consensus of the courts is that damage to the plaintiff is required,[177] but this view must be reassessed in less general terms. Punitive damages are allowed not only when "actual damages" to the plaintiff are minimal, but also when, actual damages being non-existing or impossible to assess, the plaintiff is awarded "nominal damages."[178]

What matters is that the private plaintiff has received an "injury" (not also damages), which is enough to trigger a "civil cause of action."[179] If that action were given without at least an injury to a private litigant, the action would be application of a criminal sanction, because we

---

[174] *See* Sharkey, *supra* note 142, at 412–13.

[175] *See McBride II*, 768 F.3d 382, 417 (5th Cir. 2014) ("[P]unitive damages recovery always requires a high culpability finding of willful and wanton conduct . . . ."); *see also* Tinney, *supra* note 172, § 2[a].

[176] *See* Moin A. Yahya, *Can I Sue Without Being Injured? Why the Benefit of the Bargain Theory for Product Liability is Bad Law and Bad Economics*, 3 GEO. J.L. & PUB. POL'Y 83, 83 (2005) (discussing the novel theory of "no-injury" used by plaintiffs who seek compensation without actual injury). This can be seen in products liability cases where plaintiffs contend that, "even though the product they are using has not injured them, the discovery of a potential for injury reveals an actionable form of misrepresentation." *Id.* This is a change from the historical view that misrepresentation required a showing of harm, and not merely a threat of future harm. *Id.* at 90.

[177] *See* Tinney, *supra* note 172, § 2[a].

[178] *See id.* § 6 (recognizing that nominal damages may satisfy the imposition of punitive damages); *but see id.* § 7 (stating that nominal damages cannot satisfy the imposition of punitive damages).

[179] *See* Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 603–31 (2007) (explaining that under the doctrine of standing, private civil plaintiffs must have some cognizable legal injury in order to have a right of action against a tortfeasor).

would have a sanction for a violation of the law alone: criminal sanctions do not require injury to identified persons or entities.[180] There is living proof that punitive damages may be awarded even without actual compensatory damages.

G. Only In Alabama . . . .

In 1877, the Alabama Supreme Court, in *Savannah & Memphis Railroad Co. v. Shearer*,[181] applying the 1860-revised statute named, "An Act to Prevent Homicides,"[182] established the rule that life cannot be compensated in monetary terms, but that wrongful death actions are meant only to provide punishment, for protection of human life.[183] Consequently, Alabama jury instructions on wrongful death damages read:

> In a suit brought for a wrongful act, omission, or negligence causing death the damages recoverable are punitive and *not compensatory*. Damages in this type of action are *entirely punitive*, imposed for the preservation of human life and as a deterrent to others to prevent similar wrongs. The amount of damages should be *directly related to the amount of wrongdoing* on the part of the defendant(s).[184]

---

[180] *See id.* at 629–30 ("[C]riminal actions seek to remedy a *public wrong*, while civil actions seek to compensate for a *private injury*. . . . [C]riminal law is generally unconcerned with the amount of harm caused because it seeks to discourage all criminal conduct.") (emphasis added); *see also* Sharkey, *supra* note 142, at 387, 412–13 (stating that the *purpose* of punitive damages and criminal sanctions is to vindicate "public wrongs").

[181] Savannah & Memphis R.R. Co. v. Shearer, 58 Ala. 672 (Ala. 1877). The defendant corporation was found guilty of negligence resulting in the death of the decedent, and the court relied on a wrongful death statute meant "to prevent homicides" to assess punitive damages against the corporation. *See id.* at 678–80.

[182] *See* Sloss-Sheffield Steel & Iron Co. v. Drane, 160 F. 780, 782 (5th Cir. 1908) (noting that the Alabama legislator passed an act "to prevent homicides," which was approved on February 21, 1860, and which allowed the personal representative of a decedent, whose death was caused by a tortfeasor's negligence, to maintain an action against, and recover damages from, the tortfeasor in the amount that the jury deemed just and appropriate); *Savannah & Memphis R.R. Co.*, 58 Ala. at 678–80.

[183] *See Savannah & Memphis R.R. Co.*, 58 Ala. at 680 (imposing punitive damages to *punish* and *prevent* homicides).

[184] Ala. Pattern Jury Instructions, Civ. § 11.18 (2015), http://alabamalitigationreview.wp.lexblogs.com/wp-content/uploads/sites/268/2014/02/11_18-Wrongful-Death.pdf (emphasis added). The instructions further provide:

> The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant(s). In assessing damages you are not to consider the [pecuniary or monetary] value of the life of the decedent, for damages in this type of action are not recoverable to compensate the family of the deceased from a [pecuniary or monetary] standpoint on account of [the decedent's] death, nor to compensate the plaintiff for any financial or pecuniary loss sustained by [the decedent] or the family of the deceased on account of [the decedent's] death.
>
> Your verdict should not be based on sympathy, prejudice, passion or bias, but should be directly related to the culpability of the defendant(s) and necessity of preventing similar wrongs in the future.

Id.

The rule received considerable criticism, well-exposed in a review of Alabama tort principles by Professor Susan Randall,[185] who highlighted the many anomalies that the Alabama rule creates, including how the rule allows punitive damages for mere negligence, with a relation only to the "culpability" and the "amount of wrongdoing" of the defendant, not necessarily limited to the gross and outrageous conduct which is required for allowing punitive damages.[186]

The second anomaly is the allowance of punitive damages by total obliviousness of an award of compensatory damages.[187] However, the essay informs us that the Supreme Court of Alabama has passed a correction of the rule, requiring "that a jury's verdict specifically award either compensatory damages *or nominal damages* in order for an award of punitive damages to be upheld."[188] The correction of the Alabama Supreme Court reinforces the conclusion that punitive damages can and do exist as a separate entity, and independently from either the existence or the allowance of monetary damages.

H. Punitive Damages Can Be Awarded Independently From Actual Damages

Alabama's wrongful death law is not, after all, so heretical. There is ample consensus in the courts that punitive damages can be awarded independently from the existence or the award of actual damages.[189] For example, in *Nappe v. Anschelewitz, Barr, Ansell & Bonello*,[190] the Supreme Court of New Jersey held that "if the cause of action is deemed effective even though the plaintiff had not proved his entitlement to compensatory damages, the viability of the cause

---

[185] *See* Susan Randall, *Only in Alabama: A Modest Tort Agenda*, 60 ALA. L. REV. 977, 977 n.aa1 (2009). Susan Randall is a Professor of Law at the University of Alabama School of Law. *Id.*

[186] *See id.* at 981–83, 981 n.23 ("[The Alabama rule] contradicts basic tenets of damages law by permitting punitive awards unsupported by compensatory damages and for simple negligence, rather than the more culpable conduct typically required.").

[187] *Id.* at 983.

[188] Life Ins. Co. of Ga. v. Smith, 719 So. 2d 797, 806 (Ala. 1988) (emphasis added); *see* Randall, *supra* note 185, at 983 n.31.

[189] *See, e.g.*, Singer Shop-Rite, Inc. v. Rangel, 416 A.2d 965, 968 (N.J. Super. Ct. App. Div. 1980); Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co., 386 A.2d 448, 464–65 (N.J. Ch. 1978); O'Connor v. Harms, 266 A.2d 605, 609 (N.J. Super. Ct. App. Div. 1970); Winkler v. Hartford Accident & Indem. Co., 168 A.2d 418, 422 (N.J. Super. Ct. App. Div. 1961); Barber v. Hohl, 123 A.2d 785, 790 (N.J. Super. Ct. App. Div. 1956).

[190] Nappe v. Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224 (N.J. 1984).

of action may be the basis of an award of punitive damages. This is because punitive damages may lie, provided there is a valid underlying cause of action."[191] The court then concluded: "Because of the fortuitous circumstance that an injured plaintiff failed to prove compensatory damages, the defendant should not be freed of responsibility for aggravated misconduct."[192]

The Ninth Circuit has been equally explicit. In *Bender v. Darden Restaurants Inc.*,[193] the employees of a chain restaurant asked for "both economic and non-economic damages for missed meal and rest breaks."[194] The jury awarded non-economic damages, but the district court granted defendant's motion for judgment as a matter of law, because California's Labor Code and Code of Regulations provide for private suit recovery for economic damages only.[195] The district court consequently found that the award of punitive damages could not survive reversal of compensatory damages.[196] The Ninth Circuit affirmed the denial of non-economic compensatory damages, but found error to deny punitive damages.[197] "To sustain an award of

---

[191] *Id.* at 1228. As the Supreme Court of New Jersey explained,

> The three basic types of legal damages are compensatory, nominal, and punitive. Compensatory damages are designed to compensate a plaintiff for an actual injury or loss. Nominal damages, unlike compensatory damages, do not attempt to compensate the plaintiff for an actual loss. Rather, they are a trivial amount "awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage" . . . . Finally, punitive damages are awarded as punishment or deterrence for particularly egregious conduct.

Id. at 1230 (citations omitted).

[192] *Id.* at 1231.

> The purpose of the award being to punish the wrongdoer, no reason is perceived for holding that the power to inflict punishment is dependent to any extent upon the form of the action by which the injured party seeks redress for the wrong done him by the malicious or wanton trespass committed against his property.

Id. at 1230 (quoting Dreimuller v. Rogow, 107 A. 144, 145 (N.J. 1984)).

[193] Bender v. Darden Rests. Inc., 26 F. App'x. 726 (9th Cir. 2002).

[194] *See id.* at 728–29.

[195] *See id.* at 728.

[196] *See id.*

[197] *See id.*

punitive damages," said the court, "a plaintiff need only prove a prima facie case of liability and show actual injury as a result of the wrongful conduct."[198]

The Supreme Court of Florida has been even more explicit. In *Lassitter v. International Union of Operating Engineers*,[199] the court held that:

> Nominal damages are awarded to vindicate an invasion of one's legal rights where, although no physical or financial injury has been inflicted, the underlying cause of action has been proved to the satisfaction of a jury. *Accordingly, the establishment of liability for a breach of duty will support an otherwise valid punitive damage award even in the absence of financial loss for which compensatory damages would be appropriate*."[200]

The American Law Reports[201] supplies an extensive review of the cases that address the issue whether compensatory damages are required for allowing punitive damages, whether nominal damages suffice, or whether punitive damages can be allowed even without actual damages.[202] Whatever the answer to the question, it has been explained that, even when actual or nominal damages are required by the court, "[t]he rationale for this rule is that if an individual cannot show actual harm, he or she has but nominal interest, and society has little interest in having unlawful, but otherwise harmless, conduct deterred."[203]

I. Conclusion on the Real Nature of Punitive Damages

The excursus that precedes leads to the proper perception of punitive damages. In the first place, punitive damages are not damages at all. We have called them and insist calling them by that name only for reasons of history and taxonomy. When civil courts first felt the need of

---

[198] *Id.* (citing McLaughlin v. Nat'l Union Fire Ins. Co., 29 Cal. Rptr. 2d 559, 578 (Cal. Ct. App. 1994) ("recovery of compensatory damages is not essential")).
[199] *See* Lassitter v. Int'l Union of Operating Eng'rs, 349 So. 2d 622 (Fla. 1976).
[200] *Id.* at 625–26 (emphasis added) (citations omitted).
[201] *See* Meg Kribble, *Secondary Sources*, HARV. L. SCH. LIBR., http://guides.library.harvard.edu/c.php?g=309942&p=2070276 (last updated Dec. 8, 2015) (noting that the American Law Reports provides in depth articles that address various narrow issues of law referencing statutes, cases, and other secondary sources).
[202] *See* Tinney, *supra* note 172, §§ 1[a], 6–7.
[203] 22 AM. JUR. 2D *Damages* § 570 (2015).

applying measures of punishment and deterrence, they did so by inflating the "actual" damages.[204] Later in time, courts and statutes acknowledged the separate nature of punitive damages, but kept calling them "damages" because damage is the name of the remedy that the civil court is entrusted to dispense.[205]

Punitive damages do not get their cause of action from any specific tort, but rather require an injury to a private victim of a tort in order to trigger the punitive action delegated to the private litigant.[206] It is not the law of the specific tort that rules upon the existence and the extent of punitive damages, but punitive-damages-proprietary common law or statute.[207] In fact, in some states, punitive damages are either allowed or disallowed or limited by express disposition of statute.[208]

Punitive damages are a stand-alone derivative action whose relationship with the underlying tort is only because the rules of civil procedure require the private plaintiff to have standing. Once standing is proved, and discovery reveals the outrageous conduct required, punitive damages are allowed. "The rule that exemplary damages cannot be imposed unless the

---

[204] *See* Robertson, *supra* note 5, at 84–85 (discussing two cases from 1763 in which the courts awarded damages *greater than* the actual damages sustained by the injured parties as a means of punishment and deterrence); *see also* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming The Tort Reformers*, 42 AM. U. L. REV. 1269, 1291 (1993) (noting that in early American punitive damages cases, the courts awarded damages *greater than* one's actual damages as a punitive measure based on a tortfeasor's deliberate and cruel conduct).

[205] *See Civil Cases*, UNITED STATES COURTS, http://www.uscourts.gov/about-federal-courts/types-cases/civil-cases (last visited Mar. 6, 2016).

[206] *See* Winn and Lovett Grocery Co. v. Archer, 171 So. 214, 221–22 (Fla. 1936).

[207] *See*, *e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 495 (2008) (noting that punitive damages can be determined by state statute).

[208] *See id.* at 495; *see generally* Elliott M. Kroll & James M. Westerlind, *Arent Fox LLP Survey of Damage Laws of the 50 States including the District of Columbia and Puerto Rico*, ARENT FOX LLP (2012), http://www.arentfox.com/sites/default/files/Downloads/practicesindustries/practices/AF-Survey-of-Damage-Laws.pdf (providing an overview of the common-law and statutory rules governing punitive damages in different states).

plaintiff has suffered actual damages . . . is based on the principle that the defendant must have committed a tortious act before exemplary damages can be assessed."[209]

Punitive damages are also assignable and are not due to the plaintiff as of right, but become due only after the jury has deliberated on the defendant's behavior, not upon the elements of the tort.[210] It follows that punitive damages are in fact a "pecuniary" remedy. Plaintiffs are entitled to receive just a sum of money assessed by a jury independently from any actual damage to plaintiffs, a windfall—monetary compensation for their mission as "private public prosecutors."[211] As seen above, punitive damages are an "accession to wealth," taxable as pure income.[212] Punitive damages are also not due to plaintiffs as of right, but may be shared with societal entities by decision of the judge or by operation of statute.[213]

VII. Application to Punitive Damages in Unseaworthiness.

It is now evident that denying punitive damages by qualifying them as "non-pecuniary damages" is, to say the least, a gross oversimplification. Punitive damages cannot be denied on the basis that they are "non-pecuniary damages" because they are not damages, and because,

[209] McLaughlin v. Nat'l Union Fire Ins. Co., 29 Cal. Rptr. 2d 559, 578 (Cal. Dist. Ct. App. 1994) (citing Brewer v. Second Baptist Church of Los Angeles, 197 P.2d 713, 720 (Cal. 1948)).
[210] *See In re* Badiou, 527 B.R. 692, 698 (Bankr. E.D. Cal. 2015). The court then held that, "if the punitive damages remedy was not enforceable . . . as a remedy appended to the assignable claim, then California law would perversely provide the Defendant-Debtor with a 'windfall' because of the reasonable and prudent business practices of the Insured—maintaining insurance for its business operations." *Id.* at 700.
[211] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (explaining that punitive damages are private fines assigned by civil juries to punish, not compensation for the plaintiff's injury); Estate of Wesson v. United States, 843 F. Supp. 1119, 1122 (S.D. Miss. 1994) (describing punitive damages as a windfall for plaintiffs); discussion *supra* Parts VI.G–H.
[212] *See* 26 U.S.C. § 104(a)(2) (2014); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (describing punitive damages as "undeniable accessions to wealth.").
[213] *See* Philip Morris USA v. Williams, 549 U.S. 346, 359 (2007) (Stevens, J., dissenting) (noting the importance of punitive damages awards that are payable to the states, rather than the plaintiffs); discussion *supra* Part VI.E.

whatever they are, they are pecuniary. This point was made by Professor Robertson,[214] and more recently and more specifically, by Professor John W. Degravelles,[215] who wrote:

> There are sound arguments favoring the conclusion that, despite *Miles*, the Jones Act should allow for the recovery of punitive damages. Seamen have traditionally enjoyed the right to sue for punitive damages. Courts that have decided that the Jones Act does not allow for punitive damages have often done so by equating the pecuniary-loss limitation in Jones Act wrongful death cases with a compensatory-only limitation. This is highly questionable.
>
> . . . [P]unitive damages are pecuniary and [therefore] there is no legitimate reason why punitive damages should be withheld in a Jones Act case. The common definitions of "pecuniary" are "1. relating to money, as, pecuniary affairs; and 2. Involving a money penalty, or fine; as, a pecuniary offense." Black's Law Dictionary defines "pecuniary damages" as "[d]amages that can be estimated and monetarily compensated" and "nonpecuniary damages" as "[d]amages that cannot be measured in money."
>
> Whichever of these definitions one chooses, punitive damages are pecuniary. They are awarded as money, can be estimated and, as recently stated by the Supreme Court in *Baker*, punitive damages are awarded as "measured retribution." Approximately one year before the decision in *Miles*, Justice O'Connor repeatedly referred to punitive damages as "pecuniary punishment." The case often cited for the proposition that punitive damages are "nonpecuniary" cites no authority and conducts no analysis to support this declaration. Some maritime scholars who have examined this issue have concluded that *Miles* does not address and its reasoning does not preclude, a general maritime punitive damage award because the "pecuniary/nonpecuniary" distinction does not apply to punitive damages.[216]

Also, the whole issue is set on a deceiving stage. Punitive damages cannot be awarded *just* because injury or death has been caused by unseaworthiness. As even first semester students know, unseaworthiness in seamen's claims is strict liability, independent from chance of control by, or even knowledge of, the employer ship-owner.[217] Even the shrewdest plaintiff cannot

---

[214] *See* Robertson, *supra* note 5, at 80–81.

[215] *See* John W. deGravelles & J. Neale deGravelles, Symposium: Deep Trouble: Legal Ramifications of the Deepwater Horizon Oil Spill, *The Deepwater Horizon Rig Disaster: Issues of Personal Injury and Death*, 85 TUL. L. Rev. 1075, 1075 n.a1 (2011) (stating that John W. deGravelles practices law in Baton Rouge, Louisiana, and is a Professor of Law at Louisiana State University and Tulane University).

[216] *Id.* at 1095–96.

[217] *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960) ("[T]he owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care.").

possibly conceive punitive damages when no element of culpable behavior can be found on the defendant, on the facts, or by operation of law. Punitive damages would be proper, however, when unseaworthiness is caused by gross and outrageous behavior of the ship-owner, the same reason why punitive damages are allowed in maintenance and cure, which is also a strict liability claim.[218] The cause of action of punitive damages would not be unseaworthiness or failed payment, but the conduct of the defendant, the same that triggers punitive damages in any tort action of any kind.

There is no reason whatsoever to distinguish the situation in *McBride II* from the situation in *Townsend.* Punitive damages were allowed in *Townsend* not because maintenance and cure was not paid, but because the employer callously and wantonly refused to make payment.[219] In a claim for unseaworthiness, what triggers punitive damages is, again, the conduct of the defendant.

Because of their nature, function, and architecture, punitive damages are outside the sphere of application and the reach of the rules of FELA and the Jones Act. These statutes address only the issues of liability and of the "actual" damages that follow.[220] Punitive damages exist on a different plane and platform, safe from the alleged limitations of non-pecuniary versus pecuniary damages. Punitive damages belong in the domain of a different law, the system of punishing and deterring anti-social behaviors, a system that operates at three different levels: criminal punishment, established by statute and enforced by prosecutors; civil penalties,

[218] *See* Atl. Sounding Co., Inc. v. Townsend, 557 U.S. 404, 424 (2009) ("[Punitive] damages for the willful and wanton disregard of the maintenance and cure obligation should remain available . . . as a matter of general maritime law."); *In re* RJF Int'l Corp., 332 F. Supp. 2d 458, 466 (D.R.I. 2004) (defining maintenance and cure as strict liability obligations); Anderson v. Texaco, Inc., 797 F. Supp. 531, 534 (E.D. La. 1992) (stating that punitive damages can be awarded when unseaworthiness is caused by a ship owner's gross and outrageous behavior).

[219] *See Townsend*, 557 U.S. at 407–08 (recognizing the plaintiff's entitlement to recovery of punitive damages under maritime law based on the plaintiff's employer refusing to provide maintenance and cure).

[220] *See* Frazer v. City of New York, 612 N.Y.S. 2d 806, 809 (N.Y. Sup. Ct. 1994) ("Nothing in *Miles* deals with general maritime or admiralty law claims which result from willful or wanton misconduct which is not the result of unseaworthiness.").

established by law or administrative regulations, enforced by administrative entities; and punitive damages, established by statute or common law, enforced by private litigants.

The law of torts, established by common law or statutes, like FELA or Jones Act, is competent to rule on causes of action and on the damages that spring out of the causes of action.[221] Damages are not the cause of action, but rather the function of the law of torts: to compensate the victims. To limit the compensation due to victims has nothing to do with the imposition of punishment, not of the tort itself, but of the subjective behavior of the tortfeasor, a derivative action of its own.

Even if the *Miles* doctrine were true, and only pecuniary damages were allowed under FELA, the Jones Act, or general maritime law, punitive damages would be allowed whether or not pecuniary damages are proved. It would be rare indeed that a seaman's claim for injuries does not produce at least a nominal pecuniary damage. Punitive damages would then be allowed, for the reasons given at Section H of this article; that is, because punitive damages are actionable upon an "injury," not necessarily upon a "damage," and, in any case, nominal damages would suffice.[222]

The "pecuniary damages" doctrine is also faulty on its own ground. *McBride II* wants us to believe that the famous *Vreeland* gloss aired in *Miles*[223] stands for negation of any and all non-pecuniary damages under the Jones Act and general maritime law.[224] This is just plain incorrect.

Under Jones Act and FELA, several non-pecuniary damages are routinely allowed, as the dissent in *McBride II* correctly pointed out.[225] Pain and suffering is routinely awarded under the

---

[221] *See Townsend*, 557 U.S. at 407 (disagreeing with the contention that seamen can only recover those damages permitted under the Jones Act, and recognizing that punitive damages can be assessed in general maritime actions).
[222] *See* discussion *supra* Part VI.H.
[223] *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).
[224] *See McBride II*, 768 F.3d 382, 388 (2014) (stating that Congress intended to incorporate the *Vreeland* limitation to only pecuniary damages into the Jones Act).
[225] *See id.* at 421–24 (Graves, J., dissenting).

Jones Act and FELA,[226] as well as emotional distress.[227] Post Traumatic Stress Disorder damages have been allowed in FELA claims.[228] Recently, the United States District Court for the Western District of Washington (Seattle), ruling on a loss of consortium claim, held that an injured seaman's wife may sue for loss of consortium and recover pursuant to a general maritime law claim of unseaworthiness, *and thus require denial of defendant's motion to dismiss based on Miles*. Applying the analytical framework laid out in *Townsend*, because loss of consortium was recoverable under the general maritime law prior to the Jones Act, the court found that nothing in the Act, nor in *Miles*, displaced such a claim, and that *contrary 9th Cir. precedent was thereby overruled by the later reasoning of the Supreme Court.*[229] The United States Court of Appeals, Seventh Circuit, held that railroad employees can recover for emotional injuries which are compensable under FELA if resulting from physical contact or threat of physical contact.[230] Binding authority also comes from the Supreme Court. In *Conrail v. Gottshall*, Justice Thomas held that a claim for negligent infliction of emotional distress is cognizable under FELA, and that common-law zone of danger test applies to determine who may recover for negligent infliction of emotional distress.[231]

For a comprehensive review of the issue of emotional distress in FELA and Jones Act, see American Law Reports database, which supplies extensive citations showing that these claims are allowed, the contested issue being only the test to be applied for allowing the claims

---

[226] *See* Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 149, 154 (2003); Hernandez v. M/V Rajaan, 841 F.2d 582, 590 (5th Cir. 1988); Johnson v. Offshore Express, Inc., 845 F.2d 1347, 1357, 1360 (5th Cir. 1988); *In re* Moran Towing Corp., 984 F. Supp. 2d 150, 182, 184 (S.D.N.Y. 2013); Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Public Policy: Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U.L. REV. 908, 911–14 (1989) (providing a general description of "non-pecuniary" damages); *but see* Carnival Corp. v. Mendoza, 949 So. 2d 1154, 1155 (Fla. Dist. Ct. App. 2007).

[227] *See* Ray v. Conrail, 938 F.2d 704, 705 (7th Cir. 1991) (recognizing injuries of an "emotional" nature under FELA only if there is evidence of actual physical injury or a threat of physical injury).

[228] *See*, *e.g.*, Hall v. Norfolk S. Ry. Co., 829 F. Supp. 1571, 1575 (N.D. Ga. 1993).

[229] Barrette v. Jubilee Fisheries, Inc., 2012 A.M.C. 1062, 1072–73 (W.D. Wash. 2011) (emphasis added).

[230] *See Ray*, 938 F.2d at 705.

[231] *See* Conrail v. Gottshall, 512 U.S. 532, 557 (1994).

(physical manifestation and zone of danger).[232] There is little doubt that pain and suffering and emotional damages are non-pecuniary.[233]

McBride II should be also handled with care, lest non-pecuniary damages are barred altogether for personal injuries under *Jones*. *McBride II* shows an insatiable appetite for extending the *Miles* doctrine without boundaries. However, as recently as Summer 2015, the Eastern District of Louisiana upheld a verdict for physical pain and suffering damages in a Jones Act claim.[234] In the same vein, the United States District Court for the Eastern District of New York held that, in an award for "pain and suffering" in a Jones Act case, "the court must consider loss of life's pleasures, although the court need not assign separate figures to these measures, but rather, may compute a single pain and suffering award, as long as there is no double counting."[235]

VIII. EPILOGUE

McBride II leaves a sore conflict open and poses unforeseeable dangers in the wake of the unrelenting, "hypnotic"[236] *Miles* doctrine, and with the utmost peace should be overruled. The Supreme Court declined the opportunity, and this is not the place for theorizing over the

---

[232] Theresa L. Kruk & John A. Bourdeau, Annotation, *Recovery for Negligent or Intentional Infliction of Emotional Distress Under Jones Act (46 U.S.C.A. Appx. § 688) or Under Federal Employers' Liability Act (45 U.S.C.A. §§ 51 et seq.)*, 123 A.L.R. Fed. 583, at *2 (2016).

[233] *See McBride II*, 768 F.3d 382, 424 (2014) (Graves, J., dissenting).

[234] *See* Facille v. Madere & Sons Towing, LLC, No. 13-6470, 2015 WL 5017012, at *1 (E.D. La. Aug. 21, 2015) (denying the plaintiff's motion for new trial and amended motion for new trial). In *Facille*, the jury awarded physical pain and suffering, but did not award emotional pain and suffering damages at trial. *Id.* The jury instructions were as follows:

> "[S]ome of these damages, such as mental or physical pain and suffering, *are intangible things about which no evidence of value is required*. In awarding these damages, you are not determining value, [and] instead determining what amount . . . will fairly compensate Mr. Facille for his injuries." Moreover, the jury was instructed that, if it found that Defendant was liable and that Plaintiff suffered damages, Plaintiff "may not recover for any item of damage that he could have avoided through reasonable effort."

Id. at *6 (emphasis added).

[235] Avecillas v. Ronback Marine Contracting Corp., No. 14-CV-4552 (SJF)(SIL), 2015 WL 4162769, at *4 (E.D.N.Y. July 8, 2015) (quoting Harrington v. Atl. Sounding Co., 916 F. Supp. 2d 313, 328 (E.D.N.Y. 2013).

[236] *See* Force, *supra* note 29.

reasons why. The hypothetical scholar in Professors Robertson's article might have fallen asleep again after *Townsend*, believing it was time to relax. *McBride II* may once again wake up the scholar, who, reading the en banc decision, may rephrase sarcastically the lip service to seamen's protection that he or she keeps hearing from the courts.

Seamen, those "wards of the admiralty [court who] . . . are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians,"[237] now see being denied important remedies that almost everybody else enjoys, running against the principle that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules,"[238] compliments of the statute that was passed for affording them remedies heretofore denied: the Gospel of Jones according to *Miles*.

Poor children of a lesser statute.

[237] Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823).
[238] The Sea Gull, 21 F. Cas. 909, 910 (C.C.D. Md. 1865).