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THE TAIL WAGS THE DOG: JUDICIAL MISINTERPRETATION OF THE PUNITIVE DAMAGES BAN IN THE FEDERAL TORT CLAIMS ACT

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I. INTRODUCTION

In 1946, the United States waived its sovereign immunity by enacting the Federal Tort Claims Act¹ (FTCA). Through the FTCA, the United States made itself liable for the torts of its employees "in the same manner and to the same extent as a private individual under like circumstances."² The FTCA provides that all

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1. Ch. 753, tit. IV, 60 Stat. 812, 842-47 (1946) (codified as amended at 28 U.S.C. §§ 1291, 1346(b)-(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-2680 (1982)).

2. Originally, the pertinent provision of the FTCA provided: "[T]he United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages." *Id.* § 410(a), 60 Stat. at 844. As amended and codified, this section now provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (1982).

liability and damage issues must be determined in accordance with state law,³ but it bans recovery of prejudgment interest or punitive damages against the United States.⁴

On its face, the FTCA's ban on punitive damages appears clear and noncontroversial. Punitive or exemplary damages are sanctions that may be imposed to punish a particular defendant for willful or wanton misconduct and to deter similar misconduct by others.⁵ Under the FTCA's punitive damages ban, district courts may award whatever damages will provide appropriate and full compensation under state law, but they may not award additional amounts to punish aggravated misconduct.

Recently, however, several federal circuit courts have substantially broadened the scope of the punitive damages ban by using a novel and indirect definition of "punitive damages." Presuming that all damages must be either compensatory or punitive, these courts have approached each case by first determining the amount of damages needed to compensate the plaintiff's "actual loss," and then defining any additional damages permitted under state law as

3. Originally, the FTCA provided:

[T]he United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred . . . shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death *in accordance with the law of the place where the act or omission occurred.*

Federal Tort Claims Act, ch. 753, tit. IV, § 410(a), 60 Stat. 812, 843-44 (1946) (emphasis added). As amended and codified, this section now provides:

[T]he district courts shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*

28 U.S.C. § 1346(b) (1982) (emphasis added); see *Richards v. United States*, 369 U.S. 1, 6-7 (1962); *Hatahley v. United States*, 351 U.S. 173, 182 (1956).

4. See *supra* note 2.

5. BLACK'S LAW DICTIONARY 352 (5th ed. 1979); see *infra* notes 14-18 and accompanying text.

noncompensatory, punitive damages.⁶ Employing this approach, the United States Court of Appeals for the Ninth Circuit has applied the punitive damages ban in several cases to invalidate awards because the applicable state law did not discount lost earnings awards to present value⁷ or reduce awards to after-tax earnings by deducting projected tax liability.⁸ The United States Court of Appeals for the First Circuit also has used this approach to invalidate an award because the applicable state law gave the beneficiaries in a wrongful death action more than they would have received from the decedent if he had survived.⁹ Finally, the United States Court of Appeals for the Fourth Circuit, interpreting the ban similarly, has reversed an award to a semi-comatose plaintiff for "loss of enjoyment of life" because the money could not console or benefit the unconscious plaintiff.¹⁰

By indirectly defining punitive damages as any damages that are not compensatory, these courts in effect have created a federal measure of damages even though the FTCA requires courts to determine damages using state law. Recognizing the slippery slope inherent in judicial expansion of the punitive damages ban, the United States Court of Appeals for the Sixth Circuit has expressly rejected this approach.¹¹ A panel of the United States Court of Appeals for the Ninth Circuit also has repudiated this approach,¹² although it continues to adhere to earlier opinions in which it invalidated lost earnings awards that were not reduced to after-tax earnings and discounted to present value.¹³

This Article argues against an expansive reading of the FTCA's ban on punitive damages. More specifically, the Article challenges the approach of certain federal courts that define punitive damages

6. See *infra* notes 143-272 and accompanying text.

7. See *Hollinger v. United States*, 651 F.2d 636, 641-42 (9th Cir. 1981).

8. See *Shaw v. United States*, 741 F.2d 1202, 1206-07 (9th Cir. 1984); *Hollinger v. United States*, 651 F.2d 636, 642-43 (9th Cir. 1981); *Felder v. United States*, 543 F.2d 657, 670 (9th Cir. 1976).

9. See *D'Ambra v. United States*, 481 F.2d 14, 16 (1st Cir.), *cert. denied*, 414 U.S. 1075 (1973).

10. *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984).

11. See *Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978).

12. See *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984).

13. See *supra* notes 7-8 and accompanying text.

as any award exceeding their own conception of full compensation. Their approach necessarily presupposes a federal measure of compensatory damages, while the FTCA expressly requires courts to determine the extent of damages using state law. The expansive application of the punitive damages exclusion urged by these federal courts results in a definition of "punitive damages" that contradicts the plain meaning of the term, and it produces results that conflict with the expressed intent of Congress that a plaintiff injured by a federal employee should receive the same compensation as a plaintiff injured by a private defendant.

The Article begins with an inquiry into the meaning of the punitive damages ban, analyzing the statutory language and examining in detail the legislative history of the FTCA and a subsequent amendment. Next, drawing upon the legislative history, the Article explores the role of state law in interpreting the meaning of "punitive damages." Finally, the Article studies the reasoning of federal courts that have broadly defined "punitive damages" as any award in excess of a plaintiff's "actual loss," concluding that their approach is inconsistent with the language of the FTCA and the legislative history. Although the FTCA clearly mandates application of state law in measuring damages against the government, these courts define "punitive damages" as any award exceeding a plaintiff's loss, as measured by federal law instead of state law, thereby letting the "tail" of the punitive damages ban wag the "dog" of compensatory damage determination under the FTCA.

II. THE PROPER INTERPRETATION OF "PUNITIVE DAMAGES" UNDER THE FTCA

A. *The Statutory Language*

Any attempt at statutory interpretation must begin with the language of the statute itself. The FTCA is no exception. In interpreting the FTCA, the Supreme Court has stated: "[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."¹⁴ According

14. *Richards v. United States*, 369 U.S. 1, 9 (1962).

to the Court, the provisions of the FTCA must be interpreted in light of "their plain natural meaning."¹⁵

What is the "ordinary" and "natural" meaning of "punitive damages" as used in the FTCA's punitive damages proscription? "Punitive damages" generally have been defined as damages awarded separately in cases of willful or wanton misconduct, in addition to compensation for a plaintiff's actual loss, to vindicate the plaintiff, to punish the defendant, and to deter others from acting similarly.¹⁶ This well-established and unambiguous definition of "punitive damages" has not changed significantly since well before the enactment of the FTCA.¹⁷ The two distinguishing

15. *Rayonier, Inc. v. United States*, 352 U.S. 315, 318 (1957).

16. At the time Congress enacted the FTCA, *Black's Law Dictionary* defined "exemplary damages," a term synonymous with "punitive damages," as

damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart-money."

BLACK'S LAW DICTIONARY 501 (3d ed. 1933).

17. Compare 17 C.J. *Damages* §§ 40, 268, 279-284 (1919) and *supra* note 16 and C. McCormick, *HANDBOOK OF THE LAW OF DAMAGES* 275-82 (1935) and *RESTATEMENT OF TORTS* § 908 & comments a, b (1939) with *BLACK'S LAW DICTIONARY* 467-68 (4th ed. 1951) and 25 C.J.S. *Damages* §§ 117(1), 123 (1966) and *RESTATEMENT (SECOND) OF TORTS*, § 908 & comments a, b (1977) and *BLACK'S LAW DICTIONARY* 352 (5th ed. 1979).

The stability in the definition of "punitive damages" also is demonstrated by the consistency of Supreme Court damages doctrine. Both before and after the FTCA was enacted, the Court recognized that punitive damages are appropriate only in cases involving willful or wanton misconduct and that their purpose is to punish and to deter that misconduct. Compare *Scott v. Donald*, 165 U.S. 58, 86-89 (1896) (intentional and malicious misconduct would sustain award of exemplary damages) and *Milwaukee & St. P. Ry. v. Arms*, 91 U.S. 489, 492-95 (1875) ("gross negligence" would not justify award of exemplary damages; "willful misconduct" or "conscious indifference" is required) and *Philadelphia, W. & B. R.R. v. Quigley*, 62 U.S. (21 How.) 202, 213-14 (1858) (instruction concerning exemplary damages was error when plaintiff introduced no evidence of malice) and *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (describing nature and purpose of exemplary damages) with *Carlson v. Green*, 446 U.S. 14, 47-48 (1980) (Rehnquist, J., dissenting) ("[Punitive] damages are typically determined by reference to factors such as the character of the wrong, the amount necessary to 'punish' the defendant, etc.") and *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978) (punitive damages might be available in § 1983 actions for "specific purpose of deterring or punishing," but no basis for such an award exists without "malicious

characteristics of punitive damages are that they are appropriate only in cases involving willful or wanton misconduct and that their purpose is to punish and to deter such misconduct.

The FTCA was drafted by representatives of the Department of Justice under the direction of the Attorney General.¹⁸ Undoubtedly, these individuals understood the legal significance and prevailing meaning of "punitive damages." This prevailing meaning, therefore, should be considered the "ordinary" and "natural" meaning of "punitive damages" as it appears in the FTCA.

B. Legislative History

The clear and unambiguous meaning of "punitive damages" ordinarily would obviate the need to examine the FTCA's legislative history for further explication. Such analysis is essential, however, because the authorities advocating a broad definition of "punitive damages" under the FTCA have purported to rely upon its legislative history.¹⁹

The legislative history of the FTCA includes not only materials relating to the FTCA itself, but also materials relating to various bills concerning tort claims against the government that had been introduced during the twenty years preceding the FTCA's enactment.²⁰ As a general rule, the thoughts expressed by members of earlier Congresses are not probative of the intentions of the Congress that finally enacted a piece of legislation. The FTCA is an exception to this rule, however, for three reasons. First, Congress enacted the FTCA as Title IV of the comprehensive Legislative

intention") and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159-61 (1967) (plurality opinion) (malice sufficient to impose liability for libel also justifies award of punitive damages).

18. See *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 9 (1940) [hereinafter cited as *Senate Hearings*]; *id.* at 11 (letter of Att'y Gen. Robert H. Jackson); H.R. REP. NO. 2428, 76th Cong., 3d Sess. 3 (1940) (identical letter from Att'y Gen. Jackson). This hearing, and the related report, concern H.R. 7236, 76th Cong., 1st Sess. (1939), the predecessor of the FTCA that first contained a provision barring recovery of punitive damages.

19. See, e.g., *Felder v. United States*, 543 F.2d 657, 667-69 (9th Cir. 1976); *D'Ambra v. United States*, 481 F.2d 14, 16-17 (1st Cir.), *cert. denied*, 414 U.S. 1075 (1973); Comment, *Defining Punitive Damages Under the Federal Tort Claims Act*, 53 U. CIN. L. REV. 251 (1984).

20. A nearly complete listing of the bills preceeding the FTCA appears in Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 2-4 nn.4 & 5 (1946).

Reorganization Act of 1946.²¹ As only part of a larger bill, the FTCA received relatively little attention in the congressional debate.²² The information that does exist indicates that Congress deemed the history of earlier bills to be part of the legislative history of the FTCA. In discussing Title IV, the report of the Senate Special Committee on the Organization of Congress²³ referred to, and quoted at length from, the committee report on a House bill concerning federal tort claims²⁴ which, in turn, referred to the history of earlier tort claims bills and to previous congressional hearings.²⁵ Second, Congressman Emanuel Celler was a member of the relevant House committees between 1926 and 1946. Because he was influential in shaping the final version of the FTCA,²⁶ his analysis and criticism of the previous proposals are relevant insofar as they were reflected in the subsequent revisions. Third, the various tort claims bills introduced during this same period manifest an evolution in their underlying philosophy and purpose. These evolutionary trends bear directly on the interpretation of the punitive damages ban. As a result, the punitive damages ban can be understood fully only after examination of the entire legislative history of the FTCA.

21. See *supra* note 1.

22. See Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 536 n.10 (1947).

23. S. REP. NO. 1400, 79th Cong., 2d Sess. (1946).

24. *Id.* at 30-31 (referring to H.R. REP. NO. 1287, 79th Cong., 1st Sess. (1945)).

25. H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1945).

26. As a member of the Committee on Claims in 1926, Congressman Celler submitted a supplementary report to each of two committee reports, in which he claimed that the proposed tort claims bills were inadequate. See H.R. REP. NO. 667, 69th Cong., 1st Sess. 8-14 (1926) (concerning S. 1912); H.R. REP. NO. 206, 69th Cong., 1st Sess. 8-14 (1926) (concerning H.R. 8651). Congressman Celler subsequently introduced a series of bills that eventually resulted in enactment of the FTCA. See H.R. 181, 79th Cong., 1st Sess. (1945); H.R. 1356, 78th Cong., 1st Sess. (1943); H.R. 817, 78th Cong., 1st Sess. (1943); H.R. 6463, 77th Cong., 1st Sess. (1942); H.R. 5373, 77th Cong., 2d Sess. (1941); H.R. 7236, 76th Cong., 1st Sess. (1939). Congressman Celler also authored reports for the Judiciary Committee to support several predecessors of the FTCA. H.R. REP. NO. 1287, 79th Cong., 1st Sess. (1945) (concerning S. 2221); H.R. REP. NO. 2245, 77th Cong., 2d Sess. (1942) (concerning H.R. 181); H.R. REP. NO. 2428, 76th Cong., 3d Sess. (1940) (concerning H.R. 7236). Perhaps most importantly, Congressman Celler assisted the Attorney General in preparing several crucial amendments to H.R. 5373 that were reflected both in H.R. 6463 and in the final version of the FTCA. See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 1 (1942) [hereinafter cited as *House Hearings*].

1. Early Predecessors of the FTCA

The history of the FTCA began in the middle of the nineteenth century, when claims against the government were precluded by the doctrine of sovereign immunity.²⁷ Persons with claims against the United States could secure redress only through private bills. Because the increasing volume of private bills had become a substantial burden, and because Congress wanted to afford justice to persons doing business with the government,²⁸ Congress passed legislation in 1855 establishing the United States Court of Claims.²⁹ Once its authority was extended fully,³⁰ the Court of Claims was empowered to hear claims against the United States founded either upon contract or upon any law expressly allowing suit against the United States.³¹ Its authority, however, was limited expressly to cases "not sounding in tort."³² Later, Congress created exceptions to the ban on tort cases for patent infringement suits,³³

27. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1846); Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 666 & n.343 (1985).

28. Congressional criticism of the private claims bill procedure is collected in *House Hearings*, *supra* note 26, at 49-55 and in *Senate Hearings*, *supra* note 18, at 5-6.

29. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

30. Originally, the Court of Claims had no authority to enter judgment. It only could submit findings, opinions, and recommendations to Congress along with proposed bills for congressional enactment. In 1863 and 1866, however, Congress reorganized the court and gave it the power to render judgments. Act of Mar. 17, 1866, ch. 19, 14 Stat. 9; Act of Mar. 3, 1863, ch. 92, 12 Stat. 765. The Court of Claims still lacked the power to enforce its judgments against the property of the United States. This limitation created substantial uncertainty concerning the status of that court under Article III of the Constitution. See Shimomura, *supra* note 27, at 651-52.

Congress further extended judicial power to hear claims against the government in 1887 in the Tucker Act. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. The Tucker Act expanded jurisdiction in cases against the government beyond contract cases to admiralty, tax, pay, and "takings" cases. Shimomura, *supra* note 27, at 664. On the other hand, the Tucker Act added language that expressly restricted jurisdiction to "cases not sounding in tort." The Act also gave "district courts" of the United States concurrent jurisdiction over claims up to \$1000 and gave "circuit courts" concurrent jurisdiction over claims up to \$10,000. Act of Mar. 3, 1887, ch. 357, 24 Stat. 505.

31. See *supra* note 30.

32. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505; see *supra* note 30. One commentator has asserted that this provision was phrased ambiguously, and that district and circuit courts could have read the Tucker Act as allowing certain tort claims until the Supreme Court ruled otherwise. See Note, *supra* note 22, at 534 n.5.

33. Act of June 25, 1910, ch. 423, 36 Stat. 851.

as well as for certain admiralty and maritime torts.³⁴ For ordinary torts, however, the general ban remained in effect into the twentieth century, and the sole recourse of claimants continued to be the enactment of private bills.

A portion of the burden of private tort claims legislation was relieved by enactment of the Small Claims Act of 1922.³⁵ This legislation authorized the various departments of the federal government "to consider, ascertain, adjust, and determine" claims up to \$1000 for damage to property caused by the negligence of any officer or employee of the United States.³⁶ Congress limited the Small Claims Act to settlement of claims for property damage, however, and made no provision for redress of personal injuries.³⁷

Based upon legislation introduced in the previous Congress,³⁸ Congress in 1929 passed a bill which would have increased the

34. Act of Mar. 3, 1925, ch. 428, 43 Stat. 1112; Act of Mar. 9, 1920, ch. 95, 41 Stat. 525.

35. Act of Dec. 28, 1922, ch. 17, 42 Stat. 1066. The bill's author was Congressman Underhill, a member of the Committee on Claims and a stalwart proponent of federal tort claims legislation.

36. *Id.* At the time of its passage, the House Committee on Claims estimated that the Small Claims Act would dispose of nearly one-third of the approximately 1000 private bills filed with the Committee each year. H.R. REP. NO. 342, 67th Cong., 1st Sess. 1-2 (1921).

37. See Act of Dec. 28, 1922, ch. 17, 42 Stat. 1066.

38. In 1925, the Senate passed S. 1912, which would have increased the settlement authority of federal departments to \$5000 in property damage cases and would have allowed suits in federal courts for property damage up to \$50,000. S. 1912, 69th Cong., 1st Sess. (1925) (printed as amended in 67 CONG. REC. 5605 (1926)). The bill also would have provided for personal injury claimants. Although the bill would not have afforded these claimants a right to bring suit, it would have allowed them to file claims for personal injuries or death with the United States Employees' Compensation Commission, which administered the workers' compensation program for federal employees. See Act of Sept. 7, 1916, ch. 458, 39 Stat. 742. The bill would have directed the Commission "to consider, ascertain, adjust, and determine" the claim, and to certify it for payment by Congress. The bill originally had set a maximum award of \$5000 for personal injury and death claims, but this ceiling was reduced to \$3000 prior to Senate passage. S. 1912, 69th Cong., 1st Sess. § 3 (1925) (printed as amended in 67 CONG. REC. 5605 (1926)). The Senate's amendment and passage of the bill are reported at 67 CONG. REC. 5607 (1926).

While the Senate was acting on S. 1912, the House was considering similar legislation. H.R. 8651, 69th Cong., 1st Sess. (1925). The House bill followed the Senate bill in its treatment of property damage claims, increasing the settlement authority of federal departments to \$5000 and allowing suits in the federal courts for amounts exceeding that limit, up to \$50,000. See H.R. REP. NO. 206, 69th Cong., 1st Sess. 3-4 (1926). With regard to personal injury claims, however, H.R. 8651 contained a fixed compensation schedule of weekly payments for death or disability, with ceilings of \$5000 for general claims, \$300 for medical, surgical, and hospital services and supplies, and \$200 for funeral expenses. See *id.* This

settlement authority of the departments to \$5000 for property damage and would have allowed suits in the federal courts for property damage up to \$50,000. The bill included a separate provision for administrative processing of claims for personal injuries up to a ceiling of \$7500, plus medical and funeral expenses.³⁹ This bill received a pocket veto from President Coolidge.⁴⁰

A new version of the vetoed legislation was introduced later in 1929, during the next Congress.⁴¹ Legislation introduced later in

compensation schedule was virtually identical to the schedule in the workers' compensation program administered by the United States Employees' Compensation Commission.

Following the Senate's passage of S. 1912, the House quickly considered its own version of the Senate bill. Although this House version bore the same number as the Senate bill, it incorporated many of the features of H.R. 8651. *See* H.R. REP. NO. 667, 69th Cong., 1st Sess. 3-7 (1926) (digesting the House version of S. 1912). For example, this version included personal injury provisions modeled on the United States Employees' Compensation Act, although it eliminated the detailed compensation schedule based on that Act that had been set forth in H.R. 8651. The House quickly passed the amended version of S. 1912, 67 CONG. REC. 11,110 (1926), but the Senate did not act favorably on the revised version. *See House Hearings, supra* note 26, at 41 n.17.

39. H.R. 9285, 70th Cong., 1st Sess. (1927) (printed as amended in 69 CONG. REC. 4837 (1929)). This bill passed the House in 1928, 69 CONG. REC. 3179 (1928), and passed the Senate in 1929, 69 CONG. REC. 4839 (1929). H.R. 9285 contained the same provisions as S. 1912 regarding property damage claims, allowing administrative adjustment of claims up to \$5000 and federal court jurisdiction over claims up to \$50,000. The personal injury provisions also were similar to S. 1912, but the bill raised the ceiling for these claims to \$7500 plus medical and funeral expenses. *Id.*

With regard to the compensation provisions of H.R. 9285, the bill's sponsor said, "The phraseology of this section of the bill is taken literally, verbatim, word for word, and punctuatum from the regular Federal compensation law." 69 CONG. REC. 3128 (1928) (statement of Rep. Underhill); *see* H.R. REP. NO. 286, 70th Cong., 1st Sess. 2 (1928). The bill, however, did not contain the detailed compensation schedule set forth in the House bill in the previous Congress. *See supra* note 38. After a Senate amendment, the bill also departed from earlier proposals because, instead of requiring the Commission to certify claims directly to Congress, the bill required the United States Employees' Compensation Commission to certify claims to the General Accounting Office, where the Comptroller General would audit and settle the claims. *See* S. REP. NO. 1699, 70th Cong., 2d Sess. 6-7 (1929).

40. 70 CONG. REC. index, at 295 (1929). The ostensible reason for President Coolidge's veto was that attorneys from the Comptroller General's office, rather than from the Attorney General's office, were to defend appeals from the Comptroller General's settlements on writ of certiorari to the Court of Claims. *See House Hearings, supra* note 26, at 41; H.R. REP. NO. 2800, 71st Cong., 3d Sess. 1-2 (1931); 72 CONG. REC. 9867-68 (1930) (statement of Sen. Howell); Shimomura, *supra* note 27, at 680 n.451.

41. S. 4377, 71st Cong., 2d Sess. (1929) (printed as amended in 74 CONG. REC. 85 (1930)). S. 4377 still provided for administrative evaluation of personal injury claims by the United States Employees' Compensation Commission, without detailed compensation schedules. S. 4377 differed from the vetoed legislation, however, in that it eliminated the provision that

that Congress, in 1930, would have allowed suits in the federal courts for personal injury and death claims up to \$7500, as well as for property claims up to \$50,000, with administrative adjustment of smaller claims for personal injuries and property damage.⁴² None of these bills came to a vote; nor did a similar bill introduced in 1931.⁴³ As the depression deepened, interest in federal tort claims appears to have waned. None of the tort claims bills introduced between 1933 and 1938 were reported out of the Senate or House Committees on Claims.⁴⁴

2. *Modern Predecessors of the FTCA*

The legislative history of the Federal Tort Claims Act itself began in 1939, with the introduction of S. 2690 and H.R. 7236.⁴⁵ Congress ultimately adopted the format of these two bills, and much of their particular language, in the enacted version of the FTCA. Each of these bills gave unified treatment to claims for property damage and personal injuries, in contrast to the earlier proposals that would have treated them separately.⁴⁶ Both provided for administrative adjustment of claims up to \$1000 and for concurrent jurisdiction in the Court of Claims and the federal district courts over claims up to \$7500.⁴⁷

directed the Comptroller General to defend appeals to the Court of Claims. See 72 CONG. REC. 9867-68 (1930) (statement of Sen. Howell). Compare S. 4377, 71st Cong., 2d Sess. § 2 (1929) (printed as amended in 74 CONG. REC. 85 (1930)) with H.R. 9285, 70th Cong., 1st Sess. § 2 (1927) (printed as amended in 69 CONG. REC. 4837 (1929)).

42. H.R. 17168, 71st Cong., 3d Sess. (1930); H.R. 16429, 71st Cong., 3d Sess. (1930). H.R. 17168 was described in a House report as substantially similar to the bill that the House had passed during the previous Congress. See H.R. REP. NO. 2800, 71st Cong., 3d Sess. 8-14 (1931) (comparing H.R. 17168 to H.R. 9285, 70th Cong., 1st Sess. (1927)). H.R. 16429 was compared in House debate to H.R. 15468, 71st Cong., 3d Sess. (1930), which provided only for administrative adjustment of tort claims. See 74 CONG. REC. 3087-89 (1931) (statement of Rep. Box).

43. S. 4567, 72d Cong., 1st Sess. (1931); see S. REP. NO. 658, 72d Cong., 1st Sess. (1932).

44. S. 1043, 74th Cong., 1st Sess. (1935); H.R. 2028, 74th Cong., 1st Sess. (1935); H.R. 8561, 73d Cong., 2d Sess. (1934); H.R. 129, 73d Cong., 1st Sess. (1933); S. 1833, 73d Cong., 1st Sess. (1933).

45. S. 2690, 76th Cong., 1st Sess. (1939) reprinted in *Senate Hearings*, supra note 18, at 1-4; H.R. 7236, 76th Cong., 1st Sess. (1939), summarized in H.R. REP. NO. 2428, 76th Cong., 3d Sess. (1940).

46. See S. 2690, 76th Cong., 1st Sess. (1939); H.R. 7236, 76th Cong., 1st Sess. (1939).

47. S. 2690, 76th Cong., 1st Sess. §§ 1, 201 (1939); H.R. 7236, 76th Cong., 1st Sess. §§ 1, 201 (1939). This \$7500 ceiling represented a substantial reduction from the previously

More importantly for the purposes of this Article, each bill contained several provisions relevant to interpretation of the punitive damages exclusion in the final version of the FTCA. These provisions fall into three categories. First, and foremost, the FTCA's punitive damages ban derived from a provision in these two bills which read: "In respect to such claims the United States shall be liable to the same extent and in the same manner as a private individual under like circumstances, except that the United States shall not be liable for punitive damages."⁴⁸ The FTCA adopts this language virtually verbatim.⁴⁹

Second, these bills contained numerous specific provisions of substantive law applicable to federal tort claims. Two of these provisions barred recovery when the plaintiff or the person in control of the plaintiff's property was intoxicated or guilty of negligence or willful misconduct⁵⁰ or when the plaintiff's injuries were aggravated by unreasonable neglect or refusal of available medical or surgical treatment.⁵¹ Another section provided for pro rata rather than joint and several liability of the United States as a joint tortfeasor.⁵² The significance of these provisions lies in their elimination from later versions of the FTCA, as Congress sought to minimize the number of distinct federal rules of substantive law in the FTCA.⁵³

vetoed legislation, which had allowed recovery for property damage up to \$50,000 and had allowed recovery of medical and funeral expenses beyond the \$7500 limit on personal injury claims. *See supra* note 39.

48. S. 2690, 76th Cong., 1st Sess. § 201 (1939); H.R. 7236, 76th Cong., 1st Sess. § 201 (1939).

49. *See supra* note 2.

50. S. 2690, 76th Cong., 1st Sess. § 302 (1939); H.R. 7236, 76th Cong., 1st Sess. § 302 (1939).

51. S. 2690, 76th Cong., 1st Sess. § 304 (1939); H.R. 7236, 76th Cong., 1st Sess. § 304 (1939).

52. S. 2690, 76th Cong., 1st Sess. § 306 (1939); H.R. 7236, 76th Cong., 1st Sess. § 306 (1939).

53. *See infra* notes 64-65 & 77 and accompanying text. In addition, these two bills contained several distinctive procedural provisions that were omitted from later proposals, including sections 202 and 305 (governing depositions and physical examinations), section 307 (governing installment payments), section 204 (providing distributional shares for beneficiaries in death cases), and section 308 (providing simplified procedures in death cases involving small claims). S. 2690, 76th Cong., 1st Sess. §§ 202, 204, 305, 307, 308 (1939); H.R. 7236, 76th Cong., 1st Sess. §§ 202, 204, 305, 307, 308 (1939).

Third, the administrative adjustment provisions of both bills required the Attorney General to promulgate rules and regulations to prescribe "principles of decision" and to include "a schedule of the amount of compensation to be awarded for specific physical injuries."⁵⁴ The importance of these provisions lies in their potential inconsistency with the requirement that the United States be liable to the same extent as a private individual. Senator Danaher expressed concern about this inconsistency in the Senate hearings on S. 2690,⁵⁵ and a representative of the Attorney General acknowledged the conflict.⁵⁶

Although the House passed H.R. 7236,⁵⁷ the Senate did not act on that bill or on S. 2690. As a result, the proponents of these bills were forced to introduce similar legislation in the next Congress.⁵⁸ These bills followed the general outline of their immediate predecessors, incorporating much of their language verbatim. The new bills differed, however, in several significant respects.

In the House version, for example, the punitive damages exclusion was extended to bar recovery of interest and costs.⁵⁹ The implicit understanding that state law would govern in litigation under the bill⁶⁰ also was made explicit by the addition of language requiring courts to entertain claims based on negligent or wrongful acts or omissions of government employees "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death *in accordance with*

54. S. 2690, 76th Cong., 1st Sess. § 2 (1939); H.R. 7236, 76th Cong., 1st Sess. § 2 (1939).

55. See *Senate Hearings*, *supra* note 18, at 44.

56. *Id.* at 44, 45 (statement of Alexander Holtzoff, Special Ass't to the Att'y Gen.).

57. See 86 CONG. REC. 12,032 (1940).

58. S. 2221, 77th Cong., 2d Sess. (1942), reprinted in S. REP. No. 1196, 77th Cong., 2d Sess. 1-4 (1942) and in 88 CONG. REC. 3174-75 (1942); S. 2207, 77th Cong., 2d Sess. (1942); H.R. 6463, 77th Cong., 2d Sess. (1942); H.R. 5373, 77th Cong., 1st Sess. (1941). H.R. 5373 subsequently was amended to conform to H.R. 6463. See *House Hearings*, *supra* note 26, at 1-6 (text of amended version).

59. The interest and costs exclusion was added to H.R. 5373 when it was amended to conform to H.R. 6463. See *House Hearings*, *supra* note 26, at 3, 27 (text of § 301 of the House bills).

60. See *Senate Hearings*, *supra* note 18, at 44, 45 (statement of Alexander Holtzoff, Special Ass't to the Att'y Gen., suggesting that the language requiring courts to hold the United States liable "in the same manner and to the same extent as a private individual" would mandate application of state law under the *Erie* doctrine).

the law of the place where the act or omission occurred.”⁶¹ This language also was inserted in the administrative adjustment provision of the House bill, while the section in the old bill that authorized the Attorney General to promulgate rules of decision was omitted.⁶² These changes, which were carried forward into the final version of the FTCA, eliminated the inconsistency between the administrative and litigation provisions of the old bills,⁶³ and signaled recognition of the dominant role of state law in tort claims adjudication.

In further recognition of state law predominance, the new House bill eliminated the specialized substantive provisions barring recovery for accidents caused by intoxication, contributory negligence, or willful misconduct, and for aggravation of injuries due to neglect or refusal of medical treatment,⁶⁴ as well as a provision governing distribution of shares to survivors in death cases.⁶⁵ The new House bill also restricted original jurisdiction of suits against the government to the federal district courts.⁶⁶ This change eliminated original jurisdiction in the Court of Claims, giving it only appellate jurisdiction, because of a belief that this court lacked the

61. This language (emphasis added) was added to H.R. 5373 when it was amended to conform to H.R. 6463. *See House Hearings, supra* note 26, at 2-3, 26-27, 43 (text of § 301 of the House bills). The language was carried forward and eventually was included in the FTCA. *See supra* note 3.

62. These changes were made in H.R. 5373 when it was amended to conform to H.R. 6463. *See House Hearings, supra* note 26, at 2; *see also supra* note 54 and accompanying text (describing provisions of prior bills).

63. *See supra* notes 55-56 and accompanying text. In his formal statement to the Judiciary Committee, Assistant Attorney General Francis M. Shea explained:

Under H.R. 5373, it is probable that local law would determine the liability of the United States in suits on tort claims, but nothing is said of administrative settlements. H.R. 6463 makes it clear that local law applies to the administrative determination of such claims as well as to suits thereon. Uniformity in this respect is obviously desirable.

House Hearings, supra note 26, at 26.

64. *House Hearings, supra* note 26, at 27, 43, 61; *see also supra* notes 50-51 and accompanying text (describing relevant provisions of prior bills).

65. *House Hearings, supra* note 26, at 27, 30, 43, 61; *see also supra* note 53 (noting inclusion of this provision in prior bills).

66. These changes were made in H.R. 5373 when it was amended to conform to H.R. 6463. *See House Hearings, supra* note 26, at 2, 3.

familiarity with state tort law that the district courts had developed in exercising their diversity jurisdiction.⁶⁷

During the House Judiciary Committee hearings on this legislation, a representative of the Attorney General's office briefly discussed the punitive damages ban.⁶⁸ Ultimately, this discussion proved to be one of the few direct expressions of legislative intent concerning this provision during the twenty years of hearings and debate on the FTCA and its predecessors. Among other things, Assistant Attorney General Francis M. Shea told the Committee, "[W]e think it is enough to satisfy the actual claim, rather than impose punitive damages on the United States."⁶⁹ Although one federal court has cited this statement to support the proposition that Congress intended to limit its liability to the amount of the plaintiff's actual loss,⁷⁰ nothing indicates that the Assistant Attorney General was suggesting a *federal* measure of the "actual claim." To the contrary, the Assistant Attorney General's statement was made immediately following a discussion in which he repeatedly emphasized the bill's reference to "local law" for the rules of decision.⁷¹ Read in this context, the statement suggests no

67. See *id.* at 27, 42-43 (formal statement of Ass't Att'y Gen. Shea). The restriction of original jurisdiction to the federal district courts meant that the Federal Rules of Civil Procedure controlled discovery, permitting elimination of the special provisions in the old bills regarding depositions and medical examination of claimants. See *id.* at 28, 30-31; see also *supra* note 53 (noting inclusion of these provisions in prior bills).

68. See *House Hearings*, *supra* note 26, at 30.

69. *Id.*

70. *Felder v. United States*, 543 F.2d 657, 668 (9th Cir. 1976).

71. The discussion preceding the statement proceeded as follows:

THE CHAIRMAN. You may go ahead.

MR. SHEA. H.R. 6463, insofar as it relates to administrative settlements, permits the Federal agencies to consider and determine claims for death, as well as for personal injury and property damage, which was not provided for in the other bill (H.R. 5373).

Under the other bill it was not specifically provided that local law should govern, and certain express provisions were made, for instance as to distributions.

MR. CELLER. Do you need that? Is that necessary to express it?

MR. SHEA. I should think the earlier bill would probably be construed as applying the local tort law, but this bill specifically covers it, leaving the distribution in case of death and so forth to the local law.

MR. CELLER. The only trouble is in future bills you may have to put that precedent in. If you leave it out the courts may not construe it should apply. I am only thinking out loud to get your reaction.

federal limitation on a state's measure of the "actual claim"; nor does it indicate that the term "punitive damages" was being used in any manner other than its ordinary sense. The statement's contrast between "punitive damages" and the "actual claim" of the plaintiff simply indicated *why* recovery of punitive damages was not necessary: "[I]t is enough to satisfy the actual claim." The reference does not permit the further implication that damages beyond those minimally necessary to compensate the plaintiff would constitute punitive damages.

The Senate version of the bill, S. 2221, was virtually identical to the amended House version. The ceiling on claims, however, was raised from \$7500 to \$10,000,⁷² and liability was imposed for "negligence" rather than for a "negligent act or omission." This latter change produced numerous minor alterations throughout the text.⁷³

MR. SHEA. This bill provides explicitly for the application of local law.

THE CHAIRMAN. Go ahead.

MR. SHEA. The acceptance of the award by the claimant will also release the delinquent employee as we have already pointed out. The bill leaves open the right of the Government to recover back an award procured by fraud.

Title III provides for suits in the district courts. It differs from the earlier bill in that the liability of the United States in such cases is to be the same as that of a private individual, subject to the limitations of the bill, and is to be reviewable by the Court of Claims, which we have discussed. Conformance to local law is explicitly provided for here, as it was not in the prior bill.

The prior bill immunized the United States from punitive damages. This bill also provides that neither interest nor costs shall be assessed against the United States.

THE CHAIRMAN. Right there on the item of costs, is there a limitation on the amount of costs which the Government can be responsible for which the claimant has to pay?

MR. SHEA. It provides that no costs shall be assessed against the United States.

THE CHAIRMAN. All right.

MR. SHEA. And we think it is enough to satisfy the actual claim, rather than impose punitive damages on the United States.

House Hearings, supra note 26, at 30.

72. Compare S. 2221, 77th Cong., 2d Sess. § 301 (1942) (\$10,000 ceiling) with H.R. 6463, 77th Cong., 2d Sess. § 301 (1942) (\$7500 ceiling).

73. For example, the provisions mandating application of state law in administrative and judicial proceedings stated that liability would be imposed "in accordance with the law of the place where the negligence occurred" rather than "the place where the act or omission occurred." S. 2221, 77th Cong., 2d Sess. §§ 201, 301 (1942).

The Senate passed S. 2221 on March 30, 1942,⁷⁴ and the House subsequently considered this version in lieu of its own bill. The House Committee on the Judiciary recommended passage of the bill, but not without certain important amendments.⁷⁵ For example, the committee reinstated the language from the prior bills and from the House version in the current Congress that imposed liability for any "negligent or wrongful act or omission" instead of for "negligence" alone.⁷⁶ Because the new bill required state law to govern the rights and liabilities of the United States, the committee eliminated the provision concerning proportionate liability of the United States as a joint tortfeasor.⁷⁷ The committee also clarified the provision barring recovery of interest, stating that it operated only with respect to prejudgment interest.⁷⁸ The accompanying provision barring recovery of costs was eliminated completely;⁷⁹ in fact, the new version expressly allowed recovery of costs "to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees."⁸⁰ The language barring recovery of punitive damages was not changed.⁸¹

Despite the Judiciary Committee's efforts, the House never acted on the committee bill. In addition, none of the federal tort claims bills introduced during the next Congress⁸² were reported out of committee. Proponents of federal tort claims legislation finally achieved their goal in the following Congress. The new House bill, H.R. 181,⁸³ essentially mirrored the House Judiciary Commit-

74. See 88 CONG. REC. 3175 (1942).

75. See H.R. REP. NO. 2245, 77th Cong., 2d Sess. (1942). The text of the bill after the committee amended it is reprinted *id.* at 1-5, and the differences between it and the Senate version are described *id.* at 11-12.

76. See *id.* at 2, 11.

77. See *id.* at 12; see also *supra* note 52 and accompanying text (noting inclusion of this provision in prior bills).

78. See *id.*

79. See *id.* at 2, 11.

80. *Id.* at 2.

81. See *id.* at 2, 11.

82. S. 1114, 78th Cong., 1st Sess. (1943); H.R. 1356, 78th Cong., 1st Sess. (1943); H.R. 817, 78th Cong., 1st Sess. (1943).

83. H.R. 181, 79th Cong., 1st Sess. (1945).

tee version of S. 2221.⁸⁴ Although the House Judiciary Committee reported this bill with a favorable recommendation,⁸⁵ the full House never voted on it.

The Senate version, S. 2177,⁸⁶ met with greater success. This bill was introduced and enacted as Title IV of the Legislative Reorganization Act of 1946. This enacted version of the FTCA was almost identical to its House counterparts, except that it eliminated the \$10,000 limitation on tort claims, thereby creating unlimited federal tort liability.⁸⁷ The primary reason for eliminating the \$10,000 ceiling was Congress' desire to ban all private claims bills and to eliminate the Committee on Claims as part of the overall reorganization of Congress that it accomplished with the Legislative Reorganization Act.⁸⁸ So long as a ceiling was placed on federal tort

84. *See supra* notes 75-81 and accompanying text. In particular, H.R. 181 incorporated the \$10,000 ceiling on damages and the language barring punitive damages and prejudgment interest. H.R. 181, 79th Cong., 1st Sess. (1945).

85. *See* H.R. REP. NO. 1287, 79th Cong., 1st Sess. 1 (1945).

86. S. 2177, 79th Cong., 2d Sess. (1946).

87. All previous federal tort claims bills had contained a dollar limitation on the amount that a claimant could seek in either administrative or judicial proceedings. *See, e.g.*, H.R. 181, 79th Cong., 1st Sess. (1945) (\$10,000 limitation); S. 2221, 77th Cong., 2d Sess. (1942), *reprinted as amended in* H.R. REP. NO. 2245, 77th Cong., 2d Sess. 1-5 (1942) (\$10,000 limitation in both original and amended version); H.R. 6463, 77th Cong., 2d Sess. (1942) (\$7500 limitation); *see also supra* notes 47 & 72 and accompanying text (describing provisions of previous bills). The early federal tort claims proposals contained equivalent limitations on personal injury and death claims. *See, e.g.*, S. 4377, 71st Cong., 2d Sess. (1929) (\$7500 plus medical and funeral expenses); H.R. 9285, 70th Cong., 1st Sess. (1927) (\$7500 plus medical and funeral expenses); H.R. 8651, 69th Cong., 1st Sess. (1925) (\$5000 plus medical and funeral expenses); S. 1912, 69th Cong., 1st Sess. (1925) (\$5000, amended to \$3000 in the Senate).

88. According to the Senate committee that considered the Legislative Reorganization Act:

The essential difference is that the House bill puts a maximum limitation of \$10,000 on claims for which suit may be brought, whereas this title as reported by your committee contains no such limitation. The committee is of the opinion that in view of the banning of private claim bills in the Congress no such limitation should be imposed, and that with respect to this type of claim the Government should be put in the same position as any private party.

S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946); *see* *United States v. Yellow Cab Co.*, 340 U.S. 543, 549-50 (1951); 92 CONG. REC. 10,048 (1946). *But see* 92 CONG. REC. 10,092-93 (statement of Rep. Monroney suggesting that the \$10,000 limitation was omitted because by specifying an upper limit Congress "might be setting a pattern for making larger awards on claims").

claims litigation, any claim in excess of the ceiling still could have been the subject of a private bill.⁸⁹

3. *Passage of the FTCA and Congressional Intent*

The legislative history of the FTCA and its predecessors indicates that the purposes of the FTCA were to ease the burden and expense of handling the flood of private claims bills, and to waive sovereign immunity so that claimants against the government could obtain redress as a matter of right rather than legislative grace.⁹⁰ Implicit in the waiver of sovereign immunity was the concept that the government should be treated the same as any private defendant. The elimination of the dollar limitation on tort claims from the final version of the FTCA is particularly indicative of these purposes.

Because of initial congressional reluctance to abandon the principle of sovereign immunity, the earliest proposals had emphasized administrative adjustment of tort claims, substituting the expertise of the United States Employees' Compensation Commission for the cumbersome and haphazard performance of the House and Senate Committees on Claims.⁹¹ Congressional attachment to the

89. See *Senate Hearings*, *supra* note 18, at 12-13 (memorandum to the Att'y Gen. from Special Ass't Alexander Holtzoff dated June 7, 1939); *id.* at 34 (statement of Mr. Holtzoff); *House Hearings*, *supra* note 26, at 20-21 (statement of Ass't Att'y Gen. Francis M. Shea); H.R. REP. NO. 1287, 79th Cong., 1st Sess. 12-13 (1945) (minority views concerning H.R. 181).

90. The Senate committee considering the Legislative Reorganization Act of 1946 stated: For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace.

S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946) (quoting H. R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1945)). This statement echoes language in committee reports on earlier bills. See H.R. REP. NO. 2428, 76th Cong., 3d Sess. 2-3 (1940); S. REP. NO. 658, 72d Cong., 1st Sess. 2 (1932); H.R. REP. NO. 2800, 71st Cong., 3d Sess. 2-3 (1931); S. REP. NO. 1699, 70th Cong., 2d Sess. 3-4 (1929); H.R. REP. NO. 286, 70th Cong., 1st Sess. 1-3 (1928); H.R. REP. NO. 667, 69th Cong., 1st Sess. 1-3 (1926); H.R. REP. NO. 206, 69th Cong., 1st Sess. 3 (1926); *accord* *Richards v. United States*, 369 U.S. 1, 6 (1962); *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953); *Feres v. United States*, 340 U.S. 135, 139-140 (1950); *House Hearings*, *supra* note 26, at 24-25, 39-40, 45 (concerning H.R. 5373 and H.R. 6463); *Senate Hearings*, *supra* note 18, at 7, 9, 34, 50-51 (concerning S. 2690).

91. See, e.g., S. 4377, 71st Cong., 2d Sess. (1929); H.R. 9285, 70th Cong., 1st Sess. (1927); H.R. 8651, 69th Cong., 1st Sess. (1925); S. 1912, 69th Cong., 1st Sess. (1925). Proposals for administrative adjustment by the United States Employees' Compensation Commission

system of sovereign immunity as moderated through private legislation also was evidenced by the provisions in the earlier proposals that set maximum dollar limits. In particular, the \$5000 ceiling on personal injury and death claims was derived from the limit imposed on private claims legislation by the House and Senate Committees on Claims.⁹²

Although Congressman Celler long had advocated unlimited federal tort liability,⁹³ the dollar limitations on personal injury and death claims were retained until the eve of the FTCA's enactment.⁹⁴ Even the House version of the bill that was enacted as the FTCA had set a \$10,000 ceiling on tort claims. When the Senate finally eliminated the \$10,000 limit, it did so "in view of the banning of private claim bills" and because "with respect to this type of claim the Government should be put in the same position as any private party."⁹⁵

recurred as late as 1940. *See Senate Hearings, supra* note 18, at 53-66 (statement of Commission member J.J. Keegan and text of his proposed amendment to S. 2690, 76th Cong., 1st Sess. (1939)).

92. *See* 92 CONG. REC. 10,092 (1946) (statement of Rep. Scrivner); 69 CONG. REC. 2193 (1928) (statement of Rep. Hudspeth).

93. *See* H.R. REP. NO. 667, 69th Cong., 1st Sess. 8 (1926) (supplementary report concerning S. 1912); H.R. REP. NO. 206, 69th Cong., 1st Sess. 8 (1926) (supplementary report concerning H.R. 8651); 67 CONG. REC. 10,029-34 (1926) (statement of Rep. Celler).

94. *See* S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946); *supra* note 87 and accompanying text. The inclusion of a dollar limitation in all federal tort claims proposals prior to the final version of the FTCA may explain the absence of legislative history concerning the provision barring punitive damages. The punitive damages ban would be of little significance if an absolute ceiling were imposed on federal tort claims, because a limitation of \$5000 or even \$10,000 often would prevent courts from awarding complete compensatory damages, much less additional punitive damages. Only with unlimited federal tort liability could the punitive damages ban have significant financial consequences. As a result, Congress had no reason to trouble itself with a precise definition when it considered bills containing limitations on liability. When Congress lifted the ceiling on the eve of the FTCA's enactment, it did not pause to consider whether a precise definition of "punitive damages" might be necessary to prevent improper awards of substantial punitive damages under the guise of compensatory damages.

The practical unimportance of the punitive damages provision in the earlier versions of the FTCA also is reflected by the greater attention that Congress paid to provisions concerning awards for prejudgment interest and costs to successful litigants. The House added these provisions to H.R. 6463 in 1942, and amended them later that year when it considered S. 2221. *See* S. 2221, 77th Cong., 2d Sess. (1942); H.R. 6463, 77th Cong., 2d Sess. (1942). These provisions also were the subject of discussion in House hearings. *See House Hearings, supra* note 26, at 30-31.

95. S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946).

The notion that the government should be treated the same as any private defendant was a persistent theme throughout the twenty years of debate that led to enactment of the FTCA. Critics of sovereign immunity had emphasized the unfairness of forcing persons injured by United States employees to pursue the slow and uncertain process of private legislation, while persons injured by private parties had the right to sue for the full amount of their damages.⁹⁶ The congressional desire for uniformity of treatment between persons injured by government employees and persons injured by private parties was reflected in the provisions expressly mandating that both administrative adjustment and litigation of tort claims be decided "in accordance with" state law.⁹⁷ Having decided that state law should govern to the greatest extent possible, Congress progressively whittled away the numerous substantive restrictions on federal tort claims so that plaintiffs suing the government would fare the same as plaintiffs suing private citizens.⁹⁸ As the final step in this process, Congress removed the ceiling on federal tort claim recovery, thus putting the government "in the same position as any private party."⁹⁹

In light of this legislative history, the provision barring recovery of punitive damages emerges as a limited exception within a general scheme aimed at ensuring that federal tort claimants be treated the same as plaintiffs suing private defendants. Nothing in the legislative history indicates any unusual understanding of the term "punitive damages"; nor does the history indicate any congressional intent to limit plaintiffs to any minimal standard of compensation.¹⁰⁰

96. See *supra* note 90.

97. See *supra* notes 60-63 and accompanying text.

98. See *supra* notes 64-65 & 77 and accompanying text; see also *supra* note 53 (listing distinctive procedural provisions of previous bills, which were omitted prior to enactment of the FTCA).

99. See S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946); *supra* notes 87-88 & 94 and accompanying text.

100. In fact, the opposite conclusion could be drawn. In the only lucid post-1940 discussion of the measure of damages in death cases, Alexander Holtzoff, Special Assistant to the Attorney General, emphasized that state law must determine the measure of damages even though the results might be illogical or might result in undercompensation. In hearings before a subcommittee of the Senate Judiciary Committee, Holtzoff stated, "It seems to me the situation here is no different from the case of death resulting from the tort of a private individual." *Senate Hearings*, *supra* note 18, at 46. This discussion indicates that the

Although the legislative history of the FTCA is virtually silent concerning the rationale for the punitive damages ban, three related reasons for this proscription can be inferred from other sources. First, most intentional torts are excluded from the coverage of the FTCA.¹⁰¹ Most victims of aggravated misconduct by government employees, therefore, cannot even sue the government, much less recover punitive damages. In the absence of the proscription, courts still might have awarded punitive damages in a narrow category of cases involving willful, wanton, or reckless misconduct in the commission of a non-intentional tort. Even within this category of cases, however, courts and commentators have struggled in vain to articulate a distinction between reckless misconduct, for which punitive damages may be awarded, and mere negligence, for which punitive damages are not warranted.¹⁰² Given the limited number of situations in which punitive damages might have been appropriate, and the difficulty of determining whether they should be awarded in those cases, Congress may have imposed the absolute ban on punitive damages to save the courts from the necessity of making these fine distinctions.

Second, the FTCA imposes liability on the government for the acts of its employees, based on the doctrine of respondeat superior.¹⁰³ The recoverability of punitive damages under this doctrine generated, and still generates, considerable controversy.¹⁰⁴ Authorities are split widely concerning whether principals should be liable for punitive damages because of aggravated misconduct

drafters of the FTCA were fully aware of the various state wrongful death statutes, many of which measured damages based on the value of the decedent's gross estate and not on the actual loss of the survivors. See *infra* note 147 and accompanying text.

101. "The provisions of this title shall not apply to . . . any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Federal Tort Claims Act, ch. 753, tit. IV, § 421(h), 60 Stat. 812, 846 (1946) (codified as amended at 28 U.S.C. § 2680(h) (1982)).

102. See, e.g., *Milwaukee & St. P. Ry. v. Arms*, 91 U.S. 489, 492-95 (1875); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 9-10 (4th ed. 1971); C. MCCORMICK, *supra* note 17, at 280-82; 25 C.J.S. *Damages* § 123(8) (1966); 17 C.J. *Damages* § 284 (1919).

103. See *Senate Hearings*, *supra* note 18, at 42, 44.

104. See, e.g., W. PROSSER, *supra* note 102, at 12; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1199-1205 (1931); Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296 (1961).

by their agents.¹⁰⁵ Given this controversy, the punitive damages ban could be viewed as Congress' acceptance of the argument that punitive damage awards against the government would neither punish the offenders nor deter similar misconduct by other government employees.¹⁰⁶

Third, and finally, Congress undoubtedly was concerned about minimizing the cost to the government from federal tort claims. Congress' concern for the redress of damages caused by government employees could be satisfied by an award of compensatory damages to the victims.¹⁰⁷ Because punitive damage awards against the government were not necessary to achieve full compensation and would not necessarily have advanced the goals of deterrence and punishment, Congress simply may have seen no reason to impose the added cost of punitive damages on the government.¹⁰⁸

Considered as a whole, the legislative history of the FTCA indicates that the members of the Department of Justice who drafted the FTCA, and the members of Congress who enacted it, employed the term "punitive damages" in the ordinary sense of its accepted legal definition. The legislative history also indicates that Congress intended state law to govern claims under the FTCA to the greatest extent possible, in the interest of equal treatment for plaintiffs suing the government and plaintiffs suing private defendants.

4. *The Punitive Damages Proviso*

Shortly after Congress passed the FTCA, problems arose due to a conflict between the punitive damages ban and the laws of both Alabama and Massachusetts. The courts of these states had interpreted their wrongful death statutes as entirely punitive rather than compensatory in nature,¹⁰⁹ and the Department of Justice

105. See W. PROSSER, *supra* note 102, at 12; Morris, *supra* note 104, at 1204.

106. In an analogous context—tort claims against municipalities—courts "almost without exception" have refused to impose liability on municipal corporations for the unauthorized and unratified acts of employees. W. PROSSER, *supra* note 102, at 12 n.91; see Morris, *supra* note 104, at 1204.

107. See *supra* notes 68-69 and accompanying text.

108. In discussing tort claims against municipalities, one commentator suggested: "Assessment of punitive damages against a city would probably impoverish the public treasury without serving the admonitory function." Morris, *supra* note 104, at 1204.

109. See *Jack Cole, Inc. v. Walker*, 240 Ala. 683, 200 So. 768 (1941); *Louisville & N.R.R. v. Davis*, 236 Ala. 191, 181 So. 695 (1938); *Southern Ry. v. Sherrill*, 232 Ala. 184, 167 So. 731

attempted to take advantage of the interpretations by moving to dismiss FTCA wrongful death actions in these states, based on the punitive damages ban.¹¹⁰ Congress reacted quickly, retroactively amending the FTCA in 1947. The amendment changed the section barring liability for punitive damages and prejudgment interest by adding the proviso

[t]hat in any case wherein death was caused, where the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons, respectively, for whose benefit the action was brought, in lieu thereof.¹¹¹

This proviso creates a substitute measure of damages in states where wrongful death actions are viewed as solely punitive, allowing plaintiffs in those states to recover "compensatory damages, measured by the pecuniary injuries" to the survivors.¹¹² The proviso does not apply to cases brought in states where the wrongful death statute permits recovery of compensatory as well as punitive damages. In these cases, the law instructs federal courts simply to award compensatory damages in accordance with state law, and to exclude any punitive damages.¹¹³

(1936); *Arnold v. Jacobs*, 316 Mass. 81, 54 N.E.2d 922 (1944); *Macchiaroli v. Howell*, 294 Mass. 144, 200 N.E. 905 (1936); *Porter v. Sorell*, 280 Mass. 457, 182 N.E. 837 (1932); *C. McCORMICK*, *supra* note 17, at 356-57.

110. See H.R. REP. No. 748, 80th Cong., 1st Sess. 1-2, *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1548, 1548-49.

111. Act of Aug. 1, 1947, ch. 446, § 410(a), 61 Stat. 722. As amended and codified, this section now provides:

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. § 2674 (1982).

112. Act of Aug. 1, 1947, ch. 446, § 410(a), 61 Stat. 722 (codified as amended at 28 U.S.C. § 2674 (1982)).

113. *Felder v. United States*, 543 F.2d 657, 666 n.7 (9th Cir. 1976); see *Hartz v. United States*, 415 F.2d 259 (5th Cir. 1969); *D'Ambra v. United States*, 481 F.2d 14, 20 n.12 (1st Cir.) (noting that the proviso's restriction to "pecuniary injuries" does not apply to

At about the same time that Congress enacted the punitive damages proviso, Massachusetts amended its wrongful death act to provide for compensatory damages, with a maximum award of \$15,000.¹¹⁴ In 1949, however, Massachusetts reverted back to a system of purely punitive damages,¹¹⁵ and in 1951 it raised the ceiling on wrongful death awards to \$20,000.¹¹⁶ The existence of this ceiling created a further problem in FTCA cases because nothing in the punitive damages proviso of 1947 indicated whether such a ceiling would limit the amount of compensatory damages that a court could award under the proviso. The federal courts first confronted this question in *United States v. Massachusetts Bonding & Insurance Co.*¹¹⁷ Although the district court in that case held that the \$20,000 limitation did not apply to FTCA actions under the proviso,¹¹⁸ the United States Court of Appeals for the First Circuit reversed.¹¹⁹ The court of appeals reasoned that, even though the Massachusetts statute was punitive in nature, it set the maximum amount recoverable as compensatory damages under the FTCA.¹²⁰ The United States Supreme Court, by a five-to-four vote, reversed the court of appeals and restored the holding of the district court.¹²¹ Writing for the majority, Justice Douglas explained why the state-imposed limitation on punitive damages should not apply to a federal court's determination of compensatory damages under the FTCA:

The standard of liability imposed by the Congress is at war with the one provided by Massachusetts. The standard of liability under the Massachusetts Death Act is punitive—i.e., “with reference to the degree” of culpability—not compensatory. The standard under the Tort Claims Act is “compensatory,” i.e., “measured by the pecuniary injuries” resulting from the death. There is nothing in the Massachusetts law which measures the

determination of compensatory damages when state wrongful death statute is only partially punitive), *cert. denied*, 414 U.S. 1075 (1973).

114. 1947 Mass. Acts, ch. 506; see *Beatty v. Fox*, 328 Mass. 216, 102 N.E.2d 781 (1952).

115. 1949 Mass. Acts, ch. 427.

116. 1951 Mass. Acts, ch. 250.

117. 227 F.2d 385 (1st Cir. 1955), *rev'd*, 352 U.S. 128 (1956).

118. See *id.* at 386.

119. *Id.*

120. *Id.*

121. *Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128 (1956).

damages by "pecuniary injuries." The Massachusetts law, therefore, cannot be taken to define the nature of the damages that can be recovered under the Tort Claims Act.

In those States where punitive damages only are allowed for wrongful death, a limitation on the amount of liability has no relevance to the policy of placing limits on liability where damages are only compensatory. By definition, punitive damages are based upon the degree of the defendant's culpability. Where a state legislature imposes a maximum limit on such a punitive measure, it has decided that this is the highest punishment which should be imposed on a wrongdoer. This limitation, based as it is on concepts of punishment, cannot control a recovery from which Congress has eliminated all considerations of punishment.¹²²

Justice Douglas' opinion provides further useful evidence concerning the proper interpretation of "punitive damages" under the FTCA. His opinion repeatedly emphasized that damages under the Massachusetts statute were punitive because: (1) they were based on the degree of the defendant's culpability; and (2) their primary purpose was to punish the defendant.¹²³ Significantly, the opinion emphasized the state court decisions that had characterized the Massachusetts statute as punitive.¹²⁴ This focus on the state's characterization of its own statute is consistent with the history of the punitive damages proviso, which was enacted in response to state court interpretations of the Alabama and Massachusetts wrongful death statutes.¹²⁵

122. *Id.* at 132-33.

123. *See id.*

124. *See id.* at 129 (penal character of the Massachusetts statute evidenced by "the holding of the Supreme Judicial Court of Massachusetts"); *see also id.* at 130 & n.2 (citation of Alabama Supreme Court decisions concerning the punitive nature of damages under the Alabama wrongful death statute).

125. *See supra* notes 109-10 and accompanying text. Although neither the text of the proviso nor the accompanying committee report expressly indicates that state court decisions were to be the sole determinant of whether a state statute provided only punitive damages, the report does indicate that these court decisions at least should be given substantial weight. *See* H.R. REP. NO. 748, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1548.

III. THE PROPER ROLE OF STATE LAW IN DETERMINING WHETHER DAMAGES ARE "PUNITIVE" UNDER THE FTCA

Interpretation of the term "punitive damages" in the FTCA undoubtedly implicates federal law, but this does not preclude reference to state law definitions. In interpreting other federal laws, the United States Supreme Court repeatedly has recognized that state law may be adopted as the federal rule when a uniform national body of law is not needed and when the state rule would not frustrate particular federal objectives.¹²⁶ With regard to the meaning of "punitive damages," the language of the FTCA and the legislative history strongly suggest that Congress intended the district courts to apply state law.

The FTCA by its terms subjects the government to damage liability in accordance with state law, rather than imposing a uniform federal measure of damages.¹²⁷ The predominant role of state law under the FTCA is demonstrated by the Supreme Court's decision in *Richards v. United States*,¹²⁸ in which the Court held that

126. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (adopting state law to govern the priority of liens, rejecting arguments that Federal Housing Administration and Small Business Administration loans should take precedence over private liens); *United States v. Yazell*, 382 U.S. 341 (1966) (applying state law concerning the capacity of married women to contract even though the state rule caused the federal government to lose a preferred claim against the wife's separate property); *DeSylva v. Ballentine*, 351 U.S. 570 (1956) (holding that the term "children" in the federal copyright laws should be defined with reference to state law); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204 (1946) (using state law to define "real property" in a federal statute that subjected the plaintiff to state and local taxation on real property but not on personal property or intangibles); cf. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982) (stating that Congress intended some reference to state corporation law to determine whether nonprofit corporations could solicit "members"); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) (using state law to determine whether an action was based on a written contract or an oral contract for purposes of the applicable state statute of limitations); cf. also *Chase Manhattan Bank v. Finance Admin.*, 440 U.S. 447 (1979) (invalidating a city occupancy tax on bank property because of Congress' clear intent that occupancy taxes be levied on real property, despite its characterization by the state court as a tax on tangible personal property); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973) (refusing to apply retroactively a Louisiana statute governing reservation of mineral rights because it was "hostile" to federal interests and "would deal a serious blow to the congressional scheme contemplated in the Migratory Bird Conservation Act").

127. *Hatahley v. United States*, 351 U.S. 173, 182 (1956).

128. 369 U.S. 1 (1962).

conflict of law questions under the FTCA must be resolved according to state choice of law rules.¹²⁹ According to the Court:

[The FTCA] was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather, it was designed to build upon the legal relationships formulated and characterized by the States, and, to that extent, the statutory scheme is exemplary of the generally interstitial character of federal law.¹³⁰

The legislative history of the FTCA also supports application of state law to determine whether damages are punitive or compensatory. That history reveals a strong desire for intrastate uniformity, so that a plaintiff suing the government in a particular state would receive the same compensation as any other plaintiff in that state.¹³¹ The desire for intrastate uniformity requires application of state law to the greatest extent possible. If the federal court superimposed a variant federal definition of punitive damages, intrastate uniformity would be defeated because the damages awarded under the FTCA would differ from those available to other plaintiffs in a particular state.

The United States Supreme Court's opinion in *Reconstruction Finance Corp. v. Beaver County*¹³² is instructive concerning the role of state law definitions in determining the scope of the federal waiver of immunity. That case involved the liability of the Reconstruction Finance Corporation for a local tax that applied to the corporation's real property but not to its personal property. The Court considered whether a county could define machinery within a plant as "real property" so that the county could avoid a federal ban on taxation of the corporation's personal property.¹³³ The Court held that a county could rely on state law to define real and personal property:

Congress in permitting local taxation of the real property, made it impossible to apply the law with uniform tax consequences in

129. *Id.* at 6-7.

130. *Id.*

131. See *supra* notes 95-99 and accompanying text.

132. 328 U.S. 204 (1946).

133. *Id.* at 206.

each state and locality. . . . Furthermore, Congress, had it desired complete nationwide uniformity as to tax consequences, could have stipulated for fixed payments in lieu of taxes, as it has done in other statutes. . . .

We think the congressional purpose can best be accomplished by application of settled state rules as to what constitutes "real property" so long as it is plain, as it is here, that the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act.¹³⁴

Because state law determined the *amount* of tax liability, the Court in *Reconstruction Finance Corp.* reasoned that state law also should determine the *scope* of tax liability through its definitions of real and personal property.¹³⁵ The same reasoning applies with equal force to damage determinations under the FTCA. Because Congress has indicated its desire to have state law determine the *amount* of damages, the *scope* of damages also should depend upon state law and state definitions of "compensatory" and "punitive" damages.

The subsequent decision of the United States Court of Appeals for the Fifth Circuit in *Reconstruction Finance Corp. v. Texas*¹³⁶ is even more closely on point. In that case, the Fifth Circuit considered whether a state assessment of penalties and interest against the Reconstruction Finance Corporation constituted a permissible "tax" or an impermissible "penalty." The court held that Texas law governed, and it applied state law definitions in determining that the assessment was an invalid penalty.¹³⁷

These considerations indicate that federal courts should follow a state's characterization of "punitive damages" under its damage

134. *Id.* at 209-10.

135. *Id.* at 208-09.

136. 229 F.2d 9 (5th Cir.), *cert. denied*, 351 U.S. 907 (1956).

137. According to the court:

[T]he determination of whether penalties and interests [sic], as such, are a part of the ad valorem tax must be governed by the substantive law of the State of Texas. Since Congress did not define the term "taxation" as that word is used in Section 8 of the Act, it is, therefore, clear by force of the Beaver County decision that the Congressional purpose can best be accomplished by application of settled State rules in determining whether the word "taxation" as used in Section 8 includes penalties and interest.

Id. at 11 (citations omitted).

law unless that state's definition is inconsistent with the terms of the FTCA,¹³⁸ contrary to legislative policy,¹³⁹ discriminatory against the government,¹⁴⁰ or "entirely strange to those familiar with its ordinary usage."¹⁴¹ The reference to state law for the definition of "punitive damages" would not entirely eliminate the need for a federal definition, because a federal definition would remain necessary to determine whether a state's characterization of its damage law as compensatory was aberrational or was inconsistent with the terms of the FTCA. Reference to a federal definition also would be necessary in any case in which a state had not had occasion to characterize a particular measure of damages as compensatory or punitive.¹⁴²

The significance of the adoption of state law definitions is that it would accord presumptive validity to each state's law of compensatory damages. In most cases, federal courts simply could accept a state's measure of compensatory damages without undertaking a refined comparison of state and federal definitions. Only if some aspect of a state's measure of compensatory damages were manifestly punitive within the meaning of the FTCA would a federal court be required to eliminate that punitive aspect in assessing damages.

IV. JUDICIAL MISINTERPRETATION AND EXPANSION OF THE PUNITIVE DAMAGES BAN

In light of the clear and unambiguous meaning of "punitive damages" reflected in the statute and its legislative history, and the availability and importance of state law in determining that meaning, the failure of so many federal courts to interpret the term according to its customary meaning is difficult to explain. The root of the answer lies in the adage that "hard cases make bad law." Most of the seminal cases in which federal courts have construed the punitive damages ban have been wrongful death

138. *Cf. Chase Manhattan Bank v. Finance Admin.*, 440 U.S. 447 (1979); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946).

139. *Cf. United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973); *United States v. Yazell*, 382 U.S. 341, 352 (1966).

140. *Cf. Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946).

141. *DeSylva v. Ballentine*, 351 U.S. 570, 581 (1956).

142. *See infra* notes 166-68 and accompanying text.

actions, which generally are among the hardest of cases. Commentators suggest that Lord Ellenborough made "bad law" in *Baker v. Bolton*¹⁴³ when he stated that "the death of a human being could not be complained of as an injury."¹⁴⁴ The adoption of this rule by American courts likewise has been labeled "bad law."¹⁴⁵

Following the passage of Lord Campbell's Act in England,¹⁴⁶ American legislatures adopted a variety of wrongful death statutes, each with its own measure of damages. While some of these statutes limit survivors to recovery of only pecuniary losses, others additionally allow them to recover for intangibles such as grief, loss of consortium, and loss of companionship. A few wrongful death statutes measure damages based on the value of the decedent's estate rather than the loss to the survivors. Other statutes fit none of these patterns.¹⁴⁷

Reducing the value of a life to monetary terms raises moral and philosophical issues extending far beyond the question of statutory construction. The issues are framed most painfully in actions involving the death of young children, such as the case that confronted the United States Court of Appeals for the Fifth Circuit in *Hoyt v. United States*.¹⁴⁸ *Hoyt* was an FTCA action arising from the death of a seven-year-old child on a military base in Alabama. Because Alabama's wrongful death statute was strictly punitive, the punitive damages proviso of the FTCA required the federal district court to apply a federal measure of damages that limited the father to recovery of "pecuniary injuries."¹⁴⁹ Applying this standard, the district court awarded the plaintiff only the cost of the child's funeral.¹⁵⁰ The Fifth Circuit reversed, holding that the

143. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

144. The quotation and criticism appear in W. PROSSER, *supra* note 102, at 901-02. See also T. LAMBERT, *History and Future*, in *WRONGFUL DEATH AND SURVIVORSHIP* 4-5 (W. Beall ed. 1957) (criticizing Lord Ellenborough's decision).

145. See, e.g., J. STEIN, *DAMAGES AND RECOVERY* § 233 (1972); S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 1.3 (1966).

146. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93.

147. See S. SPEISER, *supra* note 145, at 54-70; C. MCCORMICK, *supra* note 17, at 339-74. The drafters of the FTCA knew of the variety of damage measures that states employed in wrongful death cases. See *supra* note 100; *Senate Hearings*, *supra* note 18, at 45-56.

148. 286 F.2d 356 (5th Cir. 1961).

149. *Id.* at 357; see *supra* notes 109-13 and accompanying text.

150. See 286 F.2d at 357.

federal standard allowed the father to recover not just the funeral expenses, but also the "contributions" he could have expected from his son, including the loss of services and earnings of the child during minority and the loss of future gifts of goods and services that he reasonably could have expected from the child during his lifetime.¹⁵¹ The court rejected the government's argument that the cost of rearing the child to majority should be deducted from the award, stating that Congress did not intend "any such cold-blooded deduction," which "would treat an incalculable loss as a 'pecuniary gain.'"¹⁵²

Because *Hoyt* involved the punitive damages proviso and its federal standard of "pecuniary" damages, it is not directly relevant to FTCA wrongful death actions arising in the forty-eight states where the standard punitive damages ban applies. More relevant to FTCA wrongful death actions in these states is *Hartz v. United States*,¹⁵³ an FTCA action in Georgia brought by the widow of a pilot whose airplane crashed due to an air traffic controller's negligence. The Georgia wrongful death statute allowed recovery of the "full value of the life of the decedent," measured by the present discounted value of the amount that the decedent would have earned during his lifetime, without deduction of the decedent's personal expenses had he lived.¹⁵⁴ The Georgia courts had characterized damages under this statute as punitive to the extent that they exceeded the survivors' actual losses.¹⁵⁵ Relying upon this characterization, the Fifth Circuit held that the FTCA's punitive damages ban required elimination of the punitive aspect of the damage award.¹⁵⁶ The Georgia statute, however, did not provide separate, explicit measures of punitive and compensatory damages. Rather, the Georgia courts had construed the statute as punitive insofar as it awarded damages exceeding the actual loss to the survivors. Accordingly, the Fifth Circuit held that the punitive

151. *Id.* at 359-60.

152. *Id.* at 362 (emphasis by the court).

153. 415 F.2d 259 (5th Cir. 1969).

154. *See id.* at 260 n.3, 263 n.9, 264.

155. *Savannah Elec. Co. v. Bell*, 124 Ga. 663, 53 S.E. 109 (1906) (cited in *Hartz*, 415 F.2d at 264); *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954) (cited in *Hartz*, 415 F.2d at 264); *accord Atlantic, V. & W. Ry. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906).

156. 415 F.2d at 264.

damages ban required the court to deduct the personal expenses that the decedent would have incurred, and permitted it to deduct taxes as well, because only the decedent's net earnings after these deductions would have been available to his family had he survived.¹⁵⁷

The problematic aspect of *Hartz* is the broad statement at the end of the court's opinion:

[T]he trial court, in a *federal tort claims act*, cannot award a judgment in excess of the injury suffered by the survivor, and to the extent that in a case involving proven annual income of this size, the trial court should give reasonable consideration to the incidence of federal income taxation in arriving at a final judgment.¹⁵⁸

If limited to claims governed by the Georgia wrongful death statute, the court's statement clearly would be correct. The statement goes further, however. On its face, this language purports to apply equally to *all* FTCA actions, thus implying that the FTCA *itself* requires deduction of a decedent's income taxes to avoid an award of punitive damages. The same is true of the court's holding with respect to personal expenses. Although these statements should be limited to the context of the Fifth Circuit's primary reliance on Georgia's own characterization of its wrongful death statute, courts unfortunately have followed *Hartz* in subsequent cases without regard to this distinction.¹⁵⁹

A few years after *Hartz*, the United States Court of Appeals for the First Circuit decided *D'Ambra v. United States*,¹⁶⁰ which involved an action by the parents of a four-year-old child killed by a mail truck in Rhode Island. Rhode Island's wrongful death statute allowed plaintiffs to recover the present value of decedents' gross lifetime earnings, with estimated personal expenses deducted.¹⁶¹

157. *Id.*

158. *Id.* at 265 (emphasis by the court).

159. See *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983) (citing *Hartz* as requiring deduction of income taxes as a matter of federal law), *cert. denied*, 467 U.S. 1226 (1984); *infra* notes 237-50 and accompanying text; *Felder v. United States*, 543 F.2d 657, 669 (9th Cir. 1976) (citing *Hartz* as requiring deduction of personal expenses as a matter of federal law); *infra* notes 190-208 and accompanying text.

160. 481 F.2d 14 (1st Cir.), *cert. denied*, 414 U.S. 1075 (1973).

161. See *id.* at 16.

The court in *D'Ambra* framed the question as "whether Congress intended in a wrongful death case to accept liability over and above compensating the survivors to the extent of their loss."¹⁶² The court noted that, if the decedent had lived, he would have spent most of his lifetime earnings on his own wife and children, and his parents would have received only a small portion of the statutory measure of damages.¹⁶³ The court concluded that the statute was punitive to the extent that the parents' recovery exceeded their actual loss from the child's death.¹⁶⁴

To support its holding, the court discussed the legislative history of the FTCA and the 1947 proviso:

With this background we turn to consider what was meant by the term "punitive" in the principal section of the Act. *Punitive damages*, whether viewed as "smart money" or as a deterrent, is [sic] *that part of the award that is not compensatory; the terms are mutually exclusive*. Thus, the Georgia [Supreme C]ourt, speaking directly to the point, said that its wrongful death statute "is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested." . . . Following this appraisal, the court in *Hartz v. United States* refused to apply the Georgia statute in an FTCA case.¹⁶⁵

D'Ambra is the first case in which a federal court expressly categorized a state measure of damages as "punitive" under the FTCA because it exceeded the amount of the plaintiffs' actual loss, without regard to the state court's characterization of the statute.¹⁶⁶ Indeed, the First Circuit made no inquiry into the Rhode Island Supreme Court's interpretation of its wrongful death act. The court rejected the plaintiffs' argument that *Hartz* was distinguishable because the Georgia courts had characterized certain damages under the statute in *Hartz* as punitive in nature, while the Rhode

162. *Id.*

163. *See id.*

164. *See id.* at 16-18.

165. *Id.* at 17-18 (citations omitted and emphasis added).

166. Although courts had invalidated damage awards under the FTCA in previous cases, these holdings had been based on the trial court's erroneous application of state law concerning compensatory damages. *See, e.g., O'Connor v. United States*, 269 F.2d 578 (2d Cir. 1959).

Island court had made no such determination regarding the statute in *D'Ambra*. According to the First Circuit: "The statute must be judged not by its language, nor the state court's characterization, but by its consequences."¹⁶⁷ In a footnote, the court elaborated: "The only significance we attached to the circumstance that the Georgia court described its statute as partially penal is that state courts do not normally have occasion to consider the distinction, which, in turn, might result in the federal court not being alerted to the issue."¹⁶⁸

Having determined that the Rhode Island statute provided some punitive damages but that it was not solely punitive,¹⁶⁹ the court recognized that it was not bound by the "pecuniary injuries" standard of the punitive damages proviso.¹⁷⁰ Instead, the FTCA required the court to apply Rhode Island's measure of compensatory damages, but not to award any punitive damages. The First Circuit rejected the most obvious solution, which, consistent with the Fifth Circuit's decisions in *Hoyt* and *Hartz*, would have limited the parents' recovery to the percentage of damages recoverable under the Rhode Island statute representing their anticipated contributions from the decedent.¹⁷¹ Instead, starting from the questionable premise that it faced "a *statutory void* resulting from [its] holding the Rhode Island statute inapplicable as being partly punitive,"¹⁷² the First Circuit undertook to create its own measure of compensatory damages.¹⁷³ Following a protracted discussion of possible alternative damage measures for a child's wrongful death,¹⁷⁴ the court concluded that compensatory damages in such cases should be measured "by the loss of the companionship and society of the infant victim."¹⁷⁵

167. 481 F.2d at 18.

168. *Id.* at 18 n.7.

169. *See supra* note 164 and accompanying text.

170. 481 F.2d at 20 & n.12.

171. *See id.* at 19.

172. *Id.* (emphasis added).

173. *See id.*

174. *See id.* at 19-21.

175. *Id.* at 20-21. Two alternatives that the court rejected were: (1) "strictly applying a pecuniary benefits-less-cost analysis—which would, if rigorously applied to the death of a very young child, yield a zero result"; and (2) "by blinking at costs of uprearing and speculating on earnings and contributions decades hence, to come up with a recovery satisfying an

Although the First Circuit's discussion of alternatives demonstrated considerable insight, the court completely ignored the FTCA requirement that state law determine the measure of damages. The court made no attempt to determine Rhode Island's principles of compensatory damage law in common law actions for personal injuries not resulting in death. In fact, the court did not cite a single decision of any Rhode Island court. The First Circuit completely neglected the possibility that Rhode Island might have deemed its statutory measure of damages entirely "compensatory" even though it did not measure the survivors' monetary loss precisely. For example, a Rhode Island court might have treated the portion of the recovery exceeding the plaintiffs' pecuniary loss as compensation for emotional and psychological injuries, including loss of society and companionship.

The reason underlying the First Circuit's failure to consider state law apparently was its belief that a uniform federal damage measure was desirable. The court advocated congressional action "to establish a clearly defined, and, since it is a federal act recognizing federal policy, possibly a uniform standard on measure of damages."¹⁷⁶ This statement demonstrates the First Circuit's total failure to appreciate that Congress intended to have state law govern FTCA actions to the greatest possible extent, so that plaintiffs suing the government and plaintiffs suing private parties would receive equal treatment. Congress did not intend to create interstate uniformity; it intended to create intrastate uniformity.

Even if a federal standard for "punitive damages" were appropriate, the court's opinion in *D'Ambra* still would be flawed in two respects. First, the court applied an idiosyncratic definition of "punitive damages." Its characterization of all damages exceeding those necessary to compensate the plaintiffs as "punitive damages" was completely contrary to the plain meaning of the term.¹⁷⁷ Second, even assuming the legitimacy of the First Circuit's definition, the court did not apply this definition to the statute as a whole; instead, it considered only whether the statute was punitive as

unarticulated sense of justice while paying lip service to the old common law calculus." *Id.* at 19.

176. *Id.* at 21.

177. See *supra* notes 14-18 and accompanying text.

applied to the particular facts of the case before it. Any measure of damages under a wrongful death act inherently involves the imprecision associated with estimation of such variable factors as longevity, wage trends, inflation, interest rates, and tax schedules, as well as the assumption that the beneficiaries would have survived and would have remained in a dependent relationship with the victim. Because of this imprecision, application of any general rule for measuring compensatory damages may result in either overcompensation or undercompensation in any given case. Merely because a state's damage measure may overcompensate survivors in a particular case does not make its measure of damages "punitive."¹⁷⁸ If the First Circuit's approach were followed generally, every federal district court presented with a federal tort claim would have to determine whether applying the state measure of damages to the case before it would overcompensate that particular plaintiff. Surely this is not what Congress intended when it imposed liability on the government "in accordance with the law of the place where the act or omission occurred"¹⁷⁹ and "in the same manner and to the same extent as a private individual under like circumstances."¹⁸⁰

Two years after the First Circuit's decision in *D'Ambra*, the Ninth Circuit decided *United States v. English*.¹⁸¹ *English* is significant because it contains ill-considered dicta that the Ninth Circuit later adopted as its interpretation of the FTCA punitive damages ban. In *English*, the district court awarded substantial damages to the widow of a sixty-three-year-old electrical contractor who was crushed by a crane at a naval shipyard in California. The government appealed, contending that the lost earnings award was "punitive and erroneous" because the trial court failed to

178. Cf., e.g., *Siverson v. United States*, 710 F.2d 557 (9th Cir. 1983) (collateral source rule did not result in punitive damages even though plaintiff received windfall double recovery); *infra* notes 252-55 and accompanying text; *Smith v. United States*, 587 F.2d 1013 (3d Cir. 1978) (collateral source rule did not result in punitive damages even though plaintiff received windfall double recovery); *infra* notes 254 & 255; *Kalavity v. United States*, 584 F.2d 804 (6th Cir. 1978) (award to remarried widow did not result in punitive damages even though plaintiff also received support from new husband); *infra* notes 209-17 and accompanying text.

179. 28 U.S.C. § 1346(b) (1982).

180. *Id.* § 2674.

181. 521 F.2d 63 (9th Cir. 1975).

deduct a sufficient amount for the decedent's personal expenditures and income taxes and because the court did not discount the award to present value.¹⁸² Although the Ninth Circuit stated that it was resolving these issues in accordance with state law,¹⁸³ the court also made the following general statement concerning the FTCA:

The amount of damages to be awarded under the Federal Torts [sic] Claims Act is governed by the law of the place of the wrongful act. If the local law provides for punitive damages, or *permits application of standards which result in plaintiffs getting more than compensatory damages*, only compensatory damages may be awarded.¹⁸⁴

This statement evinces a willingness to look beyond a state's characterization and to apply a federal standard to determine whether a plaintiff is "getting more than compensatory damages." Despite its earlier statement that the case would be governed by state law, the court said that it was "considering both Federal and California law"¹⁸⁵ to reach its conclusion that the district court should have deducted personal expenses and taxes from the award and that it should have discounted the award to its present value.¹⁸⁶

Although the Ninth Circuit did not clearly articulate the basis for its opinion in *English*, several factors indicate that its troublesome statements concerning federal law were no more than dicta. For example, the holding in *English* requiring discounting of awards to present value appears to be based on California law, given the court's citation to a California case that expressly required such discounting.¹⁸⁷ In two subsequent cases, the Ninth Circuit has recognized that it decided the discounting issue in *English* under the law of California.¹⁸⁸ Likewise, the Ninth Circuit has said

182. *See id.* at 67, 71-72.

183. *See id.* at 65.

184. *Id.* at 70 (citations omitted and emphasis added).

185. *Id.* at 71.

186. *Id.* at 71-72.

187. *Bond v. United R.R. of S.F.*, 159 Cal. 270, 286, 113 P. 366, 373 (1911) (cited in *English*, 521 F.2d at 72) (holding that plaintiff "was not entitled to a present judgment for the total amount of such future receipts, but only for the present value").

188. *Shaw v. United States*, 741 F.2d 1202, 1207 (9th Cir. 1984); *Hollinger v. United States*, 651 F.2d 636, 641-42 (9th Cir. 1981).

that its statement in *English* regarding the deduction of income taxes from projected earnings was based on California law.¹⁸⁹ Moreover, the statements concerning deductions for personal expenses and taxes were dicta because the court did not hold that these deductions were required. The plaintiff in *English* did not challenge the propriety of the deductions for personal expenses and taxes; the court's holding was simply a rejection of the government's contention that the amount of these deductions was insufficient.

What was merely dictum in *English*, however, became law one year later in *Felder v. United States*.¹⁹⁰ *Felder* involved an airplane accident caused by the negligence of an air traffic controller in Arizona. The district court had deducted federal and state income taxes from the award, and the plaintiffs contended on appeal that the deduction was contrary to Arizona law.¹⁹¹ Even though an earlier Ninth Circuit decision indicated that the plaintiffs' contention was correct,¹⁹² in *Felder* the Ninth Circuit characterized the state law on the subject as "unclear."¹⁹³ The court nonetheless held that it was "spared . . . the difficult and disconcerting task of second guessing the Arizona court" because federal law required the deduction of income taxes from the award.¹⁹⁴ According to the court, a failure to deduct income taxes would have resulted in an award of "punitive damages" against the government in violation of the FTCA.

The Ninth Circuit derived its definition of "punitive damages" in *Felder* from an analysis of the legislative history of the FTCA. Although the court conceded that the "long and complex legislative history of the Act does not speak directly to this issue,"¹⁹⁵ it claimed to have found passages in the legislative history suggesting "that the Government was making itself liable only for losses

189. *Felder v. United States*, 543 F.2d 657, 669 n.15 (9th Cir. 1976).

190. 543 F.2d 657 (9th Cir. 1976).

191. *Id.* at 665.

192. *See United States v. Becker*, 378 F.2d 319 (9th Cir. 1967). In *Becker*, the court expressly rejected the government's argument that the trial court should have subtracted federal income taxes from future earnings, stating: "The indications are that, under the law of Arizona, the incident of income tax has no part in arriving at a damage award." *Id.* at 324.

193. 543 F.2d at 666.

194. *Id.* at 667.

195. *Id.*

actually suffered by plaintiffs.”¹⁹⁶ First, the court quoted from a 1941 report of the Committee on Claims concerning a supposed “predecessor” bill to the FTCA.¹⁹⁷ The bill in question¹⁹⁸ was not in any respect a predecessor of the FTCA,¹⁹⁹ however, and therefore the three-page committee report has absolutely no bearing on interpretation of the FTCA. The court also quoted Assistant Attorney General Shea’s statement that the FTCA was intended to “redress tortious wrongs” and that “we think it is enough to satisfy the *actual claim* rather than impose punitive damages on the United States.”²⁰⁰ As explained earlier in this Article, however, Mr. Shea’s comparison of “punitive damages” to the victim’s “actual claim” merely served to explain why punitive damages were unnecessary and did not purport to define “punitive damages.” When read in the context of Mr. Shea’s repeated reference to the FTCA’s reliance on local law, his use of the phrase “actual claim” must have referred to the actual claim as measured by state law and not by a federal standard.²⁰¹ It certainly did not suggest a definition of “punitive damages” contrary to the accepted meaning of the term.

After the court’s cursory and misleading discussion of the FTCA’s legislative history, it turned to the history of the punitive

196. *Id.* at 668.

197. *Id.* (quoting a passage from H.R. REP. NO. 1112, 77th Cong., 1st Sess. 2 (1941), suggesting that private citizens injured by the government should be “reimbursed promptly”).

198. H.R. 5185, 77th Cong., 1st Sess. (1941).

199. The bill considered in the report was not a general federal tort claims bill; it proposed only to extend the Small Claims Act of 1922 to allow settlement, within a \$1000 limit, of claims for “hospital, medical, or burial expenses” along with property damage claims. Unlike the four federal tort claims bills introduced in the same Congress, the Small Claims Act bill involved only administrative adjustment of small claims with a ceiling of \$1000, it had no provision for litigation, and it did not even mention punitive damages. The development of federal tort claims legislation was reflected not in this bill but in the four general tort claims bills. S. 2221, 77th Cong., 2d Sess. (1942); S. 2207, 77th Cong., 2d Sess. (1942); H.R. 6463, 77th Cong., 2d Sess. (1942); H.R. 5373, 77th Cong., 1st Sess. (1941); see *supra* notes 58-81 and accompanying text. These bills were drafted with the assistance of the Attorney General’s office, see *House Hearings*, *supra* note 26, at 1, while the Small Claims Act bill was drafted by the Acting Secretary of Agriculture, see H.R. REP. NO. 1112, 77th Cong., 1st Sess. 2 (1941).

The erroneous reliance on the committee report was repeated in Comment, *supra* note 19, at 258 & n.68, 260 & n.78.

200. *House Hearings*, *supra* note 26, at 29, 30 (quoted in *Felder*, 543 F.2d at 668) (emphasis by the court).

201. See *supra* notes 68-71 and accompanying text.

damages proviso adopted in 1947. In examining this history, the court relied upon a statement made by the Comptroller General in an unpublished hearing concerning the proviso.²⁰² The Ninth Circuit conceded that the quoted passage "has obvious limitations as an authoritative statement" because the proviso was enacted by a different Congress and because the proviso, unlike the FTCA, restricted plaintiffs in Alabama and Massachusetts to recovery of only their pecuniary losses.²⁰³ The court nevertheless accepted the passage "as some evidence of congressional intent to expose the Government to liability only for compensatory damages."²⁰⁴ The court also supported its conclusion with a quotation from a Supreme Court opinion in which the Court had stated that the FTCA's purpose "was to *compensate* the victims of negligence" by government employees.²⁰⁵

The Ninth Circuit's conclusion that recovery under the FTCA is limited to "compensatory damages" is not at all controversial. The court erred, however, in its further conclusion that any award of damages exceeding the plaintiff's actual loss must be noncompensatory punitive damages. Besides its questionable analysis of the legislative history, the Ninth Circuit based its conclusion that all damages exceeding actual losses were "punitive" on language from *English*, *D'Ambra*, and *Hartz*.²⁰⁶ As discussed above, these statements were either ill-considered dicta or holdings reflecting a misinterpretation of the FTCA.²⁰⁷ In fact, the court conceded that its definition of "punitive damages" was inconsistent with the accepted meaning of the term.²⁰⁸

202. *Felder*, 543 F.2d at 668 & n.13 (quoting *Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128, 131 (1956), which, in turn, was quoting excerpts of the hearings from the government's brief in that case).

203. *Id.* at 668.

204. *Id.*

205. *Id.* (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955)) (emphasis added by the Ninth Circuit).

206. *See id.* at 669.

207. *See supra* notes 153-59 and accompanying text (discussing *Hartz*); *supra* notes 160-80 (discussing *D'Ambra*); *supra* notes 181-89 (discussing *English*).

208. The court stated:

It appears settled, then, that the purpose of the FTCA is compensation, that is, it is intended to repay the amount of loss or injury sustained by a plaintiff as a proximate result of governmental misconduct which gave rise to the cause of action. Although the Act does not define punitive damages, they may be

Two years later, in *Kalavity v. United States*,²⁰⁹ the United States Court of Appeals for the Sixth Circuit rejected the peculiar definition of punitive damages that the First and Ninth Circuits had adopted. *Kalavity*, like *Hartz* and *Felder*, involved a fatality caused by an air traffic controller's negligence. Both the plaintiff and the government appealed the award made by the district court. The government challenged the district court's failure to deduct support that the decedent's widow would receive from her new husband, while the plaintiff challenged the district court's deduction of income taxes from the award.²¹⁰

The district court had refused to deduct support received from the plaintiff's new husband because Ohio law clearly prohibited reduction of awards based on the remarriage of a surviving spouse.²¹¹ In affirming the trial court on this point, the Sixth Circuit rejected as "farfetched" the government's argument that any award exceeding a plaintiff's actual loss constitutes impermissible "punitive damages" under the FTCA:

Government counsel argues that any award of damages over and above plaintiff's actual loss is "punitive" and that since plaintiff's remarriage entitles her to the support and companionship of her new spouse, she should not be compensated for the continuing loss of the support and affection of her dead husband. To follow state law in this case, the government argues, would undermine the purposes of the Tort Claims Act by allowing recovery for damages not actually suffered.

This argument on the effect of plaintiff's remarriage is far-fetched. No court has adopted it. It says, in essence, that a claimant may recover only direct or out-of-pocket losses: everything else is "punitive." . . .

thought of generally as damages intended to punish and deter. However, we are not bound to a narrow definition. Since the interpretation and application of the Act is a matter of federal law, we look to the purpose of the Act for a definition of punitive. Likewise, in deciding if a state statute is punitive, we look not to its language nor to the state court's characterization of it. Rather, we look to its effect.

543 F.2d at 669.

209. 584 F.2d 809 (6th Cir. 1978).

210. *Id.* at 811.

211. *See id.* at 810.

Damages do not become "punitive" when a court refuses to consider and reduce a wrongful death award because the decedent's spouse is now living with another person who supports her financially and emotionally.²¹²

In a footnote, the court explained its conception of "punitive damages": "Damages are 'punitive' when awarded separately for the sole purpose of punishing a tortfeasor who inflicted injuries 'maliciously or wantonly, and with circumstances of contumely or indignity.'"²¹³

According to the court, the plaintiff's challenge of the income tax deduction presented a more difficult issue. In the absence of controlling state law, the court applied the "*McWeeney* exception," which provides that no adjustment for taxes is necessary for the lost earnings of those "at the lower or middle reach of the income scale."²¹⁴ Based on this doctrine, the court reversed the district court's deduction of income taxes from the award.²¹⁵

Curiously, the Sixth Circuit in *Kalavity* referred to *Felder v. United States* as a "well-reasoned case" in which the Ninth Circuit "thoroughly reviewed the legislative history" of the FTCA.²¹⁶

212. *Id.* at 811. The court continued:

We note also that the purpose of ordinary tort damages, as distinguished from "punitive" damages, is both to compensate and to deter. Tort law mixes these two purposes, compensation and deterrence, when it awards ordinary damages. Tort law may award as customary damages something more than simply out-of-pocket loss, something for deterrence, without spilling over into "punitive" damages awarded solely for the purpose of punishment. This confusion of purpose is clearly illustrated by the fact that, by statute, liability to pay damages for the pain and suffering and loss of earnings of a decedent during his life now survives his death and attaches to his estate while, at common law, the tortfeasor's death terminated his liability and that of his estate. In excluding "punitive" damages from the coverage of the Tort Claims Act, we believe that Congress simply prohibited use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together.

Id. (citation omitted).

213. *Id.* at 811 n.1 (quoting *Milwaukee & St. P. Ry. v. Arms*, 91 U.S. 489, 493 (1875)).

214. *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34, 38-39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960). The Sixth Circuit noted that it, along with several other circuits, had adopted the exception. *Kalavity*, 584 F.2d at 812 (citing cases decided in the First, Second, Third, Fifth, Sixth, Seventh and Tenth Circuits).

215. 584 F.2d at 813.

216. *Id.*

The Sixth Circuit apparently failed to recognize that the Ninth Circuit's reasoning concerning the taxation issue in *Felder* was identical to the reasoning that the Sixth Circuit called "farfetched" when asserted by the government in the context of the remarriage issue in *Kalavity*.²¹⁷

The deduction of income taxes also was an issue in the Fifth Circuit's consideration of *Harden v. United States*.²¹⁸ In that case, the plaintiffs appealed an award compensating them for the death of their fifteen-year-old son, who had been shot by an employee at a government campsite in Georgia.²¹⁹ The plaintiffs asserted that the district court should not have deducted income taxes from the lost earnings award, arguing that the court should have applied the *McWeeney* exception because the decedent's projected earnings were in the low-to-middle income range.²²⁰ The Fifth Circuit rejected this argument, stating that "the effect of income taxes, like other items of personal expense, must be considered in awarding compensatory damages."²²¹

In holding that the deduction of income taxes was *required*, *Harden* represented only a small step beyond the Fifth Circuit's earlier decision in *Hartz v. United States*,²²² in which the court had held that consideration of income taxes was *permissible*.²²³

217. See *id.* at 811; *supra* text accompanying note 212. The two contexts may be distinguishable, but the basis for such a distinction is not readily apparent. Both issues involved the argument that any award exceeding a plaintiff's actual loss is "punitive" under the FTCA. As with its rejection of an offset for support received from the plaintiff's new husband, the Sixth Circuit's rejection of the offset for income taxes under the *McWeeney* exception was based in part on the premise that the amount of the offset would involve undue speculation in ordinary cases. Compare *Kalavity*, 584 F.2d at 811 with *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34, 39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960). As a result, the Sixth Circuit's analysis of "punitive damages" should apply equally to both issues in *Kalavity*.

The Sixth Circuit's failure to recognize the inconsistency between its praise of *Felder* and its rejection of the government's analogous argument concerning the remarriage issue in *Kalavity* may reflect a lack of careful attention to *Felder*. The Sixth Circuit treated *Felder* as distinguishable from *Kalavity* because it involved decedents with larger incomes. See 584 F.2d at 813.

218. 688 F.2d 1025 (5th Cir. 1982).

219. *Id.* at 1027.

220. *Id.* at 1029-30; see *supra* note 214 and accompanying text.

221. 688 F.2d at 1030.

222. 415 F.2d 259 (5th Cir. 1969); see *supra* notes 153-59 and accompanying text.

223. See 415 F.2d at 264; *supra* note 157 and accompanying text.

Because the Georgia state courts had characterized the state law as "punitive,"²²⁴ the holding in *Harden*, like *Hartz*, could be interpreted as applying only to FTCA actions under Georgia law. The Fifth Circuit, however, cited with approval the Ninth Circuit's opinion in *Felder*,²²⁵ as well as a Supreme Court decision requiring deduction of taxes from damage awards as a matter of federal law under the Federal Employers' Liability Act.²²⁶ The tenor of the opinion in *Harden*, therefore, suggests that the Fifth Circuit would require deduction of taxes in all FTCA actions, including cases in which the applicable state law allows damages without such deductions and does not characterize these damages as "punitive."

Shortly before the Fifth Circuit decided *Harden*, the Ninth Circuit confronted the issues of taxation and of discounting to present value for the third time²²⁷ in *Hollinger v. United States*,²²⁸ an FTCA action involving Alaska law. Alaska had adopted a "total offset" rule, under which the interest rate used to discount awards to present value is offset against the rate used to project wage increases from inflation and productivity gains, based on the assumption that the two rates would be identical.²²⁹ Courts applying the total offset rule neither increase future earnings by an inflationary factor nor reduce future earnings to present value. Because Alaska's offset rule purported to take into account discounting to present value, albeit as an offset against inflation, the Ninth Circuit could have approved the use of this simple state law approach in FTCA actions.²³⁰ Instead, the court adopted dicta from its

224. See *supra* note 155 and accompanying text.

225. 543 F.2d 657 (9th Cir. 1976) (cited in *Harden*, 688 F.2d at 1029).

226. *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980) (cited in *Harden*, 688 F.2d at 1029).

227. The Ninth Circuit previously had confronted these issues in *Felder v. United States*, 543 F.2d 657 (9th Cir. 1976), and *United States v. English*, 521 F.2d 63 (9th Cir. 1975). See *supra* notes 181-208 and accompanying text.

228. 651 F.2d 636 (9th Cir. 1981).

229. See *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967).

230. The United States Court of Appeals for the Third Circuit approved the use of Pennsylvania's total offset rule in FTCA actions in *Barnes v. United States*, 685 F.2d 66 (3d Cir. 1982). In that case, the Third Circuit rejected the government's argument "that failure to reduce an award for lost future earnings to present worth is tantamount to awarding punitive damages disguised as compensation." *Id.* at 70. The court stated:

We reject this proposition because the total offset rule . . . does include reduction to present worth. Indeed, that is its theoretical underpinning. . . .

. . . .

earlier opinion in *English*, which involved California law, stating that a court "may not assume that the discount rate and the inflation rate will net to zero."²³¹ Accordingly, the court in *Hollinger* required the district court on remand to make an independent examination, relying on expert testimony, to determine whether Alaska's total offset method would result in a higher award than if the court had increased damages to compensate for inflation and then had discounted them to present value. If the total offset approach would yield a larger award, according to the court, the excess would be "punitive" under the FTCA and would have to be deducted from the final award.²³² Because the outcome of this analysis would vary with changes in interest and inflation rates, the Ninth Circuit's approach would require courts to perform this analysis in every FTCA case in which the applicable state law employed a total offset approach.²³³

With respect to federal and state income taxes, Alaska law clearly required courts to award damages with no deduction for

We are also mindful that our duty in this case is to apply the law of Pennsylvania to whatever extent that law can be viewed to be reasonably consistent with the FTCA. It was Congress's objective in § 2674 to afford state tort laws considerable prominence in the resolution of suits against the government as tortfeasor, and we are obligated not to overlook that policy judgment in reconciling the terms of § 2674 that are at issue in this case. The Pennsylvania courts have decided that the goal of fair compensation for future lost wages is best served by a rule which favors predictable simplicity over mathematical exactitude. We cannot say that such a policy is in *any* sense punitive. We are persuaded that the total offset method is a reasonable method of predicting lost earnings; to the extent that it may overcompensate the injured party should inflation and interest rates cease to co-vary significantly, we cannot conclude that the rule exceeds the limits of 28 U.S.C. § 2674.

Id. at 70 (footnote omitted) (emphasis by the court).

231. *English*, 521 F.2d 63, 75 (9th Cir. 1975) (quoted in *Hollinger*, 651 F.2d at 641).

232. 651 F.2d at 642. In *Barnes v. United States*, 685 F.2d 66 (3d Cir. 1982), the Third Circuit declined to follow *Hollinger*, stating, "[W]e find its analysis unpersuasive." *Id.* at 70 n.3.

233. A court could avoid this inquiry if neither party supplied an expert witness to provide the necessary facts and opinions. Alternatively, the parties might agree to use either a particular discount rate or the total offset method. *See, e.g.*, *Abille v. United States*, 482 F. Supp. 703, 710 (N.D. Cal. 1980) (parties stipulated to Alaska's total offset damage law in an FTCA action); *cf. Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982) (en banc) (criticizing case-by-case approach and adopting a partial offset rule requiring use of a "below market" or "real" interest rate for discounting).

taxes.²³⁴ The Ninth Circuit, however, held that the FTCA required deduction of taxes.²³⁵ The court thus extended *Felder* to a case in which state law unambiguously prohibited deduction.

The Ninth Circuit's decision in *Hollinger* conflicts with the FTCA's express mandate that the extent of damage liability be determined in accordance with state law. Notwithstanding Alaska's clearly articulated law of damages, which expressly purported to be compensatory and not punitive, the Ninth Circuit established an entirely different and far more complex federal measure of damages which necessitates expert testimony concerning future rates of interest, inflation, and taxation. The court's decision was completely at odds with Congress' desire for intrastate uniformity in the treatment of persons injured by the government and persons injured by private citizens. The resulting disuniformity is highlighted in cases involving both the United States and a private party as codefendants. In these cases, the Ninth Circuit's rule compels district courts to make separate damage calculations for each defendant.²³⁶

The ultimate expression of the overly-expansive federal punitive damages standard under the FTCA, however, had to be the Fourth Circuit's decision in *Flannery v. United States*.²³⁷ In that case, twenty-two-year-old Michael Flannery had been left permanently semi-comatose after being struck by a government-owned automobile negligently driven by a government employee in the course of his employment. In a suit on his behalf, the district court awarded damages of \$365,158.80 for medical and nursing expenses, \$535,855 for impairment of earning capacity, and \$1,300,000 for loss of ability to enjoy life.²³⁸ The government appealed, contending that the district court should have deducted federal income taxes from the

234. *Beaulieu v. Elliott*, 434 P.2d 665, 670-73 (Alaska 1967) (cited in *Hollinger*, 651 F.2d at 642).

235. 651 F.2d at 642.

236. In *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978), the United States District Court for the District of Alaska indicated its disagreement with *Felder* but, in accordance with *Felder* and subsequent Ninth Circuit decisions, it ruled that the FTCA required it to discount the damage award against the government to present value even though damages against the private codefendant would not be discounted. *See id.* at 688-89, 691.

237. 718 F.2d 108 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984).

238. *See id.* at 110.

lost earnings award and that West Virginia law did not authorize an award for loss of ability to enjoy life when the plaintiff was unable to sense the injury.²³⁹ Because both issues appeared to involve unsettled questions of West Virginia law, the Fourth Circuit certified both questions for decision by the West Virginia Supreme Court of Appeals.²⁴⁰

The West Virginia court provided explicit answers to each of the certified questions.²⁴¹ With regard to the taxation question, the state court said that "in computing the loss of future earning capacity a deduction need not be made for federal income taxes."²⁴² Concerning the right of a semi-comatose plaintiff to recover for loss of ability to enjoy life, the court ruled that "a plaintiff in a personal injury action who has been rendered permanently semi-comatose is entitled to recover for the impairment of his capacity to enjoy life as a measure of the permanency of his injuries even though he may not be able to sense his loss."²⁴³

After receiving these definitive statements of West Virginia law, however, the Fourth Circuit purported to discover "federal questions lurking in the case,"²⁴⁴ and it countermanded the state court on both issues. The court of appeals began by stating that a uniform federal standard was required because the meaning of "punitive damages" would determine the extent of the waiver of sovereign immunity.²⁴⁵ Starting from this false premise,²⁴⁶ the court

239. *Flannery v. United States*, 649 F.2d 270, 271-72 (4th Cir. 1981).

240. *Id.* at 272-73.

241. *See Flannery v. United States*, 297 S.E.2d 433 (W. Va. 1982).

242. *Id.* at 434, 441.

243. *Id.* at 434, 439.

244. *Flannery v. United States*, 718 F.2d 108, 110 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984).

245. *Id.* In full, the court stated:

The Federal Tort Claims Act is a waiver of immunity from suit of the United States, and conditions attached to the waiver must be strictly enforced. The government's immunity is waived insofar as compensatory damages may be determined and awarded. The door for the assertion of private tort claims in federal courts is opened that far, but then the question arises about the allowability of damages treated and labeled under state law as "compensatory" which are in excess of those necessary to provide compensation for injuries and losses actually sustained.

The question of the allowance of such damages is one of federal law. What is compensatory and what is punitive, within the meaning of the statute, is related directly to the extent of the waiver of sovereign immunity. How widely

referred to *D'Ambra* and *Felder* for guidance in fashioning a definition of "punitive damages" that was contrary to the plain meaning of the term:

The FTCA's proscription of awards of punitive damages authorizes only those awards that compensate or reimburse, or provide recompense or redress for injuries suffered by the claimant. To the extent that an award gives more than the actual loss suffered by the claimant, it is "punitive" whether or not it carries with it the deterrent and punishing attributes typically associated with the word "punitive."²⁴⁷

The court proceeded to apply this definition in a manner that only can be described as adding insult to injury:

There is no doubt that Flannery has lost "his capacity to enjoy life." He is conscious of nothing and incapable of enjoying anything. . . . There is no likelihood whatever that he will ever become aware of anything.

The Supreme Court of Appeals of West Virginia held that, as a matter of state law, damages for the loss of the capacity to enjoy life were assessable upon an objective basis, and it did not matter that this particular plaintiff is unaware of his loss. It is

the Congress intended to open the door is not a matter to be resolved under the widely varying laws of the fifty states, but under a uniform standard. Thus, as was said in *D'Ambra v. United States*, 481 F.2d 14 (1st Cir. 1973), a state's statutory measure of damages "must be judged not by its language or the state's characterization, but by its consequences."

Id.

246. The Fourth Circuit's assertion that courts must strictly construe conditions attached to the waiver of sovereign immunity flies in the face of rather forceful indications by the United States Supreme Court that the doctrine of strict construction does not apply to the broad waiver of sovereign immunity in the FTCA. In *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), for example, the Court noted: "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *Id.* at 547. In a footnote, the Court explained that "Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions." *Id.* at 548 n.5. The Court concluded: "Recognizing such a clearly defined breadth of purpose for the [FTCA] as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements." *Id.* at 550. Other Supreme Court cases contain similar pronouncements. See *United States v. Muniz*, 374 U.S. 150, 165-66 (1963); *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957); see also Note, *supra* note 22, at 537.

247. 718 F.2d at 111.

perfectly clear, however, that an award of \$1,300,000 for the loss of enjoyment of life cannot provide him with any consolation or ease any burden resting upon him. . . . He cannot use the \$1,300,000. He cannot spend it upon necessities or pleasures.

Since the award of \$1,300,000 can provide Flannery with no direct benefit, the award is punitive and not allowable under the FTCA.²⁴⁸

Given the court's mishandling of the loss of enjoyment of life issue, its conclusion concerning the income tax deduction issue in *Flannery* is not difficult to guess. The court concluded, of course, that the FTCA requires the deduction of federal income taxes from future earnings awards.²⁴⁹ As if that were not enough, the court decided *sua sponte* to reduce the award for lost earnings even further, on the grounds that it duplicated the award of future medical expenses.²⁵⁰

The Ninth Circuit has declined to apply its federal definition of "punitive damages" as ruthlessly as the Fourth Circuit. In fact, the Ninth Circuit seems to have begun a retreat from its imposition of

248. *Id.* Judge Hall vigorously dissented from the majority opinion in *Flannery*. Judge Hall argued that the court should have adopted the "common-sense approach to the meaning of 'punitive' under the FTCA" employed by the Sixth Circuit in *Kalavity*. *Id.* at 115 (Hall, J., dissenting). He also emphasized that state law should govern FTCA actions in the interest of intrastate uniformity, noting:

The majority has thus succeeded in creating two conflicting standards for damages awards in West Virginia. In the future, a victim, such as Flannery, who is injured by a private party, will be entitled to recover damages for loss of enjoyment of life, while that same person, if injured at the hands of the government will receive nothing.

Id. at 114 (Hall, J., dissenting).

249. *Id.* at 111.

250. *Id.* at 112-13. Putting aside the procedural question of whether the trial court's decision was so plainly erroneous that *sua sponte* appellate consideration was warranted, the Fourth Circuit probably was correct in asserting that the expenses for nursing and custodial care covered by the award for future medical expenses duplicated to some extent the expenses for food and shelter covered by the award for loss of earnings. Nevertheless, without considering any of the differences between the costs of living in a nursing home and living independently, or any of the other elements of an award for future medical expenses, the court deducted the full amount of the plaintiff's award for future medical expenses. It left standing only the awards for lost earnings and for medical expenses incurred before trial. The court's opinion is reminiscent of the ironic aphorism that at common law "it was more profitable for the defendant to kill the plaintiff than to scratch him." W. PROSSER, *supra* note 102, at 901-02. Apparently, in the Fourth Circuit the government now will find it more profitable to render a tort victim comatose than to leave him conscious of his disability.

a federal standard in *Felder*.²⁵¹ In *Siverson v. United States*,²⁵² for example, the Ninth Circuit upheld the district court's application of Arizona's "collateral source" rule to preclude deduction of the plaintiff's Medicare benefits from the award of damages against the government under the FTCA.²⁵³ Citing several decisions from other circuits to support its finding that Medicare payments are a "collateral" source because they are paid out of a special fund to which the beneficiary or the beneficiary's relatives have contributed, and noting the district court's finding that the government had not demonstrated either the amount of plaintiff's benefits or the extent to which the United States had contributed to them, the court upheld the award.²⁵⁴ The court summarily disposed of the argument that the excess recovery constituted "punitive damages" under the FTCA:

The government contends to not deduct Medicare expenses from Siverson's award constitutes punitive damages because the effect is a windfall double recovery for Siverson. The government's rationale would essentially always find recovery from a collateral source to be "punitive" and ignores the collateral source doctrine's purpose of preventing a windfall to the defendant.²⁵⁵

251. See *supra* notes 190-208 and accompanying text.

252. 710 F.2d 557 (9th Cir. 1983).

253. Under the laws of many states, including Arizona, a defendant's damage liability is not reduced by any benefits that the plaintiff receives from "collateral sources" such as insurance payments or sick pay. See *Michael v. Cole*, 122 Ariz. 450, 595 P.2d 995 (1979) (cited in *Siverson*, 710 F.2d at 558); see also *infra* note 255 (discussing application of other states' collateral source rules in FTCA actions).

254. 710 F.2d at 559-60. Although the collateral source rule ordinarily applies to all benefits received from a fund to which the plaintiff or a relative has contributed, the language in the opinion noting the government's failure to prove the extent of its contributions implies that, if the government had met this burden, it might have been entitled to an offset to the extent of its contributions. The Tenth Circuit is in accord with this position. See *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1972) (Social Security benefits are not collateral to the extent of any government contributions; plaintiff has the burden of tracing contributions). The Third Circuit, however, has criticized this approach as "impracticable." *Smith v. United States*, 587 F.2d 1013, 1016 (3d Cir. 1978) (expressly declining to follow *Steckler*).

255. 710 F.2d at 560. The United States Court of Appeals for the Third Circuit also has rejected the argument that the collateral source rule results in impermissible "punitive damages" under the FTCA. The court explained:

We believe that the result we reach is consistent with the FTCA's proscription on punitive damages. It was the government's position at oral argument that *whenever* a FTCA victim is entitled to compensation from another

Most recently, in *Shaw v. United States*,²⁵⁶ the Ninth Circuit dealt with the implications of *Felder* in a case decided under the law of Washington. The plaintiffs in *Shaw*, a child and his parents, received a large verdict against the United States for negligent delivery procedures in a government hospital that left the child with severe physical and intellectual impairments. The issues on appeal

source—even a *private* source—such sums must be deducted from the FTCA recovery. The government contended that, even if this victim had been privately insured, for example, by a policy paid for entirely by himself, the proceeds from such a policy must be deducted from any recovery against the government or else the government is subject to punitive damages. Merely to state the government's position is to refute it. Were we to adopt the government's position we would deprive a victim of benefits—which he has paid for out of his own wages—merely because he had the misfortune to have been injured by the United States rather than by a private tortfeasor.

Smith v. United States, 587 F.2d 1013, 1016-17 (3d Cir. 1978) (footnote omitted) (emphasis by the court).

The positions of the Ninth Circuit in *Siverson* and the Third Circuit in *Smith* are consistent with the treatment of the collateral source rule in other FTCA cases in which the punitive damages question never was brought into issue. In FTCA actions, federal circuit courts consistently have upheld applications of state collateral source doctrines to preclude reduction of awards against the government, even when the United States partially funded the "collateral" source, as long as the benefits were paid from a program or special fund supplied in part by contributions of the beneficiary or a relative of the beneficiary. *See, e.g.*, *Leeper v. United States*, 756 F.2d 300 (3d Cir. 1985) (Pennsylvania law entitled plaintiff to damages for loss of accumulated sick leave with United States Postal Service); *Titchnell v. United States*, 681 F.2d 165 (3d Cir. 1982) (Medicare payments were a collateral source under Pennsylvania law because plaintiffs had contributed to the funds); *Smith v. United States*, 587 F.2d 1013 (3d Cir. 1978) (Social Security survivor benefits to widow were collateral under Pennsylvania law because they were paid out of a fund to which decedent contributed); *United States v. Price*, 288 F.2d 488 (4th Cir. 1961) (benefits received under Civil Service Retirement Act were collateral under Virginia law); *United States v. Harue Hayashi*, 282 F.2d 599 (9th Cir. 1960) (Social Security survivor benefits were collateral under Hawaii law because they were paid out of funds to which decedent had contributed); *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949) (proceeds of National Service Life Insurance policy were collateral source under North Carolina law). In cases in which the decedent or his beneficiary did not contribute to the "collateral" source, however, courts have refused to apply the doctrine. *See, e.g.*, *Overton v. United States*, 619 F.2d 1299 (8th Cir. 1980) (Missouri collateral source rule inapplicable without evidence that plaintiff contributed to Medicare fund); *Feeley v. United States*, 337 F.2d 924 (3d Cir. 1964) (medical care received at Veteran's Administration Hospital not a collateral source under Pennsylvania law). Even in the cases in which federal courts did not apply the collateral source rule, however, the courts held that the source was not "collateral" as a matter of state law, not that the FTCA precluded application of the rule to expand recovery beyond a plaintiff's actual losses. *See Overton*, 619 F.2d at 1299; *Feeley*, 337 F.2d at 924.

256. 741 F.2d 1202 (9th Cir. 1984).

included deduction of income taxes,²⁵⁷ discounting to present value,²⁵⁸ and the extent of non-pecuniary awards.²⁵⁹

Because Washington law did not require a deduction for future income taxes unless an extremely high income was involved, the district court had made no findings concerning taxes.²⁶⁰ The Ninth Circuit reversed, following its holding in *Felder* that required courts to deduct taxes from all lost earnings awards.²⁶¹ Surprisingly, however, the court did so reluctantly, indicating that it shared the concern of the Sixth Circuit, which had "questioned the wisdom of adopting such a rule in the context of a statute referring us to state law."²⁶²

An even more interesting aspect of *Shaw* was the court's rejection of the government's argument that the five million dollar award to the injured child for non-pecuniary damages was punitive because the large pecuniary award adequately compensated the plaintiffs. The court noted that Washington law permits plaintiffs to recover damages "for pain and suffering, mental anguish, and loss of capacity to lead a normal life, and characterizes such awards as compensatory."²⁶³ The court dismissed the government's contention that "an award is punitive to the extent a claimant receives more than his 'actual loss,' "²⁶⁴ emphasizing the role of state law under the FTCA and citing *Kalavity* as the proper interpretation of "punitive damages" in the FTCA.²⁶⁵

257. *Id.* at 1206-07.

258. *Id.* at 1207-08. The court's discussion of the discounting process was not particularly controversial because Washington law required discounting to present value. See *Warner v. McCaughan*, 77 Wash. 2d 178, 460 P.2d 272 (1969) (cited in *Shaw*, 741 F.2d at 1207).

259. *Id.* at 1208-10.

260. *Id.* at 1206.

261. *Id.*

262. *Id.* at 1206 n.2 (citing *Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978)). In addition to reducing the award by the amount of income tax on the lost earnings, the court indicated that the trial court should consider increasing the award to reflect taxes that would have to be paid on the income earned from investing the lump sum damage award. *Id.* at 1206.

263. *Id.* at 1208.

264. *Id.*

265. *Id.* The court also rejected in a similar fashion the government's argument that the \$1,000,000 award to each parent for loss of their child's love and companionship was so large as to be punitive. The court stated: "We find little reason to believe that a state will mischaracterize an element of damages as compensatory simply to enable plaintiffs suing under the FTCA to avoid the federal bar against punitive awards." *Id.* at 1209-10. The court

Shaw represents a forceful rejection of the expansive definition of "punitive damages" under the FTCA as any award exceeding a plaintiff's actual loss. Because the court in *Shaw* did not expressly overrule cases such as *Felder*, however, the idiosyncratic federal definition continues in effect in the Ninth Circuit with respect to such issues as the deduction of income taxes from lost earnings awards and the discounting of these awards to present value.

Thus, among the federal circuit courts that have considered the issue, only the Third Circuit²⁶⁶ and the Sixth Circuit²⁶⁷ have interpreted the punitive damages ban correctly, defining "punitive damages" as damages awarded separately, in addition to compensatory damages, for purposes of punishment and deterrence in cases of aggravated misconduct. The Ninth Circuit seems to have adopted the view of the Sixth Circuit,²⁶⁸ but it has left standing a line of cases reflecting its earlier, incorrect approach.²⁶⁹ The First,²⁷⁰ Fourth,²⁷¹ and Fifth²⁷² Circuits have defined punitive damages unequivocally as any damages beyond a plaintiff's actual loss, as determined by the federal court, without regard to the ordinary punitive damage concepts of aggravated misconduct, punishment, and deterrence.

V. CONCLUSION

When Congress waived the sovereign immunity of the United States in enacting the Federal Tort Claims Act, it intended to have the district courts determine issues of liability and damages in accordance with state law so that plaintiffs injured by the

proceeded to reduce the award of non-pecuniary damages, but it did so by finding that the award was excessive as a matter of state law. *See id.* at 1210.

266. *See Barnes v. United States*, 685 F.2d 66 (3d Cir. 1982); *supra* notes 230 & 232; *Smith v. United States*, 587 F.2d 1013 (3d Cir. 1978); *supra* notes 254 & 255.

267. *See Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978); *supra* notes 209-17 and accompanying text.

268. *See supra* notes 251-65 and accompanying text.

269. *See supra* notes 181-208 & 227-36 and accompanying text.

270. *See D'Ambra v. United States*, 481 F.2d 14 (1st Cir.), *cert. denied*, 414 U.S. 1075 (1973); *supra* notes 160-80 and accompanying text.

271. *See Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *supra* notes 237-50 and accompanying text.

272. *See Harden v. United States*, 688 F.2d 1025 (5th Cir. 1982); *supra* notes 218-26 and accompanying text; *Hartz v. United States*, 415 F.2d 259 (5th Cir. 1969); *supra* notes 153-59 and accompanying text.

government would fare as well as other tort plaintiffs suing in the same state. The use of state law to determine the scope of the punitive damages ban under the FTCA would be entirely consistent with that congressional intent. A federal definition should apply only to invalidate state definitions that are aberrational or contrary to the purposes of the FTCA. The legislative history of the FTCA does not indicate any congressional intent to depart from the various state measures of compensatory damages, and the history is entirely consistent with the plain and ordinary meaning of the term "punitive damages." The federal definition applied in a majority of the circuits that have considered the question, on the other hand, flies in the face of this plain and ordinary meaning. Their definition makes no reference to aggravated misconduct, punishment, or deterrence, and it compels the courts to create a federal measure of "actual" compensatory damages under the FTCA.

Unfortunately, the Supreme Court passed up the opportunity to rectify this misinterpretation when it denied the plaintiff's petition for certiorari in *Flannery v. United States*.²⁷³ With such large sums of money at stake, however, litigants undoubtedly will continue to press their claims until the Supreme Court resolves the split among the circuits. As this Article demonstrates, the correct resolution of this issue seems eminently clear.

273. 467 U.S. 1226 (1984), *denying cert.* to 718 F.2d 108 (4th Cir. 1983); *see also* 52 U.S.L.W. 3867 (U.S. May 29, 1984) (No. 83-1572) (summarizing issues in the petition for certiorari).