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## Reconciling Punitive Damages with Tort Law's Normative Framework

**ABSTRACT.** As punitive damages have gained greater visibility in Supreme Court jurisprudence, the need for principles explaining punitive damages and guiding their application has grown. Corrective justice would seem suited to providing guidance in this arena of tort law, but unfortunately it has never satisfactorily accounted for punitive damages. This Note seeks to answer that deficiency with what the Note calls tort law's moral accounting interest. This interest reconciles punitive damages with corrective justice within a unified theory of accountability in tort law. The Note shows how this unified theory adds practical value to the explanation and application of punitive damages.

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## INTRODUCTION

Punitive damages have long been a controversial area of tort law.<sup>1</sup> But they have gained a new degree of jurisprudential visibility following the Supreme Court's recent string of decisions addressing their constitutional status.<sup>2</sup> While these decisions have struggled to provide doctrinal clarity and have been marked by strong disagreement within the Court,<sup>3</sup> one powerful theme has emerged: the need for coherent legal principles for applying punitive damages.<sup>4</sup>

For someone who endorses a corrective justice theory of tort law, as I do, this appeal for guiding legal principles presents a golden opportunity for corrective justice to demonstrate its practical value in legal decisionmaking. Unfortunately, despite its influence, corrective justice has never quite squared its theory of the normative structure of tort law with punitive damages. As such, it does not appear capable of offering the principled guidance for which punitive damages jurisprudence calls out.

In this Note I respond to that deficiency, but to do so I must reconcile corrective justice with punitive damages. To effect this reconciliation I present a novel concept for understanding punitive damages and tort law generally: what I call the "moral accounting interest" of tort law. Tort law's moral accounting interest describes (1) tort law's capacity and reasons for distinguishing wrongful losses from the morally harmful manner in which they are inflicted, and (2) tort law's recognition that granting a plaintiff a complete

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1. See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 1 (1990) ("The debate [about punitive damages] is old, long on passion and hyperbole, and short on reason and hard evidence."); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 370 (1994) ("Controversy has followed punitive damages throughout its history in this nation.").
  2. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). See generally John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (addressing tort law's revived relationship with constitutional law).
  3. See, e.g., *Gore*, 517 U.S. 559. In *Gore*, the Court split five to four, with Justice Stevens writing the majority opinion, Justice Breyer writing a concurrence, and Justices Scalia and Ginsburg each penning dissents. See *infra* Section III.A.
  4. *Gore*, 517 U.S. at 596 (Breyer, J., concurring) ("To the extent that neither clear legal principles nor fairly obvious historical or community-based standards (defining, say, especially egregious behavior) significantly constrain punitive damages awards, is there not a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection?").

accounting for her injury depends on recognizing moral harms as additional to but normatively distinct from wrongful losses.<sup>5</sup>

The moral accounting interest explains and justifies punitive damages in a way that enriches corrective justice theory. Corrective justice theory explains liability as a mechanism for making defendants accountable to plaintiffs for wrongful losses. Tort law's moral accounting interest adds the principle that *full accountability* requires considering the entire and distinct circumstances of the wrongful loss – including the morally harmful manner of its infliction. The moral accounting interest explains our intuition that intentionally or recklessly caused losses are worse than negligently caused losses. Punitive damages, on this view, account for the additional moral harm caused by intentional or reckless conduct that violates the plaintiff's entitlement to be treated with moral respect.

This Note makes a concerted effort to explain the distinctive character of punitive damages *within tort law itself*. By contrast, recent writings on the topic have simply asserted (often without support) that the best justification for punitive damages is *generally* deterrence or punishment.<sup>6</sup> I argue that this approach is mistaken. Moreover, my approach differs substantially from that of other tort theorists by applying theory to actual judicial considerations. I take this approach to deflect the common criticism of tort theorists that they are unhelpfully abstract.<sup>7</sup>

To frame this discussion within the broader theoretical debates over tort law, I present a brief outline of the conflict between corrective justice and economic theories of tort law in Part I. I compare these approaches' competing

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5. Throughout this Note, I frequently refer to the “normative structure” of tort law or use similar phrases. Some readers may be accustomed to equating “normative” with “prescriptive” in a policy sense. However, I use the term in its interpretive philosophical sense. “Normative” refers to the reason or complex of reasons that guide a given framework or concept responding to legal problems and that explain its operation. See SCOTT J. SHAPIRO, *LEGALITY 2* (2010) (“Normative jurisprudence is the study of the law from a moral perspective . . . . Interpretive jurists seek to provide an account of the actual moral underpinnings or logic of current law. Thus, for example, they might take up the question of why our criminal law punishes criminals.” (emphasis omitted)). The interpretive question for this Note is therefore whether there is a moral logic to why punitive damages may be granted to compensate a plaintiff above and beyond her economic loss.
  6. See, e.g., Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 *CORNELL L. REV.* 239, 246 (2009) (advocating retributive goals for punitive damages).
  7. See, e.g., Robert L. Rabin, *Law for Law's Sake*, 105 *YALE L.J.* 2261 (1996) (reviewing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)) (attacking Professor Ernest Weinrib's formalist theory of corrective justice for its abstraction).

analyses and their explanations of tort law generally, as they inform the debate on punitive damages as well. I endorse corrective justice as the better approach.

Having developed this context, in Part II, I discuss how corrective justice has failed to explain or justify punitive damages in the way that it has explained and justified the general normative framework of tort law. As a result, one may be tempted to look to economic or retributive theories for an instrumentalist explanation of punitive damages. I recapitulate instrumentalist justifications for punitive damages before arguing that these accounts put punitive damages at odds with tort law's basic normative structure. I describe the tension as being one of "normative disjoint" between instrumental accounts and tort law's ordinary structure.

In Part III, I present the problems that spring from this normative disjoint in the context of the paradigmatic Supreme Court case, *BMW of North America, Inc. v. Gore*.<sup>8</sup> I pinpoint three specific problems created by instrumental accounts: the "definitional problem," the "horizontal equity problem," and the "lottery problem." Solving these problems requires an account of punitive damages that is harmonized with tort law's normative structure.

I develop that account in Part IV, in the form of tort law's moral accounting interest. I show how this interest flows from tort law's structural concern with relational duties and with remedies for their violations. Most importantly, I demonstrate how this account explains punitive damages as a function of tort law's institutional interest in allowing plaintiffs to demand full accountability from defendants for plaintiffs' injuries. Combining this interest with corrective justice's enforcement framework, I show how these ideas form a rich symbiotic relationship that defines both the conditions for and the full scope of accountability.

Finally, in Part V, I apply my principled account to the jurisprudential concerns in *Gore*. I show that the moral accounting interest provides pragmatic guidance for understanding and applying punitive damages. This coherent normative framework solves the problems I discuss in Part III, succeeding where instrumental approaches to punitive damages fail in *Gore* and elsewhere.

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8. 517 U.S. 559. I refer to this as a paradigmatic case because of its comprehensive discussion of punitive damages. See *id.* at 585-86.

## I. THE CONFLICT BETWEEN CORRECTIVE JUSTICE AND ECONOMICS

Since my argument for tort law's moral accounting interest incorporates an endorsement of corrective justice theory<sup>9</sup> over economic theories of tort law,<sup>10</sup> I begin with some background on the conflict between these two approaches.

### A. Corrective Justice Versus Economic Analysis of Tort Law

Economic analysis of tort law and corrective justice currently stand as arguably the most important competing theories attempting to explain and justify tort law.<sup>11</sup> Generally, those whom I call "legal economists" advance a form of economic theory that views tort law in instrumental terms.<sup>12</sup> For them, tort law is a tool of social management,<sup>13</sup> usually for the sake of advancing goals of efficiency and of maximization of social welfare.<sup>14</sup> In their view, tort law (and law generally) is best understood as obeying and instantiating economic

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9. I am deeply indebted to and seek to expand upon a corrective justice theory developed primarily by Jules Coleman—though I do not adopt for the moment Coleman's newer argument that corrective justice is a principle of social justice. See Jules L. Coleman, *Epilogue to Risks and Wrongs: Second Edition* (Yale Law Sch. Pub. Law Working Paper No. 218, 2010), <http://ssrn.com/abstract=1679554>.
  10. Economic theories of tort law developed as early as the writings of Oliver Wendell Holmes, Jr. O.W. HOLMES, JR., *THE COMMON LAW* 96 (Lawbook Exch., Ltd. 2005) (1881) (discussing solutions to distributing the cost of accidents). Judge Learned Hand developed the famous cost-benefit formulation in deciding questions of contributory negligence. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Ronald Coase helped to plant the seeds of an enduring economics-based approach to the law, see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
  11. What follows is a brief outline. For those interested in the contentious debate between justice theorists and legal economists, see Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997). Sociological and empirical analyses supply important insights into the practical context surrounding the theoretical debate. See, e.g., JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004). However, these approaches are not, by definition, unified theoretical approaches, though they may add empirical considerations to support a theoretical approach's practical fit.
  12. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972) (discussing an instrumentalist conception of tort law attributable to economic theory).
  13. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1107 (1972) (discussing the use of liability rules to achieve socially optimal resource allocations that might not otherwise be reached).
  14. *Id.*; see also LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 86 (2002) ("Under welfare economics, the effects of tort law are relevant to the extent that they influence individuals' well-being.").

principles that further these goals.<sup>15</sup> For example, Guido Calabresi and A. Douglas Melamed developed a framework for understanding property rules and liability rules according to the Coasean transaction costs<sup>16</sup> that attend the transfer of rights in goods.<sup>17</sup> William Landes and Richard Posner helped expand upon the familiar idea that tort law assigns responsibility for an injury to the cheaper cost avoider,<sup>18</sup> within a broader framework geared toward minimizing the costs of accidents.<sup>19</sup> And legal economists generally argue that tort law plaintiffs act as “private attorneys general” who ensure economically efficient behavior.<sup>20</sup> To paraphrase Oliver Wendell Holmes, Jr., for the legal economist the life of the law is not logic, it is economics.<sup>21</sup>

Corrective justice theorists such as Jules Coleman have vigorously contested this picture, arguing that these economic theories do not fit the actual practice of tort law.<sup>22</sup> They begin with what is known as the “bilateralism” critique.<sup>23</sup> This critique points out that tort law makes an injurer

15. See, e.g., Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 764 (1975).

16. See Coase, *supra* note 10.

17. See Calabresi & Melamed, *supra* note 13, at 1106-07 (discussing conditions for transfers of entitlements).

18. William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983). Judge Hand first considered a version of this notion only in the context of contributory negligence. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

19. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); see also GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

20. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 554, 561 (2003) (using the metaphor of “private attorneys general”); see *id.* at 544-51 (describing economic deterrence theories’ emphasis on private enforcement).

21. Cf. HOLMES, *supra* note 10, at 1 (“The life of the law has not been logic: it has been experience.”).

22. See Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986). Coleman and others have also objected to legal economists’ tendency to treat tort law as paradigmatically about accidents. See Coleman, *supra* note 9, at 22 (“There is no denying that the most prevalent tort is an accident. But it is important not to confuse the most prevalent or familiar tort with the paradigmatic tort.”); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 917 (2010) (“As it tends to be taught today, Torts is ‘accident-law-plus.’”).

23. Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1241 (1988) (reviewing LANDES & POSNER, *supra* note 19, and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)) (arguing that “economic analysis provides no explanation at all” of tort law’s “structure of case-by-case adjudication between individual victims and their respective injurers”). I use the “bilateralism” label here. Ernest Weinrib uses the term “correlativity,”



directly accountable to the person she injured through the mechanism of liability. By contrast, the economic approach to tort law necessarily implies that each party is accountable not to the other, but to overall social norms of efficiency and accident avoidance.<sup>24</sup> The corrective justice theorist contends that any approach that does not explain the basic analytical link between plaintiffs and defendants cannot coherently explain tort law.<sup>25</sup>

An economist may respond that this supposed relationship between wrongful injurers and victims does not really exist, for when we say “wrongful injurer,” what we really mean is “least cost avoider,” even though we use the term “wrongful injurer” in practice.<sup>26</sup> But one cannot purport to explain “legal practice as [one] finds it” by “treat[ing] legal concepts as if they could be remade at will in the light of one’s preferred normative theory.”<sup>27</sup> This move “finds the practice void of content and constraint, remakes it in economic terms, and then quite unsurprisingly provides an economic analysis of it.”<sup>28</sup>

### B. The Corrective Justice Alternative

Corrective justice, by contrast, explains tort law’s bilateral structure. The theory of corrective justice specifies the conditions for holding the defendant liable to the plaintiff for the loss or harm that the defendant impermissibly caused the plaintiff to suffer.<sup>29</sup> Corrective justice explains liability as an accountability relationship between the plaintiff and defendant grounded in the defendant’s fault in causing this wrongful loss to the plaintiff. Tort law

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which means roughly the same thing. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 81 (1995).

24. See Coleman, *supra* note 9, at 17 (“[A]ccording to economic analysis, the normatively significant properties of the defendant and the plaintiff are the relations that they bear to the goals of tort law: most prominently the relative capacity of each to reduce the costs of accidents at this or that cost.”).
25. *Id.* at 17 n.9 (“I have never been offered a serious response to the objection by a proponent of the economic analysis of tort law . . .”). While economists have offered an explanation of bilateralism as being a matter of search and administrative costs, Coleman finds that this explanation “renders . . . obvious and intuitively transparent features of tort law mysterious and opaque.” JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 21 (2001). In other words, if in practice courts operate on the understanding that injurers should be accountable to their victims, then it seems a stretch to redefine that relationship in economic terms simply to make economic theory fit.
26. Coleman, *supra* note 23, at 1251.
27. *Id.* at 1252.
28. *Id.*
29. Coleman, *supra* note 9, at 12.

“expresses” the principle of corrective justice by granting plaintiffs the power to demand repair from defendants for the wrongful losses for which defendants may fairly be held responsible.<sup>30</sup> This accountability relationship analytically links plaintiffs to defendants in a meaningful way that emphasizes their relational duties to each other.<sup>31</sup> Accordingly, liability annuls wrongful losses and therefore corrects the defective normative relationship between the parties.<sup>32</sup>

Corrective justice thus tracks the actual practice of tort law in a way that economic theories do not. An individual comes before a court to allege that the defendant has *harmed* her and argues in terms of harms and wrongs. She does not allege that the defendant could have better or more cheaply avoided a cost she must otherwise bear. Corrective justice recognizes that individuals view each other in relational terms that emphasize primary norms of behavior—the norms that tell us how we must properly treat one another in the first place—and duties.

A generalist reader might justifiably wonder about all this effort to support a mere truism: if a defendant has impermissibly injured a plaintiff, the defendant has some sort of obligation to the plaintiff.<sup>33</sup> But whereas the legal economist considers this truism incidental to the structure of tort law,<sup>34</sup> the corrective justice theorist understands the truism to be the central feature of tort liability.<sup>35</sup>

More broadly, the stakes of the debate have important methodological and practical dimensions.<sup>36</sup> Corrective justice theorists like Coleman are not engaged in mere intellectual exercise by developing legal theories focusing on seemingly abstract concepts like wrongs and duties. Rather, their claims countering long-held realist perspectives on the law are powerful precisely because they bear on the *pragmatic* value of legal theory. The corrective justice theorist points out that, without understanding what the law *is*, beyond what effects it has, we can neither comprehend our legal practice nor realistically attempt to change it if we find it problematic.<sup>37</sup> Economic legal arguments

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30. Coleman, *supra* note 23, at 1248-49.

31. *Id.* at 1249.

32. Coleman, *supra* note 9, at 25.

33. Coleman, *supra* note 23, at 1249.

34. *Id.* at 1245 (“[T]he economist has an explanation of the structure of litigation, but one which views it as subordinate to the law’s substantive ambitions.”).

35. *Id.* at 1245-50.

36. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 706 (2003).

37. *Id.* at 706-07.

treating the “law as a depiction of the social goals it serves” may thus be *more* impractical than the supposedly “archaic, antipragmatic, or transcendentalist” arguments of the tort theorist.<sup>38</sup>

However, corrective justice has yet to fully engage punitive damages—one of the most visible and long-running elements of tort law, though not its central feature. It is my project for the rest of this Note to supply that engagement. The corrective justice theorist need not be at a loss to explain punitive damages to her challengers. For a proper account of punitive damages shows it to fit better with a theory of corrective justice than with any of the alternatives.

## II. CORRECTIVE JUSTICE AND INSTRUMENTAL ACCOUNTS OF PUNITIVE DAMAGES

### A. *The Tension Between Corrective Justice and Punitive Damages*

If corrective justice provides a descriptively and normatively superior account of tort law’s structure, it has still never quite reconciled itself to punitive damages. For the purposes of the following discussion, I will adopt an initial working definition of punitive damages: they are damages awards in addition to whatever compensatory or nominal damages that a court awards for physical or economic loss, and typically they are thought to respond to some sort of reprehensible conduct.<sup>39</sup>

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38. *Id.* at 706.

39. The *Restatement’s* definition of punitive damages approximates this basic starting definition, but goes beyond it in specifying the normative character of that response along deterrence and social policy lines. See RESTATEMENT (SECOND) OF TORTS § 908 (1979) (“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future. . . . Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.”). Because I am interested in interrogating the nature of punitive damages’ normative response to reprehensible conduct in the first place, I do not adopt the *Restatement’s* definition wholesale. Moreover, as Schwartz points out, the *Restatement’s* definition is skewed toward economic and social policy theories of tort law; one of the members who helped formulate the *Restatement’s* definition dismissed Weinrib’s thinking as “arid.” Schwartz, *supra* note 11, at 1808. Schwartz himself is less willing to take one side or the other; indeed, he attempts to reconcile corrective justice with the deterrence view that law and economics favors. See *id.* at 1801. As a general matter, for the purposes of this Note, my doctrinal citations are to the *Restatement*

The tension between punitive damages and corrective justice derives in part from corrective justice theorists themselves. Professor Ernest Weinrib rejects punitive damages outright as being incompatible with corrective justice.<sup>40</sup> We can see why corrective justice theorists would take this stance. Courts invoke concepts of punishment and deterrence in endorsing punitive damages.<sup>41</sup> But, as we saw in Part I, corrective justice sees the central feature of tort law to be accountability between individuals,<sup>42</sup> which depends on making the defendant liable to the plaintiff when the defendant is at fault. Fault and liability depend on violations of some relational duty, *not* on culpability or on deterrence. Therefore, if punitive damages are based on culpability and deterrence, they do not fit with corrective justice.

To the extent that corrective justice addresses punitive damages, it does so at a semantic level. Punitive damages tautologically punish and are therefore a “graft” from criminal law, which punishes the culpable.<sup>43</sup> I call this response the “graft defense.”<sup>44</sup> The graft defense, which claims that punitive damages are an importation of criminal law concepts of culpability and punishment, at least obviates appeals to economic deterrence justifications. This move makes sense, since corrective justice theorists have said that economic deterrence is incompatible with corrective justice and that legal economists are wrong about tort law.<sup>45</sup> It would undermine corrective justice to turn around and *accept* an economic deterrence justification for punitive damages.

Instead, corrective justice characterizes punitive damages as an anomalous criminal law graft, the product of courts misunderstanding tort law as sanctioning punishment.<sup>46</sup> The corrective justice theorist may argue that, in this sense, punitive damages are only nominally a part of tort law, in which

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(*Second*) because the *Restatement (Third)* does not have an analogous standalone definition of punitive damages, and for the sake of consistency it makes sense to stick to the *Restatement (Second)*.

40. Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 86-87 (2003).
41. The case that established punitive damages in Wisconsin flatly stated that the rationale for punitive damages was “for the purpose of making an example.” *McWilliams v. Bragg*, 3 Wis. 424, 425 (1854); *see also* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (asserting that punitive damages are “aimed at deterrence and retribution”).
42. Coleman, *supra* note 9, at 24 (“The concept of accountability is the key . . .”).
43. *See* Zipursky, *supra* note 36, at 712-13.
44. Zipursky calls it the “illegitimacy defense.” *Id.* at 712.
45. *See* WEINRIB, *supra* note 23, at 46-48.
46. Zipursky, *supra* note 36, at 712-13.

*liability* remains the central feature.<sup>47</sup> Nevertheless, this response is unsatisfying. The graft defense remains a voluntary “loss in the battle among interpretive theories.”<sup>48</sup> In other words, if one of corrective justice’s advantages over other theories is that it explains tort law better than they do, then for corrective justice to concede ground on punitive damages is to cede some of its claim to interpretive power.

*B. Punitive Damages and the Economic Deterrence Explanation*

By contrast, economic theories of tort law happily accommodate punitive damages. These theories see punitive damages as a mode of deterrence,<sup>49</sup> and deterrence is central to economic accounts that seek to combat undesirable externalities and inefficient behavior.<sup>50</sup> Calabresi began this tradition in the narrow sphere of accident avoidance,<sup>51</sup> while Posner systematically argued that various tort doctrines advance deterrence.<sup>52</sup> Other scholars followed Posner’s more sustained effort,<sup>53</sup> including present-day theorists such as A. Mitchell Polinsky and Steven Shavell.<sup>54</sup> These theorists have argued for the deterrence value of punitive damages, for example, as a way to compensate for a tortfeasor’s likelihood of escaping liability for her behavior.<sup>55</sup>

Thus, legal economists have established a tradition of deterrence endorsement. As a result, punitive damages arguments—associated as they are with deterrence—typically take economic forms. So it is unsurprising that

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47. *See id.*

48. *Id.* at 713.

49. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979).

50. Landes and Posner are perhaps the first economic theorists to systematically develop deterrence as a “basic” goal of tort law. *See* Schwartz, *supra* note 11, at 1804. Calabresi identified deterrence as a desirable goal of accident law, if not tort law generally, some years earlier. *See* CALABRESI, *supra* note 19. Corrective justice theorists have not been interested in deterrence as a goal because they see tort law’s structure as distinct from tort law’s normative goals. *See* Schwartz, *supra* note 11, at 1807.

51. CALABRESI, *supra* note 19.

52. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 73 (1972) (positing that tort liability is “broadly designed to bring about the efficient . . . level of . . . safety, or, more likely, an approximation thereto”).

53. *See* Schwartz, *supra* note 11, at 1806.

54. *See, e.g.,* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998). Polinsky and Shavell conclude by implication that punitive damages are *not* appropriate for flagrant harm—the one circumstance where tort has *always* awarded punitive damages. *Id.*

55. *See id.*

economic theories *seem* to supply a satisfying rationale for punitive damages (though, as I will show in the next Part, this appearance is illusory). Nor is it surprising that the legal economist's rationale (among others) is enshrined in the *Restatement (Second) of Torts*.<sup>56</sup>

C. *The Retributive Idea of Punitive Damages*

Besides deterrence, the retributive approach has recently gained traction as an explanation and justification of punitive damages. This approach is connected to the theory of the social meaning of action.<sup>57</sup> The late Jean Hampton has perhaps most prominently built upon this theory in advancing a normative argument in favor of retribution,<sup>58</sup> and Marc Galanter and David Luban have in turn applied Hampton's arguments to the realm of punitive damages.<sup>59</sup> Dan Markel has also argued for conceiving of punitive damages as retributive damages.<sup>60</sup>

Hampton starts with the premise that "human behavior is expressive."<sup>61</sup> She builds from this notion the idea that certain kinds of expressive action should be interpreted as causing "moral injury," in that they lead to the "diminishment" of human value and give rise to the "appearance of degradation."<sup>62</sup> In its simple form this argument posits that when we act in an intentionally harmful way toward another person, our actions carry expressive

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56. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) ("Punitive damages . . . deter [the tortfeasor] and others like him from similar conduct in the future.").

57. Elizabeth Anderson and Richard Pildes provide a useful summary and argument in favor of this theory. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

58. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992) [hereinafter Hampton, *The Goal of Retribution*]; see also Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 123 (Jeffrie G. Murphy & Jean Hampton eds., 1988) [hereinafter Hampton, *The Retributive Idea*].

59. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993).

60. Markel, *supra* note 6.

61. Hampton, *The Goal of Retribution*, *supra* note 58, at 1661 (emphasis omitted). Briefly explained, to say that action is expressive is to say that actions, statements, or other vehicles of expression manifest a state of mind, and agents should "[a]ct in ways that express the right attitudes toward persons" or "[a]ct in accordance with norms that express the right attitudes toward persons." Anderson & Pildes, *supra* note 57, at 1512.

62. Hampton, *The Goal of Retribution*, *supra* note 58, at 1673. Hampton's use of these terms flows from Kantian conceptions of human worth that do not need to be detailed here in order to understand her view of retributivism.

content. The harmful expression conveyed by our actions reflects a judgment that the other individual does not have certain entitlements worth respecting in virtue of her value as a human being.<sup>63</sup>

For example, Dana and Paul live in an egalitarian society whose members should be free from wanton injury. Dana slaps Paul without justification or excuse. Hampton's theory explains that Dana not only physically injures Paul, but expresses to Paul and anyone else that he is not entitled to be free from wanton injury from Dana. This violates the entitlement that Paul in fact does have in virtue of the fact that both Paul and Dana live in a society that grants them equal value and entitlements as human beings. By contrast, if Dana is on a subway and, reaching for a rail to hold onto, accidentally catches Paul on the face with her hand, Dana's action cannot be said to express a view about Paul's entitlements.

In Hampton's view, in the first scenario, Dana, by slapping Paul, represents or accords to herself "a value that [she] does not have."<sup>64</sup> Dana, by committing an action that is "disrespectful of value," conveys her "superior importance" relative to Paul.<sup>65</sup> It is to these actions that a retributive response is appropriate.<sup>66</sup>

Hampton defines a retributive response as one that "vindicate[s] the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity."<sup>67</sup> This event "lower[s] the wrongdoer, elevate[s] the victim, and annul[s] the act of diminishment."<sup>68</sup> Specifically, "any . . . method for defeating the wrongdoer" is a "second act of mastery that negates the evidence of superiority implicit in the wrongdoer's original act."<sup>69</sup> This defeat at the victim's hands, which Hampton characterizes as direct or, through a legal authority, indirect,<sup>70</sup> is a punishment fitting the retributive idea.<sup>71</sup>

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63. Hampton notes that this value is "conventional," because "societies use different behaviors to convey respect . . . [and] have different conceptions of the kind of respect human beings are owed. Inegalitarian hierarchical conceptions of value have been commonplace throughout human history." *Id.* at 1669.

64. *Id.* at 1677.

65. *Id.* at 1682.

66. *Id.* at 1683.

67. *Id.* at 1686.

68. *Id.* at 1687.

69. Hampton, *The Retributive Idea*, *supra* note 58, at 126, 129 (emphasis omitted).

70. *Id.* at 125.

Galanter and Luban have taken this account and developed it into an argument for punitive damages as a retributive mechanism,<sup>72</sup> and Hampton has endorsed their argument.<sup>73</sup> The “heart” of their article “arises on retributivist theories of punishment,” specifically the account of a “publicly visible defeat” that they explicitly glean from Hampton’s work.<sup>74</sup> Both their development of the idea of “expressive defeat”<sup>75</sup> and their notions of expressive defeat’s “proportionality”<sup>76</sup> build directly from Hampton<sup>77</sup> in forming an overall account of how to “let[] the punishment fit the tort.”<sup>78</sup> In one particular case, they note the poetic justice of using a company’s cost-benefit calculations regarding human life as a measure of the punitive damages it should pay.<sup>79</sup> This argument is particularly Hamptonian because, as Galanter and Luban note, there is no better way to counteract the “false view of the wrongdoer’s value relative to that of the victim”<sup>80</sup> than by inflicting an economic punishment in the same amount as the company’s cost-benefit calculation.<sup>81</sup>

Other authors build similar retributive theories of punitive damages, if not as directly indebted to Hampton. Dan Markel, for instance, takes less of a pluralistic approach than Galanter and Luban, but nevertheless grounds his account of punitive damages in the “public’s interest in retributive justice.”<sup>82</sup> For Markel, what he calls “retributive damages” are supported by and vindicate certain political values in a liberal democracy. Specifically he connects

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71. Hampton offers a few examples of retributive punishment. These include, among others, mandatory sessions in prison where sex offenders are forced to listen to the accusations and words of victims of sexual violence. Hampton, *The Goal of Retribution*, *supra* note 58, at 1689-90. It is noteworthy that tort law provides none of the kinds of retributive responses of which Hampton approves. This is not a criticism of Hampton, as she is concerned with retributive punishment in a broad sense and not punitive damages in tort law specifically.

72. Galanter & Luban, *supra* note 59, at 1433.

73. Hampton, *The Goal of Retribution*, *supra* note 58, at 1687-89.

74. Galanter & Luban, *supra* note 59, at 1432.

75. *Id.*

76. *Id.* at 1425.

77. Hampton, *The Retributive Idea*, *supra* note 58, at 133-34 (“[T]he retributivist’s endorsement of the *lex talionis* is the insistence on proportionality between crime and punishment.”).

78. Galanter & Luban, *supra* note 59, at 1436.

79. *Id.* at 1436-38. Ford had decided not to remedy a defect in its Pinto model because the company anticipated that the value of the lives lost from the defect would be lower than the cost of repair. The punitive damages were calculated to cancel out the benefit to Ford of this calculation.

80. *Id.* at 1432.

81. *Id.* at 1436-37.

82. Markel, *supra* note 6, at 246 (emphasis added).



retributive damages to “first, responsibility for choices of unlawful actions; second, equal liberty under law; and third, democratic self-defense.”<sup>83</sup> Nevertheless, similar to Hampton and Galanter and Luban, Markel emphasizes the importance of publicly communicating the state’s “commitment to . . . norms through the use of its coercive power against the offender.”<sup>84</sup>

I summarize this line of thinking in some detail because, although I think the pro-retributivism conclusions of Hampton and Galanter and Luban are mistaken in the context of tort law, they start with the right intuitions. Expressive theories of action capture the social dimension of human behavior in a common-sense manner, and it is also clear that the law is concerned with regulating the same.<sup>85</sup> Moreover, Hampton’s concern with the impact that wrongful expressive behavior has upon the dignity of persons is important. So, to the extent that Hampton and others conceive of punitive damages as a response to this sort of expressive harm to moral value or dignity, my account will build from theirs, with some important tweaks.

But our accounts diverge at the point where these writers endorse a retributive response to moral harm. Specifically, Galanter and Luban and Markel develop a retributive account of punitive damages that is fundamentally instrumental. While their retributive justification for punitive damages recognizes that plaintiffs have suffered moral harm in virtue of the expressive, “diminishing” actions of intentional tortfeasors, they focus on responding to the wrongdoer’s action rather than on compensating the victim for her harm.<sup>86</sup> Accordingly, on their account, punitive damages primarily correct undesirable social attitudes. By explaining punitive damages in terms of a “public,” “expressive defeat,” they frame punitive damages as a tool for social regulation. They reinforce this picture by further connecting punitive damages to various relationships of social power and inequality, considerations of the “bounty system,”<sup>87</sup> and other social goals as a part of a pluralistic instrumental scheme.<sup>88</sup>

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83. *Id.* at 260.

84. *Id.* at 271.

85. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 381 (Ct. App. 1981) (stating that California punitive damages respond to “conduct evincing a ‘conscious disregard [for others’ safety]’” (emphasis added) (quoting *Dawes v. Superior Court*, 168 Cal. Rptr. 319, 322 (Ct. App. 1980))).

86. Markel does not adhere wholesale to the idea of “expressive defeat,” since he thinks that retributivism can operate “strictly [within the] relationship between the state and the offender.” Markel, *supra* note 6, at 271. Of course, this even more clearly takes the focus away from the victim and places it squarely on regulating the wrongdoer.

87. Galanter & Luban, *supra* note 59, at 1451 (“A crucial function of punitive damages is to provide financial incentives for private parties to enforce the law—the bounty system.”).

Hampton, who is less pluralistic and not so overtly concerned with tort law, nevertheless centers her endorsement of retribution on retribution's socially regulative power. Punitive damages, in a Hamptonian retributive account, have as their primary goal the public reaffirmation of moral status. It is only a secondary consequence of that goal that one party happens to pay another monetary compensation.

*D. The General Instrumental Nature and Consequences of Economic and Retributive Theories*

Whatever the merits of these theories, they are instrumental in the same way as economic deterrence arguments; only their normative goal is different. "Inefficient behavior" is thus structurally interchangeable with "wrongful expressive behavior."<sup>89</sup> The focus remains on changing the tortfeasor's activity through punishment or retribution.<sup>90</sup> This differs from corrective justice's noninstrumental focus on remedying a victim's loss.

Since retribution and deterrence are both instrumental in nature, it follows that, for both accounts, bilateralism is an accident when it comes to punitive damages. What matters, rather, is the grievousness (or inefficiency) of what one party has done as a general matter or how future parties may be deterred from doing it again. The particular parties before the court just happen to provide an occasion for the court to make policy. While fairness to the parties involved may be important to establishing liability, punitive damages are merely socially remedial or regulatory in nature, such that fairness in any bilateral sense is immaterial. As a result, these accounts imply some fundamental disconnect between punitive damages and the rest of tort law.

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88. Other authors have argued for both economic and social regulation because, for these authors, they are effectively the same thing. For example, Michael Rustad and Thomas Koenig argue that "the awarding of punitive damages is a necessary remedy against the abuse of power by economic elites." Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1276 (1993). In other words, the wealthy will abuse their power because they can easily afford to pay for their wrongdoing. On this view, punitive damages make wrongdoing expensive and hence as undesirable for the wealthy as it is for those with more limited resources.

89. Or for Markel, "inefficient behavior" is structurally interchangeable with "behavior violating the public interest in liberal democratic values." Markel, *supra* note 6, at 260.

90. This focus on "sending the message" to the tortfeasor rather than focusing on compensating the victim is reinforced by Hampton's willingness to "refrain from inflicting" punishment upon Nazi war criminals who have become senile and can no longer appreciate the message of retribution's expressive defeat. Hampton, *The Retributive Idea*, *supra* note 58, at 132-33.

As I will show in the context of a paradigmatic punitive damages case, *BMW of North America, Inc. v. Gore*,<sup>91</sup> this disconnect generates several problems. These problems, I argue, are best addressed through an understanding of tort law that reconciles punitive damages with the basic normative structure of tort law as it is expressed by corrective justice. This argument not only provides a solution to genuine practical problems in tort law; it also provides corrective justice scholars with an answer to the charge that their theory omits an account of one of tort law's most distinctive features.

I want to be clear on the argument's limitations. I am *not* arguing that punitive damages do not have deterrent and other potentially salutary effects.<sup>92</sup> Indeed, in Part V, I argue that application of my principled approach may lead to deterrence of wrongdoing. But that effect is incidental. My goal is to provide for tort law and punitive damages a principled account that avoids the problems created by disconnecting punitive damages from the normative structure of tort law more generally.

### III. PROBLEMS CREATED BY INSTRUMENTAL THEORIES

While empirical work has shown fears of runaway punitive damages to be largely unfounded,<sup>93</sup> the subject remains a source of frustration and continuing debate.<sup>94</sup> It is easy to see why: awards of punitive damages seem sensational in their increasing size and are frequently mentioned in public debates on tort reform.<sup>95</sup> One case not only embodies these concerns but serves as a useful platform for understanding the relevance of the foregoing discussion to practical punitive damages questions.

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91. 517 U.S. 559 (1996).

92. This point echoes Coleman, *supra* note 23, at 1248 ("Of course, compensating those who are entitled to repair and not compensating those who are not will affect the behavior of both; no one denies that. The point of compensation, however, is not to influence future behavior, but to annul wrongfully inflicted losses.").

93. See Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 42, 45 (1992) (discussing how large punitive damage awards are rarer and less frequently collected than assumed). Most scholarly consideration of punitive damages accompanies policy arguments about strict products liability. See, e.g., *id.* That falls outside the bounds of this Note.

94. See, e.g., Owen, *supra* note 1.

95. *Id.* at 371; see also Mike France, *How To Fix the Tort System*, BUS. WK., Mar. 14, 2005, [http://www.businessweek.com/magazine/content/05\\_11/b3924601.htm](http://www.businessweek.com/magazine/content/05_11/b3924601.htm).

A. Gore's Rationale for How To Measure Punitive Damages

The Supreme Court considered the plight of an aggrieved car purchaser in *BMW of North America, Inc. v. Gore*.<sup>96</sup> Dr. Gore had bought an ostensibly new BMW sports sedan from an authorized dealer, only to find that his sedan had previously been repainted by BMW.<sup>97</sup> BMW had adopted a policy that if one of its vehicles suffered minor damage (3% or less of the car's retail value) in transport, it would remedy the damage and sell the car as new.<sup>98</sup>

Claiming that he had been defrauded by the company's undisclosed repainting, Gore sought four thousand dollars in compensatory damages (his measure of his own economic harm) and four million dollars of punitive damages.<sup>99</sup> Gore based his argument for punitive damages on evidence that BMW had sold nearly one thousand cars to other buyers in similar circumstances and on speculation that these buyers had suffered the same economic harm.<sup>100</sup> According to Gore, it was therefore appropriate to calculate his punitive damages award by multiplying his alleged economic harm by the number of other buyers who were similarly (allegedly) harmed.<sup>101</sup> Gore ultimately added that his award was justified as an effective deterrent, because BMW had changed its disclosure policy after the trial began.<sup>102</sup>

At trial, the jury concluded that BMW's nondisclosure constituted "gross, oppressive, or malicious" fraud under Alabama law<sup>103</sup> and awarded Gore four thousand dollars in compensatory damages and four million dollars in punitive damages, as per his estimates.<sup>104</sup> On appeal, the Alabama Supreme Court agreed with Gore's arguments as they applied to Alabama, although it reduced the punitive damages to two million dollars because it concluded that fraud outside the state's jurisdiction could not be used in calculating punitive damages.<sup>105</sup>

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96. 517 U.S. 559.

97. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 621 (Ala. 1994), *rev'd* 517 U.S. 559 (1996).

98. *Gore*, 517 U.S. at 564 ("Because the \$601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the . . . dealer.").

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 566.

103. See ALA. CODE § 6-11-20(b)(1) (1993).

104. See *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 622 (Ala. 1994), *rev'd* 517 U.S. 559 (1996).

105. *Id.* at 627.

The U.S. Supreme Court reversed in a five-to-four decision, holding that the award was “grossly excessive” and therefore in violation of the Due Process Clause of the Fourteenth Amendment.<sup>106</sup> The Court found that such an award breached “[e]lementary notions of fairness enshrined in our constitutional jurisprudence.”<sup>107</sup> It ruled that BMW had no fair notice either of the wrongfulness of its conduct or of the severity of the damages it might face.<sup>108</sup> Moreover, the award was unreasonable because it failed each of the indicia of reasonableness required for punitive damages to withstand constitutional attack: (1) the reprehensibility of the defendant’s conduct; (2) the ratio of punitive damages to harm suffered; and (3) sanctions for comparable conduct.<sup>109</sup> Despite insisting on a state’s freedom to pursue policy either through legislated penalties or judicially awarded punitive damages,<sup>110</sup> the Court concluded that the award’s failure to meet these three prongs placed it outside legitimate state interests.<sup>111</sup>

In a concurring opinion, Justice Breyer specified that the major problem in the case was the failure of Alabama’s courts and legislature to place effective constraints on punitive damages.<sup>112</sup> Justice Scalia’s dissent castigated the Court for its purely subjective assessment and lamented the expansion of due process to include a substantive guarantee of reasonable punitive damages.<sup>113</sup> Justice Ginsburg argued that the Court was unnecessarily wading into an area of law “dominantly of state concern” and observed that many states were already attempting to address the issue.<sup>114</sup> She suggested that Gore’s case was not one where the Supreme Court should override the “presumption of legitimacy” of a state’s punitive damage award.<sup>115</sup>

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106. *Gore*, 517 U.S. at 574.

107. *Id.*

108. *Id.*

109. *Id.* at 575-85.

110. *Id.* at 568.

111. *Id.* at 574-75, 586.

112. *Id.* at 586-88 (Breyer, J., concurring) (discussing why, in this case, the Court ruled against what historically has been the presumptive validity of jury awards).

113. *Id.* at 598-602 (Scalia, J., dissenting).

114. *Id.* at 607 (Ginsburg, J., dissenting).

115. *Id.* at 611.

*B. Three Problems*

At first blush, Gore's arguments are unsettling. At trial, he sought four million dollars in punitive damages, although he measured his total economic loss from the alleged fraud at four thousand dollars.<sup>116</sup> Even after the award was reduced to two million dollars, a five hundred-to-one ratio of punitive damages to economic loss seems excessive, and Gore's arguments justifying them seem objectionable. How might we formulate a clear explanation of our discomfort with his arguments?

*1. The Definitional Problem*

Our objection might go as follows. If Gore is suing on his own behalf, we should be concerned that his justification for seeking a large amount of punitive damages rests on the reasoning that BMW perpetrated the same harm upon nearly one thousand other buyers. But if Gore is right, then, according to the principle of horizontal equity,<sup>117</sup> similarly situated plaintiffs should each have a right to claim similar damages.<sup>118</sup> If they did, BMW's liability would be (roughly) four million dollars multiplied by approximately one thousand plaintiffs, or close to *four billion dollars*. Such a result is bizarre. These potential plaintiffs suffered (per Gore's speculative estimation) an economic loss of four thousand dollars apiece. But if we accept Gore's theory of punitive damages and allow these plaintiffs to recover as a matter of horizontal equity, then BMW faces a four billion dollar liability for an aggregated loss of four million dollars.

It therefore seems clear that Gore cannot rest his justification for punitive damages upon harm to others. He should not be entitled to recover for their harm—especially since similar plaintiffs would be entitled to the same justification, creating a snowball effect that would result in excessive total

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<sup>116</sup>. We should remember that the objective cost of repainting Gore's car was just over six hundred dollars. *See supra* note 98.

<sup>117</sup>. Horizontal equity is most familiar in the tax context, requiring that one "tax equals equally." David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1646 (1999). The underlying idea is that individuals in the same circumstances ought to be treated the same by the law.

<sup>118</sup>. The principle of horizontal equity is expressed by nonpreclusion in tort law, according to which "nonparties [to a particular case] are not bound by the judgment some other plaintiff obtains." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

liability.<sup>119</sup> We are confronted, then, with an obvious question: to what specific problem do punitive damages respond, and what is the nature and limit of that response? For if we reject Gore's explanation that he is entitled to damages for others' harm, we still must look to some other explanation that provides us with defensible constraints on punitive damages. Even more fundamentally, if others' harm is not a satisfactory ground for awarding punitive damages, then we need an explanation of what the acceptable ground actually *is*. Let us call this need to specify the proper limits and content of a punitive damages response the "definitional problem."

## 2. Deterrence and the Horizontal Equity Problem

What about Gore's economic deterrence argument? Perhaps we can say that Gore "earned" the damages for effectively deterring future nondisclosure by BMW. In other words, the court rewarded Gore for being a good private enforcer of state policy on behalf of other similarly situated plaintiffs. But if Gore's punitive damages were based on their effectiveness as a deterrent, then, logically, no further punitive damages should be available to other plaintiffs, *because no further deterrence purpose would remain*. By definition, effective deterrence means the harm will not happen again. Why award anyone else money when effective deterrence has already been achieved? Indeed, if we really do accept Gore's deterrence logic, then, since he was compensated for the harm to other plaintiffs, they should be precluded even from claiming *compensatory* damages. After all, Gore's award is explicitly based upon collecting for others' economic harms. It follows that since Gore has collected, it is unnecessary to grant other potential plaintiffs their day in court.<sup>120</sup>

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119. Justice Breyer specifically instructed lower courts to be careful with deterrence-based punitive damage awards because they might "double count" by including in the punitive damages award some of the compensatory, *or punitive*, damages that subsequent plaintiffs would also recover." *Gore*, 517 U.S. at 593 (Breyer, J., concurring) (emphasis added). Justice Breyer has since been cited for this proposition in other cases. *E.g.*, *Campbell*, 538 U.S. at 423.

120. It is important to note, however, that this conclusion only follows if we assume the correctness of an economic account of compensatory damages, according to which there is no obvious reason for distinguishing between compensatory and punitive damages. If, on the other hand, we accept a corrective justice view, Gore's receipt of punitive damages would not preclude compensatory damages for other plaintiffs, since punitive damages would have nothing to do with remedying these plaintiffs' injuries. However, we would then be in the position of holding inconsistent views about these two types of remedies, creating a set of problems discussed *infra*, Section III.C.

Once more, we encounter a horizontal equity concern, or what I will call the “horizontal equity problem”: other plaintiffs are not and generally cannot be precluded from claiming punitive (or compensatory) damages simply because Gore won his damages first. Would we really reject horizontal equity and say that no other plaintiffs, after Gore, had a right to a remedy at all? Courts are certainly unwilling to reject horizontal equity and rightly so, for it would contradict our most basic jurisprudential intuitions. If these other plaintiffs were similarly harmed, as Gore says they were, it is *only fair* that they have their own right to a similar remedy.

### 3. *The Lottery Problem*

The economic deterrence argument creates another source of potential unfairness: if effective deterrence is a valid justification, then jury awards need not correspond to harm, so long as they accomplish the desired deterrent function. For the legal economist, this conclusion does not seem objectionable since it provides appropriate incentives for the plaintiff to sue and for car companies to change their behavior. But it is precisely this sort of delimited deterrence that Justice Breyer pinpoints as the central issue in the case.<sup>121</sup> Our concern might go beyond Justice Breyer's; such constraints should be reasonably linked to harm so that a plaintiff does not seek economic windfalls at the defendant's expense.

But that is not all; justifying punitive damages on economic deterrence grounds may lead to a more general, societal sort of unfairness. Namely, a plaintiff would receive an outsized payment for deterring a defendant just because she happened to be, as it were, the lucky litigant. But there is nothing about *this* plaintiff, on a deterrence justification, that entitles her to the award more than anyone else. Indeed, on the deterrence logic, it is hard to see why *any* plaintiff with the time and money to sue should not have a shot at winning this award. The punitive damages award thus seems like the product of a lottery, where one lucky plaintiff gets a huge bounty merely because she was the first to sue on a deterrence argument. Let us call this the “lottery problem.”

### C. *The Normative Disjoint Between Punitive Damages and Tort Law Creates a Mess*

The difficulty for the Court is that it accepted the validity of the economic deterrence justification in constitutional doctrine and attempted to make it

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121. See *Gore*, 517 U.S. at 596 (Breyer, J., concurring).



coexist with three prongs of reasonableness—reprehensibility, ratio of harm to damages (or proportionality), and comparability to similar sanctions. These reasonableness prongs, however, really depend on some basic notion of fairness. We *care* about reprehensibility, proportionality, and the sanctions for comparable conduct *because* satisfying those concerns makes for a fair result. Yet the Court’s decision attempts to combine the deterrence justification with fairness justifications.

As the above analysis shows, that combination is not tenable, as deterrence justifications create serious problems for fairness. The attempt to mix them together reveals them to be water and oil and makes the foundation of punitive damages seem deeply problematic. The clear problem here is that a loose pluralism of justifications fails to provide us with a sense of what constraints punitive damages must obey, given the conflicting purposes courts assign to such damages. This is the other side of the definitional problem. For as problematic as having no coherent definition of punitive damages may be, it is no more helpful to mix various incompatible explanations together and hope that the alloy stays together.

What these problems have in common is that they spring from a fundamental disconnect between instrumental justifications of punitive damages and tort law’s general normative structure. As I discussed in Part II, it is not only economic deterrence justifications that create this disconnect, but instrumental accounts of punitive damages (including Hamptonian retributive ones) generally. Specifically, instrumental accounts do not explain punitive damages in terms of bilateral accountability between plaintiffs and defendants. Yet tort law’s ordinary framework follows precisely this bilateral relationship, and its compensatory remedies can be explained in these bilateral terms.

It is fair to ask whether this disconnect and the “problems” it creates really require solving. The legal economist (or some other instrumental theorist) might counter by saying that punitive damages rest on normative bases distinct from those of tort law generally. Regardless of whether bilateralism is essential to the rest of tort law, punitive damages remain, fundamentally, a tool for deterring socially undesirable conduct. So here, at least, bilateralism is nonessential, such that this normative disharmony is not an issue. Simply put, punitive damages may be primarily instrumental even if tort law generally is not.

But there is reason to think that this disharmony genuinely bothers courts and commentators, despite their repeated insistence on the validity of deterrence and punishment objectives. The Supreme Court has emphasized the necessity of a “nexus” between “the deliberateness and culpability of the

defendant's action . . . [and] the specific harm suffered by the plaintiff."<sup>122</sup> By arguing for reasonable ratios between compensatory and punitive damages, the Court suggests that these forms of damages are fundamentally linked:

[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [But punitive damage awards with] ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages."<sup>123</sup>

These and many similar examples suggest that corrective justice's bilateralism concern is alive and well in punitive damages jurisprudence, even overriding economic considerations. Courts are conscious that punitive damages, like compensatory ones, go to a specific plaintiff, and accordingly demand that they be based on that plaintiff's harm. If punitive damages were really normatively distinct from the rest of tort law, we would expect that courts would *only* care about deterring the defendant's kind of conduct (or the likelihood of a calculated amount of economic harm).<sup>124</sup> Courts would not care about making these damages depend on a specific plaintiff's injury—but that is exactly what they demand. Moreover, they care about the specific circumstances of that injury.<sup>125</sup> And finally, from the discussion and citations above, courts bring moral concerns to bear that are typically left out by instrumental justifications of punitive damages, such as considerations of horizontal equity.

Commentators have been similarly concerned with issues of horizontal equity, fairness, and bilateralism. Before *Gore*, some scholars attacked "unrestrained" applications of punitive damages on the grounds of the disproportionality between the defendant's wrong and punitive damages assessed for that wrong.<sup>126</sup> This worry was especially pronounced where judges

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122. *Campbell*, 538 U.S. at 422.

123. *Id.* at 425 (quoting *Gore*, 517 U.S. at 582).

124. And even then, commentators have questioned "whether real world institutions can reliably engage in the enterprise of seeking to obtain optimal deterrence." Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 *YALE L.J.* 2071, 2084 (1998).

125. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 389 (Ct. App. 1981) ("[W]hether the award was excessive must be assessed by examining the circumstances of the particular case.").

126. See, e.g., John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 *VA. L. REV.* 139, 141-42 (1986) ("[R]epetitive punitive awards for a single course of

instructed the jury to consider overall social effects of wrongful behavior in assessing such damages.<sup>127</sup> Punitive damages, the argument went, were well suited for particular transactions between two parties, but inappropriate as a broader method of social regulation.<sup>128</sup> Non-preclusion—based on a respect for horizontal equity<sup>129</sup>—meant that these awards could be absurd in size without proper limits. After *Gore*, these concerns grew more forceful. Awarding a plaintiff punitive damages based on harm done to others in addition to that suffered by the plaintiff has been problematic for a number of scholars.<sup>130</sup> “Total harm” awards to individual plaintiffs that include various considerations external to the harm before the court have proved particularly contentious.<sup>131</sup>

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conduct could subject a defendant to liability of staggering magnitude . . . [where no] mechanism existed for effective control of aggregate awards nor for meaningful guidance of jury decisionmaking.”); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 59 (1982) (conceding that despite previous endorsements of punitive damages as a tool of social regulation, these “penalties” are “sometimes unfairly large”).

127. Jeffries, *supra* note 126, at 142 (pointing out the difficulty of asking juries to consider broader social effects of bad actions while accounting for the likelihood of other punitive awards from an individual case’s punitive damages calculus).
128. *Id.* at 141 (reasoning that in “an isolated incident . . . [t]he jury [h]ad only to assess the particular transaction before it” leading to punitive damages that “were, by today’s standards, almost trivial in amount”).
129. *Id.* at 142 (“[It did not] seem ‘either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers . . . .’” (quoting *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967))).
130. See, e.g., Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 588-89 (2003) (“[W]e should ask whether it is ever permissible . . . to award in a case brought by a single victim punitive damages in an amount that is intended to punish the defendant’s entire course of conduct, or whether, instead, the law limits each plaintiff’s recovery to the amount necessary to punish the defendant only for the harm done to the individual plaintiff.” (emphasis omitted)). Despite my disagreement with Markel’s “retributive damages” solution, he too finds this normative disjoint to be a problem. Markel, *supra* note 6, at 272 (“A concern for equality also means curtailing the lottery effects of most punitive damages structures. Plaintiffs shouldn’t receive a windfall because they have the good fortune of a wealthy injurer . . .”).
131. Several scholars have approved of efforts to restrict such impositions of “total harm” damages. See, e.g., Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After State Farm v. Campbell*, 41 SAN DIEGO L. REV. 1465, 1487 (2004) (“I view this reformation of . . . aspects of the procedures for awarding punitive damages favorably . . .”). While Thomas Colby has argued approvingly that the Court effectively annulled the “total harm” justification for punitive damages in *Williams*, see Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 397-400 (2008), deterrence arguments remain

The foregoing discussion is not meant to show that courts and commentators only conceive of punitive damages in bilateral terms. Such a claim would ignore instances where the Supreme Court has said that “compensatory and punitive damages . . . serve different purposes,” where punitive damages are “aimed at deterrence and retribution.”<sup>132</sup> I am not suggesting that courts do not mean what they say when they instruct lower courts and juries along these lines; rather, they are confusing the issue.<sup>133</sup> The foregoing discussion demonstrates that *despite* endorsing deterrence and retribution, the Supreme Court overturns punitive damage awards because of failures of bilateralism and other moral considerations. My point is that courts and commentators use language that implicitly and explicitly makes the kinds of noninstrumental demands of punitive damages that corrective justice theorists find in tort law more generally.<sup>134</sup>

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doctrinally sanctioned, and instrumental accounts like those of Markel and Galanter and Luban persist. Indeed, Colby’s own account of punitive damages as a “legal outlet for revenge,” *id.* at 441, shares in the instrumental nature of these arguments. Colby favorably cites Galanter and Luban’s account, discussing the value of “expressive defeat,” *id.* at 442-43, and explains the value of using punitive damages as a way to channel vindictive impulses, *id.* at 441. He also endorses a Hamptonian vindication of the victim’s worth, *id.* Thus the arguments here and in Part IV apply to Colby’s idea of “private revenge” as well. Here I will only add that, as a practical matter, it is doubtful that a court would ever justify punitive damages on the grounds of the desirability of “legally” satisfying vengeful instincts.

132. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

133. In the case of *Campbell*, Goldberg identifies in the Supreme Court’s reasoning “the sort of slippage [from private redress to state interests] that . . . has led [legal theorists] into a bind in [their] thinking about punitive damages.” John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL’Y 3, 7 (2004). This is a concern that equally applies to *Gore*.

134. See *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (“[W]e have made clear that the potential harm at issue [in assessing punitive damages] was harm potentially caused *the plaintiff*.”); *Campbell*, 538 U.S. at 423 (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”). These instances further buttress the assertion that bilateralism and accountability are necessary features of punitive damages. State court cases, though more varied, indicate that punitive damages (or extracompensatory damages) address the specific relationship between tortfeasor and plaintiff. See, e.g., *Smith v. Holcomb*, 99 Mass. 552, 555 (1868) (stating that extra compensation beyond compensatory damages responds to the defendant’s infliction of insult or injury on the plaintiff, which “ought to be regarded as an aggravation of the tort, on the same ground that insult and indignity . . . [directed] by the plaintiff [at] the defendant, which provoked the assault, may be given in evidence in mitigation of the damage”); *Jackovich v. Gen. Adjustment Bureau, Inc.*, 326 N.W.2d 458, 464 (Mich. Ct. App. 1982) (stating that punitive damages compensate the plaintiff for humiliation and indignity resulting from the defendant’s tortious conduct).

Even if courts think that deterrence and retribution may be valid state goals when it comes to punitive damages, they insist on these damages' conformance with the basic bilateral normative framework of tort law. Thus, one cannot realistically assert that a disconnect between punitive damages and the normative structure of tort law is unproblematic simply because of their different normative bases. It is precisely this (alleged) normative disjoint that courts and commentators find discomfiting. And it is for that reason that a harmonized normative account holds so much appeal for both courts and commentators.<sup>135</sup>

I contend that corrective justice, properly reconciled with punitive damages through the moral accounting interest, supplies that account. As I have already discussed, this reconciliation has yet to be fully argued for, since corrective justice theorists have generally rejected or minimized the role of punitive damages in their theories.<sup>136</sup> Against that backdrop, and in the interest of remedying that deficiency, I present my account of tort law's moral accounting interest.

#### IV. RECONCILIATION AND JUSTIFICATION THROUGH THE MORAL ACCOUNTING INTEREST

##### *A. A Brief Recap of the Deficiency That Needs Answering*

As we have seen, the corrective justice theorist seems to view punitive damages as an import from criminal law via the graft defense. This stance may be summarized as follows. Punitive damages are a form of punishment in response to culpability. To import punishment into tort law via punitive damages is to graft a criminal law concept onto tort law because tort law does not punish;<sup>137</sup> criminal law does. The defining features of tort law, by contrast, are wrongful losses (as distinguished from culpable wrongs), fault, and liability. Punitive damages are thus only nominally part of tort law. If tort law cares

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135. Goldberg puts the point powerfully:

Must we, or ought we, concede that all we can say of any given tort decision, or . . . doctrine, is that . . . it will reflect the attainment of an unarticulated and unarticulable balance among various considerations—including some that are diametrically opposed? I suggest that, to make such a concession, is to give up on the idea of law.

Goldberg, *supra* note 20, at 580.

136. Zipursky, *supra* note 36, at 749-51.

137. See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 486-88 (1992).

about culpability at all, it cares only to the extent that some losses are worse than others and adjusts compensation accordingly.<sup>138</sup> Even then, culpability is at best an anomalous factor to be considered in compensation.

As I have already noted, this appears to be an impoverished response, an attempt to “explain away” rather than to explain.<sup>139</sup> If tort law adjusts the extent and nature of a defendant’s liability to a plaintiff according to the defendant’s moral culpability, we ought to have a stronger explanation than the mere assertion that some losses are worse than others. Otherwise we would imagine that tort law would not bother articulating punitive damages as different *in kind* from compensatory ones.<sup>140</sup> Yet tort law does distinguish between them, often emphatically.

The difficulty corrective justice has in explaining punitive damages derives from its perhaps single-minded focus on understanding the distinct nature of tort law by understanding liability. Undoubtedly, corrective justice has provided an excellent understanding of liability as a tool for enforcing norms of acceptable conduct (i.e., relational duties) between parties. Liability makes the defendant accountable to the plaintiff for the wrongful losses that the defendant has impermissibly caused. It allows plaintiffs to demand compensation to annul those wrongful losses. Moreover, corrective justice is accurate in insisting that the necessary and sufficient conditions for liability do *not* include culpability.<sup>141</sup>

But we are missing something distinctive about tort law if we concern ourselves only with the necessary conditions for liability and the way liability operates. We should not neglect to ask a further question: in what way does tort law’s structure help to define *the nature and extent* of the duties that it will enforce, if at all? In other words, does tort law have something to say about the nature of accountability, and how does it do so?

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138. Zipursky calls this the “reduction defense,” where punitive damages are merely a renamed form of compensatory damages. Zipursky, *supra* note 36, at 712.

139. *Id.*

140. In other words, liability would automatically include punitive damages without separating them out from compensatory ones.

141. As far back as Holmes, jurists have (rightly) rejected the idea that culpability is a condition of liability. See HOLMES, *supra* note 10, at 105 (“[T]he damage need not have been done intentionally.”); cf. Coleman, *supra* note 9, at 22 (discussing how accidents may nevertheless be tortious “wrongs”).

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*B. Answering the Deficiency*

In the following analysis, I show that tort law's structure demonstrates a unique capacity to articulate the full extent of both the plaintiff's wrongful loss and the attendant *moral harm* she may suffer. While tort law first requires plaintiffs to specify a legally recognized wrongful loss, tort law allows plaintiffs to go further and specify claims for moral harm. It does so because there is a moral reason for treating mere legal wrongs differently from *culpable* legal wrongs. Tort law thus demonstrates an interest in full accountability across both norms of conduct and norms governing the *manner* of conduct. I call this unique receptiveness to separate claims of both wrongful losses and further moral harm the "moral accounting interest." Through it we can explain the place of punitive damages in tort law.

I will begin with an explanation of the concepts I use in the argument. First, I will discuss my idea of moral harm, which is much like Hampton's idea of moral injury, although my conception of moral harm is slightly different in specific ways. I will then explain how the moral accounting interest responds to the distinct nature of moral harm with punitive damages. My argument will show that the moral accounting interest combines with corrective justice to explain the proper place and scope of punitive damages in tort law.

*1. The Terms of the Discussion*

My usage of standard tort terms is straightforward. A defendant is negligent if, as in the common law doctrine of negligence, she breaches a duty of care to the plaintiff and her breach of that duty is the legal (or proximate) cause of that plaintiff's harm.<sup>142</sup> When I say that a defendant acts recklessly, I mean for the purposes of the following discussion that she acts with reckless disregard for others' safety—she engages in conduct that she either knows creates a high degree of risk to others, or that a reasonable person in her position would know creates a high degree of risk to others.<sup>143</sup> A defendant intends harm if she acts with the actual intent to harm another or with substantial certainty that her action will result in harm to another.<sup>144</sup>

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<sup>142</sup>. RESTATEMENT (SECOND) OF TORTS § 281 (1965); see also *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) ("The common law doctrine of negligence consists of three elements: 1) a legal duty owed by one person to another; 2) a breach of that duty; and 3) damages proximately resulting from the breach.").

<sup>143</sup>. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a. (1965).

<sup>144</sup>. These terms should not be confused with usages such as the "intentional tort" of trespass. The usage of intent in doctrinally defining trespass merely connects the actor *volitionally* to

I will use the words “manifest” and “express” interchangeably as instances of “expressive” behavior. It is important to specify the sense in which I mean that acts are expressive.<sup>145</sup> The key here is that an agent need not subjectively intend or be conscious of a certain meaning or expression by her action. Thus expression is different from communication, where the agent *intends* to express some meaning.<sup>146</sup> Not only would such an assessment be practically and epistemically difficult, but it is also not what tort law demands, since courts cannot see into the minds of defendants.<sup>147</sup>

Rather, to say that an act is expressive is to say that we appropriately interpret it as manifesting some mental state. By “appropriately,” I simply mean that we interpret an action in accordance with objective social conventions and norms that everyone is presumed to understand.<sup>148</sup> Thus, when we say that Dana’s reckless behavior expresses conscious disregard for others, it need not be the case that Dana was in fact conscious of her disregard for others, and that this conscious disregard caused her behavior. As Anderson and Pildes point out with helpful examples, this confuses actual causation with expression.<sup>149</sup> Nor need it be the case that Dana intended to communicate her mental state, for “one can express a mental state without intending to communicate it,” as in the case of a shoplifter’s furtive glances.<sup>150</sup> Rather, we

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the act resulting in the trespass. *See id.* § 163 cmt. b. Of course, this volitional connection is different from *intending the trespass*. *See id.* As an example, Dana may intend to walk on property she thinks is her own yet be liable for trespass, though she does not intend the trespass itself. By contrast, if Dana intentionally drives over Paul’s land despite his protests, her intent is connected to the trespass itself. *See* *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

145. This usage is adapted from Anderson & Pildes, *supra* note 57, at 1507.

146. *See id.*

147. Intent is inferred from conduct. *See, e.g.,* *Garratt v. Dailey*, 279 P.2d 1091, 1093 (Wash. 1955) (“Had the plaintiff proved . . . that [the defendant] moved the chair while she was in the act of sitting down, [the] action would patently have been for the purpose or with the intent of causing the plaintiff’s bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages.”); *see also* RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965) (“‘Intent,’ as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself.”).

148. *See* Anderson & Pildes, *supra* note 57, at 1507. (“Suppose an individual burns a piece of paper. What does this mean? If the paper is a draft card, and he burns it in the context of others doing the same thing at an antiwar rally, we understand his action to express outrage at the draft.”). For my purposes, and certainly for the purposes of the law, it is enough that in social and legal practice we generally agree that we can discern harmful intent or objectionable recklessness from conduct. *See Garratt*, 279 P.2d at 1093.

149. Anderson & Pildes, *supra* note 57, at 1508.

150. *Id.*



interpret Dana's action as evidence of a mental state of disregard for others' safety.<sup>151</sup> The same goes for intentionally harmful acts. Attempting to sensibly interpret words and conduct is what courts do, and they assign meanings to the same as appropriate. So do human beings more generally. I will expand on the differences between the expressive content in these categories of action below.

As for the other important specialized terms, I use "wrongful loss" to refer to the harm resulting from specific torts (e.g., battery), which generally includes physical or economic losses. Wrongful actions that cause wrongful losses are usually physically verifiable or otherwise concrete. I use "moral harm" to refer to the denigration of moral status that the plaintiff suffers when the defendant intentionally or recklessly inflicts her wrongful loss. This denigration may *accompany* a physically verifiable or concrete action, but it is *connected* to the expressive content of an action. Wrongful losses flow from tortious conduct. Moral harms flow from the culpable, expressive manner of that tortious conduct.<sup>152</sup>

My idea of moral harm largely resembles Hampton's idea of moral injury. When a defendant acts either with malice<sup>153</sup> or intentional disrespect<sup>154</sup> toward a plaintiff, she expresses a culpable attitude toward the plaintiff. We interpret that expressed attitude as consisting of an orientation toward the plaintiff that takes her to be unworthy of the moral respect to which she is entitled, in the course of and in addition to causing the plaintiff's wrongful loss. Roughly speaking, this moral respect consists of regarding others in such a way that takes them to have value as persons and legitimate interests that flow from that

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151. Cf. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1374 (2000) (explaining that "expressive theories of law should be understood as sentence-meaning theories, not speaker's-meaning theories," where it is the expressive action that conveys meaning, rather than a communicative intention).

152. Recall Dana and Paul, discussed *supra* Section II.C. At times, the moral harm and wrongful loss will occupy the same space; fraudulent misrepresentation is one such instance. RESTATEMENT (SECOND) OF TORTS §§ 553-557A (1977). Certain moral harms may be defined as wrongful losses. Nevertheless, tort law *always allows* for the possibility of moral harm *whenever* the wrongful loss results from intentionally harmful or reckless conduct.

153. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) ("There is [an] explanation for the [punitive damages]: TXO acted with malice.").

154. See RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.").

value.<sup>155</sup> The expression is culpable because it is morally wrong to treat others as having less value as persons.

The expression is morally harmful because it diminishes the plaintiff's moral status by demeaning or tearing her down, when instead she deserves to be treated with respect as an equal person. A maliciously inflicted wrongful loss does not just violate a norm of conduct (or a duty); it expresses to the plaintiff that she is not entitled to expect the defendant to treat her in a way respecting that norm of conduct. The defendant's action suggests that she is entitled to inflict this harm on the plaintiff as she wishes, and backs up that suggestion by *actually* inflicting the harm. This is the crux of moral harm.

To this Hamptonian view, I will add that reckless behavior is also morally harmful expressive conduct, though of a different kind. Reckless behavior expresses an attitude that the agent is not bound by the norms that bind others, usually when those norms are intended to protect the safety and well-being of others. For instance, we observe that a reckless driver can readily see everyone else driving more cautiously, yet she feels uncompelled to do the same.<sup>156</sup> Since drivers understand that such norms exist at least in part because they promote safe transit for everyone, then we accordingly interpret this driver as expressing disregard of others' safety by driving unsafely. So her unsafe driving expresses by conduct an attitude that others' interest in safety is unworthy, *for whatever reasons*, of her consideration.

Thus, a reckless person need not intend a specific wrongful loss in order to manifest a mental state of disrespect for others; conduct objectively interpreted as expressing a certain morally harmful attitude is enough. And we rightly take that expression to be morally harmful because, in civil society, disrespect for others' interest in their safety is a form of disrespect for them as persons. Hence we commonly refer to reckless drivers in terms of moral disapproval: "She is driving like a jerk." We commonly think of their actions as expressive of disregard for others: "She does not care how much her dangerous driving might hurt somebody!"

The difference between intentionally harmful acts and reckless acts may be rephrased in terms of risk: an intentionally harmful tortfeasor visits substantially certain harm on a victim, while a reckless one imposes a risk of harm across a set of possible victims. Acting with substantial certainty against a

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155. See Hampton, *The Goal of Retribution*, *supra* note 58, at 1669. It is beyond the scope of this Note to defend this Kantian view, though in practice our society appears to have adopted some version of it. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

156. Introducing complicating conditions, such as a child needing emergency care, does not ultimately change that intuition. Her culpability is mitigated by the extenuating condition, but she still expresses that her personal reasons outweigh the safety interests of others.

person is worse than exposing that person to a more generalized risk, and doctrinally tort law bears this idea out.<sup>157</sup> Yet despite their differences, intentionally harmful conduct and reckless conduct are expressive in specific and general ways, respectively.<sup>158</sup> They respectively express, from an objective interpretive standpoint, something like the following: “I will harm *you* in a way disrespecting your moral status,” and “I may expose others *in general* to risk of harm that undervalues their moral status.” Both of these expressions are morally objectionable because they are an expression of *conscious*<sup>159</sup> disregard for others’ moral status in a way that a mere accidental lapse of attention is not.

For a lapse of attention or other form of carelessness, the most we would be objectively likely to say is that the person’s action expresses something like: “I am careless,” or “I am not paying attention.” It would seem too much to interpret careless actions as expressing any orientation toward others’ worth or entitlement to safety. Behavior that results in moral harm must be the kind from which we would objectively interpret a disregard (or worse) for the moral status of others.<sup>160</sup> Whether the behavior at issue fits that bill depends on the factfinder’s conclusions.

Finally, I will subtract one element from Hampton’s account of moral injury in explaining my idea of moral harm: the infliction of moral harm, on my view, does not function to elevate the tortfeasor at the victim’s expense.<sup>161</sup> I

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157. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965) (“As the probability that the consequences will follow decreases [to] less than substantial certainty, the actor’s conduct loses the character of intent, and becomes mere recklessness . . .”).

158. We may also say that an intentional tort is borne out of an intention, but a reckless tort is borne out of an attitude. Acting upon either is an expression of a mental state. See Anderson & Pildes, *supra* note 57, at 1506 (“People can express . . . mental states . . . such as moods, emotions, attitudes, desires, intentions, and personality traits.”).

159. My use of the word “conscious” here imports the law’s conflation of actual consciousness and constructive consciousness. RESTATEMENT (SECOND) OF TORTS § 500 (1965) (“The actor’s conduct is in reckless disregard of the safety of another if he *does an act or intentionally fails to do an act* which it is his duty to the other to do, *knowing or having reason to know* of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” (emphasis added)). This idea of conscious risk justifies the result in *Ford Motor Co. v. Grimshaw*, 174 Cal. Rptr. 348 (Ct. App. 1981) (holding the car company subject to punitive damages because of its consciousness of the risk imposed by defective gas tanks in its cars).

160. Anderson & Pildes, *supra* note 57, at 1507 (“Deeds are identified, not by mere physical descriptions of bodily movement, but by the intentions that they express and that give them meaning. Interpretation is a matter of making sense of the speech or action in its context.”). Whether a particular inference is *in fact* reasonable is up to the factfinder.

161. See Hampton, *The Goal of Retribution*, *supra* note 58, at 1682.

think this description wrongly characterizes the nature of a malicious or reckless tortfeasor's action. Moral harm simply damages the victim's equality with the tortfeasor and *in virtue of the damage itself* warrants a response. Whereas for Hampton malicious actions *assert* or *appropriate* some greater moral status or value for the tortfeasor,<sup>162</sup> I think that moral injury need not be assertive; it can be merely expressed and by virtue of its expression inflict moral harm, as in reckless activity.

2. *The Argument for the Moral Accounting Interest*

With this understanding of moral harm in mind, we can understand the basic argument I advance for the moral accounting interest. The essence of the argument is simple. Tort law is a legal institution concerned with the duties we owe each other. It grants us the ability to demand an accounting from someone for the wrongful loss she impermissibly causes us. This accountability relationship, which takes the form of the tortfeasor's liability, is central to tort law. However, we want not just *some* accountability from those who harm us; we want *full* accountability – or at least a genuine attempt at it.

There would be something strange about tort law if it told us that someone who intentionally rammed her car into us owed us no more than the person who hit us entirely by accident. After all, the first person's actions are not just wrongful because they cause us to suffer some loss. *The manner* of her infliction of that loss expresses a morally harmful attitude that we are not worthy of respect as persons. It is its own moral harm to us. So we want compensation not only for the loss; we want separate, additional compensation for the moral harm. If tort law did not grant it, we would wonder if our rightful moral status was worth anything to the law. And if tort law did grant us this compensation but said nothing about *why* we received it, we would feel that our moral worth went unacknowledged as such by the law. In other words, we would say that tort law saw our moral worth as just another cost. We would think, ultimately, that this supposedly important feature – accountability – was an impoverished one, indeed.

Yet, this is not the case because of tort law's moral accounting interest. Tort law *does* recognize our entitlement to respect as moral equals with others by recognizing our moral harms as separate from and additional to our wrongful losses. It does so, if roughly, through punitive damages.<sup>163</sup> As a result, tort law

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162. *Id.* at 1677.

163. The subjectivity of what money value to assign in accounting for moral harm is unavoidable, but neither is it an impossible task. See Goldberg, *supra* note 133, at 8 (“Monetizing is a

allows us to demand full accountability and the right *kind* of accountability for our private losses from the defendants who inflict them. Tort law not only compensates us for our further moral harm; it doctrinally distinguishes that compensation from relief for our wrongful loss. The moral accounting interest requires that distinction out of recognition that we are entitled to morally respectful treatment because we have moral value.

In technical terms, where morally objectionable attitudes or intentions actually attend a wrongful loss, punitive damages offer a way of accounting for different degrees and types of harm according to different norms.<sup>164</sup> Accordingly, the intentionally harmful tortfeasor will tend to pay more punitive damages than the reckless tortfeasor,<sup>165</sup> while the merely negligent tortfeasor would be entirely exempt from them.<sup>166</sup> Such a result fits with our basic intuitions: the malicious driver who targets another for harm is worse than the reckless driver who knows or should know that she puts other people at risk of harm, while the negligent driver can hardly be thought to express a morally objectionable attitude by being careless.

Moreover, punitive damages (and the moral accounting interest that punitive damages reflect) naturally flow from tort law's litigation structure. Whereas in criminal law the state initiates prosecution, in tort law plaintiffs must take it upon themselves to both define and vindicate their own interests. This structural feature creates an impetus for a harmed individual to consider the wrongful loss she has suffered *and* the way in which she has suffered it. These considerations must lead to reflection upon, and then assertion of, the plaintiff's moral entitlement (just as we have done above). Indeed, it would

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subjective business, but however we answer [the question of the appropriate punitive damages for fraud], it won't run into the multi-millions.").

164. These different norms consist of, on the one hand, doctrinal protections of certain defined legal interests (such as interests in the security of person or of land) and, on the other, a general protection of being treated in an expressive manner befitting moral equals.
165. It is arguably true that large punitive damage awards are more appropriate for a reckless tortfeasor who causes widespread and severe harms than for an intentional tortfeasor who harms a single person (depending on contextual conditions). But this larger award is based on quantitatively larger harm and exposure. By contrast, a tortfeasor who intentionally and severely harms a large number of people would seem certain to be liable for greater damages than a tortfeasor who recklessly and severely harms the same number of people.
166. While there is a gray area between recklessness and gross negligence, tort law nevertheless precludes punitive damages for mere negligence. 22 AM. JUR. 2D *Damages* § 563 (2011). The *Restatement (Second) of Torts*, which acknowledges this gray area, nevertheless differentiates between the two. RESTATEMENT (SECOND) OF TORTS § 500 (1965). Defining conduct as one or the other is an evidentiary matter.

surprise us if plaintiffs did *not* reflect on the manner of their treatment and adjust their claims accordingly.<sup>167</sup>

3. *The Moral Accounting Interest Versus the Graft Defense*

What about the “graft defense,” which insists that punitive damages are just a form of punishment?<sup>168</sup> The moral accounting interest makes clear that they are not. Punitive damages may properly be thought of as punitive to the extent that, akin to the criminal law, they are expressive.<sup>169</sup> I will say, first, that I do not intend to present a full theory of punishment here. Nevertheless, regardless of one’s theory of punishment, the structure of criminal punishment is obviously distinguishable from tort law’s structure. The state punishes an individual for her offense, and this punishment consists of some sort of deprivation—frequently the deprivation of the offender’s liberty. In what way is this deprivation the same as the power tort law grants to a plaintiff to claim money damages from the defendant in satisfaction of a debt for a past morally denigrating action? They are both coercive actions by the state against an individual in response to a moral wrong. But this is too broad a similarity—regulations and fines also share these characteristics.

So perhaps we take a well-known—though not uncontroversial<sup>170</sup>—tack, and say that beyond being coercive, both punishment and punitive damages are expressive in the same way. They each institute a deprivation against someone who has violated a moral, social norm about the way we must treat other persons, and both punishment and punitive damages express moral condemnation of that violation. Yet this explains too little and mischaracterizes much. For punitive damages are not a deprivation in the way that many or most criminal punishments are; they are a payment from the defendant to the plaintiff in virtue of the specific, morally unbalanced relationship between them. Furthermore, while a criminal sentence is a mandatory deprivation, tort

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167. From an empirical standpoint, this is exactly what plaintiffs do. See, e.g., Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 *LAW & SOC’Y REV.* 275, 283 (2001) (describing how plaintiffs and their lawyers will evaluate the remedy that they seek depending on whether the tortfeasor is “a bad person”).

168. See *supra* notes 43-48 and accompanying text.

169. Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95 (1970).

170. See Adler, *supra* note 151, at 1369 (describing the disagreement amongst various scholars on whether punishment is in fact expressive).

plaintiffs may *forbear* from collecting their punitive damages if they wish.<sup>171</sup> There are differences in the expressive content of punishment and punitive damages as well. While a punishment may express condemnation through the vehicle of hard treatment, it makes little sense to say that by securing a payment for bad moral treatment tort law is condemning the defendant. Rather, tort law is validating a plaintiff's demand that the defendant literally pay for the moral harm she has done. But on the punishment side, we would be playing fast and loose with metaphors to suggest that jail time or other hard treatments really are "payments" for what the accused has done to society or the state.

In short, the conception of punitive damages that most fits these essential features is not that of punishment. Rather, the most sensible characterization of punitive damages is that of a defendant paying off a moral debt to a plaintiff. Punitive damages thus remain a form of accounting to the plaintiff, rather than, for instance, a payment to the state or hard treatment required by the state in response to harm to one of society's members.

To be sure, a community's moral disapproval will frequently go hand in hand with moral harm to one of its members. But moral disapproval is simply not the basis for awarding damages to a plaintiff. The basis for those damages is her personal moral harm. While a community (in the form of a jury) may play a part in endorsing or rejecting the plaintiff's claims about her moral harm, that role is individually validating. It is a mode of agreeing with the plaintiff that the defendant owes her damages for her moral harm. That mode is distinct from collectively condemning the defendant for an offense to the entire community.

If punitive damages look like the payment of a moral debt incurred by the violation of moral norms regarding the manner in which we treat one another, then they are hardly surprising as a key feature in tort law. Tort law is uniquely concerned with violations of the legal norms and duties that individuals owe to one another. Tort law takes these violations as justifications for imposing liability in the first place. So it makes perfect sense that tort law would have a moral accounting interest in responding to the manner of these violations with punitive damages.

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171. See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1005 (2007) ("Plaintiffs who may have a valid legal claim for punitive damages are under no obligation to pursue them.").

4. *The Potency of a Unified Theory Without Normative Disjoint*

When combined with corrective justice's enforcement framework, the moral accounting interest enriches corrective justice by helping us understand why tort law considers and responds to both a wrongful loss and possible moral harm. Corrective justice, as an enforcement framework, does not supply the explanation for why tort law should make such distinctions. It gives us an understanding of liability as an expression of the accountability relationship between plaintiffs and defendants. But this understanding still requires a principle that explains and justifies holding an accidental trespasser liable for nominal damages while also endorsing punitive damages for the malicious, even when the wrongful loss is the same.<sup>172</sup>

The moral accounting interest fulfills that task. It differentiates the accidental trespasser from the malicious one on the grounds that their trespasses have different expressive characters—and that tort law has a reason to distinguish them as such because infliction of wrongful losses in an expressively denigrating manner is morally harmful in a way that should be accounted for. Moral harms, like wrongful losses, should be annulled to correct the normatively defective relationship between a plaintiff and a defendant—to put them back on equal material and moral footing. This symbiotic account is moreover richer and more satisfying than either principle standing alone.

Not only is this accounting compatible with corrective justice's framework, it is indeed difficult to imagine the moral accounting interest being enforced by a framework *other* than corrective justice. The reason is that the moral accounting interest does no more than expand the domain of corrective justice's accounting relationship to its proper fullness. The moral accounting interest identifies an important element that the law and plaintiffs are entitled to consider as part of this more complete normative structure of accountability.

C. *Some Final Distinctions and a General Point*

Finally, with my account fully presented, I want to emphasize some important distinctions between my view and those of writers like Galanter and Luban, who endorse retributive justifications for punitive damages. The first and most obvious difference is that Galanter and Luban view punitive damages as an instrumental, civil-sphere version of punishment,<sup>173</sup> and thus cement a version of the “graft defense” that I discuss above. My argument, by contrast,

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172. For an example of this, see *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

173. Galanter & Luban, *supra* note 59, at 1428.



shows how punitive damages are unique to and justified in tort law as a way to ensure that a defendant fully accounts to a plaintiff for the distinct moral dimension of the plaintiff's harm. My view emphasizes that punitive damages are different from punishment because their point is to compensate a plaintiff for harm. The difference here is between burdens imposed on a defendant *because she deserves it*, and burdens imposed on a defendant to pay an additional kind of compensation *because the plaintiff is owed it*. These conceptions impose different, non-collapsible normative requirements.

For example, imagine if Dana intentionally slapped Paul. Galanter and Luban's view claims that punitive damages are valuable because Paul can (in monetary terms) slap Dana back. The problem is that retributivism does not explain why *Paul* should get compensation. It only explains that Dana should be financially hurt. On my view, punitive damages allow Paul to (in monetary terms) demand a personal apology. Paul gets Dana's money because it corresponds to a moral debt that she owes him. Again, the key to punitive damages is to understand the relationship between victim and tortfeasor as one of bilateral moral accountability.

The distinction between my argument and Markel's retributive argument is even clearer. Almost immediately, Markel dispenses with bilateralism or any attempt to make sense of punitive damages as they exist, saying outright that "the goal of this project is not to interpret punitive damages doctrine as is . . . [but] to reimagine what the law could be if we wanted it to better reflect the public interest in retributive justice."<sup>174</sup> My argument implicitly suggests that this approach disregards too easily the structure of tort law and its central features. But more importantly, this sort of argument ignores what we lose by failing to engage the normative structure of punitive damages that it seeks to replace. Indeed, one of the serious challenges to economic analysis of tort law is that it presumes a normative economic framework of optimal deterrence and efficiency, without considering the reasons that tort law may have for its existing normative structure.<sup>175</sup> Retributive arguments that take the same instrumental approach with a different normative focus will be doomed to the same errors.

It is fair enough that Markel disavows an interest in interpreting punitive damages, and he does make a thorough effort at developing his alternative instrumental structure. But do we want the alternative to replace the existing structure? A plaintiff might have very good reasons to prefer holding a

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174. Markel, *supra* note 6, at 246 (emphasis omitted).

175. See *supra* text accompanying notes 26-28 (discussing economic analysis as reformulating concepts and then applying economic analysis to the resulting framework).

defendant morally accountable through punitive damages. Not the least of these reasons consists in the fact that she may have suffered a serious moral harm and values a tort system that allows her to demand personal moral accountability for that harm. Indeed, we might all value that structure of punitive damages for its focus on moral accountability. And once we understand that tort law's overall framework, *including* punitive damages, remains bilateral and accountability-centered, we might not be so quick to replace punitive damages as they are with a general regime of social regulation.

## V. APPLYING THE UNIFIED ACCOUNT

Now we have a unified account of tort law's structure that explains punitive damages and gives moral-accounting reasons for their incorporation in tort law's enforcement framework. In the final Part of this Note, I use this unified account to resolve the serious practical problems in punitive damages suggested by *Gore*.<sup>176</sup> In doing so, I will demonstrate why coherent legal theory has pragmatic value, linking theory to law in a way that corrective justice theorists are often accused of neglecting.

### A. Addressing the Three Problems

#### 1. The Definitional Problem

First, we questioned the justification *Gore* gave in demanding four million dollars in punitive damages for having suffered fraud. That justification derived from the reasoning that appropriate punitive damages should be measured by multiplying his economic injury by hundreds of other similar buyers. Second, we felt intuitive discomfort at his (instrumental) economic deterrence argument, which justified the amount of the damages awarded to him on the grounds that it caused BMW to change its nondisclosure policy.

My account takes care of both of these concerns quite easily. I argue that tort law has a moral accounting interest in a plaintiff's articulation of the manner of her wrongful loss as distinct from and in addition to the wrongful loss itself. This interest combines with a corrective justice notion of the defendant's accountability to the plaintiff. Under this combined account, tort law adds punitive damages to compensatory damages because full accountability requires that the plaintiff's further moral harms be recognized

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

and annulled. This method of accounting properly recognizes that moral harms are different from wrongful losses.

From this perspective, we can see that in his claim for fraud, Gore has measured the value of his moral harm in the wrong terms. Rather than focusing on the fraud's culpable expression of a devaluing attitude *toward him*, Gore rested his argument on economic damages multiplied by the number of other potential plaintiffs. The error here is therefore two-fold. Not only has Gore confused moral harm with economic harm, he includes in his calculation the economic harms of others. This inclusion is inappropriate, first, because he cannot properly claim for himself wrongful losses borne by others and, second, because tort law requires these other potential plaintiffs to make claims on their own behalf. This is the essence of the definitional problem I mentioned in Part III.

Under my approach, Gore should have articulated only his own wrongful loss and moral harm. If a court had instructed the jury to consider only these factors and the jury returned a combined award on that basis, we would have a much harder time questioning that award. Moreover, we would almost certainly expect—though this would technically be a matter of empirical verification<sup>177</sup>—that a jury so instructed would be less likely to decide that Gore's personal moral harm warranted an award of millions of dollars.

## 2. *The Lottery Problem and the Horizontal Equity Problem*

The same analysis would apply to the problems with Gore's deterrence argument. Again, according to our unified account, deterrence is simply inappropriate, since punitive damages are grounded in compensating for moral harm. They are not grounded in changing future behavior or in rewarding a plaintiff with all the benefit for identifying some socially aggregated harm.

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177. Given that the jury awarded Gore four million dollars based on the numbers and justification he provided, there is reason to think that they would be receptive to the guidance suggested by my account. While subjective judgments of moral harm are always going to be controversial, a judge may simply instruct the jury that if it believed the defendant's conduct was denigrating to the plaintiff (or otherwise reprehensible), then it should award the plaintiff a punitive damages sum that reasonably reflected the degree of moral harm that the plaintiff likely sustained as a result. My instinct, though this would be an empirical matter, is that most juries would not take this instruction as an invitation to grant the plaintiff all the punitive damages he or she wanted; that is, their decision would reflect to at least some degree the concerns embodied by the "lottery problem." After all, as Jeffries points out, juries have ably managed to keep these awards reasonable in the past. See Jeffries, *supra* note 126, at 141 (noting that before 1967, "most punitive judgments were, by today's standards, almost trivial in amount").

Here we solve the lottery problem by connecting punitive damages directly to moral harm. No one could object, as they would on a deterrence account, that a plaintiff was able to collect all of what would have otherwise been society's gain for herself. For, on my account, society's gain is irrelevant to the question of compensating an individual for her own moral harm. To the extent that society benefits by letting individuals recover for their own harm, it is incidental to the purpose of punitive damages to compensate for individual moral harm. Furthermore, other parties are entitled as a matter of moral accounting to assert and recover for their own moral harm, solving the horizontal equity problem. Their claims, following legal practice, should not be precluded by *Gore's*.

As an incidental benefit, the ability of similarly situated plaintiffs to claim damages for moral harm could very likely create a cumulative deterrent effect *in the course of* properly demanding an accounting for their wrongful losses and moral harms. Happily, this result grants plaintiffs what they are due without sacrificing notions of fairness and horizontal equity, and without creating arbitrary deterrents justified merely by their success as deterrents. Finally, my account would obviate the complex and contestable society-spanning cost-benefit analysis that deterrence justifications drag into cases that are simply about one party harming another.<sup>178</sup>

### *B. Other Benefits*

My account also forecloses unattractive inferences that follow from other justifications. For instance, awarding punitive damages based on harm to all similarly situated individuals suggests a profit gained at others' expense. In the case of deterrence, rewarding a plaintiff for being an enterprising litigant at best suggests that litigiousness is desirable. At worst, it creates the specter of a race to first possession where litigants compete to gain enormous rewards for minor injuries under the banner of deterrence.<sup>179</sup> By contrast, the moral accounting interest leaves a critic only the avenue of attacking the sincerity of a plaintiff's expression of her moral harm. If that attack occurs, at least we can say with confidence that the law has done nothing wrong in allowing the

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178. See Sunstein, Kahneman & Schkade, *supra* note 124, at 2121 ("There is good reason to believe . . . that if punitive damages are designed to produce optimal deterrence, juries should be eliminated, for it is doubtful that they can be made to carry out that task.").

179. This is the natural consequence of the lottery problem. Even those who have only the most contingent relationship to the injurer will try to be the lucky litigant who captures the punitive damages windfall.

plaintiff to assert her moral entitlement to respect and in endorsing it (or not) through a corrective justice framework.

By classifying punitive damages as a response to a specific kind of moral harm and including them within corrective justice, I keep considerations of damages properly bounded.<sup>180</sup> External considerations having to do with something other than the plaintiff's harm are simply inappropriate and unjustified as outside the bounds of tort's normative enforcement. If the state wishes to further that policy, it may do so through legislation that specifies individual plaintiffs' entitlements rather than relying ad hoc on individual plaintiffs to enforce that policy.<sup>181</sup>

My account removes punitive damages from purely subjective judgments by judges<sup>182</sup> by defining punitive damages in relation to individuals' own assertions of their moral harm. In doing so, it places punitive damages on a justificatory footing that a judge might feel uncomfortable contesting – because in doing so, she would be contesting not only a plaintiff's assertion of her own moral worth but a jury's endorsement of the same.

Ultimately, if state courts were to understand punitive damages according to my account, they would avoid making tort issues into federal constitutional questions in the first place. Furthermore, they would eliminate conflicting decisional rationales involving principles of deterrence, state policy, fairness,

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180. At the same time, my account avoids the problem identified by Zipursky of “treat[ing] punitive damages as . . . a misnamed element of compensatory damages.” Zipursky, *supra* note 36, at 750. This is a technical point but one worth mentioning. Zipursky uses the term in the sense that compensatory damages make someone financially whole. On my account, punitive damages are distinct from compensatory ones because they respond to moral harms, not wrongful losses. Thus while they are compensatory, they are *not* meant, on my account, to make someone financially whole; rather they are a matter of moral accountability.

181. This point ties in with another of Justice Breyer's concerns, that “here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 596 (1996) (Breyer, J., concurring). Not only does this point tie into my argument against instrumental accounts more broadly, it reminds us that government should be capable of implementing policy through legislation rather than relying on private attorneys general. And in fact, the federal government *has* legislated policy goals when it wants to encourage, for example, fraud reporting, through the False Claims Act. The False Claims Act shows that when the government wants private enforcement of its policies, it asks for it, and it *limits* the portion of the award to plaintiffs to *one-quarter* of the *treble* damages the government claims. 31 U.S.C. § 3729 (2006).

182. See *Gore*, 517 U.S. at 599 (Scalia, J., dissenting) (arguing that under the majority's approach, punitive damages are “constrained by no principle other than the Justices' subjective assessment”).

and retribution, solving the definitional problem. Instead, courts and juries would be limited to two simple questions of accountability: (1) has the plaintiff suffered a wrongful loss for which the defendant may fairly be held responsible, and (2) has she suffered the wrongful loss in a morally harmful way such that a separate damage award is required to address her moral harm? While uncertainty would persist in these judgments, uncertainty is not the problem; the lack of a principled basis behind those judgments is.

## CONCLUSION

With a bit of background on corrective justice and competing theories of tort law, I argued that existing instrumental accounts of punitive damages were at odds with tort law's normative structure. I demonstrated the need for a harmonized relationship between punitive damages and tort law more generally that solves the problems caused by that disjoint. From a novel idea, tort law's moral accounting interest, I developed an account that reconciled corrective justice with punitive damages under a unified normative theory and solved the problems I identified in punitive damages jurisprudence. In doing so, I supplied corrective justice theorists with a defense to the charge that, for all of their theory's merits, they have failed to explain an important feature of tort remedies.

As it turns out, accountability stretches beyond wrongful losses, to the way in which we treat one another. In other words, our legal system maps accountability onto what our actions *express* about others as persons when we injure them, and not simply onto what our actions cause in terms of physical or economic losses. We certainly should not be surprised, if we understand the features of moral accountability embedded in punitive damages, to find them in the area of law most interested in accountability more generally.

My project has been to identify the defining features of punitive damages and to explain those features in order to understand what punitive damages are and what they accomplish. Only then can we know what their salient normative features are and how to properly use and evaluate punitive damages in a coherent manner. That was my goal not least because the stakes of misusing or misconceiving tort law and punitive damages are high, both in monetary and in moral terms.