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THE MORAL FOUNDATIONS OF PUNITIVE DAMAGES

David G. Owen*

I. INTRODUCTION

Punitive damages are an odd creature in the law. Inhabiting a strange borderland between the civil and criminal law, they are assessed as civil fines against persons guilty of flagrant misconduct that violates the rights of others. Their justification is rooted in the goals of retribution and deterrence,¹ which underlie the criminal law, while they are "awarded" to plaintiffs as "damages" in private lawsuits. The resulting combination of civil and criminal law theory and doctrine has generated a variety of problems and a long history of criticism concerning the fairness and utility of this hybrid remedy.² Central to the current tort law reform debate is the

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1. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2920 (1989). Retribution and deterrence as justifications for punitive damages are examined generally, and in the products liability context, in Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1277-99 (1976) [hereinafter Punitive Damages]. The functions of punitive damages are there separately described as punishment, deterrence, law enforcement, and compensation. The correspondence of these four functions to the moral philosophy framework of this Article is roughly as follows: Punishment and compensation are embraced by the freedom justification, and deterrence and law enforcement are embraced by utility. The term "retribution" is used in this Article in lieu of "punishment," since the latter term describes the more general function of punitive damages, whereas retribution and deterrence are more particular subgoals of punishment.

2. See the early, sharp criticism by the Supreme Court of New Hampshire, which never has fully accepted the punitive damages doctrine: "The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law." Fay v. Parker, 53 N.H. 342, 382 (1873). Compare the views of the Supreme Court of Wisconsin, which has long found the doctrine comfortably sandwiched between the law of torts and crimes:

[It] is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restraints the strong, influential, and unscrupulous, vindicates the right of the weak, and

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legitimacy of various aspects of the law of punitive damages,\(^3\) and recently the debate has spread to their constitutionality as well.\(^4\)

Since legal legitimacy is largely dependent upon moral legitimacy, an inquiry into the foundations of punitive damages in

encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law.

Luther v. Shaw, 157 Wis. 234, 238, 147 N.W. 18, 20 (1914).


moral philosophy is in order. This Article first explores the moral ideals of freedom and utility, and both are found to provide substantial support for the doctrine of punitive damages. The conditions of power, truth, and trust are next considered, and the rectification and prevention of their abuse is seen to provide significant additional moral justification for the doctrine. Next, the justifications for punitive damages are seen to reach only so far, and sometimes to conflict with one another, thus precluding on moral grounds the assessment of such damages in most cases of accidental harm. Finally, the two central aspects of the doctrine, the standard of liability and the measurement of amount, are re-examined in terms of moral theory.

Throughout the inquiry, the various other moral issues are illuminated by another ideal of central importance—equality. The community of humans imposes upon itself as sovereign the moral principle of equality through principles of equal justice, and individuals are constrained in many respects by the law of private rights to accord a respect to the rights of other persons equal to their own. While many may quarrel with wider theories of equality, that require for example the equal distribution of resources, some narrow view of equality based on equal moral worth is a widely accepted precept in our society. The use of punitive damages will

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5. Very little effort has been devoted to examining punitive damages in terms of moral philosophy, and the inquiry here is but a preliminary effort by a tort law theorist. Other explorations of this topic include Ausness, supra note 2; Ellis, supra note 2, at 3-12; Johnston, supra note 2, at 1429-33; and Mallor & Roberts, supra note 2. For a perceptive and thorough application of moral theory to a number of punitive damages issues, see Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741 (1989). Two excellent introductions to law and moral philosophy are T. Morawetz, *The Philosophy of Law: An Introduction* (1980), and J. Murphy & J. Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* (1984).

6. This weak, formal, "libertarian" conception of equality arguably may be collapsed into notions of freedom or right, which might reduce confusion. *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Consider Kant: "This principle of innate freedom contains within itself all the following rights: Innate equality, that is, independence from being bound by others to do more than one can also reciprocally bind them to do . . . .\" I. Kant, *The Metaphysical Elements of Justice (Rechtslehre)* *237-38* (J. Ladd trans. 1965) (1797) [hereinafter *Metaphysical Elements of Justice*]. Yet it may be argued the other way, although I think less persuasively, that freedom collapses into equality, and that the idea of a right to liberty is itself a confusion. R. Dworkin, *Taking Rights Seriously* xiii & ch. 12 (1977). The position of this Article is that the principle of equality appears to lend a helpful perspective as a separate ethic reflecting a powerful ideological tradition of Western culture that traces its roots to classical Greece. "The law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice
be seen to be supported and constrained by equality in addition to freedom and utility.

II. FREEDOM

Perhaps the most respected among moral and political values in this nation is freedom. This includes the individual’s right to be free of unwarranted interference from both the state and other citizens. The Bill of Rights protects the former type of freedom ("liberty"), while the private law—including the law of torts—protects the latter. Freedom is the most fundamental right of the individual human being. Each person is a morally special, autonomous creature who has the ability and right to control his own destiny and a duty to do so in a manner respectful of the similar right of others. Each person, therefore, is entitled to be treated as an end in himself, who should not be used to his detriment merely as a means to accomplish someone else’s end. The individual’s dignity derives from his membership in the human species.

or if the one inflicted and the other has sustained an injury. Injustice then in this sense is unfair or unequal, and the endeavour of the judge is to equalize it.” ARISTOTLE, NICOMACHEAN ETHICS 154 (J. Welldon trans. 1987) (Bk. 5 ch. 7) [hereinafter NICOMACHEAN ETHICS]. See generally R. DWORKIN, LAW’S EMPIRE 295-301 (1986); J. RAWLS, A THEORY OF JUSTICE §§ 11, 32-39, 77 (1971); Chemerinsky, In Defense of Equality: A Reply to Professor Westen, 81 Mich. L. Rev. 575 (1983); Greenawalt, How Empty is the Idea of Equality?, 83 Colum. L. Rev. 1167 (1983).

7. "Freedom (independence from the constraint of another’s will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.” METAPHYSICAL ELEMENTS OF JUSTICE, supra note 6, at *237. Compare Hegel: "The will is free, so that freedom is both the substance of right and its goal . . . .” G. HEGEL, PHILOSOPHY OF RIGHT para. 4 (T. Knox trans. (1952)) (1821).

8. “Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law.” METAPHYSICAL ELEMENTS OF JUSTICE, supra note 6, at *231. See also supra note 7 and infra note 11. That a state’s constitution and laws should be guided by this idea is argued in I. KANT, CRITIQUE OF PURE REASON *A316/B373 (N. Smith trans. 1929 [1965 ed.]) (1781, 2d ed. 1787). See Finnis, Legal Enforcement of “Duties to Oneself”: Kant v. Neo-Kantians, 81 Colum. L. Rev. 433 (1987). Compare Rawls’s first principle of justice: “[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” J. Rawls, supra note 6, at 60.

9. “The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *429 (L. Beck trans. 1959) (1785) [hereinafter FOUNDATIONS OF THE METAPHYSICS OF MORALS].

10. See supra note 7 and infra note 11.
That membership includes certain morally significant, distinguishing characteristics that justify respecting the worth of each member, including the capacity for rational thought and the possession of free will.\textsuperscript{11} How individual humans put these characteristics to work (together with the resources they are born with and acquire) determines their moral character, the moral quality of their acts, and whether they deserve reward or punishment for those acts.

Kantian theories of ethics of this type have corresponding theories of punishment that provide substantial moral justification for punitive damages. Such deontological\textsuperscript{12} concepts of punishment look backward to the commission of the wrong and seek to rectify it retributively by inflicting punishment upon the wrongdoer according to his just desert.\textsuperscript{13} Since punitive damages are designed to punish conduct that is "quasi-criminal,"\textsuperscript{14} it may be helpful to examine them in terms of a metaphor based on theft.\textsuperscript{15} The

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\item \textsuperscript{11} "As a rational being..., man cannot think of the causality of his own will except under the idea of freedom, for independence from the determining causes of the world of sense (an independence which reason must always ascribe to itself) is freedom. The concept of autonomy is inseparably connected with the idea of freedom, and with the former there is inseparably bound the universal principle of morality, which ideally is the ground of all actions of rational beings, just as natural law is the ground of all appearances." \textsc{Foundations of the Metaphysics of Morals, supra} note 9, at *452-53. "Autonomy is thus the basis of the dignity of both human nature and every rational nature." \textit{Id.} at *436. Kant here summarized his conclusions that he had developed elaborately in \textit{Critique of Pure Reason} (1781). \textit{See id.} at xiv-xvi (Introduction by L. Beck).
\item \textsuperscript{12} Deontology is the branch of ethics dealing with moral obligation from a nonconsequentialist perspective.
\item \textsuperscript{13} \textsc{Metaphysical Elements of Justice, supra} note 6, at *331. \textit{See generally} J. \textsc{Murphy, Retribution, Justice, and Therapy} (1979); \textsc{Moore, The Moral Worth of Retribution, in Responsibility, Character, and the Emotions} 179 (F. Schoeman ed. 1987). The retributive theory of punishment necessarily postulates the free will of the offender. \textit{See Note, Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis}, 76 Geo. L.J. 2045, 2063-64 (1988).
\item \textsuperscript{15} Theft is a felicitous paradigm for the type of wrongful conduct involved in the present context, in part because it highlights the restitutionary function of both punishment theory and tort law theory based on corrective justice. Theft was Aristotle's first example of
wrongdoer (the “thief”) deserves to be punished because he has “stolen” things of value, from both the individual and society, that need to be returned—in order to prevent the unjust impoverishment of the victim (and society) and the unjust enrichment of the thief. The scales of justice, thrown out of balance by the offense, can only be restored by corresponding punishment. In this respect, the offender’s punishment serves as a form of “restitution” for the theft.

The involuntary transaction form of corrective justice. NICOMACHEAN ETHICS, supra note 6, at 150 (Bk. 5 ch. 5).

16. Although a pure rights theorist would substitute “other persons” for “society,” the latter concept adequately conveys the notion and has the benefit of convention and simplicity.

17. The use of the correlative notions of unjust enrichment and restitution, see RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tent. Draft No. 1, 1983), stretches those concepts beyond their usual meaning in legal discourse. Whereas, in conventional usage, a person seeking restitution must have conferred a benefit on the other party, the victim in a tort action has instead suffered a detriment at the hands of the wrongdoer. Yet these twin notions are useful in the present context, for they illuminate the symbiotic nature of the rights of actors and victims within a closed system of corrective justice based on equal rights. “[T]he wrong, and the damage award that undoes it, represents a single nexus of activity and passivity where actor and victim are defined in relation to each other.” Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 YALE L.J. 949, 978 (1988). When an actor deliberately expands his activity beyond his own rights space into the rights space of a victim, the actor profits illicitly—by arrogating to himself more freedom than he was entitled to at the expense of the freedom to which the victim was entitled. In this sense, the victim involuntarily confers a benefit—freedom (rights space)—on the actor, which “benefit” the victim may fairly ask to be “returned.” This idea is found in Aristotle:

When one person deals a blow and the other person receives it, or one person kills and the other is killed, the suffering and the action are divided into unequal parts, and it is the effort of the judge to restore equality by the penalty he inflicts, as the penalty is so much subtracted from the profit. For the term “profit” is applied generally to such cases, although it is sometimes not strictly appropriate; thus we speak of the “profit” of one who inflicts a blow, or the “loss” of one who suffers it, but it is when the suffering is assessed in a court of law that the prosecutor gets profit, and the guilty person loss. That which is fair or equal then is the mean between excess and defect. But profit and loss are excess and defect, although in opposite senses, the excess of good and the defect of evil being profit, and the excess of evil and the defect of good being loss. The mean between them, is, as we said, the equal, which we call just. Hence corrective justice will be the mean between profit and loss.

NICOMACHEAN ETHICS, supra note 6, at 154-55 (emphasis in original). Aristotle further reasoned as follows: “That which is just then in corrective justice is a mean between profit and loss of a particular kind in involuntary cases. It implies that the parties to a transaction have the same amount after it as before.” Id. at 157 (emphasis in original).

Ernest Weinrib’s writings are especially valuable in developing a pure, neo-classical model of corrective justice defining law as a coherent normative unit based on the doing and suffering of harm. See, e.g., Weinrib, Right and Advantage in Private Law, 10 CARDozo L. REV. 1283 (1989); Weinrib, The Special Morality of Tort Law, 34 McGill L.J. 403 (1989);
The law may be seen as surrounding each person with a bubble of rights space, within which the person is free to act and which is declared off-limits to others in the exercise of their own freedom of action. The establishment of rights bubbles, with legally defined borders, provides each person with a sense of security that he can operate within his private bubble untrammelled by outside interference. When one person intentionally violates the rights bubble of another, he “steals” the victim’s autonomy, manifesting the idea that the thief is more worthy than the victim. If autonomy thefts—intentional “border crossings” into other persons’ zones of rights—were not subjected to penalties in addition to the restoration of the stolen goods (compensatory damages), the rectification of the transaction would be incomplete. This is because the theft transaction involves two things: (1) the transfer of goods from the victim to the thief; and (2) the deliberately wrongful nature of the transfer, in violation of the victim’s rights—the illicit transfer of freedom from the victim to the thief. Punishment serves to restore the equality of the victim in relation to the thief by diminishing the worth and freedom of the thief in proportion to the worth and freedom stolen from the victim. The law in this manner reaffirms the equal worth of all and the duty of each person to respect—to assign equal worth to—the rights of others.


18. Kant considered autonomy, freedom of the will, to be “the supreme principle of morality.” FOUNDATIONS OF THE METAPHYSICS OF MORALS, supra note 9, at *440; see supra note 11.


The theft of goods and freedom—intentional border crossings—also diminishes the worth of the community in relation to the thief. When persons in the community agree to rules establishing the boundaries of their legal rights, they each surrender in the process their freedom to violate the boundaries of other persons. This is, of course, a reciprocal sacrifice which contemplates that all citizens share equally in the surrender of such external freedom in order to maximize and protect the internal freedom within their private bubbles. When a thief intentionally violates the border rights of another, he assigns to himself more than the equal share of freedom the community assigned by law to him. In comparison with the thief, the law-abiding members of society are impoverished in proportion to the gain appropriated by the law-breaker. In this respect, the thief has stolen value from society by breaking the reciprocal security pact based on equal rights. In the process of restoring the victim’s worth and freedom, therefore, punishment serves to restore the community’s value of equal rights as well. Punitive damages thus serve to repay the offender’s “debts” to both the victim and society, and so to restore the proper moral balance.

It is appropriate in Kantian theory for the thief to pay at least a portion of a punitive damages “fine” directly to the victim who has been forced to resort to the civil courts to recover his stolen goods. Since the winning party in civil litigation in this nation generally must bear his own litigation costs, including attorneys’ fees, his true “recovery” is diminished substantially by these expenses. Whatever the merit of this result in cases of innocent or negligent border crossings, the recovery is clearly inadequate when the cross-

21. See supra note 16.

22. While one may argue that persons never do in fact make such agreements, a contractual perspective of this sort illuminates the fairness of the trade-off. See generally Metaphysical Elements of Justice, supra note 6, at *315-16; J. Rawls, A Theory of Justice 17-22 (1971).

23. See, e.g., J. Murphy, Kant: The Philosophy of Right 142-43 (1970). While Murphy now doubts that this rationale can be the primary aim of criminal punishment, see Murphy, Does Kant Have a Theory of Punishment?, 87 Columbia Law Review 509, 522-23 (1987), it remains a conventionally accepted retributive rationale. See, e.g., Falls, Retribution, Reciprocity, and Respect for Persons, 6 Law & Philosophy 25 (1987). Compare Hegel's conception of punishment as the nullification of a crime: “Hence to [penalize the wrongdoer] is to annul the crime, which otherwise would have been held valid, and to restore the right.” G. Hegel, supra note 7, at para. 99.

24. See infra note 111 and accompanying text.
ing is intentional. In such cases, the thief, not the victim, should bear the transaction costs involved in restoring the victim's stolen goods and freedom. But the restoration of the litigation costs alone (in addition to the directly stolen goods) provides inadequate restitution of the victim's and society's stolen freedom, as discussed above. Thus, both to complete the restitution to the victim and society, and to provide the wrongdoer with his entire just desert, punitive damages should exceed the amount of the victim's litigation expenses, in proportion to the wrong.

III. Utility

Another moral justification for punishment is based on the notion of utility. Consequential in nature, this concept evaluates the ethical content of acts and rules in terms of their aggregate welfare—the extent to which the aggregate or average happiness of all citizens is advanced. Standing in contrast to rights-based theories of ethics such as freedom (and to the corresponding retributive theories of punishment based on just deserts), the principle of utility thus is teleological, looking forward to the future effects of acts and rules on the general welfare as the basis for judging their moral content.

In utilitarian theory, therefore, punishment is morally proper only if it is calculated to produce a net benefit for society in general, hopefully for the victim, and perhaps even for the wrongdoer. Punishment may make the victim and society more secure by providing them with a sense of confidence that future wrongdoers similarly will be held to account. In addition, punishment may have educative value for the wrongdoer by teaching him the wrongfulness of the conduct and helping to instill in him a proper

25. See supra text accompanying note 23.
26. While the notion of desert may be considered as a unitary notion, its division into separate restorative and depletive functions demonstrates its restitutionary character.
27. That punishment must be proportional to the wrong is based on the principle of equality. Nicomachean Ethics, supra note 6, at 150-57 (Bk. 5 chs. 6 & 7); Metaphysical Elements of Justice, supra note 6, at *332. On the proportionality requirement in retributive theory, see also H.L.A. Hart, Punishment and Responsibility 231, 233-34 (1968).
sense of moral responsibility. Finally, and most importantly, wrongdoers are subjected to punishment in an effort to prevent future misconduct. As is true with criminal punishment, punitive damages are widely justified upon this starkly utilitarian basis of deterrence. Punitive damages assessments serve as an admonition, to the wrongdoer and others alike, that similar misconduct may be discovered and punished in the future.

To the extent that the punitive damages device actually does deter misbehavior, and one may doubt the extent to which it does, it should in theory advance the general welfare. To understand this point, one needs to shift attention from punitive damages to the rules of liability (for compensatory damages) at civil law. Liability rules in general may be assumed at least roughly to promote utility. Rights protection aside, promotion of the general welfare would appear to be the primary purpose of both the legislatures and the courts in the formulation of liability rules.

29. While moral education concerns rights, the argument is instrumentalist and so is included here.


32. This assumes that it does not deter more good activity than bad and that the transaction and other secondary costs of achieving the deterrence are exceeded by the beneficial results.

Even when one factors in rights protection, the liability rules generally tend toward welfare maximization in the long run because of the security rights-based rules promote.\textsuperscript{34}

If liability rules for compensatory damages themselves promote utility, the question that next arises is why there may be a need for a supplemental, penal device in the form of punitive damages. The answer lies in the failure of many members of society to comply with the liability rules. Since selfishness is inherent at least to some degree in both humans and institutions, deliberate (and reckless) violations of the liability rules should be expected to occur from time to time. Many violations of the liability rules are not discovered or enforced,\textsuperscript{35} because of high transaction costs and other reasons, so that selfish persons may sometimes rationally choose to maximize their personal welfare at the expense of the general welfare. By discouraging such deliberate rule violations, punitive damages thus serve as an enforcement mechanism that enhances compliance with the rules of law, and so promotes the public good.\textsuperscript{36}

In addition to promoting optimal deterrence through effective law enforcement, punitive damages have another consequentialist function that cuts across both the freedom and utility ideals—the promotion of equality. In aggregating welfare, the utilitarian presupposes an underlying equality of worth of every member of society, as do most freedom theorists in devising models of rights.\textsuperscript{37} When people deliberately breach the liability rules, they assign to themselves a greater worth than they assign to others. As discussed above, a selfish actor may seek to advance his own good at the expense of what he knows to be the greater good of others by choosing to violate the rules, knowing that his violation may not be

\textsuperscript{34} Thus, while the application of such rules may generate disutility in certain cases, they generally satisfy the broader principles of “rule utilitarianism” by promoting the general welfare over time. For discussions of rule utilitarianism, see, e.g., Rawls, \textit{Two Concepts of Rules}, 64 Phil. Rev. 3 (1955); Urmson, \textit{The Interpretation of the Moral Philosophy of J. S. Mill}, 3 Phil. Q. 33 (1953).

\textsuperscript{35} For Robert Cooter’s perceptive analysis of this issue, which he calls “enforcement error,” see Cooter, \textit{Punitive Damages for Deterrence: When and How Much?}, 40 Ala. L Rev. 1143 (1989).

\textsuperscript{36} This again assumes, from a utility perspective, that the resulting benefits exceed all costs of the enforcement process. For a thorough explanation of why law enforcement is also justifiable on retributive theory, see Chapman & Trebilcock, \textit{supra} note 5.

\textsuperscript{37} Although the promotion of equality is weakly supportable on utility grounds, its foundation lies much closer to freedom than utility. See \textit{supra} note 6.
discovered or rectified in a court of law. By serving as a counter-weight to transaction costs and other causes of enforcement failures, punitive damages tend to equalize the interests of the selfish actor with the interests of others in the community. In this way, the threat of punitive damages encourages selfish persons to accord equal respect to the rights of others.

IV. Power, Truth, and Trust

Next to be considered are three notions that helpfully inform an inquiry into the moral foundations of punitive damages: power, truth, and trust. Each of these concepts describes an important characteristic of human relationships. The abuse of any of these three relational conditions may involve a flagrant denial of another's rights, and so justify a punitive assessment.

A. Power

Many punitive damages cases involve an abuse of power. Power is the control that one person has over the welfare of another. It describes a relationship between persons based upon their relative possession of different types of resources—including attributes (intelligence, strength, beauty), skills (knowledge, persuasiveness, marksmanship), material resources (money, automobiles, guns), and personnel resources (friends, servants, employees). The more resources possessed by X, and the fewer possessed by Y, the greater is X's power relative to Y. If X is very smart, owns a gun, is a good shot, and has two strong friends, and Y is dull-witted and has no weapons or friends, X is powerful and Y is not. If and when the two interact, X's power status is reflected by Y's commensurate vulnerability.

Putting aside the question of equality in the initial distribution of resources, there ordinarily is nothing wrong with this state

38. A valuable exploration of the role of power in a variety of tort law contexts is M. SHAPO, THE DUTY TO ACT—TORT LAW, POWER, & PUBLIC POLICY (1977). For a preliminary consideration of the role of power in the punitive damages context, see Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103, 104-05 (1982) [hereinafter Civil Punishment].

39. Distributive justice considerations are beyond the scope of this Article. See generally N. BOWIE, TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE (1971); M. DEUTSCH,
of affairs. In fact, X is entitled to the protection of his many resources just as Y is entitled to the protection of his paltry few. Yet X's possession of many resources increases the amount of care he must take to prevent his power from harming Y. This is required by the principle of equality of respect, since Y is entitled to equal respect as an autonomous person with legal rights of equal value to those of X. Sometimes, this may even be required by principles of utility, since X's power may make it easier for him to avoid crossing Y's borders: he can invest in methods to define vague borders (as by hiring lawyers), and he can invest in methods to avoid their penetration (as by hiring border patrollers). Moreover, as X's power increases, his direct control over his power tends to decrease, increasing the possibility of "unintended" border crossings with Y. Thus, respect for the integrity of Y's borders may require X to provide greater vigilance in their protection through "indirect" control: as by hiring border definers and patrollers, purchasing border protection devices, and informing Y of the power directed at him so that Y may act to protect his own borders from assault. In sum, as power increases, so too does the responsibility to avoid harming the rights of others.

The aggregation of power has another implication for the law of punishment: it affects the type of border crossings that deserve to be punished. For persons with very little power, only intentional border crossings would appear to deserve punishment, since there would be little risk of harm from their infrequent and weak unintended crossings; nor would punishment of the unintended crossings by weak persons appear to be efficient or otherwise advance the public welfare. Yet powerful persons, knowing that their power "accidentally" may penetrate deeply into many borders unless effectively controlled, may morally be held to account for failing to take such "extra" precautionary steps. Such persons well know that they are often the cheapest cost avoiders, and so they often should also know that utility requires action on their part.


40. This is simply an extension of the familiar calculus in negligence law that greater danger requires greater caution. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 34, at 208 (5th ed. 1984) [hereinafter Prosser & Keeton].

41. In some such instances, X will be a cheaper cost avoider than Y.
The failure of powerful persons to take such precautionary steps often will reflect a conscious indifference to the probability of harmful consequences that is the moral equivalent of intentional border crossings or "theft." Thus, punitive damages are often appropriate for serious abuses of power.

B. Truth and Trust

Many punitive damages cases involve an abuse of truth or trust. Truth concerns the actual state of a matter and its correspondence to some proposition, perception, or state of mind.\(^{42}\) As a fulcrum for ordering one’s life, truth is a resource of great value that gives definition to the world and one’s place within it. The freedom to possess the truth is therefore precious, and its theft is pernicious.\(^{43}\)

In human relations, truth concerns a person’s correct perception of the state of a relationship, including (1) the relative power possessed by persons within the relationship; (2) each person’s intentions regarding how he will exercise his power relative to the

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\(^{42}\) As I use the term “truth” here, it means much more than the rectitude of a statement. But I use the term less rigorously than modern ontologists, epistemologists, and philosophers of logic. Among the major philosophical theories of truth, the correspondence theory at least bears some resemblance to the concept as I describe it. My use of the term is basically empirical, for it concerns “truths of fact”—variously classified as “contingent,” “synthetic,” or “a posteriori”—rather than their opposites which concern “truths of reason.” See generally A. Grayling, An Introduction to Philosophical Logic ch. 3, at 44-47 (1982); J. Mackie, Truth Probability and Paradox 30 (1973); Prior, Correspondence Theory of Truth, in 2 The Encyclopedia of Philosophy 223 (1967). The notion of truth as thus conceived approximates the concept of knowledge, which Plato considered to be “justified true belief.” P. Moser & A. Vander Nat, Human Knowledge: Classical and Contemporary Approaches 3 (1987). Yet, since knowledge involves the possession of truth, the latter is the prior—and thus, I think, more valuable— notion.

\(^{43}\) Consider the views of Kant:

The greatest violation of man’s duty to himself merely as a moral being . . . is . . . the lie. . . . By a lie a man makes himself contemptible . . . and violates the dignity of humanity in his own person. . . . A man [who lies] . . . has even less worth than if he were a mere thing. For a thing, as something real and given, has the property of being serviceable. . . . But the man who communicates his thoughts to someone in words which yet (intentionally) contain the contrary of what he thinks on the subject has a purpose directly opposed to the natural purposiveness of the power of communicating one’s thoughts and therefore renounces his personality and makes himself a mere deceptive appearance of man, not man himself.

others; and (3) each person’s beliefs concerning how the others will exercise their power relative to him. Thus, when one person harms another, the pre-existing “states of mind” of both persons concerning the nature of the relationship are of special significance in assessing the moral quality of the harmful act. If, for personal advantage, one person intentionally and harmfully misleads another person into believing reality is other than what it is, then the actor is a thief who should be punished for stealing the victim’s freedom to pursue his own life plan based upon that truth to which he fairly was entitled. Distorting another person’s view of truth for private gain is blatantly disrespectful of the equal dignity of the other person. Fraud thus is subject to punishment, both in the law of crimes and torts, for it is based upon the deliberate deception of another to his detriment. Punitive damages, therefore, are frequently awarded and often are highly appropriate in cases involving fraud and other intentionally deceptive conduct.

Much more difficult is the moral and legal relevance of the mere status of inequality in the possession of truth between two parties. That is, what is the relevance of X’s knowing something that Y does not? Here we are confronted with the classic dichotomy between action and inaction, misfeasance and nonfeasance, and whether there should be a duty of affirmative action—whether X should have a duty to share the truth with Y. The first and classic answer of the law to this is “No”: X need not give the truth to Y. This is so even if X knows that Y needs the truth to avoid harm, and X intends to benefit from Y’s ignorance of the truth. This is because the law traditionally has treated truth as an ordinary resource, lawfully possessed unequally by different persons, that generally may be exploited like other resources to one’s advantage. But the second answer to this question is the one of most

44. The purpose of a lie may be to benefit another, in which case it may be justifiable. See generally C. Fried, Right and Wrong 69-78 (1978).

45. See id. at 67.


47. See Prosser & Keeton, supra note 40, at § 106. This rule, if such it be, is subject to a number of important, if vague, exceptions. See id. See generally K. Scheffele, Legal Secrets: Equality and Efficiency in the Common Law chs. 6 & 7 (1988). The basis for the misfeasance requirement in deontological moral theory is explained in Weinrib, Understanding Tort Law, 23 Val. U.L. Rev. 485 (1989); Weinrib, Right and Advantage in Private Law, 10 Cardozo L. Rev. 1101, 1115-19 (1989).
importance here: If the relationship between X and Y is of a certain, "special" type, X must give Y the truth, or otherwise act affirmatively to protect Y's interests. Doctors, for example, have this duty to their patients, as do business partners to each other.

The duty to provide truth to another in such special, "confidential" relationships\textsuperscript{48} derives largely from two factors related to the truth—power and trust. The power of doctors over the welfare of their patients is of course enormous. Patients are highly vulnerable to harm from health problems about which they often have virtually no knowledge, and over which they have virtually no control—other than by engaging the services of a professional. By contrast, doctors attain their "professional" status by acquiring substantial knowledge (and corresponding power) concerning the solution of complex problems, which knowledge (and power) they then sell to persons who are vulnerable because they need such resources to solve their problems.

Confidential relationships are based on trust. Trust is a close correlate of truth. It is one person's belief, based on his conception of reality, that another person will act (or remain) in a certain way (or condition). In the present context, trust is the first person's belief that the other will act (or refrain from acting) in a manner that will protect (or avoid injuring) the first person's interests. This belief is based on the first person's past experience with the other, including any promises made by the other person, as well as on the first person's general life experience. Established categories of relationships give rise, by custom and law, to various expectations between the parties concerning how the parties will relate to one another in the course of the relationship. Especially when a powerful person is paid by a vulnerable person to protect the latter's interests, the vulnerable person generally will trust that he may be secure in surrendering to the powerful person responsibility for protecting those interests.

The doctor-patient relationship is a paradigm relation where trust permits the first person justifiably to transfer responsibility for his care to the powerful party. The nature of this relationship is such that the patient believes, and is induced to believe, that the doctor will use all available resources to help cure his problem, will

\textsuperscript{48} Such relationships of trust and confidence include, but may not be limited to, "fiduciary" relationships. See generally K. Scheffele, supra note 47, at 171-75.
not needlessly cause him new problems in the process, and will assign the patient’s interests at least equal respect to his own during the duration of the relationship. If the doctor harms the patient accidentally, compensation may or may not be in order under principles of negligence. But the matter may not end there, for such a relationship is based on trust, on the patient’s vision of certain truths of the types described above. If, contrary to this trust, the doctor knows that an untruth concerning the foundations of the relationship exists, and the untruth leads to an accident that causes the patient harm, then punishment—in addition to compensatory damages—may be in order.

For example, if the accident is attributable to the doctor’s hangover from excessive drinking the night before, the doctor’s choice to operate involves a conscious decision to penetrate the boundaries of the patient’s rights (and body) in violation of important (if implicit) “promises” that the doctor deliberately has made untrue. Similarly, if the patient’s harm results from conduct or procedures that reflect the doctor’s interest in maximizing income at the expense of providing proper care, then the doctor may be seen as deliberately rendering false the underlying premises of the relationship—equal dignity and respect—which the patient accepted as true on trust. In both these cases, the doctor would be guilty of a type of “theft.” This is because the doctor rendered false (yet let the patient falsely believe the truth of) promises implicit in the relationship of trust between the two. If the doctor did not affirmatively create the trust, he at least deliberately exploited it, so that he may be said to be guilty of the “theft” of the patient’s freedom to pursue his life plan based on trust. By that theft he denied the equal dignity of the patient by using the patient detrimentally as a means merely to promote his ends of profit and convenience.

Punitive damages appear especially deserved in cases of this type, where a powerful person for profit deliberately misleads a vulnerable person to his harm. Moreover, deterrence appears particularly useful in such cases, since abuses of truth and trust by powerful persons may be subtle and hard to detect. Thus, retribu-

49. See generally Prosser & Keeton, supra note 40, § 32, at 185-93.
50. Generally, the right to trust even a fiduciary would seem bounded necessarily by some notion of justifiability within the particular factual context.
tion and law enforcement both provide substantial moral justification for punitive damages where power, truth, and trust are all abused.

V. MORA LIMITATIONS ON PUNITIVE DAMAGES

To this point the inquiry into the moral justifications for punitive damages has proceeded upon certain assumptions which now need to be relaxed. Most of the preceding discussion has assumed that the wrongdoer's misconduct was deliberately wrongful, whereas ordinarily the nature of the misconduct and the defendant's state of mind, and their blameworthiness, are in dispute. Moreover, it has been assumed so far that punitive damages are assessed in amounts that are appropriate, whereas in practice the amounts of such assessments are only infrequently measured closely to their underlying moral justifications.\(^5\) Integrity in the legal system requires that punitive damages be allowed only in cases where there is adequate moral justification for their assessment, and that they be denied in cases where such justification is absent. Similarly, in cases where such damages are proper in some amount, that amount should be enough to accomplish the underlying moral imperatives, but just enough, and no more. There are, in other words, inherent moral limits to the punitive damages remedy.

A. Freedom

As discussed above, punitive damages often are appropriate in cases of "theft"—situations where a wrongdoer intentionally invades a victim's bubble of rights. Although accidental bubble intrusions may support a "restitutionary" claim for damage to any protected goods, punishment ordinarily is not deserved because the actor did not steal the goods and freedom of the victim. If the actor compensates the victim for any damage to the victim's goods, then (transaction costs aside) the restitution is complete. Furthermore, such complete restitution will correspondingly satisfy any debt to society, since the rules of tort law manifest a social recognition that some accidental border crossings are a necessary adjunct

\(^5\) See infra note 92; see generally Punitive Damages, supra note 1, at 1314-15.
to a system that seeks to maximize freedom (and utility); the restoration of the victim's goods is thus the only "penalty" that generally should be inflicted upon accidental injurers. Indeed, victims may not in moral theory have a claim even to the restoration of their goods if the damage was truly "accidental." So, in cases where "theft" is absent, punitive damages usually will be undeserved and hence improper, no matter how great the victim's loss may be.

In similar fashion, even "thieves" deserving punishment deserve it in only a measured amount. In addition to providing restitution for the directly stolen goods, the thief must in fairness also pay back the litigation costs incurred by the victim in prosecuting the restitutionary transaction, as discussed above. Moreover, the thief should pay an additional fine proportionate to the wrong to repair the damaged rights of the victim and society. But the thief should pay no more. By definition, any further punishment would be undeserved and so on a theory of desert would be morally improper.

If society constructs rules of law that are known to inflict punishment that is undeserved, the community itself is guilty of a kind of theft. Moreover, if a victim knows that punitive damages are unwarranted in his case, he is guilty as an accomplice to the theft if he pleads and recovers such damages. These thefts are not precise mirror images of an injurer's private thefts, since they are, in a sense, "legal" thefts. They nevertheless are thefts which, if unnecessary, are immoral and at least as objectionable as thefts of goods by private thieves. Legal thefts seem even more pernicious than private thefts because of the more active role of the community in accomplishing them: they are "group thefts," which violate the trust of individual citizens that the law will be as fair as possible in concept and execution. Because of the power and trust vested in the group as sovereign, the abuse of the sovereign-citizen relation by the infliction of undeserved punishment (group theft)

52. They may not have a claim unless one subscribes to a general system of strict liability. See Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973).
53. See supra notes 24-27 and accompanying text.
54. See supra notes 18-23 and accompanying text.
55. Due to both the poverty of words and concepts, and the inherent frailties of the litigation system, even the best-designed legal rules sometimes capture unintended victims. Such defects, although known to inhere in every rule, may be viewed as causing "necessary" rather than "intended" harm.
under the guise of law is morally more objectionable than private thefts.\textsuperscript{56}

\section*{B. Utility}

Utility theory also imposes clear constraints on punitive damages. If such assessments generate a net disutility for society, they are morally improper on this basis. It will be recalled that (optimal) deterrence is the principal utilitarian objective of punitive damages.\textsuperscript{57} A major problem for the utilitarian is defining the type of conduct to be deterred. It commonly is asserted that "harmful" conduct should be prevented, yet the proposition as so stated is seriously misleading.

For utility to be maximized, the goal must be to deter "wrongful" conduct, not conduct that is "harmful."\textsuperscript{58} That harmful conduct may not be wrongful is a fundamental premise of both rights and utility theories of ethics alike. Almost every action involves at least the risk of some type of harm both to the actor and to others. Harm must be accepted as a necessary by-product of virtually all activity. An action (or rule) is morally justifiable to the utilitarian if it produces the greatest possible balance of benefits over harm. Much happiness (and wealth) would be forsaken if society sought to prevent all harm. Indeed, it is hard to imagine life in a dynamic, technologically complex world if all conduct involving some risk of harm were outlawed. So the objective of utility theory is simultaneously to discourage excessively harmful activity and to promote usefully harmful activity. Accordingly, punishment should be inflicted only if it is calculated to deter conduct that is on balance harmful; conduct that produces on balance more good than harm should in theory be rewarded. "Wrongful," then, is the better word to describe the type of conduct to be deterred.\textsuperscript{59}

The utilitarian calculus also considers the effects of the punishment on the wrongdoer; a severe punishment may produce more

\textsuperscript{56} See infra text accompanying note 60.

\textsuperscript{57} See supra notes 31-36 and accompanying text.

\textsuperscript{58} Although utilitarian theorists often use the term "harm" in a net sense, to mean the excess of harmful over beneficial consequences, the term easily can be construed as meaning any harm whatsoever, as discussed infra text following note 58.

\textsuperscript{59} See generally PROSSER & KEETON, supra note 40, § 34, at 214 n.62; Problems, supra note 46, at 20-23.
harm (disutility) for the wrongdoer than benefit (utility) for society. Moreover, the transaction costs of inflicting punishment weigh in on the detriment side of the scales. Thus, the deterrence of conduct, even conduct properly defined as wrongful, is sometimes not worth the candle. There are, in other words, clear limits to the moral justification of punitive damages in utility theory.

C. Conflict in the Moral Theories

A remaining problem concerning the moral limits of punitive damages arises when the moral theories collide. The questions here are whether punitive damages are proper if they are socially beneficial, but not deserved, and vice versa. In any society committed in the least to principles of freedom, to the dignity of its individual citizens, and to "due" process of the law, the community cannot be allowed to punish a citizen solely to promote the public good. This is the type of morally repugnant group theft, reflecting an intolerable abuse of power and breach of trust, discussed above.60 Where punishment is undeserved, therefore, freedom ordinarily should trump utility.61

When the question shifts from liability vel non for punitive damages, to the determination of their proper amount, the preference for freedom arguably weakens. This is because the wrongdoer, proven to have flagrantly violated the social compact, arguably has forfeited certain of his rights over and above those necessarily withdrawn to restore the moral balance. It may be that the thief as "outlaw" should not be allowed to call upon the law for his own protection. Once the thief has deliberately stepped outside the law and grossly disregarded the interests of the law-abiding citizens who remained inside, perhaps his goods should be escheated to the community of law abiders to the extent necessary for the community to protect itself from further thefts. Having denied the equality of the victim and other members of society by his theft, the thief may have lost his moral claim to rely upon equality in calling for an amount of punishment proportional to his theft.

60. See supra text preceding and accompanying notes 55-56.
61. The demonstration of this fundamental proposition is beyond the scope of this Article. See generally G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis 24-26 (1970); R. Dworkin, Taking Rights Seriously xi (1977); Metaphysical Elements of Justice, supra note 6, at *331; J. Rawls, supra note 6, at 243-48.
Nevertheless, while a thief's claim to freedom from punishment beyond his just desert may have a more hollow ring than a victim's claim to freedom from private theft, the group generally should accord legal respect to the thief's claim of freedom from an undeserved degree of punishment. Indeed, rather than calling for the additional (group) theft of rights belonging to the thief, the initial theft should strengthen the communal resolve to reassert, through its treatment of the thief, the fundamental imperative of respecting moral rights. Outside the context of the wrong, society ordinarily should leave the dignity and equality of the thief intact.

Freedom (and equality) also should generally supersede utility when the conflict is the other way—when punishment is deserved but causes a net disutility to society. We have seen that retribution is a restitutionary concept that rests on freedom and equality: the victim and society have a right to have restored the stolen goods and freedoms by which the thief was enriched unjustly. If punitive damages law is properly defined and administered, the circumstances will be infrequent where such assessments will be deserved but on balance socially detrimental. Yet, even when such a conflict does arise, desert generally should take precedence over utility. The values of freedom and equality, underlying desert, both contain substantial power, and their joint protection would appear generally to require even a substantial social detriment.

VI. CONFORMING DOCTRINE TO MORAL THEORY

The justifications for the use and limits of punitive damages in moral theory provide the foundations for a morally sound system of punitive damages doctrine. The rules of punitive damages law, in other words, should comport as much as possible with the reasons in moral theory for such damages. The two central aspects of the doctrine that define its form—liability and measurement—thus need to be examined from this perspective.

62. See supra note 17 and accompanying text.

63. See sources cited supra note 61. This principle should be qualified in the mass tort context, where the restitutionary objectives of compensatory damages should take precedence over the restitutionary objectives of punitive damages. See infra notes 120-23 and accompanying text. Moreover, punitive damages are inappropriate for trivial, albeit deliberate, misconduct. See infra text accompanying note 85.
A. Liability

The rule of liability for punitive damages, anterior to all other doctrinal issues, is of focal importance in punitive damages doctrine. The standard of liability is variously defined in terms of "malice," "fraud," "oppression," "outrageous" behavior, "conscious or reckless indifference to the rights of others," or "wilful and wanton" misbehavior. These traditional "definitions" of the proscribed misconduct capture well the type of highly antisocial behavior that justifiably is punishable in moral theory. While each of these phrases cabins nicely some or all forms of conduct that properly are punishable, they each can capture conduct for which punishment is improper. Their common deficiency, in definition or application, is one of vagueness. The evil of vagueness is twofold—first, that a jury mistakenly may punish an innocent defendant, and, second, that a jury deliberately may punish an innocent defendant whose only "guilt" is lack of popularity.

While one might argue that vagueness must be a tolerated evil inherent in the use of language, and that it is no stranger to the law of torts or damages, all efforts must be made to excise it from the liability standard for punitive damages. As a form of punishment that is "quasi-criminal," punitive damages publicly certify both the conduct and the actor as deserving moral condem-

65. Fraud may be the one exception.
66. By "innocent," I mean innocent of violating appropriate standards of punitive damages liability. Thus, a defendant may be guilty of violating the compensatory liability rules, based on negligence or strict liability, but "innocent" of the form of flagrant misconduct appropriate for punitive liability.
67. See supra note 66.
69. Consider, for example, the vagueness in the central liability rule of tort law, negligence. See generally Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 467, 478 (1976) ("[T]he issue of whether a particular defendant's conduct was 'reasonable under the circumstances' is precisely the type of issue which, potentially at least, threatens courts with open-ended, polycentric problems that are beyond their capacity to solve.").
70. Consider, for example, the vagueness in the "measurement" of damages for pain and suffering and emotional distress. See, e.g., D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.1, at 544-50 (1973).
71. See supra note 14 and accompanying text.
nation, and so impose a stigma on the actor\textsuperscript{72} that society should be certain is appropriate. Even more importantly in many cases, once liability for punitive damages is found to be in order, punitive awards may be assessed in very large amounts.\textsuperscript{73} Thus, the law should seek to limit punitive damages by definition to cases in which they truly are deserved.

Another objection to vagueness in the punitive damages standard is that this condition breeds cynicism and a disrespect for law. When the law inflicts punishment upon a person for conduct that was not objectionable on any moral theory, the law itself becomes immoral and hence does not deserve the respect of those governed by its mandates. No such law, which punishes alike the innocent and the guilty, on grounds of jury whim and lack of popularity rather than on moral guilt, can be viewed as fair. Such a “law” does violence to notions of due process of the law,\textsuperscript{74} and to equal protection of the law. Furthermore, it is likely that the disrespect for this one aspect of the law will infect the attitudes of many on the law in general. As much as possible, therefore, vagueness should be purged from the definitional standards of punitive damages liability.

Probably the best of all the conventional liability standards is “conscious or reckless disregard of the rights of others,”\textsuperscript{75} for it captures all misconduct that should be punished and, theoretically, no more. The problem with this standard is in its administration. Many jurors confuse “rights” with “harm” by assuming that humans are entitled by legal right to be free from harm, and that actors who consciously (or recklessly) expose others to risks of harm are thieves deserving punishment. The falsity of this view is

\begin{flushright}
\textsuperscript{72} See, e.g., Wheeler, \textit{Punitive Damages Procedures}, supra note 4, at 283.
\textsuperscript{75} See generally J. GHIARDI & J. KIRCHER, supra note 64, § 5.01, at 8 (1985).
\end{flushright}
shown above.\textsuperscript{76} Further, although the word "reckless" in the stated definitional standard well describes the weaker form of punishable misconduct, it is capable of such widely varying interpretations—regarding both the actor's state of mind and the conduct's degree of risk—that it provides very little guidance without further definition.

The traditionally vague standards of punitive damages liability thus unfairly permit their assessment in circumstances in which they are not deserved.\textsuperscript{77} That such standards also will be likely to diminish social utility can be demonstrated rather simply. One may assume, albeit controversially, that liability standards for compensatory damages generally are set at or near the point of optimal efficiency.\textsuperscript{78} The classic example is the Learned Hand test in negligence law.\textsuperscript{79} In an effort to avoid the possibly heavy burden of paying compensatory damages, and out of respect for the rights of others, people often stop their conduct somewhat short of the liability line, on the lawful side, for fear of inadvertently straying across the line into "outlaw" territory.\textsuperscript{80} Now the law must draw a second line for punitive damages liability.\textsuperscript{81} If it is vaguely drawn, in a manner risking punitive liability for inadvertently (possibly even lawfully) causing harm, persons will tend to limit their conduct even further from the compensatory liability line, for fear of punishment (on top of compensatory damages) for straying across the punitive liability line. Social utility suffers as this buffer space increases between average conduct and the compensatory liability line: since utility is maximized when average conduct centers on the compensatory line, it diminishes as conduct shifts away in either direction. Consequently, a rule of punitive damages liability that punishes conduct close to the compensatory liability line—either in definitional theory or practical administration—diminishes utility as well as freedom.

\textsuperscript{76} See supra notes 58-59 and accompanying text.
\textsuperscript{77} See supra notes 64-68 and accompanying text.
\textsuperscript{78} See supra notes 33-34 and accompanying text. See generally R. DWORKIN, LAW'S EMPIRE ch. 8 (1986).
\textsuperscript{79} See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
\textsuperscript{80} This assumption, in its more general form, is sometimes challenged. See, e.g., Grady, A NEW POSITIVE ECONOMIC THEORY OF NEGLIGENCE, 92 YALE L.J. 799 (1983).
\textsuperscript{81} This is briefly discussed and illustrated graphically in Civil Punishment, supra note 38, at 115-16.
If this problem is confronted squarely, the solution is apparent. The problem, restated simply, is to avoid punishing persons for conduct falling on the lawful side of the compensatory line, or only slightly on the unlawful side. The solution to the problem is just as simple—to redefine the standard of punitive liability in terms of its distance from the compensatory liability line. The standard definition\(^{82}\) accordingly could be enhanced as follows: punitive damages are appropriate for conduct that is in conscious or reckless\(^{83}\) disregard of the rights of others, and that constitutes an extreme departure from lawful conduct.\(^{84}\)

The extreme departure concept adds an important dimension to the definitions of both conscious and reckless misconduct. In the "conscious" prong of the definition, it precludes punishment for deliberate, but petty, wrongdoing, for which punishment is too expensive.\(^{85}\) In the "reckless" prong, it helps to distance and hence distinguish flagrant misconduct deserving punishment from negligent misconduct which does not. In a nutshell, it provides breathing space that allows persons to make good faith mistakes.\(^{86}\) The criminal law for many years has included such a standard in its definition of recklessness,\(^{87}\) while the law of punitive damages generally has failed to adopt this important elaboration.\(^{88}\) By enhancing the precision of the liability definition, the proposed

\(^{82}\) Most of the traditionally broad definitions, such as "wilful or wanton," similarly could be improved.

\(^{83}\) Elsewhere I have argued that substituting "flagrant" for "conscious" and "reckless" also should improve the liability standard. Unlike the traditional standards, "flagrant" itself implies an extreme departure from proper conduct. See Punitive Damages, supra note 1, at 1388-69.

\(^{84}\) See generally Problems, supra note 46, at 27-28 & n.124; Civil Punishment, supra note 38, at 115-16; Cooter, supra note 35 ("gross shortfall"); Johnston, supra note 2, at 1398 ("great departures from the optimum").

\(^{85}\) See supra notes 35-36 and accompanying text.

\(^{86}\) See Problems, supra note 46, at 27-28 & n.124.

\(^{87}\) The Model Penal Code defines "recklessly," in part, as involving a "gross deviation" from lawful conduct. MODEL PENAL CODE § 2.02(2)(c) (1962).

\(^{88}\) The Restatement contains a weak version of this concept in its definition of recklessness, which is based, in part, on a degree of risk that is "substantially greater" than negligence. RESTATEMENT (SECOND) OF TORTS § 500 (1965). The extreme departure language was added to the latest edition of the Prosser hornbook. See PROSSER & KEETON, supra note 40, § 34, at 214. But the law of punitive damages generally has failed to include this important notion explicitly in its definition of the proscribed misconduct. Rare exceptions are American Cyanamid Co. v. Roy, 498 So. 2d 859, 863 (Fla. 1987) ("extreme departure from accepted standards of care"); Linscott v. Rainier Nat'l Life Ins. Co., 100 Idaho 854, 858, 606 P.2d 958, 962 (1980) ("extreme deviation from reasonable standards of conduct").
revision in the punitive damages standard retains the standard's central meaning but minimizes the risk that it will be misinterpreted to include conduct that should not be punished. Vagueness is not eliminated by this modest alteration of the standard definitions, but it is reduced appreciably.

B. Measurement

Once a punitive damages assessment is found appropriate, the proper amount of punishment must be determined. The amount, as well as liability itself, should be justifiable in moral theory. Yet the translation of the theory into practicable standards of measurement is a daunting task, fraught with difficulty.

The conventional approach to measurement is based upon three factors: (1) the nature and degree of the defendant's wrongdoing; (2) the nature and degree of the plaintiff's harm; and (3) the defendant's wealth. These traditional factors reflect in a general way the moral foundations of punitive damages: at least the first two are supported both by the freedom-based notion of desert and the utility-based deterrence goal. Yet a more vague basis for measurement could hardly be devised, explaining the largely unprincipled manner in which amounts of punitive damages are determined in most cases today.

89. See RESTATEMENT (SECOND) OF Torts § 908(2) (1979).
90. That consideration of the third factor, the defendant's wealth, may be difficult to justify on moral grounds is well explained in Abraham & Jeffries, Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415 (1989), and Chapman & Trebilecock, supra note 5. Whether and how the defendant's wealth in moral or economic theory may be relevant to the punitive damages measurement issue is beyond the scope of this Article. For the economic perspective, see Friedman, Reflections on Optimal Punishment, or: Should the Rich Pay Higher Fines?, in 3 Research in Law and Economics 185 (R. Zerbe ed. 1981).
92. The amounts of punitive damages assessed in most cases are, by hypothesis, unprincipled because of the indeterminacy of the first and most important measurement factor, the nature and degree of the defendant's wrongdoing. This condition of indeterminacy renders principled measurement difficult, if not impossible.
If the measurement process is to be conformed to moral theory, one must focus on the relevant moral values with more precision. The restitutionary purposes of punitive damages can be divided into four components: (1) restoration of all the plaintiff's directly stolen goods;\footnote{While compensatory damages are designed to compensate the plaintiff for his directly stolen goods, various forms of damage are noncompensable under existing law. Punitive damages serve to expand recovery to all losses actually suffered by the victim. \textit{See Punitive Damages, supra note 1, at 1295-99 (tort law); Sebert, Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation, 33 UCLA L. Rev. 1565 (1986) (contract law).}} (2) restoration of the goods expended by the plaintiff in the restitutionary process; (3) restoration of the plaintiff's stolen freedom; and (4) restoration of the losses to society. Each of these types of damage must be rectified by the wrongdoer if the victim and society are to be vindicated and if the thief is to receive his just desert.

The first component, largely accomplished by compensatory damages, is usually quite easy to measure, except for intangible losses such as pain and suffering and emotional distress. The second component, represented by attorneys' fees and other costs of litigation, is usually subject to measurement that is even more precise: based on a contingency fee of one-third to forty percent, and other litigation costs of perhaps ten to fifteen percent, a victim's total litigation costs generally equal about one-half of his compensatory award. These first two components thus are quantifiable and represent actual wealth (goods) stolen from the victim by the thief. Their recovery by the victim is a matter of moral right. Existing legal doctrine, which does not recognize the second component as recoverable as a matter of right,\footnote{In the great majority of jurisdictions, the plaintiff is not entitled as of right to any punitive damages, but such damages are awardable instead within the discretion of the factfinder. \textit{See, e.g., J. GHIARDI & J. KIRCHER, supra note 64, § 5.38, at 5-57 (1985).}} should be altered to conform to moral theory.

The last two components of the restitutionary measurement model are more problematical. Contrary to the first two factors, they are highly metaphysical, indeterminate, and hence incapable of principled measurement. Thus, while the victim and society have a moral right to their recovery, this right conflicts with the thief's right to have his punishment proportioned to his wrong in a
principled manner. There is no good resolution to this conflict of incommensurable rights, and an arbitrary rule of measurement as a compromise may be the least unsatisfactory approach.

But first the utilitarian goal of deterrence needs to be considered briefly to see how it bears on the measurement problem. Since restitution, as a freedom goal, takes precedence over utility, as discussed above, the restoration of all the plaintiff's stolen goods should be included in a punitive award whether social utility is enhanced or diminished thereby. Once the plaintiff's compensatory damages and litigation costs have been reimbursed, however, the deterrence goal comes into play. The indeterminacy of the two rights-restoration components of the restitutionary model was discussed above, and the existence of an additional deterrent need for a greater award of punitive damages would appear to provide a principled basis for such awards to exceed the victim's litigation costs.

Yet determining the correct size of penalty to promote optimal deterrence is almost as elusive an endeavor as finding the "right" amount of restitution to restore the freedoms of the victim and society. In terms of deterring the offender himself (specific deterrence), the effectiveness of any given penalty would appear to be related to its harshness on the offender, in relation to any benefits he might expect to gain from repeating the misconduct, discounted by his expected probability in being caught and punished again. If the offender is a professional thief actuated by rationality, a factfinder conceivably might be able to ascertain the size of penalty necessary to provide roughly the right amount of disincentive. Yet most humans are far from rational in much of their behavior.


96. See supra notes 61-63 and accompanying and preceding text.

97. See supra note 95 and accompanying and preceding text.

98. I accord the phrases "specific deterrence" and "general deterrence" their traditional (non-Calabresian) meaning in punishment theory. Thus, "specific deterrence" concerns the deterrence of the offender himself, whereas "general deterrence" concerns the deterrence of others. See, e.g., H.L.A. Hart, supra note 27, at 128-29.

99. This is a well-established proposition outside the field of economics: People are not and cannot become perfectly rational cognitive systems. In case our experience with our own limitations and those of others does not persuade us of this, compelling evidence that points to this limitation has been amassed in several fields of research: cognitive psychology, including normative and empirical research.
and especially so when it is "outrageously" improper. Nor is the task much easier when the wrongdoer is a corporation. The economics theorists, working on the dubious assumption that firms are controlled by rationality, can perhaps more easily draw models of optimal specific deterrence for such wrongdoing institutions than for irrational humans. While such models sometimes provide useful insights into why fines of certain magnitudes may or may not work effectively in specific abstract contexts, their predictive value generally would seem too weak to justify punitive assessments of given levels in most cases.

When the focus shifts to general deterrence, the search for an optimal penalty—to serve as a signal to persons, other than the offender, who may be similarly situated in the future—seems to be a hopeless task in almost every context. Nor may this endeavor be a useful one, for the future reflects the past infrequently, and only dimly even then. So general deterrence, while a helpful justification for punitive damages in moral theory, is virtually useless as a measurement device for establishing penalty levels in actual cases. Deterrence theory in general, dependent at bottom on human, social, and corporate psychology, and based on a vision of a future

on human inferential practices, computability theory, social psychology, and philosophy of science.


100. The Restatement defines the proscribed behavior as "outrageous conduct." Restatement (Second) of Torts § 908(1) (1979).


102. Firms logically would seem more likely than humans to base their behavior on the expected net profitability of contemplated actions. But see sources cited supra note 101.

103. See, for example, Robert Cooter's helpful model in Punitive Damages for Deterrence: When and How Much?, 40 Ala. L. Rev. 1143 (1989).

104. See Elliott, supra note 31.

105. See supra note 98.
world devoid of change, fails then to provide more than intuitive
guidance on the measurement problem.

The moral foundations of punitive damages thus leave us in a
seeming quandary: they permit and even require that punitive
damages be assessed in "proper" amounts, yet they provide very
little help in establishing what amounts are proper. Such a situa-
tion would appear to call for an arbitrary, second-best solution,
since the theoretically proper model does not work. Indeed, this is
the approach often taken by the legislatures in both the criminal
and civil law.\textsuperscript{106} Criminal fines, of course, are always capped or lim-
ited in some arbitrary respect. Moreover, the legislatures of this
nation and England have prescribed multiples of damages for a
large variety of civil offenses for many centuries,\textsuperscript{107} and this ap-
proach to measuring punishment reaches back thousands of years
to the dawn of civilization.\textsuperscript{108}

Because of the intractable problems of determining amounts
of punitive damages on any flexible standard that is principled in
moral theory, I propose that courts and legislatures replace the
current standards with a multiple damages standard, perhaps to-
gether with a flexible "kicker" limited by a cap. Treble damages,
for example,\textsuperscript{109} could be allowed as the proper measure of total
damages (including the compensatory recovery) in most cases
where punitive damages are appropriate. Thus, in a serious injury

\textsuperscript{106} Several states recently have imposed limits on punitive damages assessments
equal to prescribed multiples of compensatory damages. For some of the statutes, see John-
ston, supra note 2, at 1388 n.10; Wheeler, A Proposal for Further Common Law
Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40

Consider the observations of Lord Devlin in Rookes v. Barnard, [1964] App. Cas. 1129,
1227-28: "It may even be that the House [of Lords] may find it necessary to . . . place some
arbitrary limit on awards of damages that are made by way of punishment. Exhortations to
be moderate may not be enough."

\textsuperscript{107} Parliament enacted at least 65 separate statutes providing for double, treble, or
quadruple damages from 1275 to 1753. See Punitive Damages, supra note 1, at 1263 n.18.

\textsuperscript{108} Multiple damages were provided for nearly 4000 years ago in the earliest known
legal code, the Code of Hammurabi. They were also prescribed in the Hebrew Covenant
Code of Mosaic Law of about 1200 B.C., see Exodus 22:1, and in classical Roman law. See
Punitive Damages, supra note 1, at 1262 n.17.

\textsuperscript{109} I use treble damages merely as an example of a modest multiple that would be
roughly appropriate in most cases. A multiple of quadruple damages also could rationally be
defended: it would further promote both deterrence and the "soft" (third and fourth) resti-
tutionary components discussed above, although it also would result in overdeterrence and
the infliction of partially undeserved punishment in more cases.
case, the victim’s actual harm might amount to $1 million. If punitive damages were found appropriate, the damages would be trebled, providing the plaintiff with a total recovery of $3 million.\textsuperscript{110} After the payment of attorneys’ fees and other costs of litigation,\textsuperscript{111} the plaintiff would be left with a net award of roughly $1.7 million. As argued earlier, $2.3 million of the total award would be justifiable on restitutorial grounds—$1 million in compensatory damages and $1.3 million in litigation expenses. The remaining $700,000 of the total award would be a relatively modest, arbitrary amount to serve as restitution for the stolen rights and as a deterrent.\textsuperscript{112} Once punitive damages were found appropriate, the plaintiff would have a right to treble (or quadruple) damages, no more no less. The goals of retribution and deterrence both would be roughly served in every case by such a multiple damages approach, and neither goal would suffer greatly, as often happens in the present system.

While the multiple damages approach alone might be most satisfactory, a court or legislature might leave the judge or jury with the power to add a deterrent\textsuperscript{113} “kicker” on top of the multiple award, perhaps requiring a higher standard of fault and proof.\textsuperscript{114} But the lack of determinateness in the deterrence measurement “tool” suggests the need to cap any such kicker with precision.\textsuperscript{115}

\textsuperscript{110} Based on the compensatory award, the \textit{total} award (including the compensatory portion) would amount to treble damages, whereas the \textit{punitive} component would amount to double (compensatory) damages.

\textsuperscript{111} Attorneys’ fees are assumed to be 40\% (of the total award), and other costs are assumed to be 10\% (of the actual damages).

\textsuperscript{112} If a quadruple damages approach were taken, the plaintiff would be entitled to a total award of $4 million, comprised roughly of the following components: $1 million in compensatory damages; $1.6 million in attorneys’ fees; $0.1 million in costs; and $1.3 million for retribution and deterrence.

\textsuperscript{113} While a kicker might sometimes be appropriate on retributive grounds, the kicker more typically would be needed for deterrence.

\textsuperscript{114} The basis of fault, for example, might be raised from reckless to intentional, and the burden of proof might be raised from a preponderance of the evidence to clear and convincing evidence or to proof beyond a reasonable doubt. Examples of similar approaches include Fla. Stat. Ann. § 768.73 (Harrison Supp. 1988); Kan. Stat. Ann. § 60-3701(c) (Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987).

\textsuperscript{115} There are a large variety of ways to cap the kicker, including setting a maximum dollar amount, a percentage of the defendant’s wealth, a higher multiple of compensatory damages, or some combination of such devices. Several states have adopted various forms of punitive damages caps. See American College of Trial Lawyers, \textit{supra} note 3, at 5 n.21.
with a kicker, the kicker generally should go to the state.\textsuperscript{110} This is because the victim's goods and freedoms are adequately (if roughly) restored by treble or quadruple damages in cases with substantial compensatory damages,\textsuperscript{117} so that the kicker in such cases serves solely the public purposes of deterrence and rectification of the public's damaged rights.\textsuperscript{118} Moreover, to enhance the predictability and stability of litigation, any such kicker should be used only in cases where the insult to the public rights and the need for deterrence are clearly proved to be especially great.

The risk of overdeterrence is most severe in mass tort cases, where the defendant confronts the possibility of hundreds, or even thousands, of punitive assessments.\textsuperscript{119} The multiple damages measurement approach, without a kicker, would operate satisfactorily here as well. As the life of mass tort litigation involving serious misconduct progresses, both the frequency and size of punitive assessments tend to rise. While the multiple damages formula should not affect the frequency of such awards, it would prevent assessments from becoming very large. Overdeterrence in mass tort cases

\begin{footnotesize}
\textsuperscript{116} Several states provide that some portion of a punitive damages award goes to the state. See Johnston, supra note 2, at 1438 n.163 (citing statutes in Colorado—\textsuperscript{15}; Florida—60%; Illinois—discretionary with trial judge; Iowa—75% or more, unless tort directed at particular plaintiff); \textit{American College of Trial Lawyers}, supra note 3, at 6 n.25 (citing statutes in Georgia—75%; Missouri—50%, after deducting attorneys' fees and costs; and Kansas—50%, in medical malpractice cases).

\textsuperscript{117} In cases in which punitive damages are appropriate, the plaintiff should be entitled as a matter of right to an amount of punitive damages at least equal to his attorneys' fees and costs of litigation. See supra note 94 and accompanying text. When a plaintiff's recoverable damages are relatively small, a modest multiple will not serve this restitutionary objective. This would suggest the need for a floor for punitive damages in an amount approximating attorneys' fees plus other litigation costs. The kicker could serve this purpose in cases of this type.

\textsuperscript{118} Punitive damages serve as an incentive to plaintiffs and their counsel to act as private attorneys general to enforce the compensatory liability rules of law. See Punitiv Damages, supra note 1, at 1287-95. Yet the prospect of treble or quadruple damages should be adequate to serve this purpose in most cases involving substantial loss. Where compensatory damages are small, however, at least some portion of the kicker should go to the plaintiff to cover transaction costs (at a minimum) and to serve as an enforcement incentive. See generally Seltzer, \textit{Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control}, 52 \textit{Fordham L. Rev.} 37 (1983). Judicial attention increasingly has focused on the due process implications of multiple punitive awards for a single course of conduct. See, e.g., \textit{Bankers Life & Casualty Co. v. Crenshaw}, 108 S. Ct. 1645, 1655 (1988) (O'Connor, J., concurring); \textit{Juzwin v. Amtorg Trading Corp.}, 705 F. Supp. 1053, 1060-65 (D.N.J. 1989). But see \textit{Leonon v. Johns-Manville Corp.}, 717 F. Supp. 272 (D.N.J. 1989) (rejecting the \textit{Juzwin} due process limit of one punitive award against a manufacturer for a single course of conduct).
\end{footnotesize}
will often be inevitable, but the multiple damages approach may help to minimize the problem while preserving the more important retributive objective of restitution.

One qualification, alluded to above, must be made to the use of punitive damages of any type within the mass tort context. This involves the risk that massive tort claims will bankrupt the defendant. When this risk becomes a reasonable possibility, punitive assessments should be reduced to double damages, and when the risk of bankruptcy is proved to be substantial, punitive damages assessments of any size should be prohibited. This is because the rights of future claimants to compensatory damages may be compromised by allowing the punitive assessments. The restitutionary rights of future claimants, involving the restoration of the stolen goods themselves, have a higher priority in moral right than claims for restoration of transaction costs or stolen rights alone. Punitive damages claims a fortiori have no place in bankruptcy where a limited fund exists that is likely to be inadequate, or barely adequate, to accommodate all such claims for the directly stolen goods.

There are many difficult conceptual, definitional, and practical problems in attempting to conform legal doctrine to the moral foundations of punitive damages. Eliminating vagueness from the definitions of the liability standard helps somewhat to improve the law. The measurement problem proves even more vexing, yet the multiple damages model improves upon the conventional indeterminate approach.

VII. Conclusion

Punitive damages are deeply imbedded in the law of this nation. Their traditional justification in terms of punishment and

120. See supra note 63 and accompanying text.
121. See Punitive Damages, supra note 1, at 1325.
122. “Unlike retributive desert in which the target is the offender and its basis is the offense . . . , the desert involved in compensation has two targets as well as two bases. The wrongfully injured party deserves to be made whole again, and the party responsible for the harm deserves to be held liable for making him (or her) whole.” Burgh, Guilt, Punishment, and Desert, in Responsibility, Character, and the Emotions, supra note 13, at 316, 319-20; see also supra note 63 and accompanying text.
deterrence is rooted firmly in the moral principles of freedom and utility. Such assessments provide a vital check on the abuse of power, and they protect and promote truth and trust. They also help to reaffirm each person’s equal right to pursue his own life plan without undue interruption.

Yet punitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values. Undeserved punishment is repugnant to notions of fundamental justice, and it may do more harm to the general welfare than proper punishment does good. Moral theory helps somewhat in reforming punitive damages doctrine to address these problems. The conventional definitions of the liability standard can be altered to reduce their vagueness, but the problem of proper measurement remains elusive. A measurement device that is based on moral theory, but also on an arbitrary multiple of the plaintiff’s damages, may be the least unsatisfactory method for dealing with the measurement dilemma.

The courts, the legislatures, and the commentators all need to devote attention to the difficult task of establishing proper moral limits to punitive assessments. Assuming that this challenge can be met, the punitive damages remedy will find substantial support in the moral foundations of the law.