

COMMENT

The Psychology of Punishment and the Puzzle of Why Tortfeasor Death Defeats Liability for Punitive Damages

Nearly every jurisdiction that allows for the recovery of noncompensatory punitive damages conceives of them as serving two main purposes: (1) punishing outrageous conduct and (2) deterring its future occurrence.¹ The deterrent function of punitive damages operates both to deter the defendant from reoffending—an objective known as “specific deterrence”—and to deter others from committing similar tortious acts—“general deterrence.”² The general deterrence rationale dates back to the first cases to impose punitive damages in the United States,³ and a majority of jurisdictions have embraced general deter-

1. 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.”); 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 4:12 (2d ed. 2014) (citing forty-four jurisdictions that justify punitive damages on both punishment and deterrence grounds); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1428-29 (1993) (finding that of the “standard justifications of punishment: retribution, deterrence, incapacitation, [and] rehabilitation[, t]he last two, incapacitation and rehabilitation, are unlikely to be at issue in punitive damages cases. . . . Thus, discussion of punitive damages should focus on deterrence and retributivist theories.”); cf. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 76 (1982) (exploring several objectives potentially served by punitive damages, including compensating plaintiffs for intangible losses, and finding that “only two survive scrutiny: retribution and deterrence”).
2. Punitive damages are often referred to as “exemplary damages” to underscore their general deterrence function. See, e.g., Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 143 (2005) (“From the beginning, they were called ‘exemplary damages,’ and the capacity of the damages award to achieve fairly broad deterrence unrelated to the plaintiff struck many courts as important.”).
3. See, e.g., *Coryell v. Colbaugh*, 1 N.J.L. 77, 77-78 (1791) (rejecting the defendant’s argument that any punitive damages assessed against him should be minimal because he was impoverished, and charging the jury to “give damages for *example’s* sake, to prevent such offenses in

rence as the primary justification or one of several primary justifications for punitive damages.⁴

Simultaneously, a large majority of jurisdictions and the *Restatement of Torts* disallow punitive damages recoveries following the death of the tortfeasor.⁵ Courts' stated rationale for this rule of nonsurvivability is that neither of the two primary aims of punitive damages—punishment or deterrence—is served when the defendant dies before damages can be imposed.⁶ This rationale is correct as applied to punishment and *specific* deterrence, since neither can operate on a deceased person. Yet the aim of *general* deterrence is not necessarily defeated by the death of the defendant. Indeed, this Comment argues that if punitive damages imposed against living defendants serve general deter-

the future"). *Coryell's* holding was "clearly a rejection of specific deterrence." Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 203 (2003) (emphasis omitted).

4. See KIRCHER & WISEMAN, *supra* note 1, app. tbl.4-1 (listing forty-one states, plus the District of Columbia, that recognize a general deterrence function of punitive damages, either at common law or by statute); see also, e.g., *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986) ("The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior."); *Jolley v. Puregro Co.*, 496 P.2d 939, 945-46 (Idaho 1972) ("[T]he predominant purpose of exemplary damages is to deter the defendant and others similarly situated from indulging in comparable conduct in the future. Any vindictive or vengeful punishment aspect of an exemplary damages award is de-emphasized . . . [W]e feel that the courts in these civil cases should be motivated primarily by a purpose of deterrence and not by a purpose of punishment."); *Adamson v. Bicknell*, 287 P.3d 274, 280 (Kan. 2012) (punitive damages are assessed with the "ultimate purpose being to restrain and deter others from the commission of similar wrongs" (citation and internal quotation marks omitted)); *G.J.D. by G.J.D. v. Johnson*, 713 A.2d 1127, 1131 (Pa. 1998) ("[P]unitive damages are awarded to punish a defendant for certain outrageous acts and to deter him or others from engaging in similar conduct." (citation omitted)). In fact, eight states consider general deterrence but *not* specific deterrence to be one of the goals of punitive damages: Alaska, Arizona, Kansas, Mississippi, Ohio, Pennsylvania, Texas, and Virginia. KIRCHER & WISEMAN, *supra* note 1, app. tbl.4-1. Only two states have adopted specific deterrence but not general deterrence as a rationale for punitive damages. *Id.*
5. *Whetstone v. Binner*, 15 N.E.3d 905, 908-09 (Ohio Ct. App. 2014) (noting that "[t]he majority of other jurisdictions disallow punitive damage recoveries after the tortfeasor has died" and listing thirty jurisdictions that have adopted the nonsurvivability rule); RESTATEMENT (SECOND) OF TORTS § 926(b) (1979) ("[T]he death of the tortfeasor terminates liability for punitive damages.").
6. See, e.g., *Johnson*, 713 A.2d at 1129 ("The majority of courts that have addressed this issue have held that punitive damages may not be recovered from the estate of the tortfeasor. The reasoning behind these decisions is essentially that the primary purposes of imposing punitive damages are not furthered when the tortfeasor is deceased." (footnote omitted)); James B. Sales & Kenneth B. Cole, Jr. *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1150 (1984) ("Numerous jurisdictions . . . refuse to permit punitive damage claims against the estates of deceased wrongdoers because the punishment and deterrence rationales no longer are viable once the wrongdoer is deceased." (citation omitted)).

rence, then so do punitive damages imposed on the estates of deceased tortfeasors. The stated justification for abandoning punitive damages upon the tortfeasor's death therefore seems unconvincing, since one of the two primary purposes of these damages remains operative in the posthumous context. In making this argument, this Comment focuses on individual, non-corporate tort defendants, though in the Conclusion it draws on the corporate context to highlight recent punitive damages jurisprudence that suggests possible difficulties with the general deterrence rationale.

This Comment advances a novel explanation for the rule of nonsurvivability, one that does not rely on the deterrence rationale. Rather, this Comment focuses on the psychology of punishment. It argues that punitive damages lose some of their appeal when leached of their retributivist content because, research in the field of moral psychology suggests, preventing future misconduct by other potential wrongdoers is not as psychologically satisfying as seeing the individual wrongdoer receive her just deserts. There is thus little satisfaction to be found in imposing punitive damages posthumously. In addition, many courts express aversion to the idea of punishing the tortfeasor's innocent heirs for the misdeeds of the decedent. This reluctance, the Comment proposes, further underscores punitive damages' association with retribution as distinct from deterrence.

Part I of this Comment argues that, contrary to the prevailing justification put forth by courts embracing the nonsurvivability rule, posthumous punitive damages do advance general deterrence. Part II offers an alternative explanation for the nonsurvivability rule, one that relies on a psychological understanding of what motivates punishment. Part III concludes with a brief discussion of relevant considerations based on recent Supreme Court cases dealing with punitive damages in the corporate context.

I. THE GENERAL DETERRENT EFFECT OF PUNITIVE DAMAGES WHEN THE TORTFEASOR HAS DIED

Courts embracing the nonsurvivability rule have stated that the deterrent effect of punitive awards is watered down or becomes speculative when the deceased wrongdoer's estate is held liable instead of the wrongdoer herself.⁷ In

7. See, e.g., *Fehrenbacher v. Quackenbush*, 759 F. Supp. 1516, 1521-22 (D. Kan. 1991) (finding that assessing punitive damages against a deceased tortfeasor's estate "would vicariously punish the heirs of the wrongdoer and would not serve to deter potential tortfeasors," and rejecting the argument that a "potential tortfeasor will be deterred from committing an intentional tort by fear that his heirs will be deprived of part of his estate as a result of estate's liability for punitive damages") (citing *Thompson v. Estate of Petroff*, 319 N.W.2d 400 (Minn. 1982)); *Doe v. Colligan*, 753 P.2d 144, 146 (Alaska 1988) (finding that "the general

this Part, however, I argue that under the prevailing logic of deterrence, posthumous punitive damages should actually serve general deterrence.

Consider the deterrent message broadcast to potential tortfeasors when punitive damages are imposed against a deceased tortfeasor's estate, as happens under the regime adopted by the small minority of jurisdictions eschewing the nonsurvivability rule.⁸ Under this minority rule, potential future tortfeasors are put on notice that if they commit a similar tort and die, then their estate will pay punitive damages. But future tortfeasors also gain a sense of what will happen if they commit a similar tort and *survive*: they will be *personally* liable for punitive damages.⁹ In this way, the deterrent message communicated by

deterrent effect becomes speculative at best" when the tortfeasor is deceased); *Lohr v. Byrd*, 522 So. 2d 845, 846 (Fla. 1988) (finding that "the deterrent effect is frustrated" when punitive damages are assessed against a tortfeasor's heirs) (citing *Byrd v. Lohr*, 488 So. 2d 138, 139 (Fla. Dist. Ct. App. 1986) (emphasis omitted)); *Johnson*, 713 A.2d at 1129 ("[Courts embracing the nonsurvivability rule] reason that if it is the innocent estate and beneficiaries that are punished and not the tortfeasor himself, the general deterrent element becomes diffused and is speculative at best."); cf. *Whetstone*, 15 N.E.3d at 911 (Wise, J., dissenting) (dissenting from the majority's holding that punitive damages survive and arguing that "[p]unishing [the tortfeasor's] Estate is one step removed and therefore waters down or dilutes any such deterrent effect.").

8. *E.g.*, *Ellis v. Zuck*, 546 F.2d 643, 644 (5th Cir. 1977); *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 119 (Ariz. 2001) (en banc); *Penberthy v. Price*, 666 N.E.2d 352, 357 (Ill. Ct. App. 1996); *Tillett v. Lippert*, 909 P.2d 1158, 1162 (Mont. 1996); *Whetstone*, 15 N.E.3d at 910; *Hofer v. Lavender*, 679 S.W.2d 470, 475 (Tex. 1984); *Perry v. Melton*, 299 S.E.2d 8, 13 (W. Va. 1982).
9. One might object that as a matter of behavioral realism, potential tortfeasors will fail to make the inference that they will personally be held liable for punitive damages if they commit a similar tort and survive. It is certainly possible that potential tortfeasors need to see the wrongdoer herself punished—not just her heirs—in order to comprehend that as long as they survive, they will personally face punitive damages for similar tortious conduct. But it is not clear that courts citing the logic of deterrence have operated on the basis of behavioral realist considerations in other contexts. For instance, potential tortfeasors may not be aware of or contemplate the financial consequences of their conduct before, say, driving drunk or committing battery. The generally accepted notion that punitive damages serve general deterrence, however, seems to rely on this and other assumptions. If courts are willing to deviate from their ordinary assumptions regarding potential tortfeasors' rational, informed, self-interested behavior when it comes to the issue of whether people are able to draw appropriate inferences from exemplary cases, perhaps they should be similarly willing to deviate from these assumptions in other respects. For instance, it is possible that potential tortfeasors value sparing their children from punitive damages as much as they value sparing themselves. If tortfeasors care about their families' financial wellbeing as much as they care about their own, then imposing punitive damages posthumously should not "water down" deterrence. These claims are empirically speculative to some degree, of course; the point is that behavioral realist objections can cut either way, and we cannot adjudicate them without data. In general, courts considering the deterrent effect of punitive damages have largely been content to overlook these behavioralist wrinkles and proceed with the rational

the minority rule is substantially the same as the deterrent message communicated in typical punitive damage cases, in which damages are assessed against a living defendant. In both situations, potential tortfeasors learn that if they commit similar misconduct and survive, they will face personal liability for punitive damages. Consequently, the general deterrent effect of punitive damages does not seem weakened as a result of the tortfeasor's death.

In comparison, consider the relatively feeble deterrent message communicated by the nonsurvivability regime adopted by the majority of jurisdictions and recommended by the *Restatement of Torts*. Whether a potential future tortfeasor expects to live or die after committing a tort, the majority rule provides less deterrence than the minority rule. To the potential wrongdoer who expects to survive following the tort,¹⁰ the minority rule can use posthumous punitive damages to send a clear signal that the misconduct will trigger enhanced liability. The majority rule, on the other hand, does not reach the question whether punitive damages are warranted and therefore does not deter to the same extent potential tortfeasors who expect to live.¹¹ For the wrongdoer who expects to die before punitive damages can be assessed, neither rule creates the expectation of personal liability. But only under the majority rule is a potential wrongdoer assured that her estate will be spared punitive damages. Of course, in the extreme case of an entirely self-interested potential tortfeasor who expects to die prior to judgment and is concerned only with her personal liability, punitive damages will provide equally ineffective deterrence under either rule. For the potential tortfeasor who cares about the future wellbeing of her family, however, the minority rule improves upon the majority nonsurvivability rule by holding her estate liable.¹² Therefore, under any set of circumstances, a re-

actor model. In arguing that if punitive damages in general deter, then posthumous punitive damages deter, I am following suit.

10. In a majority of these cases, the tortfeasor likely expects *ex ante* to live after committing the tort. A review of appellate court decisions regarding punitive damages against deceased individuals found that in over half of cases, the tortfeasor's death had nothing to do with the tort. See Timothy R. Robicheaux & Brian H. Bornstein, *Punished, Dead or Alive: Empirical Perspectives on Awarding Punitive Damages Against Deceased Defendants*, 16 *PSYCHOL. PUB. POL'Y & L.* 393, 403 (2010).
11. Uncertainty over whether punitive damages will be triggered can be expected to diminish their deterrent effect. See, e.g., Ellis, *supra* note 1, at 47 (finding that as liability for punitive damages becomes less certain, "the threat . . . is reduced, fewer harmful acts are deterred, and gains to aggregate welfare become correspondingly lower").
12. For an argument that tortfeasors will be deterred by the prospect of their heirs being held liable, see *Stephens v. Rohde*, 478 So. 2d 862, 863 (Fla. Dist. Ct. App. 1985), which posits that "if a potential tortfeasor realizes that his estate is liable to diminishment by punitive damages awards, as is his own purse while he lives, this provides an additional incentive to avoid tortious conduct."

gime that imposes punitive damages posthumously will deter at least as well as, and frequently better than, a regime that does not.

Why, then, do courts insist that punitive damages do not deter when the tortfeasor is deceased? One possible answer is that courts focus solely on specific deterrence, which clearly is thwarted by the death of the tortfeasor. Yet, in most jurisdictions, courts hold that general deterrence is one of the primary aims of punitive damages.¹³ Moreover, most courts defend the nonsurvivability rule by pointing to a rationale other than thwarted specific deterrence: that the *general* deterrent effect of a punitive award is frustrated when the paying party (that is, the tortfeasor's estate) is innocent of wrongdoing.¹⁴ A commentator has elaborated the reasoning behind this position as follows: "The punishment of an innocent actor will have no positive effect on potential wrongdoers. Indeed, they may develop a contemptuous attitude, feeling that they may commit egregious acts for which innocent others will bear the punishment."¹⁵

Yet this ordinarily sensible argument—that penalties must be inflicted upon the guilty, not the innocent, in order to deter future wrongdoing by others—does not justify the nonsurvivability rule. While judges have argued that "deterrence requires a perception by others that the tortfeasor is being punished,"¹⁶ it seems more accurate to say that "deterrence requires a perception by others that *they* will be punished if they engage in similar misconduct." This

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13. See KIRCHER & WISEMAN, *supra* note 1, app. tbl.4-1 (finding that forty-one states and the District of Columbia consider general deterrence to be one of the aims of punitive damages). *But see* Doe v. Colligan, 753 P.2d 144, 146 (Alaska 1988) (holding that "[t]he central purpose of punitive damages is to punish the wrongdoer and to deter him from future misconduct"). However, the *Colligan* dissent points out: "For more than a decade, this court has recognized that punitive damages are assessed, partly, as an 'example and warning to others.' Thus, we have said that punitive damages are 'designed not only to punish the wrongdoer, but also to deter him *and others like him*, from similar wrongdoing in the future.' Indeed, this probably is the primary purpose of such an award." *Id.* (Burke, J., dissenting) (citations omitted).
 14. See, e.g., *Colligan*, 753 P.2d at 145 ("Several courts take the position that the exemplary purpose of punitive damages is not well served by imposing damages on anyone other than the actual wrongdoer."); see also Diane Wagner Carr, Note, *The Florida Supreme Court Is Asked to Decide Whether Punitive Damages May Be Awarded Against a Deceased Tortfeasor's Estate*, 15 FLA. ST. U. L. REV. 375, 378 (1987) ("The court [in *Lohr v. Byrd*] suggested that most states disallow such punitive awards because it is the heirs of the tortfeasor who are punished and not the tortfeasor himself, and because the deterrent effect of a punitive award is frustrated when the party who is not the wrongdoer is inflicted with a penalty.").
 15. Michael E. Lopez, *A Normative Theory of Nontortfeasor Liability and Taxonomy for Exemplary Damages*, 48 UCLA L. REV. 1017, 1053 n.210 (2001) (quoting Keith A. Ketterling, *A Proposal for the Proper Use of Punitive Damages Against a Successor*, 11 J. CORP. L. 765, 774 (1986)).
 16. *Whetstone v. Binner*, 15 N.E.3d 905, 909 (Ohio Ct. App. 2014) (describing reasoning used in cases in Florida, New Mexico, and Wyoming).

latter message can be conveyed by posthumous punitive damages, as long as potential future tortfeasors expect to live after committing the tort.¹⁷ Under most circumstances, then, the aim of general deterrence can be served by assessing punitive damages against the tortfeasor's estate.

II. AN ALTERNATIVE EXPLANATION FOR THE NONSURVIVABILITY RULE

A. *A Psychological Account of the Nonsurvivability Rule*

I have argued that, contrary to the prevailing justification for the nonsurvivability rule,¹⁸ awarding posthumous punitive damages deters potential tortfeasors. Why, then, do the majority of jurisdictions abandon punitive damages when the tortfeasor has died, even though one of their main stated rationales endures?

I propose the following account. Courts use punitive damages in part to seek retribution against the wrongdoer. When the defendant's death thwarts retributive aims—that is, when a remedy cannot offer the satisfaction of seeing the despicable wrongdoer saddled with an enormous judgment—there is diminished appetite to impose punitive damages, even though the general deterrence rationale remains strong.¹⁹ Overall, then, the nonsurvivability rule can be understood as a manifestation of the weight of our retributive motivations, as contrasted with our desire to deter similar misconduct by other potential wrongdoers.

Recent discoveries in the field of moral psychology support this interpretation. Studies of punishment intuitions provide converging evidence that decision makers penalize reprehensible conduct primarily on the basis of retribution and largely ignore deterrence-relevant considerations, such as the probability that such misconduct will be detected or whether the sanction is made public.²⁰ This holds true even for decision makers who believe their

17. And if potential tortfeasors expect to die after committing the tort, then we might worry that they are immune to monetary disincentives altogether.

18. See sources cited *supra* notes 6-7.

19. The unavailability of specific deterrence may provide another part of the answer.

20. See, e.g., Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 17 (1993) (finding that the penalties people impose are “generally uninfluenced by their deterrent effect on future behavior”); Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 437, 437 (2006) [hereinafter Carlsmith, *Roles of Retribution*] (finding that “retribution information is more relevant to punishment than either deterrence or incapacitation information”); Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just*

judgments should be and are directed primarily at preventing future misconduct.²¹ Furthermore, studies have found that decision makers prioritize retribution over social benefit more generally. Commentators call this phenomenon an “outrage heuristic”: punishment decisions are rooted in a simple rule that the severity of the penalty should correspond to the outrageousness of the conduct.²² This heuristic appears to govern punishment judgments even when it leads to worse consequences overall. For instance, in one study, research participants were equally willing to impose a severe penalty on a company that had marketed unsafe birth control pills when they were told that a high penalty would provide an incentive for the company to make safer products as when they were told that a high penalty would make the company halt production altogether, ensuring that the only birth control available to consumers would be even less safe products.²³ Respondents’ preferred penalties in this case seemed insensitive to whether the effects of punishment would be positive or negative for future consumers; they appeared to have been swayed primarily by the outrageousness of the company’s past behavior.²⁴

Furthermore, research findings suggest that not all social benefits of penalization are considered psychologically equal. Rather, researchers find that people seek a certain connection between the punishable wrongdoing and the social benefit brought about by the penalty.²⁵ For example, study participants evaluating a scenario in which a manufacturing company had dumped hazardous waste into a landfill were largely not satisfied with a penalty requiring the company to clean up waste produced by a different company; they preferred that the company clean up its own waste, even when the other company’s waste posed far greater danger to human health and the cost of cleanup was the

Deserts as Motives for Punishment, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 286 (2002) (discussing studies finding that views on crime are not based on a desire to deter).

21. See, e.g., Carlsmith, *Roles of Retribution*, *supra* note 20, at 447.
22. E.g., Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 63 (Thomas Gilovich et al. eds., 2002); Cass R. Sunstein, *Moral Heuristics*, 28 *BEHAV. & BRAIN SCI.* 531, 538 (2005).
23. See Baron & Ritov, *supra* note 20, at 28-31.
24. See Sunstein, *supra* note 22, at 538 (citing data reported in Baron & Ritov, *supra* note 20).
25. See, e.g., Baron & Ritov, *supra* note 20, at 20 (“The hypothesized psychological linkage of punishment and compensation might arise not only because these two functions are often linked in social institutions but also because of more general psychological principles.”); Geoffrey P. Goodwin & Adam Benforado, *Judging the Goring Ox: Retribution Directed Toward Animals*, 2014 *COGNITIVE SCI.* 1, 11-14 (finding an intuitive psychological aversion to imposing punitive measures on the apparent wrong party, even when these punitive measures would bring about the same social benefit as would result from punishing the guilty party).

same.²⁶ In other words, even when substantially the same penalty could effect a greater social benefit, many individuals were not satisfied when this social benefit appeared disconnected from the wrongdoing.

These research findings support the claim that punitive damages are less psychologically satisfying when their sole function is to prevent harm by other potential tortfeasors, rather than to punish the specific wrongdoer who has transgressed. Courts may find it less appealing to impose punitive damages on the wrongdoer's innocent heirs, even if doing so would accomplish the same general deterrence as imposing punitive damages on the wrongdoer herself (had she survived). I have argued that this is because the two pathways to deterrence are not psychologically equivalent. Assessing punitive damages against the innocent heirs lacks the requisite clear connection between the penalty and the social benefit, thereby reducing the psychological appeal of penalization.

Taken together, this body of research suggests that the psychology of punishment can provide a plausible alternative explanation for the nonsurvivability rule—one that does not rely on the implausible claim that posthumous punitive damages fail to serve general deterrence.²⁷

B. Punishing Heirs Innocent of Wrongdoing

I have suggested that the predominance of the desire to seek retribution provides a plausible explanation for the nonsurvivability rule, and that the desire to effect general deterrence is less salient than prevailing rationales for punitive damages²⁸ would imply. One could propose an alternative account: that courts refuse to award posthumous punitive damages *despite* recognizing their

26. Sunstein, *supra* note 22, at 538 (citing Jonathan Baron et al., *Attitudes Toward Managing Hazardous Waste*, 13 RISK ANALYSIS 183 (1993)).

27. There is evidence that judges, despite their expertise, are susceptible to the same psychological biases and motivational processes as lay decision makers. See, e.g., Jennifer K. Robbenolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. 315, 333 (2002) (“No differences were found in the likelihood that punitive damages would be awarded or in the sizes of the punitive damage awards of judges and jury-eligible citizens.”); see also Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 98 CORNELL L. REV. 1, 27–28 (2007) (“When awarding damages, assessing liability based on statistical evidence, and predicting outcomes on appeal, judges seem inclined to make intuitive judgments. They are also vulnerable to such distractions as absurd settlement demands, unrelated numeric caps, and vivid fact patterns.”). See generally JEROME FRANK, *LAW AND THE MODERN MIND* 126 (1970) (criticizing the reluctance to “look into the motives and biases of judges” even though “such inquisitiveness, deliberately cultivated, is at the very core of intelligent dealing with the law”); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AMER. L. & ECON. REV. 26, 29 (1999) (concluding that “judges exhibit a variety of biases”).

28. See *supra* notes 1–4 and accompanying text.

general deterrent effect, because imposing punitive damages on innocent parties is intolerable.²⁹ Indeed, courts have raised the concern that assessing damages against a tortfeasor's heirs would constitute unacceptable vicarious punishment.³⁰ For example, dissenting judges in the rare cases that allow posthumous punitive damages have written that "[t]he court has succeeded only in punishing the innocent heirs of the deceased, a result reminiscent of the feudal doctrine of corruption of blood"³¹ and that "our society does not punish the innocent for the wrongdoing of another."³²

It is not entirely clear, however, in what sense posthumous punitive damages "punish" heirs. These punitive damages leave the heirs no worse off financially than they would have been had the defendant survived to face judgment herself.³³ After all, had a tortfeasor survived and paid the punitive damages

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29. In fact, almost no court takes the position that punitive damages do serve general deterrence in the posthumous context but must nonetheless be disallowed. Rather, courts largely insist that posthumous punitive damages do not accomplish general deterrence. *Evans v. Gibson* is a notable exception: "It is true that the infliction of punishment serves as a deterrent to the commission of future wrongs by others as well as by the wrongdoer, but punitive damages by way of example to others should be imposed only on actual wrongdoers." 31 P.2d 389, 395 (Cal. 1934).
 30. *E.g.*, *Doe v. Colligan*, 753 P.2d 144, 146 (Alaska 1988); *Lohr v. Byrd*, 522 So. 2d 845, 847 (Fla. 1988); *G.J.D. by G.J.D. v. Johnson*, 713 A.2d 1127, 1134 (Pa. 1998) (Flaherty, C.J., dissenting); *Hofer v. Lavender*, 679 S.W.2d 470, 479 (Tex. 1984) (Spears, J., dissenting); *see also* *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 939 (D.C. 1995) ("The theory of justice which punishes a wrongdoer for his or her acts while avoiding punishment of innocent parties has persuaded courts and legislatures in nearly every jurisdiction deciding the issue to disallow punitive damages against estates."); *Kaopuiki v. Kealoha*, 87 P.3d 910, 925 (Haw. Ct. App. 2003) ("A good example of the majority view is *Lohr v. Byrd*, wherein the Supreme Court of Florida concluded that punitive damages cannot be assessed against the estate of a deceased tortfeasor because (1) the death of the person sought to be deterred prevents the accomplishment of deterrence, and (2) the innocent heirs of the deceased tortfeasor are punished rather than the tortfeasor." (citations omitted)); *Whetstone v. Binner*, 15 N.E.3d 905, 909 (Ohio Ct. App. 2014) ("Some of the majority courts also opine that the imposition of punitive damages punishes the innocent estate and beneficiaries rather than the tortfeasor . . .").
 31. *Hofer*, 679 S.W.2d at 479 (Spears, J., dissenting).
 32. *Johnson*, 713 A.2d at 1134 (Flaherty, C.J., dissenting); *accord Colligan*, 753 P.2d at 146 n.8 ("We reject [the] ethical-cultural argument that the 'sins' of the deceased tortfeasor should be visited upon his children and family. In our view there is no social benefit to be derived from a rule which would permit the punishment of the estate and the heirs of the deceased tortfeasor.").
 33. *See, e.g., Johnson*, 713 A.2d at 1131 ("The actual difference between the effect of the punitive damages award on the deceased tortfeasor's heirs and a living tortfeasor's family is minimal. To allow a tortfeasor's estate to escape payment of punitive damages would be comparable to the injustice of allowing a defendant to transfer his wealth to his prospective heirs and beneficiaries prior to the trial of a case in which punitive damages are sought against him.").

while still alive, the value of her estate would have been reduced by the same amount assessed posthumously against her heirs. Why should the heirs receive an undeserved windfall merely because the defendant happened to die before punitive damages could be assessed? A deceased tortfeasor's heirs are not entitled to their unjust enrichment.³⁴

One might respond that even if the heirs are not punished materially, they are punished symbolically. That is, even if the heirs are made no worse off financially than they deserve to be, the gesture of imposing punitive damages communicates censure and thus constitutes unacceptable punishment of the innocent. This argument would explain why jurisdictions that disallow punitive damages often permit recovery of compensatory damages against deceased tortfeasors' estates.³⁵ Perhaps forcing the heirs to pay compensatory damages to the victim of the decedent's misconduct does not express rebuke of the heirs, whereas forcing them to pay punitive damages does.

But why must punitive damages express rebuke of the party who ultimately writes the check? Perhaps punitive damages could carry other expressive content, such as affirmation of the worth of the victim injured by the wrongful conduct or reassertion of the community norms that repudiate such conduct.³⁶ The view that punitive damages necessarily communicate contempt for the liable party is consistent with the "outrage heuristic": the idea that penalties generally vent anger at the wrongdoer.³⁷ To courts that associate punitive damages

34. In this way, posthumous punitive damages seem not to raise the same concerns as the classic examples of punishing innocents for the sake of general deterrence, such as that of the innocent who is framed for an unsolved crime and jailed to deter others from rioting. See generally R. A. DUFF, TRIALS AND PUNISHMENTS 178 (1986) (arguing that it is impermissible to frame an innocent scapegoat for the sole purpose of deterring others). Whereas the jailed innocent is deprived of liberty to which he is entitled, the heir liable for punitive damages is deprived only of an undeserved windfall.

35. See, e.g., *Sullivan v. Associated Billposters & Distribs. of U.S. & Can.*, 6 F.2d 1000, 1012 (2d Cir. 1925) ("The general rule is that, while in cases where the cause of action survives the same compensatory damages are recoverable against the personal representative as might have been recovered against the decedent, yet in such cases there is no right to punitive or exemplary damages."); *Evans v. Gibson*, 31 P.2d 389, 395 (Cal. 1934) ("An action in tort to recover compensatory damages for injury to property, rather than to the person, survives, but after the death of the defendant tort-feasor exemplary damages cannot be awarded against his estate or his executrices.").

36. Cf. Galanter & Luban, *supra* note 1, at 1428-29 (arguing that punitive damages serve an expressive function: they repudiate the wrongdoer's message of superiority over the victim and project community norms to would-be wrongdoers). These and other forms of expressive punishment, while they may express some contempt for the tortfeasor's conduct, need not express contempt for the heirs in order to accomplish socially valuable goals.

37. See, e.g., Kahneman & Frederick, *supra* note 22, at 65 ("The *outrage heuristic* could just as well have been named the *indignation heuristic*, or perhaps just the *anger heuristic*."); see also Baron

with outrage, the prospect of imposing punitive damages against the heirs of a deceased wrongdoer may seem like an ill-considered displacement of anger—a burden placed on the innocent due to frustration that the guilty are unavailable for punishment.³⁸ This reading would suggest that one plausible reason why courts refuse to impose posthumous punitive damages is that punitive damages are so thoroughly associated with contempt that it feels unseemly to visit them upon the innocent, whatever their deterrent effect. This account would provide additional support for the view that the general deterrent function is less salient than the stated dual-purpose justification for punitive damages³⁹ would imply.

CONCLUSION: A SHIFT AWAY FROM DETERRENCE?

I have argued that general deterrence considerations cannot explain the nonsurvivability rule as well as courts have supposed and that retribution plays a larger role in the imposition of punitive damages than is generally recognized. As the psychological literature on punishment suggests, decisions regarding penalization are often motivated in significant part by outrage at the wrongdoer.

This psychological account is difficult to square with the purported dual-purpose rationale for punitive damages. Indeed, the fragility of the deterrence rationale has not gone unnoticed, at least in the corporate context. In a string of cases from *BMW of North America, Inc. v. Gore*⁴⁰ in 1996 to *State Farm Mutual Automobile Insurance Co. v. Campbell*⁴¹ in 2003, the Supreme Court has emphasized the primacy of the retribution rationale for punitive damages, holding that the reprehensibility of the defendant's conduct is the first and "[p]erhaps the most important" constitutional guidepost in determining the reasonable-

& Ritov, *supra* note 20, at 20 ("People will want to hurt the injurer even if this hurt does not deter anyone, and they will tend to ignore the deterrent effect of their judgments.").

38. For instance, a widely cited Florida Supreme Court opinion observed: "With the wrongdoer dead, there is no one to punish, and to punish the innocent ignores our basic philosophy of justice." *Lohr v. Byrd*, 522 So. 2d 845, 847 (Fla. 1988).

39. See notes 1-4 and accompanying text (describing punishment and deterrence as the two primary purposes served by punitive damages).

40. 517 U.S. 559, 568 (1996) (holding that while "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," the Due Process Clause of the Fourteenth Amendment bars states from imposing "grossly excessive" punishment on tortfeasors).

41. 538 U.S. 408 (2003) (elaborating the reprehensibility criterion and the relationship-to-harm criterion).

ness of a punitive damages award.⁴² The deterrence argument—that large penalties are required to deter corporate defendants from profitable or difficult-to-observe tortious conduct—is considered insufficient to justify punitive awards. Rather, the Court has held that due process requires penalties to be imposed in proportion to the plaintiffs’ harm.⁴³ This development has not stopped states from continuing to propound a dual-purpose approach to punitive damages, but it has, in the corporate context, imposed some outer limits on the reach of the deterrence rationale.⁴⁴

Overall, the Supreme Court’s move away from the deterrence rationale⁴⁵ is in line with this Comment’s skepticism about the capacity of deterrent aims to explain our courts’ practices surrounding punitive damages. When it comes to explaining the nonsurvivability rule, at least, the psychology of punishment provides a plausible alternative to the logic of deterrence.

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42. *Gore*, 517 U.S. at 575; see also Jill Wieber Lens, *Justice Holmes’s Bad Man and the Depleted Purposes of Punitive Damages*, 101 KY. L.J. 789, 805 (2013) (“Overall, punitive damages’ morality-based punishment purpose is prominent in the Court’s constitutional analysis. When it comes to constitutional justification, punitive damages’ deterrence plays second fiddle.”).

43. *Gore*, 517 U.S. at 575.

44. See, e.g., *Johnson v. Ford Motor Co.*, 113 P.3d 82, 88 (Cal. 2005) (“The high court’s decisions do not preclude California from imposing civil damages awards ‘for the sake of example and by way of punishing the defendant,’ though constitutional review using the *State Farm/BMW* guideposts may, in some circumstances, limit the degree of deterrence California can achieve through awards of punitive damages.” (citations omitted)).

45. Cf. Lens, *supra* note 42, at 790 (“[T]he Court made clear that the [punitive] damages’ deterrence purpose was less constitutionally powerful than the punishment purpose.”).

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