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IS TORT LAW A FORM OF INSTITUTIONALIZED REVENGE?

GABRIEL SELTZER MENDLOW*

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INTRODUCTION

Viewed in a certain light, tort law serves primarily to give injury victims a means of imposing onerous burdens on their injurers. Through the remedy of injunction, tort law enables victims to restrict their injurers' freedom of action, and through the remedies of damages and restitution, tort law enables victims to deprive their injurers of money and other things of value. Moreover, tort law distinctively grants victims *themselves* the power to impose these burdens, rather than reserving prosecutorial discretion to the state. These features of tort law invite the charge that tort law is essentially a form of institutionalized revenge. If sound, this charge is damning. Most would agree that institutions of revenge have no place in a just society, and even those who might see a place for such institutions would likely find tort law to be a poor candidate. Because tort liability is assessed by an *objective* standard, a standard that generally pays no heed to a defendant's individual capacities or to the moral quality of a defendant's motivation, tort law enables victims to exact a remedy from injurers who are only slightly blameworthy or even morally innocent—injurers no one would regard as appropriate objects of revenge.[1]

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1. As critics like Emily Sherwin see it, tort law receives little aid from philosophical theories that strive to make sense of the institution's basic structure. The theory of corrective justice, for one, allegedly sweeps tort law's relationship with vengeance under the rug. *See* Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1396-97 (2003) [hereinafter Sherwin, *Compensation and Revenge*]. Perhaps even more problematic in Sherwin's view is John Goldberg and Ben Zipursky's theory of civil recourse, which regards the retaliatory mechanism of a tort suit as tort law's defining feature. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998). Echoing a charge leveled against civil recourse theory by John Finnis, *Natural Law: The Classical Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 56-58 (Jules Coleman & Scott Shapiro eds., 2002) (arguing against civil recourse theory, not against tort law), Sherwin suggests that, far from rendering tort law normatively appealing, civil recourse theory brings tort law's uncomfortable relationship with vengeance into sharp focus. Emily Sherwin, *Interpreting*

Behind this line of criticism lies a simple and perhaps arresting argument. The *revenge argument*, as we might call it, relies on two key premises: one about tort remedies, the other about tort plaintiffs.

Premise 1: Tort remedies inflict harm on tortfeasors.
Premise 2: Plaintiffs are motivated to seek tort remedies by a desire to inflict harm.
Conclusion: Tort law is a form of institutionalized revenge.[2]

The revenge argument seems to resonate with many people, so it is an argument worth taking seriously. It nevertheless has two troublesome characteristics: the premises are doubtful, and, even if they are true, they provide no support for the conclusion.

I. DO TORT REMEDIES INFLICT HARM?

Tort remedies unquestionably impose burdens: they limit defendants' freedom of action and they cause defendants to part with money and other things of value. These burdens are substantial. But do they constitute harms? I submit that most of the time they do not.

First, consider the remedy of injunction. An injunction is a judicial decree that the defendant shall engage in or refrain from a particular course of conduct.[3] Such a decree undeniably imposes limits on the defendant's freedom—actual limits as well as normative ones. The decree imposes *actual* limits in that one who disobeys it may be fined or imprisoned. The decree imposes *normative* limits in that it saddles the defendant with a duty, something that by its very nature reduces the range of the defendant's permissible options.[4] But besides limiting the defendant's freedom, an injunction *communicates* something; in particular, it communicates something about the defendant's rights and duties. When a court enjoins me from entering your land or damaging your property or misappropriating your trade

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Tort Law, 39 FLA. ST. U. L. REV. 227, 232-33 (2011) [hereinafter Sherwin, *Interpreting Tort Law*].

2. Sherwin in effect suggests that civil recourse theory entails the revenge argument and therefore entails its unpalatable conclusion. Sherwin, *Interpreting Tort Law*, *supra* note 1, at 232-33. I am not sure whether Sherwin means for this entailment to be a strike against civil recourse theory (on the ground that the revenge argument's conclusion is false) or a strike against tort law itself (on the ground that the revenge argument is valid and civil recourse theory is committed to the revenge argument's premises). Nor am I sure that civil recourse theory really entails either of the revenge argument's premises. But I *am* sure that even if civil recourse theory does entail the revenge argument's premises (that tort remedies inflict harm and that tort plaintiffs are motivated by a desire to inflict harm), civil recourse theory does not thereby entail the argument's conclusion (that tort law is a form of institutionalized revenge). I am sure of this because I am sure that the revenge argument is invalid. *See infra* Part III.

3. *See* RESTATEMENT (SECOND) OF TORTS ch. 48, note on terminology (1979) ("[M]andatory injunctions order the defendant to take some affirmative action to undo a wrongful action already in progress, while a prohibitory injunction orders the defendant to refrain from doing some action that would violate the plaintiff's rights.").

4. The duty created by a mandatory injunction effectively reduces the defendant's permissible options to one. *See supra* note 3.

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secrets, the court thereby communicates (truthfully) that I have no right to do these things. But if I have no right to do these things, then a court that prevents my doing them arguably causes me no harm. This idea is perfectly intuitive. It also draws support from a widely accepted theoretical conception of harm, according to which harms are (among other things) setbacks to legitimate interests.[5] Although I might have an economic interest in misappropriating your trade secrets, this interest surely is not legitimate because I can satisfy the interest only by violating your rights. Thus, an injunction that frustrates my interest in misappropriating your trade secrets does not truly cause me harm, at least according to what is perhaps the most influential philosophical theory of harm.

Next consider restitutionary remedies—remedies that apply when a defendant has taken another's property or obtained a gain through fraud or disloyalty. These remedies, too, probably inflict no harm. It is quite a stretch to say that a court causes me harm when it orders me to return property that I have stolen from you. This property is not rightly mine; indeed, it is not really mine at all. It is yours, and I have a duty to give it back—a duty that arises long before any court gets involved. It is equally a stretch to say that a court causes me harm when it orders me to disgorge profits that I have earned by defrauding you or by breaching your trust. I have no right to such profits, so their loss arguably causes me no harm. As before, these ideas are backed by theory as well as intuition. If harms are (among other things) setbacks to legitimate interests, then, because a wrongful gain simply is not something in which I have a legitimate interest, the court that disgorges my wrongful gain does not truly cause me harm.

For similar reasons, a typical award of compensatory damages probably does not inflict harm, either. Like an injunction or an order of restitution, an award of compensatory damages imposes on the injurer a legal duty—in this case a duty to compensate the injured plaintiff. Typically, such a duty has substantially the same content as a duty that the injurer has already, namely, an ordinary moral duty of repair. The moral duty arises long before the legal duty does, as injurers generally have a moral duty to repair the injuries they cause or to pay compensation when these injuries are irreparable. So, when a court orders an injurer to compensate her victim, the court orders the injurer to do something substantially the same as what she already has a duty to do anyway. But if the order merely compels the injurer to do what it already and independently would have been wrong for her not to do anyway, the order arguably causes her no harm. Once again, this idea is backed by theory as well as intuition. If I have a moral duty to part with a given sum of money, then any

5. *See* JOEL FEINBERG, HARM TO OTHERS 34-38 (1984).

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interest I might have in retaining that money is not a legitimate one. So, a setback to such an interest does not constitute a harm, at least according to the widely accepted conception of harms as (among other things) setbacks to *legitimate* interests.[6]

Now, some might resist my claim that a typical award of compensatory damages merely compels an injurer to do what it already and independently would have been wrong for her not to do anyway. Many who might resist this claim would do so presumably because they object to the idea that a defendant guilty only of minor carelessness deserves to suffer a large financial loss.[7] They are right to object to this idea, of course, but they are wrong to think the idea has anything to do with tort law. An award of compensatory damages does not purport to inflict on the defendant a loss that she *deserves*. To suppose that it does is to make the mistake of equating that which a victim is morally entitled to demand from her injurer (by way of compensation) with that which an injurer deserves to have happen to her (by way of punishment). An injurer guilty only of minor carelessness admittedly does not deserve much punishment. She surely does not deserve to lose a large amount of money. But her victim might nevertheless be entitled to demand a large amount of money by way of compensation, especially if the victim is less at fault for the injury than the injurer is.

The one remedy I have not yet mentioned is that of punitive damages. Punitive damages serve explicitly to punish, so they probably do inflict harm. But in this respect punitive damages seem exceptional. Other tort remedies (such as compensatory damages) might diminish a defendant's welfare, but they do not thereby cause her harm. To suppose that they do is to conceive harm as something that occurs every time a person's welfare decreases, and to conceive harm in this way is to deprive the concept of its distinctive moral significance. If every decrease in someone's welfare were a harm, harm would be so common that harming someone would not be *prima facie* wrong, or else many seemingly innocent actions would be *prima facie* wrong.

6. *See supra* note 5 and accompanying text.

7. *See, e.g.*, Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1995) (arguing that, because the size of an award of compensatory damages varies in proportion to the injury's severity rather than in proportion to the injurer's culpability, awards of compensatory damages sometimes impose burdens that injurers do not deserve to bear).

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II. ARE PLAINTIFFS MOTIVATED TO SEEK TORT REMEDIES BY A DESIRE TO INFLICT HARM?

What motivates tort plaintiffs is an empirical question with nothing like an obvious answer.[8] Still, it seems unlikely that what motivates tort plaintiffs is always or even usually a desire to inflict harm. There is at most one tort remedy the very purpose of which is to harm defendants: punitive damages. Injunctions are not meant to harm defendants; they are meant to protect plaintiffs from future injury.[9] Awards of compensatory damages are not meant to harm defendants either; they are meant to compensate plaintiffs for past injury.[10] That is presumably why almost everyone approves of liability insurance. As long as an injured plaintiff receives compensation, we generally do not care that his damages award impoverishes the defendant's insurance company instead of impoverishing the defendant.

But even if you think that injunctions, orders of restitution, and compensatory damages awards all do inflict harm, you should still hesitate to infer that a plaintiff who seeks these remedies acts from a *desire* to inflict harm. You should hesitate to infer this because the inference is a fallacy. Here is an analogous fallacy: *Whenever you achieve one of your aims, you feel pleasure. It follows that pleasure is always your ultimate aim.* Psychological hedonism obviously cannot be purchased so cheaply.[11] Even if we feel pleasure whenever we get what we want, it does not follow that our own pleasure is the only thing we ever truly want. Pleasure *might* be a universal consequence but it is not thereby a universal goal. Not all consequences are goals. Not even all foreseeable consequences are goals. So, even if tort remedies really do inflict harm, it does not

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8. *Compare* Sherwin, *Compensation and Revenge*, *supra* note 1, at 1403 ("The [restitution] claimant desires not only to be reimbursed, but also to eliminate the wrongdoer's profits—a desire that is essentially vindictive. Viewed in this way, compensatory remedies and restitutionary remedies can be seen as appealing to the same aspect of human psychology: One set of remedies permits the claimant to better his position at the wrongdoer's expense; another permits the claimant to prevent the wrongdoer from profiting at the claimant's expense. Both enable claimants to retaliate . . . ."), *with* Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1813 (2009) ("[T]here is little if any evidence that the motive of most tort plaintiffs is to make the defendant 'suffer' at all, and they certainly do not wish for the defendant to suffer in the way that they have.") (citing Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS'N 1359, 1359, 1361 (1992) (finding that fewer than one in five families who filed medical malpractice claims based on perinatal injuries to their infants cited the desire to "seek revenge or protect others from harm" as a motivation for filing suit)).

9. *See supra* note 3.

10. *See* RESTATEMENT (SECOND) OF TORTS § 903 (1979) (" 'Compensatory damages' are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.").

11. *See* Joel Feinberg, *Psychological Egoism*, *in* REASON & RESPONSIBILITY: READINGS IN SOME BASIC PROBLEMS OF PHILOSOPHY 501, 501-12 (Joel Feinberg ed., 3d ed. 1975) (exposing flaws in various arguments for psychological egoism and psychological hedonism).

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follow that what motivates tort victims to seek these remedies is a desire to inflict harm.

III. IS TORT LAW A FORM OF INSTITUTIONALIZED REVENGE?

You might think that I have been criticizing a straw person in that I have made the premises of the revenge argument implausibly strong. If you think this, you might also think that a more plausible version of the revenge argument would go as follows:

Premise 1: Tort remedies *sometimes* inflict harm on tortfeasors.
Premise 2: Plaintiffs *sometimes* are motivated to seek tort remedies by a desire to inflict harm.
Conclusion: Tort law is a form of institutionalized revenge.

These weaker premises are indeed more plausible. (They might even be true.) But the argument still has a problem. The problem is not that if you weaken the revenge argument's premises to make them more plausible, the premises will no longer entail the conclusion. The problem is rather that the conclusion does not follow even from the original, stronger premises. Even if tort remedies *always* inflict harm and plaintiffs *always* pursue these remedies out of nothing but a desire to inflict harm, it does not follow that tort law is a form of institutionalized revenge. The reason why this does not follow is simply that an institution's purpose does not depend on its participants' motivations.

To see why an institution's purpose does not depend on its participants' motivations, consider a similar argument about the income tax:

Premise 1: The income tax inflicts harm on taxpayers.
Premise 2: Tax collectors are motivated to collect taxes by a desire to inflict harm.
Conclusion: The income tax is a form of institutionalized harm infliction.

As everyone knows, the income tax's purpose is to raise revenue, not to inflict harm. This remains the case no matter what the income tax's incidental effect and no matter what the tax collector's motivation. If the income tax does indeed inflict harm, it inflicts harm only incidentally—even if it inflicts harm inevitably. So, even if the tax collector is a sadist who enjoys taking people's money, this psychological fact cannot transform the income tax from an institution of revenue into an institution of harm. The institution's purpose simply does not depend on its participants' motivations.

The same is true for tort law. Like income taxes, tort remedies (other than punitive damages) inflict harm only incidentally, if they inflict any harm at all. Thus, even if the typical tort plaintiff wants

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nothing but to get even with his injurer, this psychological fact does not render tort law an institution of revenge.

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