Introduction

Tort Law Punishes

The depiction of punitive damages as "a monstrous heresy" that has deformed the law of torts since their very introduction set from that very moment the tone of the theoretical inquiry on the place of punishment in private law. The tension then instilled and the theoretically motivated recoil against punitive damages has long made many tort scholars and tort theorists across jurisdictions reluctant to sound out plausible theoretical groundings for the place of punishment in tort law. As a result, scholarly attention has largely focused on the anomalous, exceptional, and foreign nature of punitive damages in torts. Many scholars have defended the theoretical inconsistency of punitive damages with tort theory more forcefully, often to the point of calling for the institution's abolition (or limitation) in common law jurisdictions or outright rejecting it in civil law legal systems. Doubtlessly, this defensive tendency is not uniform across jurisdictions. Genuine scholarly efforts attempting to offer explanations of and justifications for punitive damages are already prolific and on the rise in the United States, are observable and steadily increasing in England (and other Commonwealth countries), and are gradually taking hold in civil law jurisdictions as well.

None of the arguments against punitive damages raised during this long history have as yet proven persuasive enough to accomplish their abolitionist aims. Quite the contrary, punitive damages, at least in practice, are here to stay. They are widely recognized in common law jurisdictions and are gradually gaining recognition in civil law systems. The United States is without doubt the paradigmatic common law jurisdiction where punitive damages are prominent in the law of torts, both in theory and practice. However, recent trends show that they are also gaining prominence in other theoretical and dogmatic domains, even in legal systems where their availability was originally constrained (such as in England) or historically resisted or denied (as in most civil law jurisdictions). For instance, there are now English law scholars who currently contemplate expanding the availability of punitive damages beyond the restrictive "categories test" and "forms of actions" constraints. They argue that the traditional, formalistic approach to the institution prevents the law from substantively responding to behaviors that are equally as reprehensible but

fall outside the current restrictive categories. Similarly, in civil law legal systems, Argentina, Mexico, and Chile being the primary pioneers, punitive damages have been expressly recognized. In Europe, the initial attitude of outright rejection is also changing. Punitive damages have been included in the recent draft proposal for civil code reform in France and Italy, Spain, France, and Greece have started to demonstrate more permissiveness to the enforceability of foreign court judgments that include punitive damages. These developments have led to fresh conversations and scholarship on punitive damages in other European jurisdictions – even in Germany where punitive damages have been fiercely resisted and foreign punitive judgments have been to date considered contrary to domestic public policy and thereby unenforceable. As all these examples should have made evident, the punitive quest in private law has a dynamic quality in that it finds expression even in systems that expressly deny their validity. Most importantly, tort scholars, both from civil and common law legal traditions, widely acknowledge the pervasiveness of punitive components in tort law, having identified practices by which classic compensatory damages (such as increasing compensatory awards for pain and suffering) covertly or indirectly demonstrate responsiveness to punitive concerns in addition to the strictly compensatory award. Underlying this observation is dissatisfaction with the widespread practice in tort law of imposing poorly hidden yet openly denied punishment. Alongside this dissatisfaction is the conviction that, if tort law is truly condoning and imposing punishment, the practice must have reasoned, legal justification and be carried such that any punishment meted can be identified, treated, and controlled as such. Implicit in these observations is also the notion that regarding punishment in tort as some dependent, parasitic, or subsidiary component of compensation (i.e., when compensation is not enough) is misleading. Treating punishment as some add-on to compensation misses the point that punishment and compensation are distinctive responses to wrongdoing and demand independent and differentiated treatment.

In this overall, even global state of affairs, the time seems ripe for a wide-ranging, thorough, and meaningful quest for the theoretical and legal justification of punishment in tort law. For as much as punitive damages represent the paradigmatic example of a tort institution with salient retributive elements, scant scholarly attention has been devoted to justifying the persistence of the retributive dimension. The starting point for this project is my understanding that a genuinely scholarly attitude should willingly acknowledge the insufficiency of the classic theoretical account of tort law as an exclusively private rectificatory mechanism that is made evident by the pervasiveness of its punitive components. In addition, such an attitude also mandates a more profound discussion regarding the proper place for punishment in modern tort law, one that is neither constrained by the traditional treatment of punishment as an "anomaly" nor a corollary regulatory mechanism whose exclusive aim is "deterrence." As I aim to demonstrate over the course of this expedition, none of these scholarly approaches have as yet proven conducive in terms of elucidating the

role of punishment in tort law (or in what way it is embedded in punitive damages). While many accounts for punishment in tort law compete for dominance, none clarifies its justifications in a way that properly distinguishes the punitive, compensatory, and deterrent dimensions of the law of torts. Here again, the time seems ripe to fill that gap.

This project takes seriously the observation that tort law punishes. It takes seriously the most compelling reconstruction of the widely accepted double "punish and deter" function of punitive damages, which posits that their purpose is "retribution and deterrence." *Torts and Retribution* adds a new dimension to the current narrative by fleshing out missing retributive ingredients in a robust alternative theory to the dominant deterrence accounts of punitive damages. Put another way, this project departs from the contention that, if retribution does have a place in tort law, then we should ask what that place is and ought to be. It is this simple yet highly controversial and long misunderstood idea that I aim to explore, to recast, and to ultimately vindicate. *Torts and Retribution* unchains the classic approach to punishment in torts from the exclusive and unilateral perspective of the defendant (wrongdoer perspective), taking a novel tack that purports full integration of the long-overlooked perspective of the victim of reprehensible wrongdoing who seeks the imposition of a punitive award through tort law (wrongdoer-victim perspective). As the title of this book suggests, the goal is reconciling torts and retribution in a manner that responds to both the relational significance of the role of the victim in expressing *condemnation* and to the importance of maintaining institutional modes of moral communication that convey *value affirmation* between the private parties involved in a tortious situation. My argument boils down to the claim that retribution in torts is relational. Following a cross-disciplinary approach that enriches tort law with insights from the literature on social cognition regarding victims' retributive motivations and from criminal law debates over the retributive justifications for the imposition of punishment, *Torts and Retribution* devises the novel notion of *Relational Retribution*. This notion comfortably suits both the interpersonal structure of tort law and the proactive role traditionally allocated to the victim in tort litigation. By recognizing the necessary interconnection between defendant and plaintiff, *Relational Retribution* offers a much more holistic account of retribution in torts, which recognizes the necessary interconnection between the reprehensible character of the defendant's conduct as deserving of punishment and the rich correlative retributive motivations of the tort victim who initially seeks the imposition of the monetary sanction (the punitive award) for purposes of *condemnation* and *value affirmation*.

Taking retribution in torts seriously is certainly daunting. It necessarily demands reassessment of widely accepted assumptions underlying the understanding of tort law as an exclusively private rectificatory mechanism. To begin, it requires questioning the classic formalistic depiction of victims as seeking restoration to their former state before the tort occurred, however imperfect that rectification may be. In its

place, I depict the victims as seeking richer, textured, and value-laden responses that also capture the significance of the wrongdoing in a way that communicates the situated meaning of the impact of reprehensible wrongs on them and their complex motivations for resorting to tort law and its procedure for private redress. My reading of the tort victim feeds on insights from social psychology and social sciences into the true motives that drive people to punish reprehensible wrongdoing as well as from the "reactive attitudes" distinctively involved in holding others morally accountable that are discussed in moral philosophy. These findings elicit difficult questions on the desirability of making room for intuitive-emotive reactions to wrongdoing in the classic rationalistic mold of legal reasoning. They also invite doubt over the widespread view that victims' motivations to sue, particularly their punitive or retributive motivations, are a suspiciously subjective factor that tort law ought not consider given their proximity to a desire for private revenge or retaliation, both of which are considered morally objectionable bases for a normative justification for punitive damages. Most controversially, the research defies the supposed monopoly of the state in administering and imposing punishment through criminal law and procedure. As I should have expected, I myself have had to struggle to square the theoretical and empirical sources with my own understanding and legal training. On the other hand, I do understand the resistance I encountered to my willingness to push the retributive quest further and offer alternative readings of widespread assumptions that I find more persuasive. It has been a long journey. Hopefully, readers looking to engage in a fresh conversation on the topic will appreciate this work, while those less persuaded by the new reading will find among the classic and contemporary works surveyed resources that help them reinforce their position or perhaps even improve it.

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A few clarifications on scope, terminology, and methodology are in order. I focus exclusively on punitive damages because they represent the paradigmatic punitive institution in torts that primarily responds to retributive concerns. However, this does not mean that the question regarding the place of punishment in tort law should be exclusively confined to punitive damages. Indeed, some tort law scholars have recently argued that a range of other remedies (for instance, general damages awarded for defamation, the relaxation of the remoteness of damage rule where the wrongful behavior is deliberate, accounts of profits, among others), even if covertly or informally, also manifest a concern with punishment in torts. These are insightful claims that certainly deserve attention, but, since they do not directly concern retribution, at least not in the relational terms in which retribution is reconstructed in this book, I opted to maintain my original focus on punitive damages.

Because punitive damages are sought against individuals and corporations alike, I contend that assessing retribution in the mass-market setting becomes relevant in the enterprise of understanding the ultimate justification for punitive responses in

the product liability context. I am aware that many tort scholars, mostly from outside the United States, resist the idea of categorizing product liability as tort law. However plausible this objection may or may not be, it does not undermine my argument. My aim is to elucidate the retributive rationale of punitive responses to reprehensible wrongdoing whether the defendant's behavior is exercised as an individual or as an individual acting collectively (e.g., a corporation). Ignoring retributive responses to egregious corporate wrongdoing that occurs within mass-market contexts would mean failing to account for relevant instances of wrongful behavior which causes significant harm to victims and leads to similar demands for a punitive response. Whether classified as tort law or not, product liability litigation against corporate defendants is similarly informed by questions of accountability, private redress, and relational justice. Those are the core values that ultimately matter.

I am also aware that punitive damages in product liability litigation have mostly been awarded in the United States (and, very recently, Argentina). However, I do not believe the relative isolation of the United States experience impairs my argument either. In the present global economy, reprehensible corporate behavior manifesting systematic mistreatment of consumers and reckless indifference for their rights and well-being is so commonplace that we cannot afford to ignore it. Paying judicious attention to the relevant debates on punitive damages in the American product liability context could contribute not only to a better understanding of the fundamental retributive rationale of the institution but also help identify the relevant markers in a global discussion of the proper place for punishment in mass markets beyond the jurisdiction of the United States. The significance of this timely conversation is reinforced by recent developments in Europe (and beyond), where active efforts to adapt the EU Product Liability Directive (1985) to the digital age are at the center of the debates over AI liability.

As regards terminology, because punitive damages are also known as exemplary damages in England and other Commonwealth jurisdictions, I use the terms "punitive damages" and "exemplary damages" interchangeably throughout the book. Moreover, because the most compelling reconstruction of the widely accepted "punishment and deterrence" double function of punitive damages is that they are aimed at "retribution and deterrence," I will use the terms "punishment" and "retribution" interchangeably as well. Last, since punitive damages operate in the context of reprehensible wrongdoing conveying some degree of mistreatment, indifference, open disregard, demeaning, or disrespect from the wrongdoer to another person, I often use the term "victim" to refer to the wronged party and "offender" to refer to the wrongdoer.

Methodologically speaking, the aim of the book is to determine the best theoretical grounding for punitive damages. I do not attempt to show that my reconstruction of the justification for retribution in torts best accommodates or fits the theoretical accounts already available in the tort law literature. Certainly, several aspects of

Relational Retribution fit the civil recourse theory understanding of tort law as relational wrongs with its underlying ideas of accountability, obtaining private redress, and responsive behavior following a wrong better than it fits the insistent focus of the corrective justice approach on allocation back or the exclusive emphasis of economic analysis on deterrence, but seeking the greatest degree of accommodation with these competing tort theories is not central to the book's aim.

The aim is to provide a more robust, sturdy theoretical grounding capable of guiding us when the question is what the proper place and justification for punishment in tort law is and ought to be across jurisdictions. Likewise, I do not intend to interpret, account for, criticize, or justify any particular doctrine, statute, precedent, or practice of awarding punitive damages. The goal is to provide solid theoretical grounding from which jurists and scholars from diverse jurisdictions and legal traditions might better conceptualize the retributive rationale operative in tort law, independently of the particularities and actual shape of the practices of awarding punitive damages in their legal community. For that reason, I cite statutes, case law, restatements of the law, and other relevant legal materials on punitive damages in many different legal systems only with the purpose of illustrating, discussing, challenging, developing, and advancing the arguments that this book presents. Ultimately, the point is that jurisdictions across the world will benefit from learning from each other and, most importantly, from a robust theoretical retributive framework that better informs domestic discussions on whether to adopt punitive damages (and how) or whether to improve their current application and institutional design going forward (and how).

While the book does predominantly rely on references to Anglo-American case law and scholarship, this reliance is simply explained by the historically much more widespread and diverse nature of the practice of awarding punitive damages in that tradition (i.e., they are generally available in a broad range of cases, from product liability to privacy torts to sexual harassment lawsuits, among many others) as compared to other common law jurisdictions (such as England, where the availability of punitive damages is tightly restricted to certain categories of torts). Two factors in particular have created an environment that has given rise to heated debate and rich discussions on the punitive institution, ultimately fueling the salience of punitive damages as a central feature of Anglo-American tort law. First is the decades-long push for tort reform in the United States, which has habitually accused punitive damages as a tort institution "out of control" (i.e., one that has become excessively unpredictable and produced exorbitant awards, and was therefore in need of reform). This factor is compounded by the influence of legal realism and, particularly, the flourishing of law and economics accounts of tort law that situated the theoretical debate over punitive damages' rationale in dominant terms of efficient deterrence. Additionally, the book's predominant engagement with Anglo-American sources reflects the preponderant influence of the Anglo-American experience and scholarly debates on the topic in most civil law legal traditions that have either recently introduced punitive damages or are currently debating whether to do so. The review

and assessment of the existing punitive damages practice and scholarship in the most representative jurisdictions will provide a valuable resource not only to those seeking an in-depth understanding of the common law practice and its shortcomings but also to legal scholars, practitioners, lawmakers, and judges in countries outside the common law tradition in various stages of considering the adoption of punitive damages within their legal systems.

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In the remainder of this Introduction, I preview the central themes of the book to provide readers with a sense of its overall approach and what to expect. To that end, I highlight the core ideas, some substantive, others methodological, that underpin the foundations of the theoretical retributive framework that I explore, introduce, develop, and defend throughout the book.

PERSISTENT QUESTIONS

Punitive damages have long been considered a complex remedial institution that stands somewhere between the civil and the criminal law or – to put it more precisely – an institution oriented toward punition within a private-law context. Its focus on punishment is in fact what leads to the most perplexing puzzles associated with it. Although awarded as damages for harm done to a plaintiff by a defendant in a private lawsuit, the purpose of such awards in most jurisdictions is explicitly conceived as punitive in nature and therefore noncompensatory. Nevertheless, because the gravamen behind such damage awards is considered civil, the procedural safeguards of the criminal law (such as proof "beyond a reasonable doubt" of responsibility and prohibitions against double jeopardy, excessive fines, and compulsory self-incrimination) are not generally held to apply. The mix of criminal and civil law objectives and effects ensures that controversy will always surround the institution.

From a theoretical standpoint, the recurrent problem is whether there exists any normative space for punishment within a civil action or if punishment should be reserved for the public-law realms of either criminal or administrative and regulatory law. The notion that private law remedies, reflecting the underlying logic of civil claims, are to be compensatory and nonpunitive is so well established that it may be seen as the core distinction between public and private law. The evident tension created by this dual aspect of punitive damages leads to, at least, two fundamental questions: (1) What place, if any, do punitive damages have in the law of tort? And, if they do have a place in tort law, (2) should they be subject to differentiated treatment in virtue of their hybrid nature? The threat that punitive elements in tort law pose to the long-standing distinction between public and private law is so powerful that tort theorists have generally responded with arguments that in one way or another can be seen as an attempt to circumvent the fundamental punitive quest. Some reject punishment as an anomaly to be tolerated or ignored; others force it

into tort law's compensatory framework. Still others equivocate punishment with deterrence or offer a refashioning of the victims' right to demand punishment as a legal power for private redress. These reactions from tort theorists to the question of punishment largely explain the scarcity of theoretical reflection on the place of retribution in tort law. In fact, the scholars who follow these approaches have shown very little interest in developing the retributive dimension of tort law because the notion of just retribution is either inconsistent with the notion of justice in the framework they propose or because they are indifferent to the matter, for the questions that preoccupy them would not enrich from its development. Only recently has more effort been made to provide justifications for the practice of awarding punitive damages that evoke some notion of retribution, but only in highly qualified manners that do not convincedly advance a thorough retributive rationale of the institution. By taking the punitive quest seriously, this book undertakes the long-overdue enterprise of building a robust theoretical grounding for the retributive dimension of tort law embedded in punitive damages.

Besides the strange mix of civil and criminal law objectives and effects that operate in punitive damages, a second distinctive aspect, which also raises important challenges for theorists, is related to the double function served by the institution, that of "punishment and deterrence." All legal actors seem to understand punitive damages as an award that goes beyond compensation for the actual harm inflicted both in order to punish defendants and deter them (and others) from engaging in similar misconduct in the future. In a notable show of consensus, the scholars, lawyers, and judges all openly agree: punitive damages both "punish and deter." Despite the near unanimity of this understanding of the double purpose of punitive damages – punishment and deterrence – what legal actors and scholars specifically mean when they refer to either punishment or deterrence is ambiguous. Indeed, the duality of the concept that the label "punishment and deterrence" is meant to capture is often used to defend conflicting views on punitive damages. Many, if not most, scholars fail to recognize the tension between and under-specification of the most common explanations.

For instance, punishment can be plausibly thought of as retribution. Yet this notion is sufficiently abstract to accommodate quite varied conceptions, such as private retribution (where the relevant wrong is that done to an individual plaintiff seeking vindication of her rights) or public retribution (where the focus is on a wrong caused to society in general). As for the scholars who hold deterrence to be the primary goal of punitive damages, this approach also leaves room for divergent understandings, for deterrence too can be specific, general, or both (depending on whether the aim is dissuading the particular defendant from reoffending, or dissuading others from engaging in similar tortious conduct by way of example or warning). Deterrence can also be complete or optimal, depending on whether the intent is to discourage completely or to a certain degree the defendant's engagement in a specific activity or behavior. Because of the special role

that the double function plays in the debates over punitive damages, it is tempting to conceptualize the competition for predominance of different theories as an interpretive dispute – one that revolves around the different possible conceptions of punishment and deterrence. Accordingly, each author could be understood as arguing for the particular interpretation of "punish and deter" that, in her view, best captures and justifies the practice of awarding punitive damages. This interpretation would then provide the most solid foundation on the basis of which proposals for particular adjustments to regulate the practice of punitive damage awards would be oriented.

That both functions are to some extent interconnected does not mean that one of the functions cannot be understood as the core of the institution to the detriment of the other. It could be the case that punishment is seen as a secondary or as a necessary attribute of deterrence, or that deterrence is a secondary, necessary effect of punishment. The large and sophisticated body of scholarship on the deterrence aspect of punitive damages has not yet been matched by a similarly thorough account of its dominant retributive dimension. By taking seriously the most compelling reconstruction of the widely accepted double "punish and deter" function of punitive damages, which posits that their purpose is "retribution and deterrence," this book argues that stripping punitive damages of their retributivist content would deprive them of a fundamental element. The interconnectedness of retribution and deterrence makes the relevant question not whether to embrace "retribution" or "deterrence" but instead examining the interplay between the two (i.e., how "retribution" and "deterrence" interact). Following this approach, the book identifies the types of deterrence that are compatible with *Relational Retribution*.

VALUING THE VICTIM'S PERSPECTIVE

Torts and Retribution is meant to invite readers to rethink and resignify the role of the private actor in the articulation of tort law and the tort process. Taking retribution seriously means shifting the attention from the classic formal, utterly abstract depiction of the victim in a tortious situation as seeking individual restoration in order to comprehend a much more substantive, contextual, and textured account of what motivates victims to assume the considerable cost, in both financial and personal terms, of pursuing a punitive response to the wrongdoing they suffered. The foundation for the reconstruction I propose is a richly complex understanding of tort victims who hold dear values that impinge on their own sense of self-worth as well as the other-regarding norms they believe should be enforced in their political community. This understanding of the tort victim is responsive to the moral significance of the wrongdoing for the victim and to the importance that is attributed to the values (or dignitary interests) that the defendant's reprehensible behavior encroached or invaded. Ultimately, this approach argues for abandoning the nearly exclusive and unilateral focus on the reprehensibility of the defendant's behavior

and the notion of deservedness or "just deserts" for the imposition of a monetary sanction. Instead, it proposes a relational approach to retribution which is able to better connect the defendant and victim in a more holistic fashion and better capture the correlative significance of the victim's motivations to punish reprehensible wrongdoing. Once we delve more deeply into the victim's retributive motivations and establish their relational dimension, retribution solely conceived as "just desert" no longer seems an accurate representation of what tort victims seek to achieve by filing a punitive lawsuit. Instead, it turns out that alternative motives for retribution such as "denunciation" and "value affirmation" often better explain the victim's perspective. In this book, I develop this insight by exploring, identifying, and refining the expressive content of *Relational Retribution* in torts as an institutional mode of moral communication between the private parties. Underlying the analysis is the idea that, assuming we care about individuals' ability to engage meaningfully with their peers and community, we should make sure legitimate, official channels for expression are available to them. Tort lawsuits provide in an important sense a means for developing and articulating collective standards of conduct. Punitive damages themselves are a meaning-producing institution that embraces the values embodied in the condemnatory legal message that the wrongdoer is not somehow worth more than the victim and is not entitled to treat the victim in a manner that diminishes her value.

THE VICTIM'S (LEGAL) POWER TO BE PUNITIVE

Any book that challenges the prevailing view that punishment exclusively pertains to the state's monopoly over coercion that is embodied in the domestic context by the criminal law and procedure might understandably assume a position of resistance. I ask those prone to such a stance to consider the contention that the initial uneasiness with this project mainly stems from the particular framing of the public–private divide by tort scholars themselves. The objection most often raised is that punitive damages represent a dangerous privatization of the state's power to punish. This objection is predicated on an understanding that one of the greatest accomplishments of the modern state is the massive reduction in violence that it brought to everyday life. This triumph was partly if not largely achieved through the prohibition and prosecution of various forms of private violence (duels, honor killings, etc.). The theoretical foundation for the prohibition of those forms of violence was the principle barring individual citizens, following the universalist Enlightenment principles that inspired the French and American Revolutions, from punishing reprehensible wrongdoing themselves. Ever since, embracing private revenge has been anathema in our societies, however accepted and even condoned in exceptional circumstances. Still, the clear-cut eighteenth-century divide between public and private law is not only simplistic but, now at least, largely unconvincing. No one denies that citizens should not enjoy the power