

Did You Get The Message

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Scott Hershovitz, *Tort as a Substitute for Revenge*, in **Philosophical Foundations of the Law of Torts** (John Oberdiek ed., forthcoming 2014) available at [SSRN](#).

Modern tort theory begins with Holmes, who was eager to recast the old law of ‘trespass’ on suitably modern terms. Back when people were superstitious and quick to blame, tort could be understood as law that provides an alternative to vengeance. In our disenchanted world, however, tort law must be seen as a mechanism by which the state pursues a public policy, such as compensation of injury victims.

In *Tort as a Substitute for Revenge*, Professor Scott Hershovitz invites us to ask whether Holmes got us off on the wrong foot. Indeed, he argues that tort law has an important connection to revenge and that, as such, it is to be credited with delivering a kind of justice.

Hershovitz builds his analysis around a “chestnut” from Holmes’s time, the 1872 decision of *Alcorn v. Mitchell*. Alcorn had sued Mitchell for trespass. At the conclusion of that suit, which Alcorn lost, and while the two were still in the courtroom, Alcorn spat on Mitchell. Mitchell then sued Alcorn for battery, obtaining a jury award of \$1,000, most of which consisted of “vindictive” (punitive) damages. The Illinois Supreme Court affirmed. To be spat on, it observed, is to suffer a serious indignity, all the more so in a courtroom.

If nothing else, *Alcorn* provides a memorable illustration of an ‘offensive-contact’ battery. Hershovitz digs into the record, however, and finds interesting information relevant to his theoretical claims. Alcorn was a wealthy, powerful man, whereas Mitchell was not. Hershovitz plausibly speculates that Alcorn was used to getting what he wanted, was furious that the court had ruled against him, and was keen to re-establish his place—and Mitchell’s—in the pecking order. All of which might explain the apparent extravagance of Alcorn’s exhortation. According to the complaint, this was no ‘ordinary’ spitting incident. Alcorn filled his mouth with noxious substances and spewed them in Mitchell’s face, an act so dramatic that onlookers urged Mitchell to kill Alcorn on the spot! For failing to heed the crowd’s exhortations, Mitchell claimed to suffer a significant reputational hit.

Assuming these are facts and not mere pleading embellishments, what do they tell us? Hershovitz suggests the following. One person’s injuring of another carries an expressive component. Alcorn’s conduct was not an offense to some inflated notion of personal honor. It was an effort to degrade Mitchell. That effort demanded a response, lest Mitchell be perceived as acceding to his degradation. Alcorn’s actions sent a message, and Mitchell needed to send a message back.

Hershovitz’s core claim is that a tort suit enables a form of victim response that, like an act of revenge, conveys the right message. To obtain damages from a tortfeasor is to re-assert and re-establish one’s moral standing in the face of an act that threatens to undermine it. Against corrective justice theorists who maintain that tort law holds wrongdoers to a duty to repair losses that they cause, Hershovitz offers a very different notion of correction. Tort law is about corrective justice, but corrective justice is about *getting even*.

Tort as a Substitute for Revenge is elegant and provocative. In placing victim empowerment at the center of his account, Hershovitz builds on, but takes in a different direction, the civil recourse theory of tort that Benjamin Zipursky and I have developed. In emphasizing the expressive and equality-reinforcing aspects of tort law, he—along with other ‘next-generation’ scholars, including Andrew Gold, Nathan Oman, and Jason Solomon—opens new vistas in tort theory. Yet Hershovitz’s work is distinctly engaging for so boldly linking tort, dignity, revenge, and justice.

Not surprisingly, these linkages also raise some questions. Hershovitz’s claim is *not* that we should see tort law as channeling an understandable impulse to engage in bad behavior (revenge-taking) toward acceptable behavior (litigation). This view, he would say, fails to give revenge its due as a righteous response to wrongdoing. But is revenge really righteous?

One might concede that the Alcorns of the world ‘have it coming’—that *they* have no grounds to object when their victims respond vengefully. (If Mitchell retaliated by punching Alcorn, would we credit a complaint from Alcorn?) And revenge is undeniably a source of vicarious satisfaction. Still, caution is warranted. A moviegoer who delights in on-screen revenge might describe his enjoyment as a *guilty* pleasure, and with reason. Cinematic vengeance is cinematic; it has been expertly air-brushed to maximize its palatability. In reality, the best candidates for acceptable vengeance are probably immediate, small-scale retaliations, and even these might be merely excused rather than justified. In short, one can acknowledge the allure of revenge yet maintain that victims who respond in that angry, ugly manner have asserted their worth in an unacceptable way. In turn, one might question the notion that there is a deep connection between the wreaking of vengeance and the doing of justice.

Hershovitz’s account also may have trouble making sense of important parts of tort law. The meaning of an injury caused by inattentive driving or an inadvertent medical error seems qualitatively different from that of Alcorn’s abuse of Mitchell. This is *not* because—as Holmesians tend to think—it is erroneous to treat car accidents and malpractice as matters of rights and wrongs. Rather, these events don’t seem to carry a message that could possibly render revenge a suitable response. (Even many batteries seem not to send the degrading message of Alcorn’s.) Likewise, it seems a stretch to describe awards of compensatory damages for injuries of this sort as instances of “getting even.” Perhaps, then, Hershovitz’s is not so much a theory of tort law as of those insult-based torts that tend to give rise to punitive damages.

These questions notwithstanding, Hershovitz is fighting the good fight in challenging Holmesian orthodoxy. We moderns are not required to think of tort law bloodlessly, as an administrative scheme of compensation or deterrence.

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