Expressivism, Corrective Justice, and Civil Recourse

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Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 **J. Tort L.** 1 (2017), available at SSRN.

With clear examples, incisive and sweeping philosophical argumentation, and an engaging prosaic lilt, Scott Hershovitz writes about tort law the way his mentor Ronald Dworkin wrote about constitutional law. If this sounds like high praise, it is. Hershovitz's *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 **J. Tort L.** 1 (2017) is a pleasure to read. Indeed, I regard *Treating Wrongs as Wrongs* as one of the most important torts articles published in many years. Its excellence of course motivates me to push hard against its central themes to see whether they stand up.

Hershovitz's principal claim in this article is that "tort law is very much an expressive institution." He explains what it means to say that an area of law is an expressive institution, why this is correctly said about tort law, what messages tort law expresses – "this person is entitled to be treated with dignity" and "the defendant wronged the plaintiff" – and why it is an important fact about tort law that it sends these messages.

The article concludes on two overtly normative observations – one practical and one theoretical. On the practical side, he suggests that tort reform measures are undermining the capacity of tort law to serve its important expressive function, and that such measures must therefore be squelched. On the theoretical side, he suggests that his expressivism is actually a form of corrective justice theory, and a better form than those that have been advanced by Ernest Weinrib and others, as descendants of Aristotelian corrective justice.

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Criminal punishment is, for Hershovitz, the paradigm of an expressive institution. A central point (although not the only point) of incarcerating someone who has stabbed another person or swindled innocent investors is to send a message of condemnation. The state, on behalf of the public, is proclaiming that such behavior is disrespectful and unacceptable and the actor is to be recognized as deserving of negative judgment.

The imposition of tort liability is similar, but the message is somewhat different. Hershovitz presents the chestnut *Alcorn v. Mitchell*,[1] in which a wealthy person spat on the lower-class plaintiff in order to express his contempt for him. The jury found for the plaintiff in his battery claim – the spit being the battery – and awarded him $2,000 in vindictive damages (reduced by the trial judge to $1,000). The point of the judgment entered against the defendant was to *express or announce that the defendant had wronged the plaintiff*. A finding of nominal damages or miniscule compensatory damages would not have done so; the significant financial award gives meaning to the court's recognition of the wrong that was done. As in Anthony Sebok's important 2007 article on punitive damages in the *Iowa Law Review*,[2] Hershovitz links Jean Hampton and Jeffrie Murphy's expressivist account of criminal punishment[3] to punitive damages in tort law.[4] Critically, the plaintiff's verdict corrected the implicit message of the defendant that he was better than the plaintiff; it asserted the plaintiff's equality and dignity.

Hershovitz defends his broader view that tort law is an expressive institution by adapting replies to standard objections to wrongs-based theories. One is the objection that, since many torts are not predicated on blameworthy conduct, it makes no sense to call torts "wrongs" and to see tort law as expressing the wrongfulness of the defendant's conduct.

One particular example – *Kresin v. Sears, Roebuck & Co.*[5] – captures both the power and the vulnerability of Hershovitz's article. Seventy-three-year-old Rose Kresin was walking through a Sears parking lot when a Sears employee backed up a van and accidentally ran her over. Kresin lived, but suffered devastating injuries: she endured facial, rib, leg, and collarbone fractures, and a skull fracture that left her blind; she became permanently wheelchair bound and incontinent, and suffered numerous serious infections (including meningitis) during a two-month-long hospital stay after the accident. The jury found that the Sears employee, Alfredo Jijon, was negligent in backing up without looking behind him sufficiently, and the court entered a judgment against Sears for $16.5 million in compensatory damages – including compensation for past and future medical care and homecare, disfigurement, and pain and suffering. The appellate court affirmed.

Kresin is clearly not a case involving punitive damages, for the defendant employee's conduct was neither willful nor wanton; it was simply negligent. Hershovitz agrees that this is a case of compensatory damages, but he plausibly rejects the idea that this is loss-shifting or indemnification or "making whole" in any satisfactorily clear sense. Compensatory damages may be meant to compensate, but that is quite different from saying they are there to reproduce the plaintiff's prior physical condition. Rather, Jijon's conduct sent the message, "I do not have to watch out for you." The verdict, too, is expressive. It expresses that the plaintiff was wronged by the defendant – she was injured by the defendant's failure to be sufficiently vigilant of her possible whereabouts or the possible presence of someone behind him. In awarding her a $16.5 million verdict, the court was apparently making the point that Kresin is to be treated with dignity too.

> The damage award said to Jijon: This is what you did. This is your fault—the disability, the disfigurement, the pain and suffering. The damages did not make Kresin whole, not even close. But they did make clear that her injuries were Jijon's responsibility. And they ensured that Kresin would be paid for her injuries, so that they would not stand as markers of mistreatment her community did not care to do anything about. If we did not offer that to Kresin—if we left in place injuries that might be repaired or sat silent about those that could not—then she would indeed have reason to doubt her social standing. Maybe she could be treated that way, she might think, because she was, and nobody cared to do anything about it. The compensatory damages stopped that train of thought cold. They made clear that Kresin could not be treated that way.

(P. 33-34; emphasis and footnote omitted.)

Hershovitz's elegant expansion of the vindicative to beyond punitive damages is of course a crucially important part of his project of making expressivism a theory of tort law more generally. The next step in generalizing the account (in moving past intentional torts to negligence) concerns whether this must be a trial in which a verdict is actually announced. Does his expressivism turn on there being a trial and a verdict, or it is applicable to cases that have settled, perhaps confidentially? The settlement phenomenon would seem to present Hershovitz with a lesser-of-two-evils type of dilemma. If expressivism does extend to such settlements, the metaphor of "expression" seems to be vanishingly thin, because there is no audience (other than the parties) to whom the message of "plaintiff standing" is being expressed. Conversely, if it is only the trial verdict cases that count, then the account touches only a very small percentage of tort cases, and hence seems unable to bear the weight of a theory of tort law. Hershovitz tries to dull each horn of this dilemma: he concedes that in confidential settlements there is an audience of only the parties, but contends that is a significant audience, and he uses the pervasiveness of settlement in the shadow of the law as a ground for seeing the cases actually tried as especially important.

Critics will see tension between expressivism and the objectivity of the standard of care in negligence law, and Hershovitz anticipates this objection. His reply builds on the work of numerous recent tort theory scholars, explaining that a person who has committed a wrong might nevertheless not have been at fault in a manner that warrants blame. The key, however, is that whether or not the defendant was blameworthy, the plaintiff actually was wronged and suffered a rights invasion. On the expressivist account, the need for our system to send a message vindicating the rights of the person who was injured still exists. That is why expressivism is, according to Hershovitz, consistent with

the objectivity of the standard of care in negligence law, and even with strict liability.

Finally, the normative payoffs, theoretical and practical. After providing a powerful argument that the material make-whole conception of corrective justice theory fails, he contends that expressivism is itself a form of corrective justice theory:

> And corrective justice is not a form of justice because it governs the allocation of goods that shift as the result of wrongdoing. It is a form of justice because the way that we respond to wrongdoing is partly constitutive of the basic structure of our social relations. The distinctive demand of corrective justice is that we treat wrongs as wrongs, so that victims enjoy the social standing that wrongdoers threaten to deny them.

(P. 58.)

At a practical level, Hershovitz argues, expressivism provides reasons to push against recent tort reform measures: "Many recent changes to tort law serve mainly to muck up the messages that tort aims to send. In jurisdictions that have abandoned the collateral source rule, for example, damages no longer reliably convey the seriousness of the injuries inflicted." (P. 62.) Hershovitz touches critically on other particular measures as well, but also reminds the reader that, since the institution of tort law is fundamentally *meaning-conferring* and thus in one sense constructive, it is in many respects a flexible and contingent matter how we decide to do it.

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My principal concern arises when we push hard on a crucial ambiguity in Hershovitz's account. Sometimes, "expressivism" is meant to connote that the body of law in question categorizes the conduct of various actors according to what the primary actor's conduct expresses (intentionally or unintentionally). At other times "expressivism" stands for a view according to which *what the court does* when it imposes liability is to send a message. Recall that the discussion of *Kresin* alluded to both: Jijon's conduct sent the message, "You [Kresin] do not matter," and the jury verdict of over $16 million sent the message, "You, Kresin, do matter!"

Expressivism in torts has significant problems on either of these versions – defendant-conduct expressivism and court expressivism. We already know why the defendant-conduct expressivism will not work; Hershovitz told us when he conceded that a rights violation meriting redress in tort need not be accompanied by the sort of conduct that expresses a lack of respect for the dignity of the plaintiff. The objective standard of care and strict liability pertain to conduct that counts as wrongful and tortiously actionable, notwithstanding that it need not express anything about the victim.

Liability imposition in any case that reached a plaintiff's verdict is arguably expressive, however, and in this respect, court expressivism is more promising. But now we must return to the concerns about settlement I described earlier. Given that the vast majority of cases settle, we must concede that the theory explains only a tiny piece of the area. While decided against a backdrop of possibilities, the whole point of settling cases is to skip the step in which a neutral party (judge or jury) actually decides whether the plaintiff *was* wronged. And unlike plea agreements in criminal law, the defendant never actually admits or acknowledges having committed a legal wrong at the core of the allegation by the adversary in litigation.

In his eagerness to see the legal system as a morality play, Hershovitz misstates the way that equality grounds tort law. Equality is fundamental to tort law, but not principally because of the *shows* of equality the state enacts through trials that end in victim vindication. Through tort law, the state respects equality by empowering each person to demand redress from someone who wronged her or him should she or he so choose. Physical power, wealth, connections, gender, and race are supposed to be irrelevant both to whether one will be subjected to wrongs of another, and, concomitantly, whether one will be able to hold another accountable for having done such a wrong (Hershovitz is certainly right that in light of the uncertain and unequal real-world availability of such power, today's tort law needs

reform). It is not so much what the verdict and the state's entering of a judgment mean or express. More important is the power – one might even say "leverage" – that having a private right of action supplies to those who have been wronged. In this way, the capacity to extract compensation from defendants through confidential settlement is not an anomaly or a puzzle (as it appears to be on an expressivist theory); it is a vivid illustration of the equalizing and empowering force of tort law.

Expressivism, like civil recourse theory, shares much with corrective justice as developed by Weinrib, but in the end rejects it. Hershovitz nonetheless asserts that he adheres to a form of corrective justice theory – a better form than Weinrib's. He retains the teleological aspect of corrective justice theory – tort involves seeing to it that justice, even rectification, is done through courts after someone has been wrongfully injured by another. What it contests is the nature of the rectification – the true message of the plaintiff's dignity is being sent when a judge enters a judgment for the plaintiff based on a jury verdict.

Torts is more private than recognized by either Weinrib or Hershovitz. It is rooted in the private power to hold to account those who have violated one's rights. As a Dworkinian, Hershovitz might argue that his more teleological account better justifies tort law. Leaving aside whether that is so (I am skeptical), I worry that Hershovitz's expressivism does not qualify at the basic level of fit. Tort law respects dignity by giving power to those who have been wronged by others, not by expressing the moral truth about them.

Notwithstanding what I, as a civil recourse theorist, am able to depict as a fundamental difference between my views and Hershovitz's – power allocation versus message-giving – *Treating Wrongs as Wrongs* is an important article for anyone in tort theory or torts to read. In one place, it neatly constructs a promising and previously underdeveloped approach to tort law and takes on the leading pragmatic and philosophical criticisms of morally inflected tort theories. In so doing it captures, in philosophically sophisticated but easily readable form, the strong intuition of law students and lawyers that torts is not just about money and harm, it is also about people and power.

1. 63 Ill. 553 (1872).
2. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 **Iowa L. Rev.** 957 (2007), available at SSRN.
3. Jeffrie G. Murphy & Jean Hampton, **Forgiveness and Mercy** (1988).
4. Alas, Hershovitz does not engage Sebok's article, which (anachronistically put) cuts both ways as to the views Hershovitz advances. On the one hand (supportive), Sebok expertly chronicles the development of a vindicative function for punitive damages in the earlier historical phases of the remedy, and elegantly combines these ideas with Jean Hampton's work on the equality-expressive function of punishment. On the other hand (challenging), Sebok's aim is to capture the distinctive role and meaning of *punitive as opposed to compensatory* damages, and it is central to Hershovitz that the expressivist account applies to both.
5. 736 N.E.2d 171 (Ill. App. Ct. 2000).

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