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DIGNITY TAKINGS, DIGNITY RESTORATION: A TORT LAW PERSPECTIVE

VALERIE P. HANS*

I. INTRODUCTION

Bernadette Atuahene identified several objectives for the Dignity Takings/Dignity Restoration Symposium organized at the Chicago-Kent College of Law.¹ Her first goal for the symposium was that it serve as a law and society reclamation project. Her ambition for conference participants was for them to move beyond the traditional constitutional analysis of property takings to consider the multiple ways that takings occur. Law and society scholars often urge us to move beyond law on the books to law in action.² Embracing this tradition, Bernadette Atuahene encouraged conference participants to push beyond takings “on the books” to takings “in action,” and to focus in particular on the dignitary consequences of takings.

A second ambition for the symposium was to broaden the conversation about the restoration of dignity after a taking. She posed a variety of questions for conference participants to consider. If one has suffered a taking that results in the loss of one’s dignity, what is required for adequate restoration of that dignity? Given that private property may be commandeered for public purposes,³ how does this public purpose of a taking of property figure into the restoration process? And how does one

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1. Bernadette Atuahene, Welcome and Introduction, Dignity Takings/Dignity Restoration: A Symposium. Chicago-Kent College of Law (Nov. 10, 2016).

2. The classic citation distinguishing law on the books, or black letter law, and the law in action, the application of the laws, is Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

3. See generally GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012).



restore dignity when the dignitary impact of a taking falls not only on an individual, but also on a group?

The third motivation of the symposium was to present interdisciplinary perspectives on dignity takings and dignity restoration. Hence the presenters included not only legal scholars but also scholars with backgrounds in the fields of education, English, history, political science, and sociology. These diverse presenters drew on their often distinctive disciplinary and theoretical perspectives to offer new approaches to the subjects of dignity takings and dignity restoration. Lasana Harris and I, both trained as psychologists, provided closing remarks. In addition to the disciplinary mix, scholars also drew on other domains of law, including tort law, criminal law, the law of war, civil rights, and employment law, for insights into the taking and restoration of dignity.

A rich group of symposium papers, and the resulting articles featured in this special issue of the *Chicago-Kent Law Review*, more than met the symposium's objectives. Authors employed, as a springboard, Atuahene's ground-breaking research on dignity takings and dignity restoration in the field of property law.⁴ Building upon insights from the procedural justice literature, her case study of South African land restoration introduced the idea of dignity takings, defined as takings of property that are accompanied by dehumanization or infantilization.⁵ Atuahene asserted that, to achieve adequate dignity restoration, remedies for dignity takings must be done through processes that affirm and reinforce the dignity of the individuals who are affected by such takings.⁶ The case study analyzed the perceived fairness of dignity restoration efforts in the context of the South African land restitution program, following the country's transition from apartheid to democracy.⁷ She found that having a voice in the proceedings, and being treated with dignity and respect—two key features found to be important in the procedural justice literature—were strongly associated with participants' perceptions of fairness.⁸ Although the South African Land

4. BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM (2014) [hereinafter ATUAHENE, WE WANT WHAT'S OURS]; Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796 (2016) [hereinafter Atuahene, *Dignity Takings and Dignity Restoration*]; Bernadette Atuahene, *Takings as a Sociological Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171 (2016).

5. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 4, at 796.

6. *Id.*

7. *See generally* ATUAHENE, WE WANT WHAT'S OURS, *supra* note 4.

8. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (identifying the major features associated with perceptions of justice).

Claims Commission was partially successful in its efforts to achieve equitable remedies, it fell short of fully restoring the dignity of the dispossessed, Atuahene concluded.⁹

The twin notions of dignity takings and dignity restoration provided a productive framework for participants at the conference. I was invited in my closing remarks, and in this essay, to focus specifically on the concept of dignity restoration. Following Bernadette Atuahene's encouragement to think outside the box, I draw on tort law theory and on research about tort damages to reflect on the links between monetary compensation and dignity restoration. I highlight how a corrective justice perspective in tort law emphasizes the relationship between the wrongdoer and the injured person. The remedy of money damages helps to reestablish an equitable relationship between the defendant and the plaintiff and to reassert the worth and the dignity of the plaintiff. Reflecting on issues discussed at the conference, I consider how to assess the adequacy of money damages for dignity restoration. I also analyze what empirical evidence suggests about the significance of the source of the financial compensation for dignity restoration.

II. CORRECTIVE JUSTICE AND DIGNITY RESTORATION

As conference presenters analyzed dignity takings and dignity restoration in their specific areas, they underscored the fact that the legal system has multiple goals, some of which are centrally associated with concepts of dignity and the relationship between the parties, and other goals which are not. Analysts of the tort system, for example, often divide the aims of tort law into deterrence and corrective justice.¹⁰ A prime goal of tort law is deterring harmful behavior, giving "actors appropriate incentives to engage in safe conduct."¹¹ There is a rich literature on deterrence in tort law.¹² However, most of that literature focuses squarely on controlling the actions of the defendant. The relationship between the defendant and the plaintiff is not central to the deterrence goal.

But if we consider other goals of the tort system, the defendant-plaintiff relationship is extraordinarily important. The relationship is

9. See generally ATUAHENE, WE WANT WHAT'S OURS, *supra* note 4.

10. See generally KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (4th ed. 2012); JENNIFER ROBBENOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW (2016).

11. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §6 cmt. d (AM. LAW INST. 2010).

12. For a review, see Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115 (1993).



especially significant in the tort cases involving dignitary wrongs, such as offensive battery, assault, and false imprisonment, but it is not exclusive to them.¹³ The corrective justice rationale for tort law anticipates that “imposing liability remedies an injustice done by the defendant to the plaintiff.”¹⁴ Tort law aims to offer a mechanism for remedying wrongs, to fairly allocate the costs of injuries, and to compensate the injured.

In civil recourse and corrective justice theories of tort law, there is a strong emphasis on the relationship between the defendant and the plaintiff. In the theory of civil recourse, the idea is to provide a vehicle for plaintiffs to seek redress from those who have wronged them.¹⁵ The corrective justice perspective insists on reasserting the moral and relationship balance between the defendant and the plaintiff.¹⁶ A verdict of liability communicates the message that the defendant has wronged the plaintiff. The application of a tort remedy stands for the righting of that wrong between the parties. Money damages are meant to remedy that wrong and to redress the imbalance between defendant and plaintiff.

In addition to providing valuable monetary compensation for the specific injuries the plaintiff has experienced, money damages can also serve as a vehicle for restoring the dignity of the plaintiff. Some claimants are motivated to bring a lawsuit not only because of the financial award, but also because a public judgment of liability can “place responsibility on an offender, moderate any self-blame, recognize and affirm the societal norm that was violated, and communicate to an injured party that he is a respected member of the community.”¹⁷

The symposium motivates us to ask a question that should apply equally to both tort and property cases. For example, to what extent are money damages effective in restoring the dignity of a plaintiff? Jennifer Robbennolt and I recently analyzed the dignitary implications of money damages in tort cases.¹⁸ Like many plaintiffs who have experienced the taking of property, most tort plaintiffs are centrally concerned with the financial dimensions of their situations. Money damages can help compensate for lost wages, high medical bills, and other negative financial consequences of their injuries. But psychological factors, including desires

13. JAMES A. HENDERSON JR., RICHARD N. PEARSON, DOUGLAS KYSAR & JOHN A. SILICIANO, *THE TORTS PROCESS* 729–40 (8th ed. 2012).

14. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. d.

15. See e.g., John C. P. Goldberg & Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *VAND. L. REV.* 1 (1998).

16. ROBBENOLT & HANS, *supra* note 10.

17. *Id.* at 19.

18. *Id.* at 2–4.

for fair treatment, acknowledgment, and apology, are also significant motivations for tort plaintiffs.¹⁹ Janice Nadler and Shari Seidman Diamond have discovered that these psychological factors are also important to plaintiffs in property cases.²⁰ In both domains of law, money damages are attractive in part because they send a message that the plaintiff is a worthwhile individual, a message that helps to reestablish equity between the parties.

The dignitary impact of money damages gives rise to several questions. First, how much money is necessary as adequate compensation for the loss of dignity? In U.S. civil trials, we leave this difficult and challenging determination to the factfinder, either the judge or the jury. In determining what amount of money will fairly and adequately compensate the plaintiff, juries take into account the context of the injury and the identities and relationship of the defendant and the plaintiff.²¹ Lawyers, arbitrators, and insurance adjusters take into account the overall context and the relationship between the parties, as well as benchmarks from Jury Verdict Reporters or other sources, as they offer financial compensation and settle or resolve cases.

Inevitably, the assessment of the adequacy of an award or settlement is a comparative, contextual judgment.²² Consider, for example, the \$20 million settlement that Fox News's parent company provided to the former Fox News anchor Gretchen Carlson to resolve her claims of workplace sexual harassment by her boss Roger Ailes.²³ The financial settlement was accompanied by a public apology "for the fact that Gretchen was not treated with the respect and dignity that she and all of our colleagues deserve."²⁴ The substantial financial settlement, described as "unprecedented" in size for a sexual harassment suit, was seen as a strong vindication.²⁵ A Washington lawyer who regularly represents claimants in

19. *Id.* at 115 (describing psychological factors in tort cases).

20. See, e.g., Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 4 J. EMPIRICAL LEGAL STUD. 713 (2008) (describing psychological factors in property cases).

21. See Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120 (2011).

22. *Id.*; NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 281–302 (2007).

23. Michael M. Grynbaum & John Koblin, *Fox Settles with Gretchen Carlson over Roger Ailes Sexual Harassment Claims*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html> [<https://perma.cc/5WHF-S9G5>].

24. *Id.*

25. Paul Farhi, *\$20 Million Settlement and a Host's Abrupt Exit Add to Fox's Summer of Discontent*, WASH. POST (Sept. 6, 2016), <https://www.washingtonpost.com/lifestyle/style/former-fox-host-gretchen-carlson-settles-sexual-harassment-lawsuit-against-roger-ailes-for-20->

sexual harassment lawsuits observed that the large payment to Carlson “clearly is a recognition that she was right that she was treated inappropriately, and that in and of itself is quite stunning.”²⁶ Here, the comparison between the size of a typical sexual harassment settlement and Carlson’s settlement reinforced the ideas that her injury was serious, and that a substantial settlement was required to restore her dignity.

However, commentators regularly compared Carlson’s \$20 million settlement to Roger Ailes’s \$40 million exit package from Fox, a comparison that seemed to imply that the harassing Ailes remained in an inequitable and superior status to the harassed Carlson.²⁷ One observer noted, “compared both to Fox’s revenues of \$2.3 billion and the \$40 million golden parachute Roger Ailes supposedly received for leaving Fox in the wake of the harassment allegations, Carlson’s lawsuit ultimately doesn’t make a huge dent.”²⁸

Another example that illustrates the significance of comparison and context in assessing the dignity-restoring power of money damages comes from the 9/11 Victim Compensation Fund.²⁹ Kenneth Feinberg served as the fund’s special master and determined compensation in individual cases. As special master, he confronted “a huge responsibility . . . putting price tags on lost loved ones’ lives—and of survivors’ aspirations.”³⁰ Feinberg was required by statute to base the victims’ economic compensation on the victims’ actual economic losses. But that set up painfully obvious differences in settlement amounts. He reported that some families reacted to the different settlement amounts with resentment: “Widows of firefighters and military men could not understand why they would receive less from the fund than the stockbrokers’ widows. Why was the government devaluing the lives of the heroes at the World Trade Center and the Pentagon by awarding more to wealthier civilians?”³¹

Funds were also set aside to compensate the survivors and victims’ families for pain and suffering. In one raucous meeting, Feinberg heard from families who asserted that they or their loved ones had suffered more

million/2016/09/06/f1718310-7434-11e6-be4f-3f42f2e5a49e_story.html?utm_term=.f859b3fe2407[https://perma.cc/W5YR-EUNZ].

26. *Id.*

27. *Id.*; Grynbaum & Koblin, *supra* note 23.

28. Bryce Covert, *Putting Gretchen Carlson’s Multi-Million-Dollar Settlement in Context*, THINK PROGRESS (Sept. 7, 2016, 12:01 PM), <https://thinkprogress.org/carlson-settlement-harassment-accfa1726eb> [https://perma.cc/T34B-YTHR].

29. *See, e.g.*, KENNETH FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005).

30. *Id.* at xxi.

31. *Id.* at 71–72.

than other 9/11 victims. The victims on airplanes were said to have suffered more because they witnessed the terrorists up close, or, alternatively, the victims at the World Trade Center suffered more because they were trapped in a collapsing building. Survivors claimed to have suffered more because they were newlyweds, or, alternatively, married for decades.³² Feinberg was acutely aware that these dollar awards for pain and suffering were also seen as reflections of the worth of those lost in the 9/11 tragedy. Mindful of the symbolic significance of the financial settlements, he concluded that it was best to give the same amount of compensation for pain and suffering to all of the similarly-situated claimants.³³ In sum, the work on money damages in tort law indicates that financial awards and settlements can restore the dignity of the plaintiff, but the amount that is required to effect dignity restoration is inevitably contextual and comparative.

A second question is whether the dignitary meaning of money damages depends in part on *who* is providing financial compensation. Does it matter whether the individual wrongdoer, an insurance company, or—even in some circumstances—the government is the source of financial compensation? An extensive body of psychological research has found that, after experiencing events that have caused inequity in a relationship, the restoration of equity increases the satisfaction of those in the relationship.³⁴ Therefore, we would expect that compensation from a wrongdoer who directly provides compensation to an injured person should be more satisfying to the person who has been injured.

Research confirms that the identity of the provider of financial compensation is critically important to the plaintiff's restoration of dignity. In one illustrative experiment, people received compensation from either a wrongdoer or a neutral third party; in line with the theory, they expressed more satisfaction when they obtained compensation from the wrongdoer.³⁵ Interestingly, other experiments have shown that when compensation is paid by the wrongdoer as opposed to a third party, the amount of compensation awarded increases. Jonathan Baron and Ilana Ritov presented participants with a series of tort cases, experimentally varying how the injured plaintiff would be compensated. In some versions of the cases, the company that caused the victim's harm paid a dollar amount directly to the victim. Other versions had the company initially make a payment to the

32. *Id.* at 75–76.

33. *Id.* at 76–77.

34. ROBBENOLT & HANS, *supra* note 10, at 115–16.

35. See generally Andre deCarufel, *Victims' Satisfaction with Compensation: Effects of Initial Disadvantage and Third Party Intervention*, 11 J. APPLIED SOC. PSYCHOL. 445 (1981).

government, which in turn gave the compensation to the victim. People were more generous when the victim received direct payments. Baron and Ritov concluded that “setting the balance right between the injurer . . . and the victim” was an important driver of damage awards.”³⁶ Another experiment found that punitive damage awards were higher when participants were given the option of making an award to the individual who was harmed, instead of to the state treasury.³⁷ These studies all reinforce the idea that a prime purpose of money damages is the restoration of equity and balance between the defendant and the injured plaintiff.

It should be noted, however, that depending on the process, financial compensation from third parties may also restore equity and the dignity of victims—although the route to dignity restoration may be more indirect.³⁸ The 9/11 Victim Compensation Fund described earlier offers one example. Another is an innovative program in Belgium in which the state provides monetary compensation for emotional harm stemming from the death or severe injury of a close relative.³⁹ The modest amounts are intended to be primarily symbolic. However, participants in the program reported that the monetary compensation “made them feel recognized and supported in the loss they had personally suffered and that this had helped them to come to terms with their loss.”⁴⁰ If the process of compensation allows participants a voice, and treats them with respect, third party compensation can be effective in dignity restoration, as Atuahene found in the property context.

The psychological appeal of receiving compensation directly from the wrongdoer raises an interesting issue. Most compensation for injury is provided outside the formal legal system, and by parties other than the defendant who directly caused the harm. The existence of vicarious liability means that companies are on the hook for at least some of their employees’ wrongdoing. Roger Ailes, for example, did not contribute to Fox News’s \$20 million payment to his victim Gretchen Carlson. Commentators have extolled the efficiencies of mechanisms such as no-fault insurance and other loss-spreading approaches. But, as Daniel Shuman pointed out some years ago, these benefits should be balanced against the positive

36. Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 31 (1993).

37. Michelle Chernikoff Anderson & Robert MacCoun, *Goal Conflict in Jurors’ Assessments of Compensatory and Punitive Damages*, 23 LAW & HUM. BEHAV. 313 (1999).

38. See discussion in ROBBENOLT & HANS, *supra* note 10, at 116. See also Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 440 (2003).

39. ROBBENOLT & HANS, *supra* note 10, at 116.

40. Liesbeth Hulst & Arno J. Akkermans, *Can Money Symbolize Acknowledgment? How Victims’ Relatives Perceive Monetary Awards for Their Emotional Harm*, 4 PSYCHOL. INJ. & L. 245, 255–56 (2011). See discussion in ROBBENOLT & HANS, *supra* note 10, at 116.

psychological impact for plaintiffs of receiving compensation directly from those who have harmed them.⁴¹ Direct payments are apt to be more potent in restoring the dignity of the injured person.

To summarize, money damages can operate to restore the dignity of a person who has been injured in tort or deprived of property. A financial award or settlement conveys an acknowledgment of the wrong and signals the reestablishment of equity between defendant and plaintiff. Whether the award is seen as adequate to fully restore dignity is influenced by context, especially comparison cases. And financial compensation directly provided by the defendant holds greater promise for dignity restoration.

III. CONCLUSION

The symposium raises a host of important theoretical and empirical questions about the key concept of dignity. I'm grateful to Bernadette Atuahene for encouraging me and other conference presenters to push beyond traditional legal scholarship in the property field, adapting the ideas of dignity takings and dignity restoration to other legal questions. Both the conference and this symposium issue reflect the rich conversations that have ensued as authors adapted and applied ideas associated with dignity takings and dignity restoration to other legal fields. Her encouragement led me to focus more centrally on what many assume to be a side benefit of money damage awards in tort cases: the ability of money damages to restore the dignity of an injured plaintiff. Analyzing the idea of dignity in tort cases, I found many resonances with Atuahene's property-based analysis, even though many injured plaintiffs did not suffer the extreme dehumanization and infantilization that Atuahene identifies as a defining characteristic of dignity takings. As work in this area proceeds, I encourage researchers to consider whether the concept of dignity in property law, so effectively deployed by Atuahene and other authors, is distinguishable from dignity in other legal domains.

41. See generally Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39 (1994).

