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INTRODUCTION: WHAT DOES IT MEAN TO SAY THAT A REMEDY PUNISHES?

ANTHONY J. SEBOK, SYMPOSIUM EDITOR*

I. A FAMILIAR DICHOTOMY AND TWO QUESTIONS

The idea that private law remedies are compensatory and not punitive may be as old as the distinction between public and private law. In his *Commentaries*, Blackstone not only claimed his now-famous distinction between public and private wrong, he also drew a connection between remedy and wrong. Private law remedies violations of private right through redress “by either restoring to [the victim] his right” or providing him compensation.\(^1\) Criminal law does not restore anyone’s rights; it secures a “benefit to the public” through punishment and prevention.\(^2\)

Of course, Blackstone recognized that the same wrongful act could be both a public and a private wrong.\(^3\) Theft is a wrong that hurts the person dispossessed of her property by denying her a civil right, and it is also an injury to “the whole community” because it is a breach of public right.\(^4\) What Blackstone urged was that the purpose and structure of the response to each rights violation be complementary and mutually exclusive: redress for the former and penal sanction for the latter.

The structure proposed by Blackstone can be criticized on many levels. One could point out, as Holmes did, that early precursors of the common law mixed redress and sanction freely. In Lecture I of *The Common Law*, Holmes noted that in Anglo-Saxon law, the winner of an action for damages could seize and destroy the animal or inanimate object which was the immediate cause of the injury suffered in order to “punish” the losing party, and in Roman law con-

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1. 4 WILLIAM BLACKSTONE, COMMENTARIES *7*.
2. *Id.*
3. *Id.* at *5*.
4. *Id.*
tract breach was sometimes remedied through personally delivering the breacher to the aggrieved creditor. From this he concluded that early property, contract, and tort law was characterized by a desire for vengeance.

One could argue, as modern law and economics scholars do, that the redressive function of private law and the sanction function of criminal law should have the same purpose: to deter inefficient conduct *ex ante* and thereby maximize social welfare. Or one could argue, in the tradition of progressive and critical legal scholarship, that the redressive remedies of private law are coextensive with the sanctions imposed through public law, in that both public and private law ultimately serve to promote and preserve the interests of a subset of society (usually capital).

And yet the generalization that private law compensates and does not punish persists. At the same time, even legal novices learn quickly that the generalization has exceptions, either built directly into the law (such as punitive damages), or into its results (such as disgorgement). This symposium seeks to understand how these exceptions fit into Blackstone's general scheme. Its goals are twofold. First, to locate episodes in private law where punishment, not compensation, seems to predominate the remedies structure. Second, to develop theories concerning where such episodes occur and, where possible, explain why.

The essays in this volume range over a heterogeneous collection of doctrinal fields. Three authors have written on contract law; three authors have written about torts; one author has written about remedies; and another author has written about private antitrust actions. The authors approach the issue of punishment from a diversity of theoretical perspectives as well: some of the authors clearly favor law and economics and its formal methodology, others work out of the more philosophically-oriented perspective of corrective justice, while yet others adopt a more pragmatic approach, examining doctrine against a test of legal coherence.

Two further sets of differences divide the authors. First, since punishment itself is a heterogeneous concept, different authors could

7. See, e.g., Duncan Kennedy, FORM AND SUBSTANCE IN PRIVATE LAW ADJUDICATION, 89 HARV. L. REV. 1685 (1976).
have found (or have looked for) different senses of the concept in their chosen area of inquiry. Punishment can have a number of justifications, of which deterrence and retribution are but two of the most inclusive kinds. It should not be surprising, therefore, that many of the authors, if they found punishment, found that it injected either a deterrent or retributive element into the area of law they examined. It is clear, for example, that Aaron Edlin and Alan Schwartz see a large role for deterrence in contract damages, while Andrew Kull recognizes a retributive theme in restitution.

Second, some, but not all, of the authors stated or implied that the injection of punishment (in either of its senses) into the private law is either a good or a bad thing. Ernest Weinrib clearly thinks that punishment can never properly be part of contract damages, while Volker Behr argues that the recent growth of punishment-like damages in German law is a healthy development that should be encouraged.

Taking these two sets of value judgments as axes, I will briefly set out how each article grapples with the questions of what sort of punishment is to be found in private law (if any), and whether punishment's presence in private law (or at least a corner of private law) is a matter of regret or celebration.

II. THE ARTICLES AND THE TWO QUESTIONS REVISITED

Andrew Kull's article, *Restitution's Outlaws*, makes the uneasy case for recognizing punishment in the law of unjust enrichment. As Kull notes, it is taken to be "axiomatic" that restitution is not supposed to be punitive. However, Kull, who is the Reporter for the Restatement (Third) of Restitution and Unjust Enrichment, notes that one cannot simply ignore that restitution is sometimes withheld from a litigant on the grounds that "by their bad conduct, [they] have forfeited their right to the court's assistance." Kull calls this restitution's "negative sanction."

The title of Kull's article may be viewed as a double pun. The law itself could be viewed as acting like a doctrinal "outlaw" (or vigilante) when it imposes a negative sanction, since it is supposed to

10. Id. at 23.
11. Id.
do no more than return parties to their *ex ante* positions. On the other hand, and this is more likely what Kull has in mind, the law of restitution imposes negative sanctions on equity's "outlaws"—that is, persons who have otherwise meritorious claims and who have acted in some way that deserves social sanction. Kull details two ways in which restitution imposes its negative sanction. The first way involves episodes of "unclean hands." The second way involves episodes in which the defendants do not merely disgorge their wrongful gains but are forced to forfeit all their gains.

Kull concludes by observing that the negative sanction in restitution is obscured by the way in which we classify restitutionary remedies and their function. He suggests at the end of the article that the function the negative sanction serves is retributive. Thus, Kull's article offers the following answers to the questions which frame this volume. In unjust enrichment, at least, punishment serves a retributive function, and it is an intrinsic and integral part of the law as it now stands. Kull gives no indication that he thinks of punishment in restitution as an "outlaw" in any way that should alarm us. If anything, Kull seems to be suggesting that his identification of the negative sanction in restitution should make us rethink the axioms with which we characterize the law.

Aaron Edlin and Alan Schwartz's article, *Optimal Penalties in Contracts*, also embraces punishment in the area of private law in which they specialize. Edlin and Schwartz note that currently, the law prohibits liquidated damages which are greater than the *ex ante* estimation of the promisee's expectation interest. These are called penalties for nonperformance, a characterization which Edlin and Schwartz accept. What Edlin and Schwartz reject is the categorical rejection of liquidated damages which are penalties.

Obviously, Edlin and Schwartz think that a contract penalty should be understood simply as the price necessary to achieve social efficiency. Contract penalties should not be retributive but should serve pure deterrence goals. They recognize that in the real world, any given liquidated damages clause could be used tactically by either

12. *Id.* at 23–24.
13. *Id.* at 27–29.
14. *Id.* at 30.
16. *Id.* at 36–37.
a buyer or a seller to achieve gains inconsistent with society’s interest in maximal utility. They note, for example, that liquidated damages may be inefficient when the multiplier is less than 1.0, equal to 1.0, or greater than 1.0. Their point, however, is that there is no a priori reason for the courts to treat liquidated damages clauses where the multiplier is greater than 1.0 differently than when it is 1.0 or less than 1.0. By way of example, Edlin and Schwartz illustrate why, when either or both of the contracting parties can choose to invest in the performance of the contract, it may be efficient to allow the investing party to demand a penalty from the breacher that is greater than 1.0.

Edlin and Schwartz conclude that since courts are in a very bad position to discriminate among liquidated damages clauses on the basis of their efficiency, they should allow all such clauses as long as they have not been formed under the conditions of unconscionability. This rule would remove the stigma currently borne by contract penalties. Edlin and Schwartz thus believe that punishment clearly should be part of contract law, but only if by punishment one means self-imposed penalties designed to deter future selves from engaging in inefficient conduct. Thus, it is clear that they believe that penalties—as defined presently by the courts—are a good thing that ought to be rescued from their current state of disfavor.

Kull’s and Edlin and Schwartz’s certitude meets its match in Ernest Weinrib’s article, Punishment and Disgorgement as Contract Remedies. Although it is specifically about contract law, Weinrib, a preeminent spokesperson and advocate for corrective justice in private law, makes an argument that is broad enough to suggest a rebuttal to Kull’s article as well.

Weinrib notes that in Canada, England, and Israel, recent decisions have shown a softening of the law towards permitting a punitive function in disgorgement and contract damages. He sees this as a disturbing trend, especially in the area of contract law. Because Weinrib writes from the perspective of corrective justice, his main concern is that the remedies imposed in private law should “undo the injustice between the parties.” This not only categorically excludes

17. Id. at 39.
18. Id. at 52-53.
19. Id. at 45.
20. Id. at 52-54.
22. Id. at 60.
instrumental justifications, such as deterrence, but it also puts a very demanding burden of proof on punishment rationales rooted in retribution.

Weinrib argues that corrective justice should look to Kant to explain the remedy which contract law should prescribe. He notes that Kant "estimates contractual performance as the possible content of a right," and the conditions of a contract's formation determines whether the contract's performance may be demanded by the rightholder. Under this approach, in the event of a contract breach, the plaintiff's wrong is the defendant's repudiation of the plaintiff's right to performance. It is not the value of the performance—that thing which, since Fuller and Perdue's famous article, has been called the "expectancy interest." Weigh

Weinrib recognizes that since specific performance is rarely awarded in common law contract, expectancy damages serve as a proxy for the damages resulting from the violation of the right to performance. But for Weinrib, failing to understand the distinction between viewing expectancy damages as an artifact and the right to performance as the original can have dangerous consequences. He argues that the Fuller-Perdue approach to expectancy damages, which is to view them as flexible instruments of social policy, opens the door to punitive damages in contract law. He thus sees Whiten v. Pilot Insurance, a recent decision by the Supreme Court of Canada, which allowed an insured to collect noncompensatory damages from her insurer as a product of a court's failure to understand the corrective justice foundations of contract damages.

Similarly, Weinrib looks at what he calls "miscellaneous instances of gain-based recovery" in the common law and asks whether they represent a new "general conception" of disgorgement. While the instances identified by Weinrib are not exactly the same as those identified by Kull, the phenomenon identified by each overlaps. Weinrib is interested in cases of contract breach where the plaintiff's loss is measured by the defendant's gain, such as where defective performance by the promisor saves him money without causing the promisee further loss. As Weinrib points out, echoing Kull, the basis for disgorgement in these cases is that one should not profit from

23. Id. at 66.
24. Id. at 67–68. See the discussion of Fuller & Perdue at pp. 62–64.
25. Id. at 69–70.
26. Id. at 72.
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one's own wrong. Weinrib's criticism of this explanation is that it cannot satisfy the corrective justice test for the right remedy. Under corrective justice, the plaintiff needs to show more than an "historical" connection between the defendant's breach of the plaintiff's right and the defendant's gain; she must show a "normative connection" in order to have a right to the gains flowing from that wrongdoing.

Weinrib's article clearly sets out his view that punishment can properly include both deterrence and retribution, and that in either case, corrective justice counsels that private law should have none of it. Weinrib has no objection to the state pursuing social goals, whether they are efficiency or retribution, but he thinks that it is a mistake to confuse the penalties that might flow from the pursuit of those goals with the remedies to which individuals have a right under private law. Thus, in contrast to others in this symposium who have written with optimism—guarded or otherwise—about the role that punishment can play in determining damages in cases of unjust enrichment and contract breach, Weinrib is quite pessimistic. If the law continues in the direction identified by many of the authors in this symposium, it will become "more flexible but less just."

With Weinrib's caution in mind, it is worth considering Volker Behr's article, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*. This rich and far-ranging article covers many different themes, but one which is most prominent is the story Behr tells of the move by the German code of private law (the "Bürgerliches Gesetzbuch" or "BGB") towards incorporating noncompensatory damages in a wide range of doctrinal areas.

The story Behr tells is one in which at the outset German tort law bore the seeds of damages for "satisfaction" within doctrine of pain and suffering. These damages were, on the one hand, noncompensatory, since they were measured against the character of the defendant's wrong (his intent, usually) and not the damage caused to the plaintiff by the defendant's act. They were compensatory to the extent that they were given to the victim to compensate him for his

27. Id. at 73.
28. Id. at 74.
29. Id. at 100-01.
30. Id. at 103.
wounded honor.\textsuperscript{32} These damages developed since the 1960s as a way to offer serious protection for violations of the right to personality.\textsuperscript{33}

It is especially worth noting that the process described and denounced by Weinrib seems to have actually taken place in Germany in recent years. Weinrib fears that loosening the tight connection between the corrective justice content of private law right and its remedy would open the door to the misuse of damages so they would be shaped and measured by instrumental goals, such as deterrence. As a descriptive matter, Germany seems to be following that path. Behr describes how recent courts have elevated pain and suffering damages in cases involving violations of the right to personality by the media so as to achieve deterrence.\textsuperscript{34} Under pressure from the European Court of Justice, the German law of employment discrimination has been modified to allow for damages that would serve deterrence more fully.\textsuperscript{35} Finally, even the precise question of disgorgement, which separates Weinrib and Kull, has been decided by the German courts—in Kull’s favor.\textsuperscript{36}

Behr’s account is careful not to overstate the punitive elements at work in the BGB. Nonetheless, he describes an area of law in which both retributive and deterrent functions have been embraced by the courts, at first covertly and then overtly. His view is that the punitive elements already at work in the BGB are serving a variety of important functions. There is really no point in asking whether it is a good thing or not that the BGB has “imported” the idea of punishment in private law from the common law. The more pressing question is when will the German courts and bar discuss the ways in which Germany shares a variety of punitive devices with the common law—thus making it easier for German courts to understand and enforce the punitive awards which arise abroad (especially in America) which they are asked to enforce.\textsuperscript{37}

The article I have written complicates the dichotomy between punishment and compensation around which the other authors have organized their analyses. The article criticizes the history used by the Supreme Court to decide Cooper Industries, Inc. v. Leatherman Tool

\textsuperscript{32} Id. at 133–34.
\textsuperscript{33} Id. at 134–35.
\textsuperscript{34} Id. at 136 (citing the 1994 decision known as Caroline I, BGHZ 128, 1).
\textsuperscript{35} Id. at 142–47.
\textsuperscript{36} Id. at 138–40.
\textsuperscript{37} Id. at 156–61.
Group, Inc. in 2001. I am not critical of the decision itself, which held that appellate courts must perform de novo review of jury awards of punitive damages under the Fourteenth Amendment of the United States Constitution. The problem with the way the court arrived at its decision is that it held that de novo review is permissible because the ascertainment of how large a punitive damage award can be is not a factual question. What makes this statement so jarring is not just that it takes jury determinations of punitive damages out from under the Seventh Amendment, but that it is based on the Court’s assertion that at one point in history juries were finding facts when they awarded punitive damages, but that time has passed.

I argue that the historical contrast upon which the Court based its Seventh Amendment argument is not supported by the facts. The history of punitive damages is far messier than the Court allows, and far too messy to support its claim that somehow the function of punitive damages has changed, which is why the Seventh Amendment does not cover jury determinations of punitive damages, whereas once it did.

Beyond the historical argument and the critique of how the Court got to where it wanted to go in Cooper, I am making a broader point: there never was, and there need not be now, a strict dichotomy between punishment and compensation when it comes to tort damages. I illustrate that for many nineteenth-century legal scholars and judges, punitive damages served a retributive function that went beyond compensation for pain and suffering or promoting deterrence. They served a very specific need to provide compensation for wounded pride and injured honor. Like the early German conception of “satisfaction” which formed the nucleus of punitive damages in the BGB, early American tort law took seriously the idea that “full” compensation sometimes required retribution on the part of the victim of a tort against the defendant who violated his rights in tort.

If American punitive damages were at one time capable of serving a compensatory function through retribution, then Weinrib’s corrective justice concerns about punishment in private law might

38. 121 S. Ct. 1678 (2001).
40. Id. at 175–78 (citing Cooper, 121 S. Ct. at 1686–87).
41. Id. at 186–88.
need to be narrowed. It might be the case that, as Weinrib argues, corrective justice cannot endorse remedies in private law that promote ends unconnected to the wrong suffered by the victim of the violation of the private law right. But if punitive damages, for example, serve a compensatory function by punishing, then it might be the case that punishment, to the extent that it serves a retributive function, is compatible with corrective justice. My description of punitive damages in nineteenth-century America fills out what the possibility might actually look like.

The last two articles anticipate and develop a problem that lurks at the back of the choice between retribution and deterrence that runs throughout the symposium. As Spencer Waller notes, even in an area of law like antitrust, where by statute there is a private right of action to pursue set damages, the punishment function does not follow the structure set out by the remedy. Waller points out that for a variety of reasons no one can say that the sanction for an antitrust violation is treble damages, even though that is what the statute says. The treble damages principle in private antitrust is, according to Waller, incoherent at its core. The rationale for treble damages has variously been explained as promoting compensation and/or deterrence, although as Waller points out, there seems to be a retributivist theme running throughout. The incoherence in principle is exacerbated in its application. The entry of many new enforcers on both the public and private side of antitrust remedial action means that there is a complex and unstable dynamic of settlement and multiple penalties. In the wake of litigation surrounding the Department of Justice’s prosecution of price fixing in the bulk vitamin industry, some defendants, such as BASF, Hoffman-La Roche, and Rhone-Poulenc, paid damages for public and private actions that may have totaled seven times their gain. In other cases, antitrust violators who were more skillful in their navigation of the various actions brought by state and private actors could get away with paying much less than three times their

43. Id. at 211.
44. Id. at 211–13.
45. Id. at 225.
gain. Waller calls this wild and unpredictable variation in antitrust damages "the punishment gap" in the treble damages principle.

The question of coherence and consistency in punishment is something that cannot be ignored by anyone who purports to defend punishment in private law. Waller's article on antitrust damages in private actions suggests that even where maintained by statute, punishment in a system that depends on private actors initiating and monitoring the calculation and collection of the penalty can result in a wide scattering of remedies for the same act. Neal Feigenson takes up the same question in his review essay, *Can Tort Juries Punish Competently?* The article reviews *Punitive Damages: How Juries Decide*, which was recently published by a distinguished group of law professors and social scientists.

Sunstein and his coauthors used a series of experiments conducted with mock jurors to try to determine the factors that lead jurors to make choices in verdicts about punitive damages. The purpose of the research project was, as Reid Hastie describes in the book's overview, to investigate three main questions. First, how do jurors translate judgments about culpability into verdict dollar amounts? Second, how well do jurors perform at deciding whether certain conduct is culpable to the degree that would warrant punitive damages under the law? And third, how good are jurors at understanding the sort of cost/benefit decisions that are required by defendants in the real world?

Feigenson takes a close look at the methodology and preconceptions that went into each of the studies that make up the book's ten empirically-oriented chapters. He gives its authors due respect for having attempted an important and massively difficult research project. But, Feigenson reminds us that the book's conclusion should put us on guard about the assumptions that underpin it. The book concludes, somewhat ruefully, that lay juries are not very good at translating individual judgments of moral censure into verdicts that are designed to punish. If private law is to punish, how can it if the

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46. *Id.* at 234–35 (discussing the *Mylan* settlement).
47. *Id.* at 233.
49. *Id.* at 22–25.
one tool needed to impose punitive remedies—the jury—is ill-suited for the job?

Perhaps the problem with juries is not that they cannot do what is asked of them but that the authors of *Punitive Damages: How Juries Decide* are asking the wrong thing of juries. As Feigenson points out, the inability of lay persons to correlate their moral intuitions with a four-paragraph, 300-word instruction based on the works of Harvard Professors A. Mitchell Polinsky and Steven Shavell might mean that juries are bad at awarding punitive damages. Or, it might mean that juries reject the Polinsky-Shavell instructions as a useful tool to determine appropriate civil penalties.51

In his conclusion, Feigenson asks whether the lesson of *Punitive Damages: How Juries Decide* is that juries do not think in terms of optimal deterrence.52 If that is correct, it is an insight that has importance for how we think about punishment in private law. If we believe that the private law already does punish, as almost all the authors in this symposium seem to believe, should it matter that it seems that juries are especially bad at punishing in order to promote efficient deterrence? Edlin and Schwartz may not care, since they were discussing damages negotiated by the parties, not damages set by jurors. But for all the other authors, the question is quite pressing. Waller provides a picture of a world that already seems to have accepted widespread incoherence at its core with regard to penalties designed to deter and compensate—but it not clear that private law theorists can look to the world of antitrust for their model.

III. NEW DIRECTIONS FOR INQUIRY

The articles in this symposium suggest that punishment is already present in various parts of the private law in America, other common law systems, and Germany. Even if one views these episodes of punishment as too rare and limited to make a great difference in the private law overall, it seems that one important lesson that comes out of these articles is that in some ways the question of which punishment—retribution or deterrence—is as important as whether there is punishment and what one thinks of it. This new question—what sort of punishment ought there to be in private law—might form the basis of a new direction of study.

51. *Id.* at 275–76.
52. *Id.* at 287.
This symposium was initiated by the editors of the Chicago-Kent Law Review, based upon the advice and recommendation of a number of the faculty at that institution who believed that the topic would reward patient and careful study. The results of their faith are contained in the articles that follow. Many thanks to Michael Shapiro, the editor-in-chief of the law review, Professors Richard Wright and Steven Heyman of Chicago-Kent, and all of the authors who chose to work on this project and who produced such excellent articles.