

# Compensation and Revenge

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## I. INTRODUCTION

Compensation is one of the least controversial goals of law; compensating for harms is assumed to be both efficient and morally praiseworthy. I shall argue that the moral component of this assumption

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needs refinement. Some of the features of legal remedies that pass as compensatory suggest that pursuit of compensation is not entirely virtuous.

As typically described, compensatory legal remedies are remedies designed to make victims whole.<sup>1</sup> Their goal is to rectify, as far as possible, the harmful consequences of legal wrongs. Ideally, victims are restored to their “rightful position,” meaning the position they would have been in if no wrong had occurred.<sup>2</sup>

It is hard to object to compensation, so described. Compensation protects entitlements, expresses society’s respect for the victim, and provides aid to those who have suffered harm. From an instrumental point of view, compensatory remedies provide incentives for efficient behavior by forcing injurers to internalize the costs of their activities and by reducing the need for wasteful precautions by potential victims.<sup>3</sup> According to theories of corrective justice, compensation also enforces moral duty. Those who commit wrongs incur a moral obligation to alleviate the losses they have caused.<sup>4</sup>

At least, this is the dominant view of legal compensation. In practice, however, compensatory remedies depart in a number of ways from the assumed goal of reconstructing the claimant’s rightful position. Measures of compensatory liability sometimes exceed, sometimes fall short of, and sometimes bear no relation to what is required to make the claimant whole. Of course, some inaccuracy is to be expected. Particular legal remedies may have multiple functions, only one of which is compensation, and compensation itself may be shaped by conflicting aims. Further, even when the object of the remedy is clear, there are obvious institutional constraints on its fulfillment. Nevertheless, there is a problem of fit between the stated goal of compensation and the details of compensatory remedies that raises questions about the practice of compensation.<sup>5</sup>

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1. *E.g.*, 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 1.1, at 3 (2d ed. 1993) (“The damages remedy is a money remedy aimed at making good the plaintiff’s losses.”).

2. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 15–16 (2d ed. 1994) (explaining that restoring the plaintiff to his “rightful position” is “the essence of compensatory damages”).

3. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.10, at 192 (6th ed. 2003) (discussing the incentive effects of tort damages).

4. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 374–75 (1992) (describing a “mixed” conception of corrective justice); Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in TORT THEORY 24, 25–26, 38–47 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993) (describing a “comparative” conception of corrective justice); *cf.* Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 421–24 (1992) (tracing a connection between corrective justice and Kantian natural right).

5. *See, e.g.*, 1 DOBBS, *supra* note 1, at 286–87 (identifying “[t]he role of compensation in damage remedies” as an important issue of remedies doctrine); LAYCOCK, *supra* note 2, at 16 (noting the impossibility of complete restoration).

To explain these discrepancies, I will suggest another way to look at compensation.<sup>6</sup> Compensatory remedies provide satisfaction to the victims of legal wrongs. Part of this satisfaction comes from a payment that makes up for measurable losses. Yet satisfaction also comes from retaliation against the injurer. In other words, the object of compensatory remedies is not simply to adjust the absolute position of the claimant, but also to adjust an outcome in which the relative positions of the claimant and the wrongdoer are deemed to be unfair. The comparative element of compensation, which seeks to counterbalance rather than simply to repair the wrong done to the claimant, has a close affinity to revenge.

## II. COMPENSATION AND LOSS ADJUSTMENT

Ameliorating losses is, of course, a central objective of private legal remedies. On close examination, however, remedies that purport to be compensatory do not precisely track victims' losses.<sup>7</sup>

### *A. Uncompensated Loss*

A preliminary observation is that there is no free-standing legal right to compensation for losses. If lightning causes a fire on the victim's property, the only source of compensation for the loss is the victim's first-party insurance policy. Those who suffer sudden setbacks may sometimes receive support from the state, but public assistance, when available, is better characterized as rescue than as compensation.

The full machinery of compensation comes into play only when some person or entity is deemed responsible for the victim's loss. The defendant may be an intentional wrongdoer, or the defendant may have caused harm by failing to advert an unreasonable risk, which many view as wrong.<sup>8</sup> Alternatively, liability may be imposed without fault in order

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6. The term "compensation" is not necessarily limited to loss adjustment. To compensate means not only to "make amends for," but also to "counterbalance." 3 THE OXFORD ENGLISH DICTIONARY 601 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). "Compensate" is derived from the Latin word "compensāre," meaning "to weigh one thing against another." *Id.*

7. For an extended discussion of the goal of restoring claimants to their rightful positions and doctrinal impediments to the realization of that goal, see LAYCOCK, *supra* note 2, at 11–227. Many of the examples used in the following sections are loosely drawn from Laycock's excellent casebook.

8. On the question of what constitutes wrongdoing, see, for example, Larry Alexander, *Negligence, Crime, and Tort: Comments on Hurd and Simons*, 76 B.U. L. REV. 301, 302–03 (1996) (suggesting that inadvertent negligence is not culpable and

to spread losses among parties exposed to a common risk. But even here, compensation depends on a causal connection between the injury and an actor who can be made to pay. If the fire in the claimant's house began when a ceiling fan caught fire, the manufacturer of the fan may be liable, but only if the claimant shows that a defect in the fan was the probable cause.<sup>9</sup>

Thus, loss is not a sufficient condition for compensation. Claims to compensation must be linked to particular transactions with responsible defendants.

### B. Limited Focus

A related point is that legal remedies do not address the full range of consequences following from a legal wrong. Allegedly compensatory remedies exclude from consideration both some losses and some benefits that follow from the wrongful act. The results of this limited focus are often at odds with the stated goal of reconstructing the position the claimant would have been in if no wrong had been done.

On the loss side, compensation is not available for harm that is deemed to be either unforeseeable or simply too remote.<sup>10</sup> If the claimant's house accidentally catches fire, the phone company may not be liable for the damage resulting from its negligent failure to transmit

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questioning the importance of corrective justice); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 158–60 (1973) [hereinafter Epstein, *A Theory of Strict Liability*]; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 174–85 (1974) (basing a duty to repair on agency and causation); Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 262–63 (1996) (arguing that the negligent imposition of risk is culpable but not wrong); Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 276–85 (1996) (arguing that negligence liability is best understood as enforcing deontological norms).

9. See *Enrich v. Windmere Corp.*, 616 N.E.2d 1081, 1084 (Mass. 1993) (holding that causation was not established); see also JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 25–29 (4th ed. 2000) (discussing inferences of causation in product defect cases).

10. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928); see also 1 DOBBS, *supra* note 1, at 321; LAYCOCK, *supra* note 2, at 110–29. For extended analysis of proximate causation, see, for example, H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 62–108, 254–307 (2d ed. 1985) (developing a conception of causation from precedent and common sense); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 357 (2002) (opposing the standard of harm within the risk); Michael S. Moore, *Causation*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 150, 152–53, 156–59 (Joshua Dressler ed., 2d ed. 2002) (reviewing approaches to legal causation). The stricter standard applied to consequential damages for breach of contract is most plausibly explained as providing an incentive for the efficient exchange of information. See *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151–52 (Ex. 1854); see also POSNER, *supra* note 3, § 4.9, at 118–26.

the claimant's calls to the fire department.<sup>11</sup> Another widely followed rule holds that in the absence of physical harm to a claimant's person or property, claims for economic harm will be denied, even if the harm is quite foreseeable. If the defendant negligently sets a fire that destroys a tourist attraction, neighboring businesses probably cannot recover for their resulting loss of trade.<sup>12</sup>

The scope of offsets for the beneficial consequences of a legal wrong is even narrower. Logically, benefits conferred by the injurer must be accounted for in an accurate reconstruction of the position that the victim would have been in but for the wrong. To some extent, this is done: Courts may credit benefits that follow directly from a wrong against liability for related harm. Offsets, however, are limited in several ways.<sup>13</sup> The *Restatement (Second) of Torts* takes the position that to support an offset, the benefit conferred must affect the same interest of the claimant that suffered harm.<sup>14</sup> In addition, the collateral source rule excludes benefits from sources that are considered independent from the wrongdoer.<sup>15</sup> If the defendant negligently causes a fire that damages the property of the claimant, payments by the claimant's insurer typically are not deducted from the claimant's legal claim against the defendant.<sup>16</sup> Certain types of subsequent events may also be excluded from consideration, although they confer benefits on the claimant and were

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11. *Southwestern Bell Tel. Co. v. Norwood*, 207 S.W.2d 733, 735 (Ark. 1948) (holding the telephone company not liable).

12. *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 978–79 (E.D. Va. 1981) (limiting the scope of economic damages for pollution).

13. See 2 DOBBS, *supra* note 1, § 8.6, at 488–92 (discussing types of cases in which offsets are and are not available).

14. RESTATEMENT (SECOND) OF TORTS § 920 cmt. a (1979) [hereinafter RESTATEMENT (SECOND)]. For example, if the claimant sues the defendant for false imprisonment, claiming damages for physical harm and emotional distress, the defendant cannot claim an offset for the profits the claimant made selling the story to newspapers. *Id.* § 920 cmt. b, illus. 6. *Contra* LAYCOCK, *supra* note 2, at 102–03 (criticizing these limitations). The *Restatement* also provides that benefits that are “common to the community” may not be offset. RESTATEMENT (SECOND), *supra*, § 920 cmt. c.

15. 2 DOBBS, *supra* note 1, § 8.6, at 488.

16. See RESTATEMENT (SECOND), *supra* note 14, § 920A(2) & cmt. b (setting out the collateral source rule). There are a number of explanations of varying persuasiveness for the collateral source rule, including financing litigation, protecting the intent of the payer, preventing a windfall to the injurer, encouraging the purchase of insurance, or protecting the process of subrogation. None of these explanations, however, justify all applications of the rule. See 2 DOBBS, *supra* note 1, at 494–98 (questioning the asserted rationales for the collateral source rule); LAYCOCK, *supra* note 2, at 107–10 (questioning the rationales).

made possible by the wrong. If the claimant's husband dies in a fire and the claimant claims damages for loss of support and consortium, most courts will not allow evidence of the possibility, or even the fact, of the claimant's remarriage.<sup>17</sup> The remoteness of benefits is also likely to be important: If the claimant's injuries force the claimant to give up an obsessive hobby, and this in turn enables the claimant to discover new interests, a court probably will not take account of what the claimant gained, but will consider only what he lost.

Also excluded from consideration are the consequences of the remedy itself. Courts do not consider how the claimant is likely to use the money paid as damages or what negative effects the payment may have on the claimant's life. The claimant may feel guilty in spending money received on account of her husband's death, or the claimant may spend it freely and provoke envy and derision among former friends.<sup>18</sup> Another possibility likely to be ignored by the courts is that the institution of compensation will have negative effects on the claimant if the claimant is also a potential defendant.<sup>19</sup> All these effects are logically relevant to a comparison of the claimant's position before and after the wrong, but they do not enter into the calculation of compensatory remedies.

### C. *Nonpecuniary Losses*

Some losses can be repaired. If the claimant lost income as a result of bodily injuries, a sum of money identical to what he lost is a perfect substitute. But many of the consequences of an injury are not translatable into money. When harm is done to nonmonetary, nonfungible goods, what was lost cannot be measured in cardinal terms, and in any event cannot be replaced.<sup>20</sup>

Nevertheless, courts purport to compensate for many forms of

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17. *E.g.*, *Coleman v. Moore*, 108 F. Supp. 425, 427 (D.D.C. 1952) (holding evidence of remarriage inappropriate because remarriage "is an event subsequent to the death"); *Wiesel v. Cicerone*, 261 A.2d 889, 895-96 (R.I. 1970) (allowing a widow to proceed in her former married name to disguise the fact of remarriage); *see also* 2 DOBBS, *supra* note 1, at 448-49 (noting the general rule of exclusion of evidence of remarriage); LAYCOCK, *supra* note 2, at 103 (noting the general rule of exclusion).

18. *See* LAYCOCK, *supra* note 2, at 161-62 (quoting Scott W. Wright, *Living with Pain*, AUSTIN AM. STATESMAN, Sept. 21, 1990, at A1) (recounting a story of families in a poor town who incurred the suspicion of formerly supportive neighbors when they began to spend money from wrongful death awards).

19. *See* Jennifer H. Arlen, *Reconsidering Efficient Tort Rules for Personal Injury: The Case of Single Activity Accidents*, 32 WM. & MARY L. REV. 41, 63-65 (1990) (discussing the effects of bilateral risks).

20. *See* 1 DOBBS, *supra* note 1, § 3.1, at 281-82 (questioning the compensatory character of damages for nonpecuniary injury but suggesting that they may be justified in order to finance litigation, express "fellow-feeling" for the injured person, and provide incentives).

intangible harm. Sensory and emotional harm, harm to dignity and reputation, loss of or harm to important personal relationships, and interference with civil rights are all well-established bases for claims to money damages.<sup>21</sup> Yet in all these cases, awards of money are tied very loosely, if at all, to the effects of the wrong.

Computing monetary awards for nonmonetary harms is not a scientific process. Judges instruct juries to award a reasonable sum.<sup>22</sup> Once the jury has fixed on an award, judges hesitate to intervene, and when they do adjust awards, judges base their adjustments on the outcomes of past trials.<sup>23</sup> Awards vary greatly, and they vary in ways that tend to reflect defendants' culpability or victims' perceived desert rather than differences in the extent of loss.<sup>24</sup> The common practice of awarding lump sums for future pain and suffering without discounting to present value confirms that these awards are not seriously understood to conform to actual loss.<sup>25</sup>

Moreover, some components of intangible harm claims are not really losses at all. Suppose the claimant suffers painful burns and is distraught over the ugliness of his scars. These are best described as forms of hardship, which can only be assimilated to the goal of annulling loss by torturing the description of the harm—loss of the absence of pain and embarrassment? Of course, an award for pain and suffering can be viewed as paying the claimants for their ordeals, and therefore as part of the process of placing them in the position they should be in. But this too is disingenuous. In fact, there is no sum of money that would induce most people to endure serious injury or death: The amount required to make good a loss of this type is infinite.<sup>26</sup> In some cases, money can buy devices that will make life easier and more interesting in the aftermath of an injury. Often, however, a seriously injured victim may be unable to

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21. See generally LAYCOCK, *supra* note 2, at 144–98 (discussing damages for nonmonetary harm).

22. Cf. 1 DOBBS, *supra* note 1, § 3.1, at 283 (noting the lack of standards); LAYCOCK, *supra* note 2, at 175 (same).

23. E.g., *Levka v. City of Chicago*, 748 F.2d 421, 425–27 (7th Cir. 1984) (reversing the award of damages for a civil rights violation based on a review of comparable verdicts); see also 1 DOBBS, *supra* note 1, § 8.1(4), at 383 (stating that review “becomes a real embarrassment when there are no standards for measurement”); LAYCOCK, *supra* note 2, at 187–89 (discussing remittitur and varying attitudes of judges toward jury verdicts).

24. See LAYCOCK, *supra* note 2, at 156–60 (reporting verdicts in wrongful death cases).

25. See RESTATEMENT (SECOND), *supra* note 14, § 913A cmt. a (discussing discounting); see also *id.* § 913(1) (indicating that awards for bodily harm and emotional distress do not carry interest).

26. See POSNER, *supra* note 3, § 6.12 (suggesting that infinite damages would overdeter).

enjoy what money can buy.<sup>27</sup> Meanwhile, in the case of dignitary harm or interference with the exercise of civil rights, typical monetary awards are likely to far exceed what the claimant would accept voluntarily to suffer the offense or forego the right.<sup>28</sup>

In addition to problems of measurement and substitution, remedial doctrine excludes some intangible injuries from the scope of compensation. Courts traditionally have denied claims for the loss of life expectancy,<sup>29</sup> as well as claims for negligently inflicted emotional distress without accompanying physical injury or physical effects.<sup>30</sup> Wrongful death statutes often limit the circle of persons entitled to recover.<sup>31</sup> Most statutes also exclude damages for grief, and some exclude all nonpecuniary loss.<sup>32</sup>

Another type of loss that is not recognized as a subject of compensation is moral affront, which many would say is entailed by wrongdoing. Gerald Gaus maintains that in the absence of justification, rights violations involve not only loss of value, but also interference with the victim's power of "self-direction."<sup>33</sup> Deliberate or reckless harm can also be seen as an expression of contempt for the intrinsic worth of the victim.<sup>34</sup> Money does nothing to eliminate harm of this kind. To this extent, compensatory remedies are helpless to restore victims to their rightful positions.

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27. See Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 364 (1988) (suggesting that the marginal utility of money may fall after an injury).

28. See 2 DOBBS, *supra* note 1, § 7.3(2), at 304–09 (discussing the damages for dignitary torts).

29. *Id.* § 8.1(4), at 390–92 (noting that courts allow recovery for emotional distress resulting from the prospect of early death, but courts do not allow recovery for shortened life expectancy).

30. *Id.* § 8.1(4), at 393–94 (discussing recovery for the fear of future harm); LAYCOCK, *supra* note 2, at 189–90 (noting that, as of 1994, a majority of courts still deny recovery for negligently inflicted emotional distress with accompanying injury or breach of duty).

31. *E.g.*, CAL. CIV. PROC. CODE § 377.60 (West Supp. 2003) (identifying persons with standing to bring wrongful death actions); see also 2 DOBBS, *supra* note 1, § 8.3(4), at 430 (discussing statutes that authorize death damages based on loss to designated survivors).

32. *E.g.*, *Liff v. Schildkrout*, 404 N.E.2d 1288, 1291–92 (N.Y. 1980) (denying recovery for the loss of consortium); see also 2 DOBBS, *supra* note 1, § 8.3(5), at 439–42 (discussing the limits on nonmonetary death damages). Courts have sometimes interpreted statutes that limit damages to pecuniary loss to all recovery for the "pecuniary" value of relationships within a family. See, e.g., *Krouse v. Graham*, 562 P.2d 1022, 1025 (Cal. 1977).

33. Gerald F. Gaus, *Does Compensation Restore Equality?*, in NOMOS XXXIII: COMPENSATORY JUSTICE 45, 60–62 (John W. Chapman ed., 1991).

34. See Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY 35, 44–45 (1988) (discussing the message that wrongs send to victims).

*D. Other Limitations, Including Costs*

Even when harm is a matter of lost income, and therefore remediable by money damages, various rules can cause damage awards to diverge from the claimant's actual loss. For example, personal injury awards are not subject to income tax, yet many courts conceal this fact from juries and exclude evidence of taxes that the victim would have paid on lost income. Thus, if the claimant suffers injuries that prevent him from working, the jury will hear evidence about the claimant's expected gross income, not after-tax income. The claimant will then receive a tax-free award, which evidently will overcompensate him for his loss.<sup>35</sup> On the other hand, rules governing interest on damage awards are erratic and often fall short of the real effects of time on the value of money.<sup>36</sup>

Another significant departure from perfect nullification of losses is the allocation of the costs of litigation. The American rule on lawyers' fees requires each party to pay its own litigation expenses, an outlay that cuts significantly into the restorative effects of the remedy.<sup>37</sup> Nor is there any accounting for the stress of litigation or the positive emotions that may accompany a win.

*E. Implications*

Compensatory remedies depart in a number of ways from the assumed goal of annulling wrongful loss and restoring claimants to the position they would have occupied if no wrong had occurred. In mentioning these various discrepancies between damage remedies and loss adjustment, I do not mean to suggest that loss adjustment is merely a sham that covers other motives for granting remedies. Annulling losses is certainly a central part of the practice of compensation, and at least some recalcitrant rules, such as the rule governing lawyers' fees, can be

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35. See RESTATEMENT (SECOND), *supra* note 14, § 914A(2) (noting that personal injury awards are not adjusted to reflect tax exemption); 2 DOBBS, *supra* note 1, § 8.6(4), at 501–08 (discussing the traditional and still-prevalent rules on adjustments); LAYCOCK, *supra* note 2, at 204–06 (discussing the relation between damages and taxes).

36. See 1 DOBBS, *supra* note 1, § 3.6(1)–(5), at 333–61 (discussing prejudgment interest); LAYCOCK, *supra* note 2, at 210–13 (same).

37. Despite numerous statutory exceptions, this remains the rule in ordinary tort cases. The principal justifications for the rule are encouraging claims and avoiding complex fee calculations. See RESTATEMENT (SECOND), *supra* note 14, § 914(1) (noting that damages normally do not include litigation expenses); 1 DOBBS, *supra* note 1, § 3.10(1), at 386–88 (discussing the American rule); LAYCOCK, *supra* note 2, at 844–46 (same).

explained as promoting competing policies that are external to compensation. Other inconsistencies may simply reflect the fact that perfect reconstruction of a disrupted state of affairs is not possible.

Nevertheless, the anomalies mentioned above suggest that compensatory remedies are not exclusively devoted to loss adjustment. Even when there are no evident competing goals at stake, the enterprise of compensation ranges beyond feasible repair of actual loss. Courts give remedies that correspond in a rough way to the salient consequences of wrongs and also provide claimants with a sense of satisfaction that justice has been done. In the next section, I shall examine the possibility that part of the satisfaction claimants obtain through compensatory remedies lies in doing something, through the medium of litigation, to even the score.

### III. RETALIATORY COMPENSATION

Restoring claimants to the positions in which they would have been in the absence of a wrong is an appealing description of compensation because it avoids any suggestion of vindictiveness on the part of the claimant. A wrong has been done, and the law seeks to cancel its harmful effects. Loss-oriented descriptions, however, overlook the fact that compensation, as practiced in our legal system, is a two-party transaction in which a claimant calls upon a defendant to pay for harm done. The defendant has caused a setback for the claimant, a loss of the claimant's rightful position in the world. Compensation allows the claimant not just to regain lost ground, but to regain it at the defendant's expense.

Prominent versions of corrective justice theory account for the imposition of liability on defendants by invoking the moral duty of wrongdoers. The agency of the wrongdoer in causing a loss creates a "normative link" between wrongdoer and victim, which in turn requires the wrongdoer to assume the loss.<sup>38</sup> This focus on the wrongdoer's duty deflects attention from the role and attitude of the victim in pursuing a claim, and thus avoids the question of vindictiveness.

Leading corrective justice theories, however, do not provide a complete explanation for the practice of legal compensation. One difficulty lies in fitting legal liability within the arithmetic assumptions of corrective justice. Corrective justice is most successful when the wrongdoer intended to inflict, and did inflict, a particular harm on the victim. Often, however, the extent of a legal defendant's liability is measured by an outcome that was not only unintended, but improbable at the time of the defendant's act.<sup>39</sup>

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38. Perry, *supra* note 4, at 24–26; *see also* COLEMAN, *supra* note 4, at 374–75 (explaining the wrongdoer's responsibility).

39. *See* Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *LAW & PHIL.* 1, 4–5 (1987) (discussing the discrepancies between tort

Even if one accepts that outcome is relevant to moral responsibility, standard corrective justice theory is descriptively inadequate. Corrective justice is said to require annulment of losses; therefore, it fails to explain the various discrepancies between compensatory remedies and actual loss. Nor does corrective justice theory explain the aggressive sentiments that often accompany claims to compensation. Victims do not simply wish to recover for losses; they wish to prevail over their injurers.<sup>40</sup>

Some of these difficulties are resolved if the relationship between victim and injurer is recast as one of revenge rather than moral right and duty. On this view, a victim who pursues a compensatory remedy strikes back at the injurer by seeking relief at the injurer's expense. The outcome of the remedy is not simply a correction of loss, but an adjustment in the comparative positions of the parties. Corrective justice theorists are not likely to welcome this revision, but it can help to explain the anomalies of compensatory remedies.

Common experience suggests that the pursuit of compensation can be vindictive. The following sections trace the thread of vindictiveness that runs through both the history of compensation and certain features of modern remedial doctrine.

#### *A. Ancient Remedies*

Vindictiveness played a significant role in the origins of compensation. A series of laws enacted by Anglo-Saxon kings before the Norman Conquest illustrate this point.<sup>41</sup> The pattern of Anglo-Saxon compensation schemes, however, is not unique; primitive laws from various parts of the world, some much older than the Anglo-Saxon

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liability and retributive justice); Emily Sherwin, *Why Is Corrective Justice Just?*, 15 HARV. J.L. & PUB. POL'Y 839, 842, 847 (1992) (questioning the moral basis of liability). *But cf.* BERNARD WILLIAMS, MORAL LUCK 27–32 (1981) (discussing “agent-regret”); Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 LAW Q. REV. 530, 530–31, 537–53 (1988) (proposing that responsibility for outcomes is “inseparable from our status as persons”).

40. *Cf.* Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 905–07 (arguing that “financial responsibility alone is inadequate for legal responsibility” and proposing that defendants should be required to care for their victims “for as long as the innocent victims suffer”).

41. *See generally* 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 19–21 (4th ed. reprint 1966); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 25–56 (2d ed. 1959); 2 *id.* at 449–62.

examples, are surprisingly similar.<sup>42</sup>

The Anglo-Saxon legal codes consisted mainly of schedules of payments for common types of wrongs, such as killing, maiming, and theft. They specified *gelds*, which fixed the value of things destroyed, and *bots*, which fixed payments for damage, including bodily harm.<sup>43</sup> The payment due for killing a person was the *wergeld* (or *wergild*), or man-price.<sup>44</sup> *Wergelds* varied dramatically with the status of the victim. A free peasant might have a *wergeld* of 200 shillings, while a noble might be worth 1200 shillings.<sup>45</sup> *Bots* for injury were prescribed in colorful detail. The laws of Alfred, for example, prescribed payments of five shillings for slicing off a thumbnail, thirty shillings for cutting off a thumb, sixty-six shillings and six and one-third pennies for gouging out an eye, and thirty shillings for inflicting a head wound “if both bones . . . be pierced.”<sup>46</sup> There were also *bots* for harms more in the nature of indignity than injury. In the laws of Ethelbert of Kent, binding a free man was worth twenty shillings.<sup>47</sup>

The compensation called for by the Anglo-Saxon codes was payable to the injured person, or in the case of a killing, to the decedent’s kin.<sup>48</sup> Kinsmen of the wrongdoer were responsible for paying compensation in degrees fixed by custom.<sup>49</sup> In cases of serious wrongdoing, an additional payment known as *wite* might be due to the king, but the primary emphasis of the laws was on the claims of victims and their kin.<sup>50</sup>

Opinions differ on the motives for these laws, but most historians

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42. For an interesting discussion of a variety of ancient codes, see generally James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29 (1996).

43. These terms appear in A.W.B. SIMPSON, *The Laws of Ethelbert*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 1, 5 (1987); see also 1 POLLOCK & MAITLAND, *supra* note 41, at 47–48 (referring to *wergild*); 2 *id.* at 450 (referring to *bot* and *wergild* or *wer*).

44. BILL GRIFFITHS, AN INTRODUCTION TO EARLY ENGLISH LAW 68 (1995) (referring to *wergeld*); 1 POLLOCK & MAITLAND, *supra* note 41, at 47–48 (referring to *wergild*); 2 *id.* at 448–51 (same); SIMPSON, *supra* note 43, at 4 (same).

45. GRIFFITHS, *supra* note 44, at 68 (referring to *wergelds* of 200, 600, and 1200 shillings); 1 POLLOCK & MAITLAND, *supra* note 41, at 34 (noting that the *wergild* of a *thegn* was at 1.6 times that of a commoner and reporting references in early sources to *twy-hynd* and *twelf-hynd* men, meaning men with *wergilds* of 200 and 1200 shillings, respectively).

46. GRIFFITHS, *supra* note 44, at 75–77.

47. *Id.* at 35; see also 1 POLLOCK & MAITLAND, *supra* note 41, at 53 (stating that “binding a free man, or shaving his head in derision . . . was visited with heavier fines than any but the gravest wounds”) (footnote omitted).

48. See 2 HOLDSWORTH, *supra* note 41, at 35–40 (discussing kinship and the rights of kin); 1 POLLOCK & MAITLAND, *supra* note 41, at 31 (discussing the rights of kin).

49. See 2 HOLDSWORTH, *supra* note 41, at 36 (discussing the duties of kin); 1 POLLOCK & MAITLAND, *supra* note 41, at 31 (same).

50. See SIMPSON, *supra* note 43, at 5 (referring to *wite*).

agree that they served, at least in part, as a civilized substitute for violent revenge.<sup>51</sup> According to typical accounts, codified compensation schedules supplanted a system of blood feuds, in which victims and their kin were entitled, and probably honor-bound, to retaliate against wrongdoers and their kin. The payments set out in the kings' laws likely reflected payments that had become customary in locally brokered settlements of feuds. As the kings became stronger, the enacted compositions became mandatory, and legal compensation took the place of unsupervised retaliation.<sup>52</sup>

The early codes not only provided substitutes for violent revenge, they also can be viewed as entailing revenge in a more civilized form. There is a natural connection between composition and revenge, in that the ability to avenge oneself in kind by inflicting injury implies the ability to accept payment instead.<sup>53</sup> Moreover, the payments called for by the codes tracked the pattern of revenge through feud in several ways. Payments were not tailored to loss, but rather fixed according to types of affront. As noted, the kin of a deceased victim were entitled to collect, and the kin of the wrongdoer were liable. The link between the claimant's status and the size of the *wergeld* is also consistent with vindictive sentiments, in that a victim who occupied a high place in society might view a wrong as a greater affront, resulting in a greater duty to avenge.

Perhaps the strongest connection between the compositions required

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51. Compare 2 HOLDSWORTH, *supra* note 41, at 42–45 (stating that the *wergild* “took the place of the feud”), 1 POLLOCK & MAITLAND, *supra* note 41, at 46–48 (suggesting that compositions supplanted feuds), and SIMPSON, *supra* note 43, at 11–13 (suggesting that Ethelbert, the first Christian king in England, enacted laws to establish that it was honorable, rather than sinful, to accept composition in place of violent revenge), with PATRICK WORMALD, *Inter Cetera Bona Genti Suae’: Law-Making and Peace-Keeping in the Earliest English Kingdoms*, in *LEGAL CULTURE IN THE EARLY MEDIEVAL WEST: LAW AS TEXT, IMAGE AND EXPERIENCE* 179, 192–98 (1999) (suggesting that laws established royal power and responsibility for order and provided a source of patronage), and James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41, 82 (1995) (suggesting that various ancient laws were enacted to set “magico-religiously, or ‘scientifically,’ proper rates, both as concerns prices and as concerns dismemberment”).

52. See, e.g., 2 HOLDSWORTH, *supra* note 41, at 37–38, 43–46 (“As the state gained in strength it suppressed the *maegth* if it attempted to stand against the law.”) (footnote omitted); 1 POLLOCK & MAITLAND, *supra* note 41, at 31, 46–47 (“Step by step, as the power of the State waxes, the self-centred and self-helping autonomy of the kindred wanes.”); 2 *id.* at 450–51, 458–60 (same); SIMPSON, *supra* note 43, at 11–13 (suggesting that revenge was required by honor). Whitman is critical of what he calls the “self-help model” of ancient law, which he finds overly simple. Yet he concedes that this model is at least partially correct, even if incomplete. Whitman, *supra* note 51, at 42–43.

53. See Whitman, *supra* note 51, at 56–58 (attributing this view to Johann Michaelis).

by the early codes and the pursuit of revenge is indirect. Several authors have noted that the prices fixed by the ancient codes are implausibly high, way beyond most people's ability to pay.<sup>54</sup> In case of default, the wrongdoer might be outlawed, which meant that henceforth he would be outside the protection of the law, disowned by his king, and liable to be hunted down and killed without penalty.<sup>55</sup> Alternatively, and perhaps more likely, the wrongdoer and his immediate kin might be sold into slavery or enslaved to the victim.<sup>56</sup> If this were the practical effect of the payment schedules set out in the codes, the pursuit of compensation was in fact the pursuit of the ultimate adjustment in the comparative positions of wrongdoer and victim: The wrongdoer was either cast out from society or made the victim's slave.

### B. Modern Remedies

Accounts of the development of the law often relate that, as the law matured, state-imposed punishment took the place of personal vengeance. Wrongs came to be seen as affronts to the community, which assumed the right and duty to respond through criminal conviction and punishment.<sup>57</sup> Correspondingly, private remedies became a vehicle for redressing losses. Yet some aspects of modern compensatory remedies suggest that the law still provides an outlet for the impulse toward personal revenge.

As already noted, one prominent feature of compensatory legal remedies is the connection between claims and defendants. Both loss adjustment and deterrence could, in principle, be achieved through a scheme in which potential injurers were charged according to the risks that their activities imposed on others, and losses were paid for from the resulting pool of funds.<sup>58</sup> A pooling arrangement of this kind would end the dependence of liability on fortuitous outcomes, which arguably is

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54. See 2 POLLOCK & MAITLAND, *supra* note 41, at 460 (calling the system "delusive, if not hypocritical").

55. See 2 HOLDSWORTH, *supra* note 41, at 46 (discussing outlawry); 2 POLLOCK & MAITLAND, *supra* note 41, at 449–50, 460 (same).

56. See 2 POLLOCK & MAITLAND, *supra* note 41, at 460 (suggesting that high prices led to enslavement); Lindgren, *supra* note 42, at 40–43 (discussing Mesopotamian, Frankish, and Visigothic codes).

57. See 1 POLLOCK & MAITLAND, *supra* note 41, at 44–45; 2 *id.* at 456–62 (tracing the evolution of king's peace and criminal law); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 83–86 (1996) (discussing the private and public enforcement of norms in England between 1200 and 1500).

58. See Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 460–69 (1990); see also Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 422–28 (1982) (setting out a view of corrective justice, later repudiated, in which victims' rights to compensation are not necessarily linked to the wrongdoer's liability).

morally arbitrary.<sup>59</sup> Our legal system, however, continues to support individual suits by victims against injurers. This preference for two-party adjudication may, of course, be a matter of tradition and administrative convenience. Yet it is at least consistent with the intuition that victims find a satisfaction in pursuing their injurers that they would not derive from recourse through a pooled fund.

The limited transactional focus of compensatory remedies is also consistent with the pursuit of revenge through legal claims. As noted earlier, legal remedies tend to address a particular slice of time and space, excluding the remote consequences of wrongs, benefits viewed as collateral or unconnected to harms, and developments subsequent to trial. These limits on legal inquiry may be appropriate for administrative reasons, or they may reflect limits on moral responsibility.<sup>60</sup> But limited inquiry is also characteristic of revenge. The desire for revenge is an emotional response to a particular affront, which arises without extensive analysis of the remote effects and the possible benefits that follow from the triggering event. Revenge, like remedies, is situation-specific.

In terms of content and measurement, modern compensatory remedies conform more closely than Anglo-Saxon compositions to the goal of repairing victims' losses. Damages are not crudely geared to social status, and wrongdoers do not become debt slaves of their victims. Yet, various elements of modern damages that are difficult to explain in terms of actual loss are consistent with a lingering interest in revenge. In particular, awards of money on account of immeasurable and irreparable harms such as pain and suffering can be seen as vehicles for a transfer of wealth—a mark of status in modern society—from wrongdoers to victims.<sup>61</sup> At least in cases of unintentional harm, the impact felt by

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59. The driver who hits a young lawyer faces much greater liability than the driver who hits a telephone pole.

60. See generally HART & HONORÉ, *supra* note 10, at 62–108, 254–307 (discussing causation and legal and moral responsibility); Moore, *supra* note 10, at 152–53 (discussing legal causation).

61. Damages for pain and suffering are also harder to explain on economic grounds than some other features of compensatory remedies. The absence of first party insurance coverage has led some economists to conclude that pain and suffering awards fail to produce an increase in welfare. Pain and suffering may reduce, or have no effect on, the value of money before and after the injury. Therefore, the prospect of recovering for pain and suffering in case of injury is worth less than the costs such awards impose in the form of higher prices. See, e.g., Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 391–92 (1989) (noting the wealth neutrality of pain and suffering in minor accidents); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1546–47 (1987) (noting that emotional distress

defendants may be softened by insurance; but even then, the victim enjoys the symbolic satisfaction of asserting a public demand for payment. Thus, remedies labeled as compensatory may also serve as outlets for revenge.

Outside the realm of compensation, vindictive impulses help to explain some other puzzling features of private legal remedies. One of these is the availability of punitive damages in civil suits.<sup>62</sup> Punitive damages are often explained on deterrent grounds. Particularly in the case of intangible harms, compensatory damages may not provide full deterrence, either because they do not reach all the costs of wrongs, because they fail to account for the psychic gains accruing to wrongdoers, or because not all victims pursue claims. Punitive damages raise the price of the wrongs and provide an additional incentive for victims to sue. Punitive awards, however, are not closely tied to the harm inflicted by the wrongdoer; therefore, they are a blunt tool for rounding out cost-based civil deterrence. Meanwhile, they are well suited to vindictive ends: They enable the victim to impose private punishment and to profit at the wrongdoer's expense.

Vindictive tastes also help to explain restitution. Restitution was first recognized as a field of law in 1937 when Seavey and Scott identified "unjust enrichment" as the common theme among diverse legal and equitable doctrines that offered remedies when one person had gained unfairly at another's expense.<sup>63</sup> Preventing unjust enrichment is now widely viewed as both an important objective of private law and a moral ideal.<sup>64</sup> On the ground of unjust enrichment, courts assist plaintiffs in claiming not only property wrongfully taken from them, but also gains that, for various reasons, the defendant ought not to keep.<sup>65</sup>

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may not increase the marginal utility of money); Schwartz, *supra* note 27, at 362–67, 408–11 (proposing that courts deny recovery for nonpecuniary loss). *But see* Ronan Avraham, Pain-and-Suffering Damages in Tort Law—Revisiting the Theoretical Framework and the Empirical Data 102–09 (2002) (unpublished manuscript, on file with author) (challenging the assumption that consumers would not buy insurance if available).

62. For a discussion of punitive damages and their rationales, see generally 1 DOBBS, *supra* note 1, § 3.11(1)–(3), at 452–84; LAYCOCK, *supra* note 2, at 665–67.

63. RESTATEMENT OF RESTITUTION § 1 (1937).

64. *See, e.g.*, 1 DOBBS, *supra* note 1, § 4.1(1), at 556 (referring to unjust enrichment as "a law of 'good conscience'"); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 12 (Gareth Jones ed., 5th ed. 1998) (describing unjust enrichment as a "principle of justice which the law recognises and gives effect to in a wide variety of claims"); *cf.* JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 3–4, 7–8, 24–26 (1951) (characterizing unjust enrichment as "both an aspiration and a standard for judgment" but cautioning against treating it as a rule of law).

65. *See, e.g.*, *Kossian v. Am. Nat'l Ins. Co.*, 62 Cal. Rptr. 225, 227–28 (Ct. App. 1967) (holding a mortgagee, who received, but did not solicit, the benefit of the plaintiff's services in clearing debris after a fire and also collected insurance proceeds, liable based on unjust enrichment); RESTATEMENT OF RESTITUTION § 1 cmt. c (1937) (stating that a

Lon Fuller summarized the attractiveness of unjust enrichment claims by observing that “if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.”<sup>66</sup> Therefore, a claim to restitution “presents twice as strong a claim” as a claim to compensation based on loss.<sup>67</sup> At least in the case of intentional wrongs, restitution is also available when the defendant’s gains exceed the plaintiff’s losses.<sup>68</sup> In these cases, the gain that doubled the appeal of restitution for Fuller stands alone as a ground for legal liability.

Yet, the argument for restitution is not as obvious as it first appears. Christopher Wonnell has pointed out that, from an economic standpoint, and possibly from a moral standpoint as well, a pure loss is more regrettable than a loss that produces gains.<sup>69</sup> If, as Fuller suggests, the victim’s claim is stronger when wrongful loss produces corresponding gains for the wrongdoer, the reason for the claim’s strength must lie in the envy or the resentment that the victim feels in response to the wrongdoer’s advantage. The claimant desires not only to be reimbursed, but also to eliminate the wrongdoer’s profits—a desire that is essentially vindictive. Viewed in this way, compensatory remedies and restitutionary remedies can be seen as appealing to the same aspect of human psychology: One set of remedies permits the claimant to better his position at the wrongdoer’s expense; another permits the claimant to prevent the wrongdoer from profiting at the claimant’s expense. Both enable the claimant to retaliate, and both provide a satisfaction that is comparative as well as absolute.

### *C. Summary and Qualifications*

It is worth emphasizing once again that if in fact revenge is an aspect of compensation, it is only one aspect. Easing losses is an important concern, even if it is not a sufficient condition for legal action.

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recipient of a benefit is liable if “as between the two persons, it is unjust for him to retain it”); *id.* §§ 15–23 (recognizing liability for the receipt of mistaken payments).

66. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 56 (1936) (footnote omitted).

67. *Id.*

68. See RESTATEMENT OF RESTITUTION § 1 cmt. e (1937) (noting that restitution may be available in the absence of corresponding loss).

69. Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 *EMORY L.J.* 153, 174–90 (1996) (questioning the coherence and justification of the principle of unjust enrichment).

Deterrence through internalization of costs is also an obvious reason for imposing compensatory liability. But descriptions of compensatory remedies that make no mention of their capacity to satisfy vindictive tastes are euphemistic. A demand for a significant sum of money, sought through the lengthy and strategic process of legal complaint and trial, allows the victim to stalk the injurer, witness his discomfort, exact a payment, and obtain the satisfaction of improving himself relative to the injurer at the injurer's expense.

There are some recalcitrant features of compensatory remedies that weigh against a substantial role for revenge in the practice of compensation. First, one would expect the desire for revenge to vary according to the degree of the injurer's culpability. Fault may in fact influence juries in assessing compensation, especially in cases of intangible harm.<sup>70</sup> Yet, as a general matter, compensatory legal remedies are not confined to intentional or even negligent wrongs. A second, related difficulty is that compensatory remedies apply against entities as well as persons, with no distinction in the amount of compensation awarded. Even if one accepts the practice of vengeance, retaliating against a legal notion such as a corporation seems futile and unrewarding.

The indifference of compensation to fault and to the nature of the defendant adds to the irrationality of revenge through claims to compensatory remedies, but it does not rule out vindictive motivations. Vengeance is driven by emotions rather than refined judgment: Victims react to the fact of an injury and retaliate against its cause. On further reflection, the simple fact that the injurer's life goes on undisturbed while the victim suffers the consequences of the injurer's acts may be enough to sustain the victim's desire for revenge. Thus, although fault sharpens retaliatory emotions, it may not be indispensable.<sup>71</sup>

As for revenge against entities, legal history provides colorful examples of vengeful impulses directed against nonhuman offenders. William Ewald relates, in detail, the trials of rats in sixteenth century France.<sup>72</sup> Similarly, Maitland discusses the use of deodands in the thirteenth century: If a cart struck and injured a victim, the victim was entitled to the cart, not simply for its value, but so that he could avenge himself on the source of the harm.<sup>73</sup> Wreaking vengeance on a corporation is, at least, more sensible than wreaking vengeance on a cart because

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70. Cf. 2 DOBBS, *supra* note 1, § 7.3(2), at 310 (suggesting that motive can be relevant to damages in cases of dignitary torts).

71. Early English law focused on causation of injury rather than fault. See 1 POLLOCK & MAITLAND, *supra* note 41, at 53–55; 2 *id.* at 470–73 (expressing disapproval).

72. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1898–1916 (1995).

73. See 2 POLLOCK & MAITLAND, *supra* note 41, at 473–74 (discussing deodands).

people stand behind the corporation as owners and managers.

Another difficulty is that some injurers are sufficiently wealthy or sufficiently well-insured that compensatory liability will not inflict much pain. In a significant set of cases, therefore, revenge through claims to legal compensation will be symbolic at best, with little practical effect. Yet, the fact that not every instance of legal compensation inflicts a substantial penalty does not mean that the practice of compensation has no retaliatory function. Punitive damages, which take account of the injurer's wealth, may also serve as a backup to compensation in cases of serious fault. Moreover, a symbolic victory following the ritual and annoyance of a trial provides some satisfaction in itself.

#### IV. THE QUESTIONABLE VIRTUE OF RETALIATORY COMPENSATION CLAIMS

There are reasons to believe that remedies that pass as civil and compensatory are not solely concerned with losses, but also provide an outlet for vengeance. If so, the question arises whether pursuit of vengeance in this form is a virtue or a vice.

##### *A. Spiteful Harm*

Harm is often inspired by anger. Yet, as recounted by Jeffrie Murphy and Jean Hampton, the harms that inspire angry reactions, and the types of anger involved, vary in morally significant ways.<sup>74</sup>

Lowest on the scale of reactive harm is harm from spite. A spiteful actor strikes out at a target because the target has beaten the actor in competition, or because the target is more skillful, more attractive, or luckier than the actor.<sup>75</sup> Hampton distinguishes spite from "malicious hatred," which she associates with revenge, but condemns both as irrational and immoral.<sup>76</sup> The accompanying emotion is a simple form

74. See FORGIVENESS AND MERCY, *supra* note 34. Harm may also be motivated by dislike, but dislike is not anger in the sense of a reaction to some aspect of the relationship between parties, so it is not discussed it here. See Hampton, *supra* note 34, at 60–61 (discussing "simple hatred").

75. See Hampton, *supra* note 34, at 76–78; see also PETER A. FRENCH, THE VIRTUES OF VENGEANCE 101–04 (2001) (suggesting that anger against a winning competitor is less objectionable than anger against those perceived as having higher moral worth).

76. See Hampton, *supra* note 34, at 65–78 (discussing the futility of malice and spite); Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 34,

of envy that results from the actor's comparative failings.

This type of envy is an unhealthy emotion, reflecting the actor's poor performance and lack of self-respect, and comparative failing is certainly not a just reason to harm someone who is better or luckier than oneself. Moreover, as Hampton points out, harm from spite is self-defeating: Bringing the target down does nothing to improve the objective success of the actor.<sup>77</sup> Spiteful harm, therefore, is unjustified and inexcusable.

### B. Retribution

At the high end of the scale is retribution, meaning the harm imposed on wrongdoers because they have committed morally blameworthy acts. Not all would agree that past wrongs are a sufficient reason for punishment. From a utilitarian point of view, the infliction of pain on wrongdoers is justified only to the extent that it produces good consequences, such as deterrence and possibly vengeful enjoyment, which outweigh the various forms of disutility it entails. Punishment that yields no benefit has no moral value.<sup>78</sup>

From a retributive point of view, however, punishing wrongdoers is good in itself. For some, this is simply a matter of moral desert.<sup>79</sup> Others have attempted to unravel the moral function of retribution. In a world in which morality has no causal force of its own and God does not police human action, punishment may be needed to connect the wrongdoer to moral values and give them effect in his life.<sup>80</sup> Alternatively, punishment may balance the account of those who have benefited from breaches of social order, or it may communicate the value of the victim by disproving a false claim of superiority implied by a wrongful act.<sup>81</sup>

If one accepts any of these arguments, the harm inflicted for retributive reasons is justified. Retribution, however, is not self-enforcing. It is

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at 111, 144–45 [hereinafter Hampton, *Retributive Idea*].

77. Hampton, *supra* note 34, at 77–78 (stating that spiteful harm at most changes the “curve” of human success).

78. The basic elements of the debate over punishment between utilitarians and retributivists are set out in Joel Feinberg, *The Classic Debate*, in *PHILOSOPHY OF LAW* 727, 728–31 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

79. See, e.g., Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179 (Ferdinand Shoeman ed., 1987).

80. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 374–80 (1981) (describing his account of retribution as “nonteleological”). Peter French makes a similar argument on behalf of revenge. See FRENCH, *supra* note 75, at 80 (“The only power that morality has to affect human affairs resides in the response of moral people . . .”).

81. See Hampton, *Retributive Idea*, *supra* note 76, at 122–47 (explaining retribution as a defense of human value); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 482–86 (1968) (offering a distributive explanation).

carried out by other human beings, often at a significant cost, and therefore depends on retributive emotions. Even those who accept retribution in principle have expressed concern about the emotions that drive it.<sup>82</sup>

A range of different emotions can accompany retribution. At the favorable end of the continuum are moral indignation against a wrongful act and perhaps moral hatred directed toward the wrongdoer for harboring immoral values. Murphy approves this type of hatred, which expresses a commitment to moral values, a sense of desert, and a desire to “restore . . . proper moral balance.”<sup>83</sup> Hampton agrees that it is right to desire retribution against wrongdoers, because retribution counteracts the demeaning implications of the wrong. Yet she recommends foregoing moral hatred for the wrongdoer in the interest of forgiveness.<sup>84</sup>

When victims of wrongs seek retribution, the sentiment involved may subtly change from moral indignation and moral hatred to resentment.<sup>85</sup> A wrong implies an assertion of superiority over the victim—in Murphy’s words, a statement that “I am here up high and you are there down below.”<sup>86</sup> Resentment is the desire to correct this implication by inflicting pain on or otherwise mastering the wrongdoer. Again, Murphy cautiously endorses resentment, which he associates with self-respect.<sup>87</sup> Hampton, however, disapproves of resentment. In her view, resentful

82. See, e.g., Moore, *supra* note 79, at 751–56 (discussing the dangers of retributive emotions); Jeffrie Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY, *supra* note 34, at 88, 96–103 [hereinafter Murphy, *Hatred*] (expressing reservations about retributive hatred); Jeffrie G. Murphy, *Two Cheers for Vindictiveness*, 2 PUNISHMENT & SOC’Y 131, 137–39 (2000) [hereinafter Murphy, *Vindictiveness*] (discussing the dangers of vindictiveness).

83. Murphy, *Hatred*, *supra* note 82, at 89; see also FRENCH, *supra* note 75, at 96–97 (endorsing both moral anger and hostile responses based on moral anger).

84. See Hampton, *Retributive Idea*, *supra* note 76, at 143–61 (distinguishing attitudes toward the act from attitudes toward the person).

85. Hampton distinguishes sharply between resentment, which she links to “malice” toward the wrongdoer, and moral indignation, which she links to moral hatred for the wrongdoer. See Hampton, *Retributive Idea*, *supra* note 76, at 145–46. Murphy, in contrast, cautiously defends a form of “retributive hatred,” which appears to be a blend of resentful hatred and moral hatred. See Murphy, *Hatred*, *supra* note 82, at 89–95; see also FRENCH, *supra* note 75, at 106–11 (defending retributive hatred and personal retaliation).

86. Jeffrie Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY, *supra* note 34, at 14, 25; see Hampton, *supra* note 34, at 44–45 (explaining that wrongdoers “demean” their victims by treating them as having lower worth than they have in fact).

87. See Murphy, *Hatred*, *supra* note 82, at 89–95; Murphy, *supra* note 86, at 16; Murphy, *Vindictiveness*, *supra* note 82, at 132–35; cf. FRENCH, *supra* note 75, at 93 (associating revenge with honor).

retaliation is a strategy adopted by victims who harbor doubts about their own value. Seeking to confirm that value, the resentful victim asserts superiority over the wrongdoer by inflicting harm. This strategy is self-defeating, in Hampton's view, because the superiority that comes from bringing another down is illusory. The logic of resentment and retaliation also implies a nonegalitarian and competitive conception of human value, which Hampton rejects.<sup>88</sup>

Others have cited the dangers that resentment poses to the victim. Resentment can become obsessive, disrupting the life of the victim and those who are close to him.<sup>89</sup> Even short of obsession, resentment may corrupt the victim by mutating into envy or sadism.<sup>90</sup>

Resentment and other negative emotions associated with retribution also may interfere with the justice of the punishment inflicted on the wrongdoer. Michael Moore points out that feelings of resentment are not good epistemic guides for moral judgment.<sup>91</sup> Moore also suggests, however, that wrongdoing triggers a more reliable type of emotion in the form of vicarious guilt. Observing a wrong, we imagine how we would feel if guilty of such an act, and our emotional reaction serves as a reliable guide to morally just punishment. On this basis, Moore ultimately defends retribution, at least in institutionalized form.<sup>92</sup>

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88. Hampton discusses both resentment, which in her taxonomy is directed toward the act, and malicious hatred, which is triggered by resentment and directed toward the wrongdoer. Ultimately she condemns both. See Hampton, *supra* note 34, at 65–75 (discussing the nature and futility of malicious resentment); Hampton, *Retributive Idea*, *supra* note 76, at 145 (discussing the immorality of resentful retaliation).

89. See Moore, *supra* note 79, at 752–53 (maintaining, however, that the desire for retribution is not necessarily obsessive); Murphy, *Vindictiveness*, *supra* note 82, at 134 (maintaining similarly that vindictiveness is not necessarily obsessive).

90. See Moore, *supra* note 79, at 753–56 (following Nietzsche in associating retribution with “resentment, fear, anger, cowardice, hostility, aggression, cruelty, sadism, envy, jealousy, guilt, self-loathing, hypocrisy and self-deception”).

91. *Id.* at 761–62 (“Nietzsche gives us reason to believe the retributive principle to be false when he shows us how lacking in virtue are the emotions that generate retributive judgments.”).

92. *Id.* at 764–66 (“What would you feel like if it was you who had intentionally smashed open the skull of a 23-year-old woman with a claw hammer while she was asleep . . . ?”).

*C. Private Revenge*<sup>93</sup>

Retaliation can take a number of forms, not all of which are supported by the best arguments in favor of retribution. At one end of the continuum is a formal system of criminal conviction and punishment for culpable wrongs, carried out by the state according to standards collectively agreed on and applied as even-handedly as possible to all transgressors. At the other is an individual vendetta in which someone who has been injured strikes an unregulated blow designed to inflict harm on the cause of his injury.

Formal retribution and informal revenge have in common that one person, or group, imposes a penalty on another based on something harmful that the target has done.<sup>94</sup> Yet revenge can diverge from formal retribution in several ways. Formal retributive punishment is inflicted in the name of the community for transgressions of its common standards. Collective judgment and the judicial processes that precede punishment tend to filter out resentment and highlight moral indignation.<sup>95</sup> The focus is on absolute desert rather than comparative mastery. In contrast, informal revenge is based on personal grievance arising from an injury to the avenger or someone close to him.<sup>96</sup> With no collective filter at

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93. Nozick and some others treat retribution and revenge as mutually exclusive categories of reaction to harm. *See* NOZICK, *supra* note 80, at 366–68. Yet, the categories have a tendency to bleed into one another. The purest form of retribution is harm inflicted by the state against a wrongdoer, following a formal process of adjudication, in accordance with the wrongdoer’s moral desert, and motivated by collective moral indignation. Short of this, possibilities range from harm inflicted privately by a victim against a wrongdoer, in accordance with moral desert, and motivated by moral indignation, through harm inflicted by a victim against a wrongdoer, in accordance with moral desert but motivated by resentment or by a mix of resentment and moral indignation, or to harm inflicted by a victim against an injurer, motivated by resentment of the injury. Perhaps any privately inflicted harm counts as revenge rather than retribution, but some of the privately inflicted harms just described have retributive characteristics, and even formal retribution may involve collective revenge for an act that harms society as a whole. Therefore, it is preferable to treat revenge as a larger category of reactions to harm done that includes retribution and identify retributive revenge as harm imposed on culpable wrongdoers in accordance with moral desert.

94. *See id.* (analyzing the structural similarities between retribution and revenge). Nozick also traces a common set of communicative intentions characteristic of retribution and revenge: The retaliator intends the target to know, and to know that the retaliator intends the target to know, the reason for the penalty. *Id.*

95. *See* Moore, *supra* note 79, at 766 (suggesting that institutions can be designed to restrain darker retributive emotions).

96. *See* NOZICK, *supra* note 80, at 367 (stating that, unlike retribution, “[r]evenge is personal”).

work, the sentiment of resentment discussed by Murphy and Hampton comes prominently into play: The avenger desires to reassert superiority over, or at least parity with, the target by inflicting pain.<sup>97</sup> Moreover, revenge, unlike retribution, is not limited to targets that are blameworthy.<sup>98</sup> The resentment an injured victim feels is surely stronger when the injurer acted deliberately or was careless of the victim's safety. But, as noted earlier, even when the injurer is blameless, the victim may resent the fact that his life has been disrupted while the person who caused the disruption continues on unscathed.<sup>99</sup>

In the absence of a moral wrong, the act that caused injury cannot be interpreted as an assertion of superior worth by the injurer in the manner discussed by Murphy and Hampton.<sup>100</sup> Perhaps the injurer asserts superiority by failing to discharge a duty imposed by corrective justice. This form of assertion, however, is much more remote than the assertion entailed by a wrongful act, and in any event there is no assertion at all if corrective justice itself requires fault.<sup>101</sup> When there is no implication of superiority, the only cause for resentment is the fact of injury and the injurer's comparative prosperity. Nevertheless, the victim may resent this outcome and desire to correct it by inflicting pain.

Private revenge, therefore, is much harder to defend than formal retribution. In its nonretributive forms, revenge is triggered by injury alone and motivated by resentment. It can be dangerous to the avenger as well as the target, without the checks provided by legal procedure and collective judgment.

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97. See *supra* text accompanying notes 86–88.

98. See NOZICK, *supra* note 80, at 366–67 (stating that retribution is for wrongs, while revenge may be for injuries or slights, and that retributive punishment is limited to fit the seriousness of the wrong). Nozick also asserts that revenge is emotional, while retribution is dispassionate. *Id.* at 367. But Moore argues persuasively that retribution too is dependent on emotions. See Moore, *supra* note 79, at 753–76. Therefore, it may be more accurate to say that institutionalized retribution places procedural filters between punishment and the emotions that inspire it, which are not present in the case of informal private revenge.

Nozick also maintains that retribution is generalized, while private revenge is particular. NOZICK, *supra* note 80, at 367. This is not the case, however, when private revenge is pursued through legal process.

99. Murphy and Hampton generally, but not always, confine their analysis of resentment and revenge to responses to wrongdoing. Compare Murphy, *supra* note 86, at 16 (linking resentment to wrongs), and Hampton, *supra* note 34, at 54–55 (limiting resentment to culpable wrongdoing), with *id.* at 71 (suggesting that malicious hatred is possible in the absence of wrongdoing). French admits the possibility of “simple resentment” in response to injury, but limits moral anger and retributive anger to instances of wrongdoing. See FRENCH, *supra* note 75, at 95, 97, 106.

100. See *supra* text accompanying notes 86–88.

101. Compare Epstein, *A Theory of Strict Liability*, *supra* note 8, at 213–15 (defending strict liability), with Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147, 154–59 (1988) (refuting strict liability as a moral basis for tort liability).

At the same time, private revenge is distinguishable from spiteful harm.<sup>102</sup> The avenger does not inflict harm simply to eliminate comparative advantage; he strikes on account of personal harm that is traceable to the agency of the target. The avenger resents the target because the target has caused a setback for the avenger without adverse consequences for the target. In a case of spite, the target has caused the avenger distress, but only by showing the avenger in an unfavorable comparative light.

Revenge, therefore, is a step up from pure spite: Reacting to the cause of a setback is more understandable than harming another on account of one's own comparative failings. Resentment and the desire for revenge also have deep roots in human nature. Revenge is adaptive in primitive society and may continue to be useful in more civilized settings because it signals a willingness to retaliate against aggression.<sup>103</sup> Revenge also can give pleasure and can serve as an outlet for resentment that might otherwise become poisonous.<sup>104</sup> Yet, revenge and its companion emotion, resentment, lack the plausible justifications that support retribution and moral indignation. Retribution is, arguably, a moral good; revenge is, at best, excusable.

#### V. RETALIATORY CLAIMS TO COMPENSATION

Claims to compensation allow victims of injury to improve their positions at the expense of their injurers. At least part of the function of an award of compensatory damages is to repair loss. Payments for medical expenses, rehabilitation, and loss of net income, for example, serve to restore the victim's status quo ante or something comparable to it. The morality of pursuing this type of claim against the injurer depends on how one answers the question posed by corrective justice theorists: When does the agent who caused an injury have a duty to correct the injury's consequences?

Yet, as I have argued, not all instances of purportedly compensatory

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102. See *supra* text accompanying notes 75–77.

103. See J.L. MACKIE, *Morality and the Retributive Emotions*, in 2 PERSONS AND VALUES: SELECTED PAPERS 206, 215–18 (Joan Mackie & Penelope Mackie eds., 1985) (tracing the evolution of vengeful sentiments); Vincy Fon & Francesco Parisi, *Revenge and Retaliation* (Dec. 12, 2002) (unpublished manuscript) (presenting a game theoretical analysis of revenge), available at <http://ssrn.com/abstract=359200>.

104. See FRENCH, *supra* note 75, at 3, 35 (noting the pleasures of revenge and popularity of Western revenge movies); Murphy, *Vindictiveness*, *supra* note 82, at 133–34 (noting the pleasures and benefits of revenge).

remedies fit this description. Damages may diverge from actual loss, and defendants may be made to pay on account of ordeals that cannot be undone. These elements of damages, as well as some of the sentiments that move victims to pursue them, appear retaliatory.

Holding aside the repair of losses, retaliation through a civil legal claim may be justified on retributive grounds if the legal wrong that caused injury was also a moral wrong committed by a culpable defendant. In fact, this form of individual retaliation against a wrongdoer is preferable to a private vendetta because the form and extent of harm inflicted on the wrongdoer are subject to the checks of the legal process and jury verdicts. Generally, however, compensation is based on injury rather than blameworthiness. Injurers may be liable without fault, and in any event, the extent of their liability does not depend on the degree of their fault. For the most part, therefore, moral desert is not in play, and there is no ground for moral indignation.

In excess of repairable loss, and in excess of moral desert, the pursuit of compensation is closely akin to ordinary nonretributive revenge. The claimant resents an outcome in which he has suffered and the actor who caused his suffering has not. A claim to legal damages allows the victim to reverse this state of affairs.

To be sure, there are differences between retaliation through compensatory legal claims and ordinary revenge. A legal claimant does not simply inflict harm on his injurer; he betters his own position at the injurer's expense. In other words, revenge in this form is not purely destructive. The pursuit of a legal claim also avoids Hampton's charge of futility: Superiority gained by lowering another is illusory, but superiority gained through a transfer from the other to oneself is real.<sup>105</sup> Thus, revenge through a claim for compensation is more sensible than ordinary revenge and is probably less objectionable because it does not involve the infliction of harm for its own sake.

In my view, these differences do not elevate retaliation through legal claims to the level of justified conduct or make resentment of injury a positively virtuous emotion. At best, they lessen the vice involved. Beyond repairable losses resulting from moral wrongs, the victim has no moral entitlement to the injurer's assets and no moral battle to fight.

This is not to say that damage remedies should be radically reformed or that victim resentment should be sternly repressed. Law must take account of the strong features of human nature, at least if they do not amount to serious vices. A legal system cannot depend on force for its effectiveness: It needs the faith and voluntary allegiance of the people it governs. To command allegiance, the system must settle disputes in a

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105. *See supra* text accompanying note 88.

way that provides general satisfaction, and satisfaction is a matter of prevailing tastes and values. If private vengeance is a strong taste, a legal system that provides outlets for it will be more authoritative and therefore more successful in maintaining good order than one that does not.

At the same time, the reverent descriptions of compensation that prevail in legal discussion are disingenuous. People are aggressive, they retaliate when hurt, and lawsuits provide vehicles for retaliatory aggression. Corrective justice, despite the high moral ground often claimed for it, is a close companion to revenge.

