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HONOR AND CIVIL RECOURSE: A RESPONSE TO NATHAN OMAN'S *THE HONOR OF PRIVATE LAW*

Benjamin C. Zipursky*

INTRODUCTION

Nathan Oman's brilliant and provocative article *The Honor of Private Law*¹ asserts that private law must be understood as a system for the vindication of lost honor. While he enthusiastically embraces civil recourse theory and graciously credits me and my frequent collaborator John Goldberg for pointing private law theorists down the right path, Oman faults us for failing to supply an adequate defense of civil recourse theory. Seeking to remedy this deficit, Oman advances an honor-based justification for civil recourse theory.

Readers should find great pleasure in reading Oman's article, not only because of its freshness, originality, and powerful ideas, but also because it is beautifully written and provides an illuminating account of several important aspects of English legal history. The article presses on vulnerabilities in my own work in a way that I would have, if I had been able to see them clearly, and it offers alternative ways of thinking about problems that present great promise for continuing the general project of civil recourse theory. Moreover, Oman quite appropriately selects private law—not just tort law—as the subject matter that civil recourse theory should be aspiring to explain.

This Essay is divided into two parts, the first critical and the second constructive. Part I is a broad-gauged critique of Oman's honor theory of private law, particularly as applied to torts: it argues that the "Honor" thesis, as Oman has put it, is unsustainable at the level of positive law, at the level of participants' self-understanding of private law, and at a normative level. Part II switches gears. It proposes an honor justification of private law that is rights-based, not teleological, and argues that such an account is far more plausible. The Essay concludes by arguing that the positive, hermeneutical, and normative concerns raised by the teleological account are not problematic once a rights-foundation is provided for Oman's honor-engaging justification of private law.

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1. 80 *FORDHAM L. REV.* 31 (2011).

I. A CRITIQUE OF OMAN'S HONOR THESIS

A. *Injury and Diminution of Honor*

“Civil recourse allows for the regaining of honor in the face of its loss by giving the victim a means of acting against a wrongdoer.”² In this passage, Oman seems to be suggesting that just as a plaintiff in restitution may regain the chattels possessed by another, so a tort plaintiff may, by suing the tortfeasor, regain the honor that she lost as a victim of the tort. The bringing of the tort action—if it a successful tort claim—vindicates the plaintiff as in the right and defendant in the wrong, and thereby restores the plaintiff’s honor.

Part of what is effective about this analysis is the idea that there is some special attribute—honor (or dignity)—that was threatened or damaged by the tort and that is restored by the tort action and judgment. When Oman describes the attribute and how it is restored, it is clear that honor for him is in part a kind of esteem; it relates to how one is regarded by others in one’s community. That is in part why the plaintiff’s agency in obtaining a judgment against the defendant is critical. The plaintiff is seen to be successfully redressing *what the defendant did to her*. The loss of esteem inherent in having been wrongfully victimized by another is regained.

Just as Oman’s analysis fits dueling quite well, it fits some torts quite well too. Libel and slander are good examples. The plaintiff’s injury is a loss of the esteem of others (and perhaps herself), a loss occasioned by tortious treatment. The injury of diminished esteem is very much like an injury in defamation law. It is a good of being well regarded (and understanding oneself as well regarded) that is lost, and which tort litigation supposedly restores.

The problem is that the injuries of tort victims are as various as the torts themselves. Loss of honor is in effect a form of loss of esteem, and it misses a great deal about what the wrongs of tort are to assert that each involves essentially a loss of esteem. The many torts are comprised of many different legal wrongs: some entailing essentially bodily injuries, some property injuries, some financial, and so forth. Many torts are not about a loss of honor at all.

If I were Oman, I might respond as follows: the loss of honor is not the only or even the primary injury of each tort, but it is intrinsic to its being a tort that it essentially involves a victim’s status—and in that sense, a loss of honor—as against the tortfeasor. Conversely, the regaining of honor through vindication is not the only or even the primary redress, but it is an intrinsic part of any redress.

My problem with this anticipated response is that it stretches too far. Classic torts such as being negligently injured by a mediocre surgeon, or damaged by a defective product, or having a defendant near one’s residence engage in a commercial activity that generates too much noise too much of

2. *Id.* at 63.

the time are not about a loss of honor at all. They are clearly not, in the first instance, attacks on the plaintiff's honor or deprivations of honor. But let us look more closely at the proposition that it is intrinsic to having been the victim of such a tort that one's honor is diminished.

I want to begin by rejecting (roughly, by fiat) what might be called a "radically objectivist conception of honor," according to which someone's honor could be diminished even if no one regards her honor as having been diminished. I am therefore willing to assume that if there has been a diminution of honor, it must be perceived by at least: (a) the plaintiff, (b) the defendant, or (c) some third party. Each of the torts mentioned above—medical malpractice, products liability, and nuisance—could happen in a way that was unknown to everyone but the plaintiff. It follows that it cannot be essential to the injury that it involves an alteration in the way that third parties regard the plaintiff. Lost honor in the sense of lost esteem or reputation cannot be the essence of a tort.

It is tempting to suppose that the defendant's respect for the plaintiff must be critical to the tort; that a plaintiff's right of civil recourse against a negligent surgeon is predicated on the surgeon's not having taken her seriously as a patient and not having shown her sufficient care. Tempting, but untenable. Victims frequently experience medical malpractice this way, and there are no doubt cases in which such failures of moral seriousness and care are the nub of the problem. But there is no plausibility to the claim that medical malpractice essentially involves such an attitude. Terrible injuries occur when physicians are operating in complete good faith, and they simply fail in their execution. The same is true of car accidents, trespass to land, nuisance, products liability, and many areas. Liability is not contingent on lack of respect or subjective care on the part of the defendant.

Can we say, at least, that the injured plaintiff must have experienced a loss of honor, or a loss of self-esteem, or that she must herself perceive the defendant as having acted in a manner that was lacking in respect for her or recognition of her dignity? Again, I think not. The patient might like the doctor and feel respect for, and respected by, the doctor. If the patient's post-surgical trajectory is poor and it turns out that an operation was not well executed, the injured patient (let us suppose she developed a painful abscess requiring further hospitalization) may well bring a medical malpractice claim notwithstanding a perception that the physician respected her or treated her as an equal. Just as having been injured and having been dishonored are distinct, so conceiving of oneself as having been injured and conceiving of oneself as having been dishonored are distinct. A loss of control over one's bodily functions might be a kind of injury that goes along with loss of self-esteem, but many bodily injuries (like a painful infection requiring hospitalization) will not.

If this analysis is correct, then a tort can occur even where there is no loss of honor or esteem. Indeed, prototypical torts can and do occur in a way that has little or nothing to do with the diminution of honor or esteem. Having been the patient or victim or recipient of a tort obviously entails

having been injured, in some sense, and an injury is essentially something one is *prima facie* better off being free from. But not all tort injuries involve the diminution of the plaintiff's honor, or even a perception of such a diminution.

B. *Suing for Vindication of Honor*

Oman might answer that the point of suing is to regain or restore honor. Even if the tort is not an attack on honor or does not, by its own nature, diminish honor, the very fact of having been the victim of a tort—a “bringing down” of a kind—puts plaintiffs in a place from which they seek vindication. Likewise, even if winning a tort suit is not itself a boost to honor, it is a kind of vindication to win a tort suit, and this vindication is itself a kind of social reinforcement of one's status.

There are at least two problems with this anticipated response. First, it is *prima facie* incoherent to argue that all those who are entitled to bring a successful tort claim are entitled to regain their honor if one has conceded that not all such persons have lost honor; one cannot regain what one has not lost. But let us soften the suggestion a bit to deal with this problem, by supposing that successful tort claimants are vindicated and have their honor and status reaffirmed; having been injured, on this account, does not necessarily diminish honor, but destabilizes the victim's self-esteem or honor, and creates a desire or need for vindication of honor. I am inclined to doubt this suggestion for the same reasons that I doubted the stronger claim about diminution of honor (and it is, after all, only my suggestion, not Oman's). Let us proceed, nonetheless.

Oman is careful to indicate that his honor thesis is asserted at three levels: that private law is in fact rooted in a normative framework that aims at the restoration of honor (positive);³ that participants in the practice understand it in this manner (hermeneutical);⁴ and that its capacity to provide the restoration of honor supplies a justification for the practice (normative).⁵ After fleshing out the strengths of Oman's view at each level, I articulate reasons for rejecting each.

1. Positive

The most powerful argument on the positive law level is that there is a resemblance between private law and dueling, and it is true that private law has often been framed historically as an alternative to dueling.⁶ The resemblance is that there is an artificial and stylized pairwise matching of adversaries after one of them has decided that the other wronged her and she should be entitled to act against the wrongdoer, and there is a socially accepted framing of this issue. Moreover, after the event, the dispute and complaint are resolved, one way or the other. Finally, there are indeed

3. *Id.* at 43–49.

4. *Id.* at 63–68.

5. *Id.* at 55–63.

6. *Id.* at 48 & nn.107–11.

courts who state that the point of the judgment is that the plaintiff will inevitably want to hold the defendant accountable for how he has mistreated the plaintiff, and lawful means of doing so are a superior alternative to unlawful means.⁷

This account is troubling on several levels. First, as others have pointed out, tort law is not nearly so bipolar as corrective justice theorists suggest.⁸ Frequently, there are multiple defendants, and the defendant is not the one to pay. Second, we do have a good sense of what an area of private law would look like if it were really about vindication of honor; it would look a great deal like the common law of libel or slander, where restoration of reputation is key, or like punitive damages or aggravated damages, where courts award damages beyond the pecuniary because of the “highhanded” manner in which the defendant had acted.⁹ Private law in general and tort law in particular are vastly different. Third, unlike dueling, the trial or the litigation are means of settling what actually happened, and fixing responsibility for it; they are not symbolic. Finally, and relatedly, it is the concrete aspect of the injury or loss that tort law appears to be restoring; from a structural point of view, the corrective justice theorists have a greater claim to capturing the positive law of remedies than Oman’s Honor version of civil recourse theory.

2. Hermeneutical

In my work with John Goldberg, I have often characterized tort law as providing plaintiffs with “an avenue of *civil recourse* against those who have committed relational and injurious wrongs against them.”¹⁰ Oman pushes this line of thinking further, asserting that plaintiffs who choose to sue do so because they feel dishonored and disempowered, because they believe they are entitled to demand something from the one who hurt them, and because they seek a kind of public vindication. Private law academics have too long ignored what the lay community sees in litigation all the time; combativeness and litigiousness in people who feel wronged and seek vindication, and who are perfectly candid about this.

Oman’s article brings a helpful corrective to the quite naïve and psychologically unstudied characterization of tort law that fills today’s hornbooks and law reviews. And yet it faces some serious problems. The first is that he provides little empirical support for this claim. Of course, it

7. See, e.g., *Grey v. Grant*, (1764) 95 Eng. Rep. 794, 795 (K.B.) (“[T]he plaintiff has been used unlike a gentleman by the defendant in striking him, withholding his property, and insisting upon his privilege, all of this tending to provoke him to seek his revenge in another way than by law, and therefore we think the damages are not excessive.”).

8. See, e.g., Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1620–21 (2004) (citing asbestos litigation as an example of failure of the bipolarity model).

9. *Broome v. Cassell & Co.*, [1972] A.C. 1027, 1085 (H.L.) (recognizing that a higher level of damages are warranted where the defendant “behaved in a highhanded, malicious, insulting or oppressive manner in committing the tort”).

10. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 946 (2010).

is quite common for legal theorists to offer hermeneutical characterizations of the way legal actors understand themselves without providing empirical support; I am surely guilty of this many times over. Oman may bear a special burden, however, because his account is deliberately provocative and unconventional, depicting as common sense what Holmes characterized—more than a century ago—as the distant past.¹¹ Additionally, there is the fact that the overwhelming majority of tort suits do not go to trial, but rather settle in a context where the plaintiff consents to receiving money and foregoing any admission of responsibility by the defendant, and thus any public vindication. Finally, it is well established that the great majority of tort claims are brought in areas quite distant from the sort of intentional tort claim (battery, fraud, defamation) where the hermeneutical version of the honor thesis is the most plausible.

3. Normative

Oman offers a powerful argument that, notwithstanding the erosion (happily) of vertical hierarchies in which an older concept of honor made sense, contemporary societies like our own maintain a horizontal conception of honor.¹² On this view, each person stands as an equal to each other, and is entitled to be regarded as an equal. The law makes this promise authentic by allowing those who have been injured through a failure to accord them equal respect to demand such equal standing by calling the wrongdoer to account. Private law is the system through which individuals can maintain their honor; they do so by bringing lawsuits against those who have wronged them and brought them down. Honor conceived as dignity and equality is a value that is worth treasuring; this undergirds a justification for the maintenance of private law.

The foregoing argument is seriously incomplete, for it fails to explore the existence of alternatives for securing these values, the success of private law in securing these values, and the collateral costs associated with doing so. One of the most precious aspects of individual well-being and dignity—the right against aggressive physical attacks by others—is a right that we protect largely through criminal law. Although individuals do not themselves possess the power to initiate a prosecution¹³ the state has a responsibility to do so, and there are both formal and informal mechanisms designed to ensure that the state attends to that responsibility. In legal systems with more robust regulation, certain aspects of physical well-being—freedom from industrial pollution in one's residential community, freedom from race-based hate speech—may be better protected, and in that sense individual dignity may be more protected. Conversely, a private law

11. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2-4 (Dover ed. 1991) (1881).

12. Oman, *supra* note 1, at 53-55 (citing, among others, FRANK HENDERSON STEWART, *HONOR* (1994)).

13. In fact, English law initially recognized such private powers, *see* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359-61 (1986), as did American colonial law, *id.* at 366-71. Some foreign jurisdictions, such as France continue to do so. *Id.* at 384-86.

system as expensive and highly bureaucratized as our mass tort law, for example, may be so weak at delivering vindication and so alienating as to undercut any serious defense of private law as a good means of protecting individual honor.

II. HONOR, EQUALITY, AND PRIVATE LAW: A RIGHTS-BASED FRAMEWORK

Two of the most memorable features of Oman's article are the discussion of the social function of dueling¹⁴ and the recounting of the Marquis Evremonde episode from Dickens's *A Tale of Two Cities*.¹⁵ In the former, dueling is described as having "its own logic" and applying as only among social equals who, by issuing challenge to another, were forcing a rival "to address him as an equal."¹⁶ In the Marquis case, an aristocrat kills a man's child while driving his carriage recklessly through the streets of Paris, and then tosses the man a coin while berating him for permitting his child to wander.¹⁷ Both examine a conception of honor that Oman seems to concede is now outmoded, and both seem to be outside the range of social norms concerning honor that undergird private law in our legal system today. Oman's choice of these examples and their salience in the piece actually point the way to a somewhat different conception of the place of honor in private law, a conception that would not be vulnerable to the criticisms laid out in Part I, above, and would have several of the attributes that Oman is seeking.

Part of what is remarkable about the Marquis example is how appalling it is. It is morally appalling not simply because the Marquis did in fact behave (in killing the child and then simply throwing a coin to the father) in a manner that displayed utter indifference to the value of another human being, but because he was entitled to do so. In reading Oman's rendering of Dickens, one is appalled because one sees that the child did not have an effective right not to be so injured and the parent did not have a legal right to seek redress for what had been done to the child. This was, in part, because of the vertical hierarchy built into that society; the Marquis was immune, beyond accountability. In the face of the conviction that the child ought to have had such right against injury and the parent ought to have had some right of redress, the complete absence of such rights is morally stirring.

Let us now focus more carefully upon these two convictions: the conviction that the child had a right to be free of such injury, even by the Marquis, and the conviction that the parent had a right of redress against the Marquis. Neither of these is really a conviction about the importance of *keeping honor or restoring lost honor*. To say that the child had a right not to be so injured, even by this powerful person, is to say that duties to refrain

14. *Id.* at 43–49.

15. *Id.* at 60–63 (citing CHARLES DICKENS, *A TALE OF TWO CITIES* (Modern Library ed. 1996) (1859)).

16. *Id.* at 57.

17. *See id.* at 60.

from mistreating others in various ways apply to human beings, notwithstanding status. This is in part about equality, and the implications a norm of equality have for a wide range of human actions.

To say that the child or the parent should be able to call the Marquis to account for this terribly wrongful conduct is not to say something about honor or the importance of restoring it. It is to say something about the right of redress, the right to redress a wrong that one has suffered (or one's child has suffered). It is not the honor regained, it is the standing to assert a rights violation and have a right of redress.

When we put both convictions together, we get one forceful and coherent package conjoining two normative ideas: human beings have rights not to be mistreated by others, and have rights to hold others accountable to them if they are so mistreated. In a legal system that includes within it a healthy form of private law like our own, the legal right not to be mistreated packs a punch: it carries with it a legal power to hold someone accountable for violating this right. By recognizing both a right not to be mistreated and a power to hold an injurer to account for such mistreatment, our system provides each individual with dignity. Indeed, one might say that each is accorded the honor of being deemed to stand on equal footing with all others, and that our system puts its money where its mouth is by actually granting standing to each to hold others accountable through private law, regardless of status.

Remarkably, our legal system actually provides every member with a right to challenge others to something like a duel, at least insofar as litigation in private law is something like a duel. In a strong embrace of an egalitarian norm, our system actually empowers each to demand of others that they face him or her in litigation on equal terms.¹⁸ As compared to a society that provides only restricted access to dueling, our system is better in at least three respects: (1) litigation is more civil and less violent; (2) litigation is open to all, and equal; and (3) the contest is keyed to remedying the wrong that was done, typically in a practically useful manner.

The account above is, in one sense, about the honor of private law. Our private law deems each person to merit the honor of *being an obligee of certain duties of conduct and having the power to hold others to account*. This is a kind of honor that is fundamental to our civil society, and is a recognition in a meaningful way of making real the political value of equality. In all of these respects, I believe that Oman is correct to assert that recognition of the honor of each person is a basic feature of private law, and one that is critical to its justifiability.

It is critical to see, however, that Oman's account is fundamentally teleological whereas mine is not. Oman depicts private law as performing the function of allowing individuals to regain their honor; he depicts the

18. I do not mean to deny that tort law as we actually have it in the United States today is subject to serious criticisms from an egalitarian point of view, and that one of these criticisms might be that litigants with different resources for lawyers and experts do not, in reality, stand on equal terms.

system as in this sense aiming at private persons' restoration of honor.¹⁹ In my own brief account, by contrast, the recognition of the dignity of each is constitutive and not functional. It depicts private law as committed to the dignity of each, in an egalitarian manner, and committed in a way that is not just words but rights and empowerment. The honoring of each lies in the imposition of duties on all to treat them as valuable and requiring recognition, and the empowerment of each to call others to account through the state. To be sure, an individual choice to exercise this power is sometimes made for the express or implicit purpose of regaining a sense of honor and regaining the esteem of others, but that is a contingent matter. So too is the matter of whether the strategy of using rights of action for this purpose actually succeeds.

A constitutive conception of civil recourse and honor is not vulnerable to the criticisms I have articulated to Oman's teleological view: positive, hermeneutical, and normative. Tort doctrine is not designed to restore honor; the law of remedies is in some ways designed for restoration, but restoration of a variety of goods that tortfeasors harm or damage—honor being only one among them (and typically not the most important). Yet tort doctrine is designed to empower plaintiffs to demand damages as part of an act of self-restoration. A large part of the reason it is so designed is that the system recognizes that to treat people as equals is to treat them as *entitled* to be free of certain injuries inflicted by others and therefore to be entitled to demand rectification from those others if they wrongfully injure these right-holders. And, in doing so, our system is expressing equal regard for the dignity of each.

Tort plaintiffs sometimes sue to restore a sense of honor, but often sue for many other reasons: obtaining compensation for their injury, ensuring that a defendant's harmful conduct is recognized by others, accounting for a loss, paying one's bills, expressing one's anger, or trying to heal. By making a private right of action in tort a right that the plaintiff has discretion to exercise or not to exercise, the system empowers individuals to act for these and other reasons, or even to act for an ill-defined set of reasons. What plaintiffs do understand (at least if their lawyers are acting as they are ethically bound to act), is that the right to make this decision—and certain key steps along the way in carrying out the decision (like whether to settle or whether to go to trial)—are choices that belong to the plaintiff. Insofar as plaintiffs are able to understand this power as their own (and that remains unclear), their self-understanding arguably includes a sense that the state is treating them with dignity; conversely, insofar as defendants understand themselves to be at the mercy of tort plaintiffs, they do indeed feel commensurately humbled. In these respects, a rights-based conception of civil recourse theory explains the relevance of honor at a hermeneutical level, too.

19. Oman, *supra* note 1, at 69 (“The arguments in this Article suggest that ultimately the vindication of honor provides a justification for civil recourse in the private law.”).

Finally, a rights-based foundation for the honor-engaging defense of civil recourse theory also works well at a normative level. First of all, in a rights-based account—as opposed to a teleological account—we are free to concede that in certain respects and in certain cases, a criminal prosecution may be far more critical to the vindication of honor than a private lawsuit would be. To take a contemporary example, the hotel maid who claimed she was raped by Dominique Strauss-Kahn has indeed filed a civil claim against him and the possibility of success in that claim remains, notwithstanding the dismissal of the criminal indictment.²⁰ Yet I think it would be widely agreed that any vindication of her honor from a successful tort claim will pale in comparison to the vindication that would have been delivered by a successful criminal prosecution. The defensibility of private law in connection with honor does not turn principally on how successfully honor is in fact vindicated by exercises of the right to sue. It turns on the equal respect expressed through the provision to each of a right to sue. The honoring of each lies in the empowerment of each to hold the other accountable, not in the respects in which self-esteem or reputation are likely to be changed by the litigation itself. Of equal importance, the honoring lies in the fact that the wide array of norms of conduct in private law impose duties running from each to all, not to mistreat others; to keep one's promises to them; to respect their property and person alike.

CONCLUSION

In setting up his elegantly structured article, Oman writes: “Is it normatively desirable for victims to act against those who have wronged them?”²¹ He criticizes me and my co-author, John Goldberg, for failing to supply an adequate defense of the practice of acting against a wrongdoer, and he purports to supply a justification for doing so: the vindication or regaining of insulted honor. My own view is that neither the explanation nor the justification for tort law requires answering that question. Moreover, were I forced to answer the question of whether it is normatively desirable for victims to act against those who wronged them, I would give the one answer that the careful philosopher and the prudent lawyer would agree upon: It depends. Nor am I persuaded that a teleological honor-based account provides a general justification for an affirmative answer to the question.

Nonetheless, I think Oman is onto something when he looks at honor, dignity, and equality as the core of the normative defense of civil recourse theory that must be spelled out. The honor is not, however, the good that is gained by a tort plaintiff exercising her right of action. The honor lies in the state's recognition of the right of each not to be wrongfully injured by others and to demand accountability if they are so injured.

20. See Colin Moynihan, *Strauss-Kahn Wants Judge to Dismiss Accuser's Lawsuit*, N.Y. TIMES, Mar. 29, 2012, at A23.

21. Oman, *supra* note 1, at 42.