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## MORALITY AND LAW OF TORTS

Anushka Sharma<sup>1</sup>

### ABSTRACT

From the perspective of information costs, tort law creates a conundrum. While its duties frequently serve as a defense against others in general, unlike property, they don't seem to be standardized and are more susceptible to judicial innovation. This paper contends that to manage the complexity of inter-actor interactions, torts, like property, use modular structures. By breaking down the realm of interactions between parties into manageable, semi-autonomous chunks—modules—both property and torts overcome the information cost problem with "in rem" rights. Tort law uses additional methods to restrict information costs than using "things" to achieve modularity. For example, tort law hides information and is less context-dependent than one might anticipate from a "law of actions." Corrective justice, civil redress, and natural rights are three aspects of tort law that noneconomic tort law theories emphasize as addressing the complexities of tort law. These include proximate causation, duty content, and the bilateral structure of the tort. Similar to property law, a significant portion of tort law's dependence on straightforward moral principles that are simple to express and self-enforce is explained in part by information costs. It turns out that, at the descriptive level, economic analysis and broadly moral tort theories are more closely related than is typically believed. Providing a logical reconstruction of the entire body of common law or a sizable portion of it is one approach to legal theory. This has been meant for legal philosophers aiming to rationalize a body of law under one or more justice principles. In order to rationally reconstruct the law of torts based on purported moral principles, the main tort theorists have attempted to give it a moral foundation. This is examined in this paper. There are two sections to the paper. The idea that tort law is best understood as falling under the purview of either the principle of retributive justice, a broad theory of moral responsibility, or an inherent ideal of fairness in the idea that one should only impose on others those risks others impose on one is examined and rejected in the first part of the paper. The study comes to the conclusion that no one moral standard can adequately explain the law of torts in the sense of providing a reasonable reconstruction. Tort law makes a distinction between situations in which the plaintiff must establish that the defendant was at fault for harming him in order to recover damages and

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<sup>1</sup> The author is a student of law at NMIMS Kirit P. Mehta School of Law, Mumbai.

situations in which the plaintiff may still be able to do so. Rules of fault responsibility are stated to regulate the first category of situations, while strict liability principles govern the second.

This paper will assess four moral arguments that have been made to explain or defend either responsibility or strict liability in this essay, which will be published in two portions in forthcoming issues of this magazine (or both). Although several of these arguments have weaknesses, this paper will maintain that some of them are intelligent and will add to any thorough theory of torts, but that ultimately no single moral principle or cohesive set of moral principles makes the tort system necessary. This paper argues that none of these arguments can fully accomplish the challenging explanatory and justificational tasks that their proponents have set for them.

*Keywords: Tort Law, Morality, Society, Property, Right.*

## INTRODUCTION

The roots of the law of torts, in especially the law of nuisance, have been the subject of a significant deal of writing during the past several years.

Many reform proposals have been made under terms like "strict liability" and "enterprise liability," criticizing the inefficiency and/or inadequate compensation claimed to exist in the current system. This would replace all or a portion of the developed structure with some kind of "no-fault" insurance. The structure is defended by others based on what they believe to be its economic efficiency. Others, who don't place any value on expertise, understand and support the same structure from the perspective of justice and equity. Many in rem rights are safeguarded by tort law, including property rights, rights to one's body and character, and others. When we contrast torts with property, this in rem nature of the tort is, nonetheless, rather perplexing.

Property rights are fundamentally in rem rights, which are good against the world and convey a message to a sizable and endless audience of duty bearers, such as the message to "stay off" in trespass on land. If these distant parties were required to handle specialized tasks, they would incur high information costs.

The fixed list of property rights, or the several clauses principle, restricts customization by parties and directs innovation in property forms away from courts and towards legislatures in order to

reduce the information costs of in rem rights. Where does the law of torts stand, though, since the in rem character of property has been cited to justify the standardising of property?

Despite the fact that it is also frequently in rem, tort laws are not uniform in this regard. There aren't many different types of torts, and courts haven't been afraid to experiment by making up new types of torts.

Property starts with things and works outward, whereas tort law focuses more directly on acts and activities (which I will collectively refer to as "actions"), in that it emphasizes conduct that may cause harm to others. This is the major distinction between property and torts.<sup>2</sup>

By breaking down the world of interactions between parties into manageable chunks—modules—that are semi-autonomous, both property and torts overcome the information cost problem with in rem rights. Small local changes in complex systems might have unforeseen effects elsewhere in the system.

This paper will contend that once information costs are considered, torts become more comparable to property, potentially bringing economic and moral conceptions of torts closer together.

## **FINDINGS**

### **HISTORY OF TORT LAW**

Studying the development of tort law, which began in the Mediterranean region (Israel, Greece, and Rome), one cannot help but be struck by the principle that a man is responsible for any harm brought on by his fault due to its gradual, uncertain, but overall majestic emergence.

Tort law was born out of societal morality and is based on certain moral principles<sup>3</sup>. In its most basic form, the goal of tort law is to protect society from disorder and anarchy by creating a court where one person can file a claim against another without engaging in personal vengeance.

Similar to how society's principles dictate that no one should mistreat someone, and that if they do, they must be punished in order to restore the victim to a respectable position.

For instance, under the strict liability concept, most of the time there isn't a mistake or guilt; instead, it's usually an unavoidable accident, yet it would be unethical to leave the person who suffered helpless. Tort law has a certain structure that a moral interpretation of it must follow even though it doesn't convey morality in general.

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<sup>2</sup> Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 *Journal of Tort Law* (2011).

<sup>3</sup> Joseph M Steiner, *Economics, Morality, and the Law of Torts*, 26 *The University of Toronto Law Journal* (1976).

Tort law has moral foundations, but it cannot be said that those foundations are its only source. It is important to remember that a wrongful act or omission must be one that is sanctioned by the law under contemporary tort law. A liability cannot exist for an ethical or social wrong that is just present.

For instance, failing to assist a starving person or save a drowning child is solely a moral wrong; as a result, no blame can be assigned unless it can be established that the person had a legal obligation to assist the starving person or save the drowning child. Another relevant example where merely violating moral obligations does not render a person guilty is the case of a woman who becomes unwell and asks her neighbor B to take care of her since she is by herself. B looks after "A" and provides various kinds of assistance, including providing food and medication and ensuring that she feels at ease in his company when she needs it. After some time, A recovered. When B became unwell, he asked A to assist him during his illness, but A refused, and B eventually became crippled as a result of the lack of sufficient care and assistance. Here, A had a moral obligation to care for B, but he can't be held accountable if he neglects the woman.

Another instance of the morals being a two-edged sword is as follows:

If A and B were to drive recklessly and carelessly, but by the grace of God, A avoided any accidents and passed the road safely, B would undoubtedly crash into C.

According to modern tort law, only B is responsible because only he or she violated someone else's legal rights (in this case, C's), but from a moral standpoint, both parties should be held accountable because they both performed their duties carelessly. B looks after "A" and provides various kinds of assistance, including providing food and medication and ensuring that she feels at ease in his company when she needs it. After some time, A recovered. When B became unwell, he asked A to assist him during his illness, but A refused, and B eventually became crippled as a result of the lack of sufficient care and assistance.

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Another instance of the morals being a two-edged sword is as follows:

If A and B were to drive recklessly and carelessly, but by the grace of God, A avoided any accidents and passed the road safely, B would undoubtedly crash into C. According to current tort law, only B is responsible because only he or she violated someone else's legal rights (in this case, C's), but from a moral standpoint, both parties should be held accountable because they both performed their duties carelessly. A moral judgement would provide praise or reproach to an

action or behavior as well as to an individual. However, advancements in the domains of ethics and psychology have strengthened the idea that man is unable to make any such judgments. Such a decision would have to take into account every element that makes up "the personal equation" of an individual.

## MORALITY

### *A. The Wrong of Lying*

Typically, moral theory concentrates on lying<sup>4</sup>. A lie, precisely defined as a statement made verbally or nonverbally that contains a proposition that the speaker knows to be untrue but wants the listeners to believe is true. Although there is widespread agreement that lying is wrong, opinions on why vary.

Of course, telling a falsehood could directly undermine the interests of the person you're lying to. Lies produce misleading perceptions of the truth, which a believer may act upon at his peril. As a result, moral philosophers have looked for more justifications for why lying should be considered wrong in general. According to the strictest deontological interpretations, lying is evil inherently for a number of reasons. Aristotle served as inspiration for St. Augustine and St.

Thom Aquinas, who argued that lying is against the rules of nature. God gave men the ability to speak as a way to communicate their thoughts. Therefore, stating what one does not believe in is always wrong, regardless of intent or result.

Always is a universal and fundamental guideline of language use. An effective lie alters the target's thought process, displaces his will, and manipulates his behavior to suit the speaker's purposes. The liar disregards the victim's ability to make wise decisions for themselves.

According to Nybert, lying is not only a common aspect of human interaction but also a necessary adaptive ability and, on occasion, a way to achieve good. Therefore, Nyberg made particularistic appraisal of the ethics of deceit, led by ciples of decency, rather than a prohibition against lying. Nyberg is not the only person who has mixed feelings on the morality of lying, but it is fair to argue that his accommodating outlook runs counter to accepted moral philosophy.

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<sup>4</sup> Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 *Law & Phil.* 371 (1982).

### ***B. Lies and deception***

An assertion that goes against what the speaker believes is a falsehood.

Deception is a much broader notion that encompasses an infinite number of tools used by the deceiver to instill erroneous beliefs in the minds of their victims<sup>5</sup>. It consists of deeds and omissions as well as deliberate silences. Philosophers of morality typically make a distinction between lying and deception and denounce lying as the worst crime. The moral boundary between lying and other forms of deception has occasionally been construed very broadly, as in the Jesuitic doctrine of mental reservation, which holds that a statement that is technically incorrect but that is made with the speaker's secret understanding is not a lie. Even worse than deceptive omissions may be deceptive behaviors. Deceit is potentially worse than indirect deception. The creation of false beliefs by deception can sometimes be worse than the neglect or obstruction of actual beliefs. Accordingly, if a friend contacts you while looking for you at Nordstrom's and you lie and say you're not there, you have lied and are morally responsible for your actions. But if you simply stand behind one of the store's pillars to give the idea that you are not there, you have only misled through behavior. It is not as bad as the lying if you have done something wrong.

### **MORALITY IN THE LAW OF TORTS**

A tort is a civil wrong that happens as a result of an action or inaction, other than a breach of contract, and for which the court places blame. In other words, a wrong has been done, and the victim will receive financial compensation. Tort law governs wrongs and provides redress against them. On the other side, morality is essentially the social norms that establish what is ethically right and bad. In a nutshell, it is a person's moral code of behavior.

The ultimate Intention of the person performing the act is the primary factor that determines whether the act is morally or ethically right or wrong. To put it another way, the idea of morality is concerned with both the external deeds and the internal motivations for those deeds or occurrences. But morality and ethics also have a significant impact on how laws are created.

When a law is being made or a judgement is being handed down, the societal values are kept under consideration because laws are there to serve the society. For example, the crimes and

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<sup>5</sup> Larry Alexander & Emily Sherwin, Deception in Morality and Law, 22 Law and Philosophy (2003).

other actions that are identified as illegal under the law are those that are identified as immoral by virtue of the values of the society.

Morality is therefore the basis for the development of laws. Tort law is the branch of law that primarily deals with civil lawsuits<sup>6</sup>. Most claims that are brought before a civil court, with the exception of contractual disputes, are covered by tort law. Tort law seeks to both make up for wrongs done to individuals and to shield them from the wrongdoings of others. Typically, this is accomplished by paying the victim money damages. To properly recompense victims of harms that could be demonstrated was the original intent of tort law.

Tort law was born out of social morality and is based on certain moral principles. In its most basic form, the goal of tort law is to protect society from disorder and anarchy by creating a court where one person can file a claim against another without engaging in personal vengeance.

Similar to how society's principles dictate that no one should mistreat someone, and that if they do, they must be punished in order to restore the victim to a respectable position.

Additionally, we will contrast how moral theory and the law address dishonesty. 2 After taking a quick look at moral philosophy as it relates to deception, we move on to discuss various legal regulations of deception before noting some instances in which the legal system itself is misleading.

At least one type of deception is severely opposed by dominant moral theories: false claim, also known as lying. At first glance, the law seems to adopt an even more rigid position, banning both lying and other forms of deception.

Technically speaking, it is contradictory to hold someone liable for mistakes that are statistically inevitable, even for the most considerate and conscientious citizen, and to define fault as a failure to behave as a good citizen or to assert that negligence must be judged by the standard of the reasonable man. Therefore, traffic accidents are currently assessed on the basis of error, despite the fact that research indicates that an average driver makes one mistake every two miles, or more than nine mistakes in every five minutes of city driving.

The creation of a general fund for illnesses and injuries along with ongoing efforts to increase the amount of compensation it can provide, or at the very least the enforcement of no-fault insurance for obviously dangerous activities, is required by moral law. Individual social security expansion

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<sup>6</sup> André Tunc, *Tort Law and the Moral Law: Inaugural Lecture*, 30 *The Cambridge Law Journal* (1972).



is also encouraged.

The information cost theory fits with deontological theories of torts for the straightforward reason that it is simpler to communicate legal norms that are based on widespread moral norms. This advantage can be significant, particularly where the legal standard is otherwise potentially expensive. Tort law is similar to property in this regard, which also benefits from information cost advantages from relying on moral standards like those prohibiting stealing. In its governance principles, Property also relies on reciprocal patience - think of nuisance - which also draws inspiration from natural rights and regional customs. Using extralegal moral rules to reduce information costs is a component of torts, which include nuisance.

However, nuisance is not a typical tort, thus it is still unclear in what other ways general morality can help lower the information cost of torts. A specified thing's simplicity helps to some extent with nuisance, which is a property tort. Because it affects adjacent landowners, it is also less in rem than trespass and several torts like assault. Land does not often migrate, hence the classes of right holders and responsibility bearers are rather fixed and somewhat constrained, even when a big nuisance may involve numerous landowners.

As we showed in the previous Part, the law of torts is more straightforward and robust than it would be if it relied just on cost-benefit analysis. Information cost theory suggests a more conventional framework for torts, which, not surprisingly, resembles the basis for Kantian, corrective justice, and civil recourse theories of torts. In contrast to the rule-by-rule is-it-efficient school of law and economics, it is even consistent with a high-level utilitarianism that pays attention to modular architecture. Tort law needs an architecture that takes into account information costs, which is crucial given that this architecture is rooted on common morality. On the basis of this account, it is unclear what constitutes a tort and what kind of rights exist.

Instead, information costs can be used more extensively than they have in the past to explain how tort law is defined and how morality interacts with it, similar to how property law is defined.

In an architectural sense, based on information flow, tort is similar to property.

## **LOOPHOLES**

Deception is not as widely regulated by the law as might first appear. Laws prohibiting deception have several exceptions and limitations. These flaws raise concerns about the connection between morality and the law, as do the obvious failure to apply the law as stated and an intriguing

readiness to allow dishonesty in the administration of the legal system itself. We start by listing several instances where the law allows deception before considering potential explanations and offering educated guesses concerning the morality of deception in the law.

### *1. Exemptions*

The generally broad legal prohibition against deception does not apply in all circumstances. For instance, the domain of sexual interactions has very little fraud responsibility<sup>7</sup>. Deception does not render sexual consent invalid in criminal situations unless it is "fraud in the factum." Therefore, if a woman gives her consent to intercourse with a guy posing as her husband, he has sexually assaulted her; nevertheless, if she gives her agreement to sex with a man who falsely professes his love for her, her assent is sufficient to spare him from punishment. Tort liability is likewise restricted; the few cases that do permit restitution for fraudulent solicitation of sex involve exceptionally egregious lies, such as false statements regarding venereal disease or infertility that have grave physical repercussions or false statements made by fiduciaries.

### *2. Qualifications*

The seemingly broad definitions of fraud that govern tort and contract law are subject to subtle but significant qualifications in addition to the legal tolerance of deception in specific contexts. One requirement that permeates the legal handling of deception is that it must result in actual injury, most often financial harm.<sup>8</sup> The Mo Penal Code, for instance, defines theft by deceit as deception used to acquire property and excludes situations of "no economic significance." The tort of fraudulent misrepresentation also typically needs evidence of financial loss. The so-called "dignitary" torts, such as assault, battery, false imprisonment, and defamation, allow plaintiffs to get significant damages without having to demonstrate economic harm. Deceit is not one of these types of torts.

Punitive damages are only occasionally given, and nominal damages are not available for fraud. Courts have accepted claims for tangible losses, as well as occasionally claims for intangible damages, but the damages that have been granted have been for the measurable effects of the misrepresentation, not for the insult of having been duped. Although deceit also contributes to

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<sup>7</sup> B. C Zipursky, *The Inner Morality of Private Law*. *The American Journal of Jurisprudence*, (1938).

<sup>8</sup> J Oberdiek, *Method and Morality in the New Private Law of Torts*, (2011).

other torts, such as defamation, the legal wrong in these situations is the employment of deception to further separate tortious goals, such as reputational harm. Therefore, tort law does not go as far to punish as it does to punish force with reference to the compensable injuries.

The tort and contract laws do not explicitly define the condition of justifiable reliance. Restatements list a number of circumstances in which a misrepresentation victim is not entitled to compensation. The victim typically cannot take the expression of an opposing party's perspective as a statement that the opinion's tenets are true. This restriction becomes more significant since claims regarding the price, caliber, or authenticity of an item being sold are regarded as statements of opinion, even though they take the form of factual claims. As a result, if a seller claims that the items he is selling are "worth \$10,000" after paying \$8,000 for them, the claim will be considered an opinion, and the victim cannot rightfully rely on it.

Statements of intent may also be taken with a grain of salt. According to *the Restatement (Second) of Torts*, a recipient "has cause to trust the will being carried out" only if they can rely on a statement of intention. *The Second Restatement of Contracts* also stipulates that "Reliance by the recipient is not justified. A misrepresentation of purpose under the circumstances is consistent with acceptable standards of additionally, statements of intent should be considered with mistrust. According to *the Restatement (Second) of Torts*, a recipient "has cause to trust the will being carried out" only if they can rely on a statement of intention. *The Second Restatement of Contracts* also stipulates that "Reliance by the recipient is not justified. A deception of purpose in the given conditions is consistent with ethical standards of conduct.

A significant protection for deception in the form of non-disclosure is another restriction on the legal prohibition of deception's seemingly broad application. Not always is it acceptable to use passive deception. When one party to a transaction discovers information that renders a prior statement inaccurate, that party may have a duty to disclose special facts. An obligation to reveal may also be imposed by custom. For instance, *the Restatement (Second) of Torts* mandates disclosure when one party to a transaction knows the other is misrepresenting "basic" facts and the misrepresenting party "would reasonably expect a disclosure because of the relationship between them, the customs of the trade or other objective circumstances."

### ***3. In Contrast***

**Fiduciary Duties** The harsher requirements that apply to fiduciaries show the importance of the different restrictions on liability for deception under fundamental tort and contract law principles.

80 Fiduciary rules apply to persons who operate in particular professions that are known to require fiduciary behavior, such as lawyers, doctors, brokers, and trustees, as well as to those who hold positions that, based on a case-by-case review, seem to encourage trust. When made by fiduciaries, declarations that ordinarily would be regarded as untrustworthy statements of opinion become claims that warrant reliance. While a non-fiduciary would be allowed to take use of identical informational advantages, failing to disclose information by a fiduciary is equivalent to misrepresenting the facts. Fiduciary disclosure obligations cover relevant facts in addition to material information. When the parties' connection is thought to necessitate a higher degree of confidence than is typically required, these special standards seal the majority of legal gaps pertaining to deception. By raising the bar in a select group of situations, they signal that trust isn't always valued in interpersonal interactions.

#### ***4. Law and Practice***

Another, quite obvious, issue with the laws governing fraud is that they are not consistently upheld. Think about a job interview as an illustration.<sup>9</sup> The first thing you do as a candidate is choose your best suit, which is a considerably finer outfit than what you would ordinarily wear to work. Even if you have a headache and go against various personality qualities that you know it is better to hide, you are positive and upbeat to everyone you encounter during the day. You express your interest in Lincoln, Nebraska, and your interest in the financing of municipal bonds by sitting and speaking in a way that you believe will convey confidence and ease—two things you do not want to be perceived as lacking.

Each of these actions—which are not acts of kindness on your part—is intended to deceive in a transaction with significant stakes for everyone. The candidate has committed several offences, according to a reasonable interpretation of the Model Penal Code.<sup>10</sup> Businesslike look, collegiality, devotion to the company's location, and level of enthusiasm in the work are all factors that are of "pecuniary relevance to the employer," and the candidate purposefully gave the wrong impression on each of these points. If taken literally, the components of liability are also present. However, the job applicant would undoubtedly be shocked if charged with a crime or tort. Criminal prosecutorial discretion and other methods of selective enforcement would exclude a situation like

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<sup>9</sup> E Weinrib, *The Special Morality of Tort Law*, 34 (1988).

<sup>10</sup> A.T Cowan, *Victim of the Law of Torts a Morality Play in Prologue and Dialogue*, (1938).

this. A common sense interpretation of doctrinal requirements, such as materiality and justified reliance inspired by customs that are well known even if they are difficult to explain, would have a similar impact on the civil side. Therefore, in actuality, unwritten limitations on culpability for deception are added to express omissions and qualification liabilities. Regarding the law's act reach, there isn't much room for doubt either. We appear to understand what is actually forbidden and what is not.

## CONCLUSION

Torts use modular structures to manage complexity, just like property. Contrary to property, which heavily relies on the clarity and information-hiding effect of things as modules, tort law excludes vast swaths of contextual information through some of its most traditional aspects, such as its bilateral structure, duty rules, proximate cause, and other related concepts. The aspects of tort law that have attracted the most focus from the perspectives of corrective justice, civil recourse, and natural rights conceptions of tort law can also be described as formal in the sense that they are mostly context-insensitive and support modularity in tort law.

Similar to property law, certain aspects of tort law are easier and easier to uphold since they are grounded in common morality.

The information cost theory bridges the gap between the noneconomic and economic approaches to tort law at the level of right definition by explaining the relationship between tort and property. The information cost theory contends that more fundamental differences across tort theories represent the true distinctions. Even while it can be challenging to draw a precise distinction between the two disciplines of tort law that is primarily based on culpability and accident law, two concepts at least seem to stand out from the previous debate with enough clarity. On the one hand, when someone makes a conscious choice, morality requires that he assume responsibility for his actions. I have to account for what I want, just as a businessperson has to account for the methods he uses to achieve his goals. On the other hand, when an accident occurs, the moral law requires that the victim be compensated first. It is true that human error frequently plays a role in accidents, and that since "error humanum est," our attitudes and attempts to grow and care for others will undoubtedly have an impact on the number of mistakes we make on a daily basis. Our examination of the laws controlling deceit reveals major differences between legal doctrine and moral theory, particularly non consequentiality moral theory. The deontological interpretations that regard lying to be either fundamentally evil or a breach of the victim's autonomy are at odds

with the pattern of doctrinal requirements and omissions. Even while maintaining trust is a concern of law, legal requirements fall short of those set forth by moral theorists that emphasize trust. When closely examined, law seems to be focused on the societal repercussions of deceit, willing to give off deception control in favor of other aims and values, and maybe even open to pursuing benefits from deception.

In the context of rules controlling fraud, this last interpretation has some credence due to the specific significance and peculiarities of the norm of truthfulness. Sincerity is a delicate standard. Deception has a special set of complications since, to the extent that it enhances civility, privacy, or efficiency, these advantages also depend on the standard of honesty. Deception will never succeed if no one believes it. In other words, both trust and effective deceit depend on the basic norm of truthfulness being widely accepted. Because of this, society has an additional justification for insisting that truthfulness is necessary if it has an ambivalent attitude toward honesty in the sense that it sometimes deems lying to be desirable.