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The Morality of Compensation through Tort Law

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Abstract. In this paper, I will focus on the normative structure of tort law. Only by elucidating the point or rationale of holding the wrongdoer responsible to the victim can we understand the value of having tort law instead of establishing other mechanisms of redress, such as a social insurance scheme. Ultimately, I will argue that the value of interpersonal justice, which underlies tort law, might not suffice to fully justify it in a given community. It all depends on whether victims of accidents are able to vindicate their rights against wrongdoers on a regular basis. If social conditions make this unlikely, then the state might be morally required to implement other forms of compensation, either replacing tort law altogether or supplementing it with social insurance in cases where private justice mechanisms tend to fail more dramatically.

1. Introduction

Social insurance schemes pose a serious challenge to tort law systems. After all, other institutional arrangements, such as a social compensation fund in combination with administrative fines, or even criminal sanctions, might result in a more efficient (or at least effective) way of dealing with victims' needs while maintaining the accident rate at a reasonable level. The classical antifunctionalist response to this challenge claims that tort law is not about compensation and deterrence, or any other external goal, for that matter. Instead, it is about interpersonal justice, which is a special kind of morality independent of how good tort law is at helping achieve these other goals which are external to the relationship between the interacting parties (Weinrib 1995, 1–6).[1]

However, it is hard to dispute that compensation and deterrence are both important social goals. Therefore, the value of interpersonal justice, whatever it may be, is

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[1] Weinrib's book is probably the most forceful antifunctionalist manifesto in this field.

in competition with them. Some of the most prominent advocates of corrective justice acknowledge this. They admit that limiting the operation of private rights *might* be justifiable if, for instance, other background justice considerations recommend replacing it with a social insurance system. This, of course, does not mean that nothing is lost in the process (Ripstein 2016, 294–5). It therefore seems that bringing out the value of addressing the harm we cause to each other through a tort law system is vital in assessing what is lost in normative terms when a different path is chosen.

Naturally, there are many possibilities. Among other alternatives, tort law could be (a) replaced altogether; (b) excluded for certain kinds of injuries such us those suffered in a work-related or an automobile accident;[2] or (c) remain available as an option, but incompatible with receiving aid from the compensation fund.[3] How far we can go in creating compensation funds to the detriment of tort law is partially determined by the value we place on tort law as an institution. Without a clear view about what that value is, it is impossible to reach a conclusion about whether implementing a specific compensation fund in a given legal system is a good idea or not. Consequently, identifying the value of tort law is essential to institutional design.

As I see it, any inquiry about the value of tort law should take its normative structure as a starting point. It is usually assumed that tort law comprises two pairs of rights and duties.[4] The first pair includes a right not to be harmed, which is correlative to a duty not to harm. These are called "primary" or "first-order" rights and duties. Once these rights and duties are infringed and breached respectively, a right to be compensated—correlative to a duty to compensate—is triggered. These are considered to be "secondary" or "second-order" rights and duties, given the conditions in which they are applied: They depend, logically and chronologically, on the primary ones not being respected.

Of course, this characterization is controversial. Some authors do not accept that primary rights and duties belong to tort law. Even among adherents of corrective justice there are those who think that tort law is all about *compensatory* rights and duties.[5] Others, on the contrary, insist that the *common law* does not recognize a substantive duty to pay damages. Instead, compensatory duties are created by courts for different reasons; in other words, they do not exist before a court order. And before such a court order, "the victim only has a legal power to obtain a right to an order that the defendant pay damages" (Smith 2019, 58 and 191ff.).

[2] A well-known example of an exclusive response to injury is the New Zealand Accident Compensation Act of 1972, which barred the right to sue where the victim was covered by the compensation fund (see Todd 2016, 22ff.).

[3] In Spain, Royal Decree 9/1993 of May 28 provides social aid to people who received transfusions or other medical treatments with hemoderivatives within the public health system before blood testing became mandatory and, as a consequence, were accidentally infected with HIV. To be eligible, claimants have to waive their right to sue for damages. For an excellent survey of the operation of compensation funds in Spain, see Ribot Igualada 2020.

[4] See, among many others, Goldberg and Zipursky 2012, 261; 2020, 13ff.; Perry 2009, 81 n. 7; Stevens 2007, 4–19; and, with the qualifications made in Section 3 below, Weinrib 1995, 10; 2012, 93 n. 27.

[5] Among the civil law authors, Pantaleón (2000, 167, 171 and n. 10) rejects the existence of the duty not to harm and, at the same time, the idea that tort law pursues economic objectives. Among Anglo-American authors, Jules L. Coleman (1992, 316) claims that there is a duty not to harm, but the domain of tort law is that of the secondary duties of compensation (Coleman 2001, 34).

I will not enter into this debate in this article. Elsewhere, I have argued at length for the existence of primary rights and duties.[6] Regarding the duty to pay damages, this is specifically provided by many (if not all) civil codes in Europe and Latin America, and it is also accepted as part of tort law by many respected authors in the *common law* tradition (see n. 4 above). Therefore, I will assume the two-level structure of rights and duties I described above and then focus on the normative link between primary and secondary rights and duties. Only by elucidating the point or rationale of this connection can we understand the value of tort law. If violations of primary rights and duties triggered other legal responses, such as punishment for injurers and redress for victims, then whatever value is served by the defendant being liable directly to the plaintiff would be lost. If this is true, we can see the value of tort law by discerning the meaning of empowering the victim to seek redress from the particular wrongdoer.

Some authors, such as Neil MacCormick, Ernest Weinrib, Arthur Ripstein, and John Gardner, suggested that primary and secondary rights and duties are connected at a deeper level. MacCormick based the connection on a fundamental right all persons have to reasonable security in their bodily integrity and their property. According to Weinrib and Ripstein, right and remedy constitute a normative unity. The compensatory remedy in tort law is just the vindication of the right that was initially violated. Gardner, on the other hand, explained that primary and secondary duties are justified by the same reasons, and this fact reveals the rationality of tort law remedies. All these views agree on one simple idea: If Cleo wrongs Olympia, the normative order that governed their relationship before the wrong remains valid after the wrong, which implies that the remedy replicates the bilateral structure of the interaction. Whatever normative claim Olympia had against Cleo retains its strength after the wrong, taking the form of a specific remedy, and each and every duty that Cleo owed to Olympia continues to provide normative guidance, and directs Cleo towards restoring the unjustly altered situation.

I will discuss these arguments in Sections, 2, 3, and 4, where I will accordingly argue that these influential theories fail to identify the distinctive value of tort law. Against the "rights perspective," I will try to show that the connection between the initially violated right and the particular tort law remedy is not a conceptual truth, nor is it normatively required by the values these authors place on interpersonal justice. Against Gardner's "continuity thesis," I will try to show that secondary duties of repair cannot be exclusively grounded in the same reasons that justified primary duties. However, I do think there is value to implementing a tort law system. In Section 5, relying on the work of John Goldberg, Benjamin Zipursky, and Stephen Darwall, I will endorse a view about what that value is. However, I will suggest that in many nonideal contexts it is insufficient to fully justify tort law as the *only response* to unjust interactions. Once real-life constraints

[6] The question is not trivial at all. The fact that the legislation does not mention primary rights and duties does not mean they do not exist in practice, nor is it the case that explicit reference to them (in those legal systems in which they *are* mentioned) entails that they necessarily exist. It all depends on whether they truly play some role in the conceptual framework that regulates the practice of accountability. I have tried to show how the pattern of inferences that leads to different remedial responses is puzzling without assuming the existence of primary rights and duties in Papayannis 2014, 19 and 31ff.

are taken into account, it will become clear that the best way to address the harms that we cause to each other might require a combination of tort law and other social mechanisms to secure fair compensation for the victims of unjust interactions, at least in certain cases.

2. The Right to Reasonable Security

For some time, many authors have seen some kind of continuity between primary and secondary rights and duties. After all, if Cleo has a duty not to harm Olympia, and she then harms Olympia, it seems clear that Olympia has a legitimate expectation that Cleo will do something about it *because* Cleo has reasons for doing so. Adapting MacCormick's example in "The Obligation of Reparation" (MacCormick 1982, 214–5), it can be said that if Cleo drives out of her garage and accidentally bumps into Olympia's car, she must tell Olympia what happened, explain the circumstances in which the accident took place, apologize, and offer to pay the repair costs. It seems fairly sensible to reach such a judgement, one which is backed up by ordinary morality. But is there any principle that could justify a judgement such as this? That is, can these intuitions that underlie our ordinary moral judgment be rationalized (ibid.)?

MacCormick thinks they can, based on the normative premise that individuals have a right to reasonable security in their bodily integrity and their property, which is assumed to be something incontrovertibly good for everyone (ibid., 217).

Note that this right to security is not absolute, but is in fact limited to what is reasonable. This implies that we must also accept those risks which others impose on us, to the extent that they are reasonable. When is a risk reasonable? This is not easy to determine, but one possibility is to consider as reasonable those risks which are more beneficial in terms of freedom than harmful in terms of reduced security.[7]

Returning to the example of the car we are dealing with, the harm that Cleo causes Olympia is an infringement of her right to reasonable security in her person and possessions. The right to security, says MacCormick, is *erga omnes*, and allows us to state certain derived duties, such as

(1) everyone should meet the standard of reasonable care; and
(2) once the right to reasonable security is infringed, a duty to repair emerges, borne by the wrongdoer.

Both duties, according to MacCormick (1982, 219), are founded on a "simple analytical connection which obtains between any 'right *in rem*' […] which holds good as against everyone in general, and the personal right to remedial action which arises as against any specific individual who infringes the primary right." He believes that denying these derived rights would be an implicit admission that our original assertion of the primary right was insincere. Both duties are based on the right to security; therefore, the duty to repair the harm caused is not necessarily connected with the duty to meet a standard of reasonable care but is rather independent of it. In other words, the reason why Cleo

[7] For more on this, see Keating 2001, 42–3.

must compensate Olympia for the damage caused to her is not that she behaved unreasonably with respect to Olympia's interests, but that she infringed Olympia's objectively measured right to reasonable security. This move allows MacCormick to accommodate strict liability within his theoretical framework.

Thus, the right to reasonable security is ambiguous. If it is a right not to suffer the imposition of unreasonable risks, then it is violated as soon as a duty of care is breached, regardless of whether the breach has any material effect other than the disturbance that the mere imposition of risk might cause to the affected party. If, on the other hand, the right to reasonable security is to be understood as a right not to be harmed, then it is violated only when the victim is actually injured. The unreasonable behaviour in itself is insufficient to violate the right. No matter how unreasonable the risks generated by Cleo are, she does not violate Olympia's right in this second sense if no harm results from her actions. I think it is sound to conceive the right to reasonable security as including *both claims*, as MacCormick suggests. However, the normative consequences that follow from the violation of the right to reasonable security need not be the same in both cases. Thus, when Cleo breaches a duty of care that she owes to Olympia, Olympia has the authority to demand that Cleo cease her unreasonable conduct. In contrast, it is much more controversial whether Olympia has a valid moral claim to compensation against Cleo for the risks she imposed on her (see, among others, Finkelstein 2003, 965ff.; Oberdiek 2012, 341, 350, 356; 2017, 68–9). In tort law, compensation is granted only when the victim suffers a violation of the right to reasonable security in the second sense; that is, only when she is actually harmed by the wrongdoer.

We can accept that, as a requirement of rationality, Olympia's right to security in the first sense imposes on Cleo a duty to meet a reasonable standard of care. But with regard to the duty of repair, the question does not seem so obvious. MacCormick argues that the right to a reasonable level of security implies a right to be compensated when this primary right is infringed, correlative with the wrongdoer's duty to compensate. This is so because a right which, upon being infringed, does not generate any consequences is an empty right (MacCormick 1982, 219). This is undoubtedly true. However, from the fact that a right not to be harmed without a remedy is meaningless, it does not follow that the *particular* wrongdoer has a duty to pay compensation. Given the thesis that we are analysing, the only thing we can infer from the fact that Olympia was harmed in some unreasonable way is that *someone* should compensate her, not that compensation has to be provided exclusively or specifically by the person who caused the harm.

In sum, the right to reasonable security in the first sense necessarily entails a duty not to impose unreasonable risks on others. Otherwise, what would it mean to claim that one has a right against unreasonable impositions of risks? On the other hand, the right to reasonable security in the second sense is more complex. It entails that the victim has a right not to be harmed, and if harmed, to be compensated. The right not to be harmed is also obviously linked to a correlative duty not to harm. Olympia cannot have a right not to be harmed unless everyone else is under a duty not to harm her. But the same cannot be claimed about her right to be compensated (as a further expression of her right to reasonable security). This subsidiary right could be satisfied in principle by a duty of the state to provide compensation to victims of wrongful harms. That would make her right to security meaningful enough. So, what justifies the option for a tort law system? In asking this I am not merely suggesting, as MacCormick (1982, 226) does, that it is an open question whether the moral costs of abolishing tort law are so great as to preclude all alternative schemes. Indeed, my objection is more fundamental. I am claiming that

the value of tort law, and hence the moral costs of abandoning it in favour of a social insurance scheme, cannot lie in the right to reasonable security, because these schemes are specifically designed to pursue this very purpose.

3. The Unity Thesis

As has been shown, the right to reasonable security does not provide a justification for tort law or identify where its value lies. In spite of everything, MacCormick's views on the matter highlight the path to other interesting arguments, based on the principle of corrective justice, that try to elaborate on the idea that there is a *unity* between the rights initially violated and the remedies recognized by tort law.

The focus of corrective justice is in private relationships. From this perspective, individuals interact as free and equal persons. They are free inasmuch as they all have exclusive authority regarding the aims or goals they wish to pursue in their life. And they are equal in that they enjoy the same rights to develop their free will. Recently, Arthur Ripstein (2016, 33ff.) argued that tort law embodies the moral principle that no person is in charge of another. This principle, with a clear Kantian flavour, explains why no one can use their own means (in particular their body and property) to the detriment of the means of others, and no one has the authority to determine the purposes for which the means of others are to be used. Put simply, no one can interfere with your means, while at the same time you are not allowed to interfere with the means of others. Tort law is about protecting the means you already have, not your well-being or a particular distribution of resources (ibid., 7–8 and 83). After the harmful interaction, tort law purports to restore the normative imbalance caused by the wrong. The wrong cannot be erased from the world, but its material effects can be mitigated by placing the victim in the same situation she would have been in if the harm had never happened (ibid., 233ff.).

In a similar vein, Weinrib explains that in any unjust interaction the defendant acts in a way that exceeds the limits of her freedom and at the same time infringes the rights of the other party. Causing harm and suffering harm are two sides of the same coin, since one is inconceivable without the other. However, the injurer does not behave unjustly with respect to the victim if she does not violate the terms of interaction, thus obtaining a normative gain at the expense of the victim, who suffers a correlative normative loss. When the breach of the rules governing private interactions generates harm, the equality between individuals acting as self-determining moral agents breaks down (Weinrib 1995, 81–3).

In this way of looking at interactions, says Weinrib (2012, 81), the causative event *is the reason* for the legal response provided by the remedy. The whole idea of tort law is to undo the injustice caused by the injurer and suffered by the victim. Given that the injustice (i.e., the harm caused by the injurer) deprives the victim of what rightfully belongs to her, the right and the remedy refer to the same object: the victim's bodily integrity or property. Hence, Weinrib (ibid., 84) argues that the remedy is the *continuation* of the right initially violated.

The idea of a right without a remedy when that right is infringed is absurd, since the right, if it is a genuine *right*, cannot be extinguished by the production of an injustice. If the victim had no remedy once such rights were infringed, then the best way to free ourselves from the duties imposed on us by the rights of others would be to infringe them (Weinrib 1995, 135; 2012, 90). Therefore, once the injustice is produced,

the remedy appears as the *natural* legal response to the unjust action by the defendant. As Weinrib sees it, the justification of the compensatory remedy *cannot* be independent of the victim's right which has been infringed. In a strict sense, right and remedy cannot be set apart. The remedy is the proper manifestation of the right once it is infringed or violated (Weinrib 2012, 87). In fact, in demanding a remedy to rectify the injustice, the victim is merely invoking the same right that was not respected by the defendant. Therefore, Ripstein explains, right and remedy make up a normative *unity* (Ripstein 2016, ix). The unity thesis makes it clear that the restrictions the law imposes on our behaviour before the injustice and the remedy awarded by law after the injustice share the same justification. In other words, the reasons that justify the remedy are the same reasons why we consider that the causative event constitutes an *injustice* (Weinrib 2012, 85–6).

Let us consider an example to clarify the unity argument. Imagine that Cleo destroys an object that belongs to Olympia. Of course, Cleo does not, through this act, destroy Olympia's right. She destroys the object to which Olympia is entitled, but as we have seen, rights must survive after they are violated. Obviously, after the object is destroyed, Cleo cannot fulfil her duty not to destroy it, but her duty not to do so must also survive and takes the form of remedy (ibid., 91). During this time after the harm is done, the action required by Olympia's right is compensation: Cleo must repair Olympia's unjust loss. It is important to point out that, according to Weinrib, this is not a new duty, correlative with a new right of the victim. The same duty may require different actions at different times, and the same action may be required by different duties (ibid., 89). In this sense, Weinrib weakens the idea that the normative structure of tort law includes rights and duties that are genuinely primary and secondary. The parties have a set of rights and duties, and the actions required by these rights and duties vary depending on the factual circumstances. Before the injustice, the required action is to abstain from causing harm. But after the harm, these rights and duties require a different action: compensation for the losses arising from the unjust interaction. After the unjust interaction, Olympia still has a right to the object that was destroyed by Cleo. And if the right survives even after the destruction of the object protected by that right, then it must be concluded that the remedy is the proper manifestation of that right once the object is destroyed.[8]

Now let us consider some objections to this explanation. The first thing we would like to know is what kind of thesis Weinrib and Ripstein are advancing. Is it a conceptual or a normative thesis?

As a conceptual thesis, the unity of legal rights and remedies is rather doubtful. A truism about rights in general is that having a right consists, at the very least, in having a valid, justified, or legitimate claim, privilege, power, or immunity in accordance with a system of (moral or legal) norms.[9] So, if Olympia has a property right to her car, she at least has a valid claim, privilege, power, or immunity

[8] It should be emphasized that the opportunity to respect the right of the victim after the wrong does not turn the correlative duty into an alternative obligation not to harm or to compensate. The remedy reaffirms the right; it does not deny the injustice (Weinrib 2012, 93).

[9] As is clear, I am relying on Hohfeld's positions. See Hohfeld 1913, 30. However, this view is broadly agreed upon by such diverse authors as Joel Feinberg (1970, 243 and 253) and Riccardo Guastini (1999, 180–1).

regarding that object. What valid claims, privileges, powers, or immunities are included in Olympia's property right? That cannot be known without looking at the particular legal provisions that apply to the case in question or, if the issue concerns Olympia's moral rights, without resorting to a normative theory. A classic liberal theory would surely recognize in Olympia's property right many more valid claims than would a socialist theory. This shows that we need to distinguish clearly between what Coleman and Kraus (1986, 1341) called the *syntax* and the *semantics* of rights.

The *syntax* is the logical form or the conceptual properties or features of rights that cannot be anything but true with regard to rights. By contrast, the *semantics* of rights relates to their content. Thus, it is a conceptual feature of Olympia's property right that she has at least one valid claim to the object protected by that right; it is not, however, a conceptual feature that her property right includes the normative power to destroy the object. Indeed, some laws impose limits on private property to prevent it from being damaged or destroyed. If the *Mona Lisa* were put up for sale, Donald Trump could go ahead and buy it, but in many legal systems, that would not give him the right, for example, to paint a moustache on her face. In a moral discussion we could also disagree on whether the owner of the *Mona Lisa* has the right to add a moustache to her features, and our discussion would focus on whether there are grounds to assert that this is (or is not) a valid or justified claim of the rightful owner. However, the idea of a property right over the *Mona Lisa* that excludes the normative power to paint a moustache on it is not something we would find incomprehensible, as we might with the idea of a circular square or a prime number ending in 8.

That said, it is clear that Olympia's property right might include a number of distinct claims. Usually, a property right includes a bundle of claims: (a) to use the object; (b) to exclude others from using the object; (c) to transfer the object to third parties; (d) under certain conditions, to demand compensation from anyone who destroys the object; (e) to reclaim the object when deprived of it illegitimately; etc. Despite this, none of these claims is necessarily required for the existence of the property right as such. Indeed, a much more robust property right could replace claim (d)—the right to be compensated by whoever destroys it—with the right to be compensated *by the state* when someone destroys it. And since such a modification is possible, there is nothing incomprehensible about a property right or a right to bodily integrity that includes a nonbilateral remedy. It only remains to be seen how to avoid the absurd consequence that worries Weinrib, namely, that a right without a remedy against the offender results in the fact that the best way for the injurer to rid herself of her duty is by breaching it. But this can easily be resolved by adding a fine or any other sanction against the wrongdoer.

In short, the problem is that a property right consisting of several unilateral remedies (for example, criminal sanctions for the injurer and social compensation for the victim) is still a property right, albeit with a content different to that preferred by Weinrib, Ripstein, and the Kantian tradition (Weinrib 1995, 107). Therefore, in conceptual terms, Weinrib and Ripstein cannot base the unity of right and (bilateral) remedy on what it *means* to have a property right or a right to bodily integrity.

Alternatively, the unity thesis could be defended as a normative thesis: Individual rights *must* incorporate bilateral remedies as mandated by corrective

justice. In this way, it could be conceded that it is conceptually possible for rights to have nonbilateral remedies, while at the same time arguing that the remedy ought to be bilateral when the injustice it is intended to correct derives from a wrongful interaction between two people. Put another way, Weinrib could try to make explicit the moral loss involved in addressing an unjust interaction with nonbilateral mechanisms.

For Weinrib, the reparation required by tort law re-establishes the balance between the parties as self-determining agents. The compensatory remedy *undoes* the injustice by which one person benefits at the expense of the other (ibid., 63). Once the unjust interaction takes place, the only way the wrongdoer can fulfil her duty to respect the victim's right is by reversing the effects of her original infringement (ibid., 135). This seems correct. If there is something to be done *by the wrongdoer* in order to respect her original duty, some rectificatory action on her side, such as compensation, is called for. But can the victim's right be respected by a different legal response? In other words, why is it important that the wrongdoer reverses her original infringement or violation? What value is added by relational rectification as compared to nonbilateral remedies? The problem with nonbilateral remedies is that they leave normative gains and losses uncorrected or that they do not allow the victim to recover her means (or the authority over her means). But I do not see why this should be true.

Let us focus first on the normative gains obtained by the wrongdoer and the correlative losses suffered by the victim. The wrongdoer obtains a normative gain when she acts in a way that is incompatible with the victim's freedom, or, in other words, when she infringes the victim's right. Moreover, since the victim's self-determining agency is undermined, we can say that she suffers a correlative normative loss. Now, if this kind of gain and loss can be eliminated to any extent, it would be odd to deny that imposing a significant punishment on the injurer for harming the victim leaves the normative gain uncorrected. After exceeding the limits of her freedom, a proportional punishment allegedly diminishes her freedom, making up for the previous excess. If the problem is that punishment does not erase the unjust interaction, the question now is how a relational remedy could do so.[10] The same applies to the victim. After all, a compensation fund might well restore the victim's autonomy by giving her back the means she uses to pursue her ends. The fact that her agency was harmed (or the authority over her means challenged) because she did not determine how her means were to be used in the past should not worry us here, for no remedy can change the past. In this sense, it seems that the injustice in which one party benefits at the expense of the other can be reversed with a combination of unilateral remedies.

Against this objection, it could be said that relational remedies are the only (imperfect) way to enforce the original terms of interaction, given by correlative rights and duties. As Ripstein (2018, 618) replied in a previous debate,

> in a system of rights to reciprocal independence in which no person is in charge of another's means, the organising rights must survive their own violation. Because each person's right to be independent of another person's choice is normative and relational, the relational norms do not lose their significance when they are violated […].

[10] See Hershovitz 2011, 112ff., for an argument that stresses the difficulties of reversing unjust interactions.

But again, why does each person's right to be independent of another person's choice require relational remedies? Why is compensation and punishment in different operations not enough to enforce the original terms of interaction? Is the norm *Do not harm another person's means* less meaningful when it is backed up with nonrelational remedies than when it is by relational ones? If it is, I do not see that the account examined in this section illuminates exactly why it is so.

Ultimately, although I am sympathetic to Weinrib's and Ripstein's views, I am not convinced that the value of tort law could be *exclusively* traced back to the initial rights of the parties to the interaction or to the rectification of normative gains and losses or to the right to be independent of another person's choices.

4. The Continuity Thesis

Unlike Weinrib, Gardner claims that the legal discourse that distinguishes between primary and secondary duties is correct. The remedy does not instantiate the *same obligation* that was breached, because obligations are defined by the action they make obligatory. And *compensating* is a different action from *not harming* (Gardner 2011, 29). In effect, the first action logically presupposes the second. Olympia can only be compensated if she has suffered some sort of wrongful injury beforehand. Otherwise, any provision in her favour can perhaps be considered a benefit, but not compensation.

That said, Gardner goes on to observe that although compensating and not harming are different obligations, compliance with the second obligation—having breached the first—mitigates the previous breach to some extent (ibid., 30). In other words, compensation for the harm done has some normative effect on the previous breach of the duty not to harm. To use an example of MacCormick's (1982, 212; cf. Gardner 2011, 28), imagine a father who promises to take his children to the beach on a Sunday; then suppose he cannot keep his promise, because some urgent matter requires his full attention. It is more or less obvious that after the breach of duty, the father still has reasons to take his children to the beach on the next sunny day, or the first chance he gets. Compared to keeping his original promise, this is the *second-best* alternative. But although it is not the optimal situation, the second action somewhat mitigates the previous broken promise. According to Gardner, that is what a duty of repair is about, its point being to "mitigate, so far as possible, one's non-performance of one's original duty" (Gardner 2018, 100). The idea is that if the father fails to take his children to the beach, as promised, he can still do something for them in the future, such as taking them on another day or taking them to the movies instead or buying them that toy they have wanted for some time, among many other possibilities. In a certain way, the *ex post* compensation is the second-best way to satisfy the reasons justifying the father's primary obligation—the one deriving from the promise he made (Gardner 2011, 33).

Of course, Gardner is very careful to sufficiently emphasize that the continuity thesis holds provided that "everything remains the same," making explicit mention of the *ceteris paribus* condition, along with similar other formulas (ibid., 32, 33, and 34). The continuity thesis, in these terms, seems quite plausible. There are certain facts that ground the first-order duty not to harm. These same facts, added to the fact that the duty not to harm has been breached, now ground, at T2, a duty to pay compensation. Given that the wrongdoer, at T1, had a duty not to harm, she therefore had *reasons* not to harm. These reasons do not disappear at T2, after the

harm has been caused. *In principle*, the same agent who previously had reasons not to harm has reasons to compensate the harm. If, for example, someone else compensates the victim before the wrongdoer does, or if the victim relieves the wrongdoer of the duty to compensate, these events would count as an alteration of the *ceteris paribus* condition and the continuity thesis would not apply. But, leaving these cases aside, the reasons that justify the first-order duty not to harm also justify the second-order obligation to pay compensation. This is the normative tie that explains the rationality of tort law.

In brief, the continuity thesis, says Gardner, "is the thesis that the secondary obligation is a rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due" (ibid., 33). The reason why the tortfeasor must compensate the victim is therefore the *same reason* why she had a duty not to harm in the first place. The compensation imposed by tort law makes the tortfeasor conform, albeit partially (hence imperfectly), to the reasons which she originally had not to harm the victim. More recently, Gardner said that "when […] a wrong was done to another person, various reasons went unconformed to, and those reasons are still awaiting conformity. The question is always, what is the best conformity with those reasons that is still available? Whatever it is, that is now one's remedial or 'secondary' duty towards the same person" (ibid., 102).

I think Gardner's argument is powerful and elegant. The continuity thesis reflects the way we *normally* think about obligations, not only compensatory obligations, in a wide range of situations. However, I do not think the continuity thesis is necessarily true, in which case it would therefore be unable to explain the normative link between the primary obligation in the justification of the secondary-remedial obligation in tort law.[11] The problem is that, even if the *ceteris paribus* condition holds, some considerations that were out of place at T1, or at least had little weight back then, may now be relevant at T2.

To see this, suppose that Cleo is terribly poor and Olympia is immensely rich. Before the harm occurs, the fact that Cleo is poor *does not count as a reason* not to take inexpensive precautions that would prevent a scratch on the paintwork on Olympia's Rolls Royce. Imagine that one night Cleo is waiting for a friend on the same corner at which Olympia has parked her Rolls Royce. She is feeling tired after a hard day's work, and the pavement is still wet because it has rained in the afternoon. So, she decides to lean against the door of the car to ease the waiting. The fact that Cleo is poor is irrelevant to the justification of her action. Cleo should not lean against the car, since by doing so she could ruin the paintwork by scratching it (which in due course she does). Her poverty does not exonerate her from taking precautions which in this case have no monetary cost to her. But the point is that she leant against the car. Now the paintwork is scratched and Olympia sues for damages.

Repairing the very expensive paintwork of Olympia's very expensive car costs the equivalent of nine months of Cleo's salary. As I take it, this is *one reason* that countervails the other reasons that Cleo has to repair the harm caused to Olympia. Nothing has changed since T1. At T2 Cleo is still as poor as she was at T1, Olympia is still as rich as

[11] For other interesting objections to the continuity thesis, see Smith 2019, 181ff., and Tadros 2020, 186ff.

she was, and the cost of repairing the harm is as high as it was. Hence, the *ceteris paribus* condition still holds. However, the reasons that Cleo had not to cause harm at T1 may not justify a secondary obligation to compensate Olympia at T2, as they are countervailed by the fact that the compensation is simply too harsh and oppressive for her. The fact that Olympia is incredibly rich is not a reason not to take precautions, let alone to relieve Cleo of her duty not to harm Olympia at T1. But the fact that repairing the harm is too demanding for Cleo, in conjunction with the fact that the harm is nothing but a slight setback to Olympia's interests, counts against imposing on Cleo an obligation to pay damages. Holding Cleo accountable for that amount of money will surely reduce her freedom more than the uncompensated loss would affect Olympia's freedom. After all, what Cleo earns in nine months might not match what Olympia gives in tips at the restaurants she goes to in the course of just one month. If moral agents must be treated with equal consideration and respect, it could be argued, it seem unjustified to impose a tremendous burden on Cleo simply so that Olympia can avoid a minor annoyance (again, in relative terms).[12]

The objection, it could be said, consists in pointing out that, from the perspective of tort law, it is not that compensation is *usually* due after the breach of the primary duty not to harm. And yet the discourse in terms of reasons we are considering here does point in that direction. After infringement, compensation is, *in general*, a means by which we conform to the original reasons we had not to harm, and we should act on the basis of these reasons, which lead us to repair the harm done—provided, of course, that all else remains equal. But in the legal domain, compensation does not *usually* follow infringement: It is, in fact, an obligation. *Legally*, the fact that Cleo has harmed Olympia is a reason to compensate and is *also* a reason not to act on the basis of other reasons that recommend not repairing the harm (such as the fact that compensation would be too harsh or oppressive for Cleo, or that the harm involves minimal discomfort for someone as rich as Olympia).[13]

Gardner's argument succeeds in showing that the reasons that justify the primary obligation are not extinguished upon breaching the obligation. But to explain the normative connection between first- and second-order obligations, we must also show that the reasons that justified the first-order duty not to harm at T1 *maintain their weight or force* at T2, after the breach (or, at least, that they have sufficient weight, if not the same weight, as at T1). However, as I have suggested, we can think of cases where the reasons that had sufficient weight to justify the primary obligation not to harm at T1 do not have sufficient weight to justify the secondary obligation to pay compensation at T2, even though no normatively relevant aspect is altered in the context.

A possible reply is to point out that, as Olympia is extremely rich, the harm caused by Cleo is insignificant for her. This being so, perhaps Cleo has only a very weak reason not to harm her—a reason so weak that it might after all be unable to justify a

[12] This argument is in line with MacCormick's view that an obligation to repair depends, among other things, on the ability to pay. See MacCormick 1982, 218. The reader might be troubled by the fact that the argument relies on considerations of *distributive* justice when this is a case of *corrective* justice. However, the continuity thesis relies on the reasons the agent had at T1, and claims that they survive the breach and justify a new compensatory duty at T2. I think it is quite implausible to claim that Cleo has an undefeated reason to pay compensation in such a situation; that would mean she has an undefeated reason for action that will lead her to starve for nine months merely to prevent a minor annoyance to Olympia.

[13] The analysis rests on the notion of obligation as a protected reason (Raz 1979, 17).

primary duty of not harming her in that particular situation.[14] So, if Cleo does not have the primary duty not to cause harm at T1, then she cannot have a *secondary* or derivative duty to compensate Olympia at T2.

This argument is interesting, but in my view it faces two serious difficulties. First, if this line of argument is correct, that would place tort law too far away from the moral discourse Gardner uses to analyse primary and secondary duties. According to the law, the only thing that matters is whether or not Cleo violated Olympia's property right. It goes without saying that Olympia's property right cannot be called into question by the fact that the harm has virtually no impact on her well-being, or that she considers it insignificant. None of these considerations have any bearing on whether there is a legal duty to avoid harming Olympia or, eventually, a duty to compensate her for the harm done. Then, if the continuity thesis does not match the practice, obviously it cannot elucidate the practice's value. Second, this response is also counterintuitive. At the time she acts, Cleo does not know how important the car is to Olympia. Moreover, she knows that the harm can be prevented by taking inexpensive precautions: not leaning on Olympia's car will do. Finally, Cleo can clearly appreciate that the Rolls Royce is a very expensive car and that, given her economic situation, she would be unable to compensate for any harm she causes to it. Taking everything under consideration, it seems that Cleo has stronger reasons not to harm than any other person with the economic means to compensate. Being aware of one's inability to make repair should add an extra weight in our reasons not to harm in the first place. Since Cleo knows that after the harm there is nothing she can do to make it right again between Olympia and her, this very fact should reinforce her reasons for taking the necessary precautions, which, I repeat, in this case have no economic cost.

Despite everything, the continuity thesis is appealing. Where does this appeal come from? To see this, I think that the persistence of unconformed reasons should be clearly distinguished from their justificatory force. At T1 some reasons might justify a duty not to do harm. These reasons surely survive the breach, even if they fail to justify a new compensatory duty at T2. Accordingly, two different versions of the continuity thesis can be formulated:

- *Strong version*. When a first-order duty is breached, the reasons that justified it now make obligatory the action that best conforms to those same reasons.
- *Weak version*. When a first-order duty is breached, the reasons that justified it still exert their normative pressure: They still require conformity. So, any action recommended by those reasons to some extent mitigates the previous breach.

My argument rejects the strong version of the continuity thesis but certainly accepts the weak version. In the example of Cleo and Olympia, the closest thing to not causing harm is paying full compensation. But, in the circumstances, an obligation to provide full compensation is, all things considered, morally unwarranted. Still,

[14] John Gardner suggested this line of response to me at the Second Meeting of the Thematic Network on Responsibility and Legal Argumentation (University of Genoa, 9 and 10 Nov. 2017). The argument is entailed by the incorporation of egalitarian considerations into the standard-of-care analysis. See Keren-Paz 2003, 302.

it could be argued that actions other than full compensation might be required. After all, partial compensation or an apology would make things morally better than no response at all. This intuition can be explained by the weak version in a plausible way: The reasons that justified the duty not to harm did not disappear after the harm. They still apply and require conformity, although they do not necessarily ground a duty to compensate. Unfortunately, this is what is needed to justify tort law, at least in its current form. Of course, I am not denying that *if* a secondary, reparative duty exists, it exists for the same reasons that were unconformed when Cleo failed to fulfil her original duty not to harm Olympia. My point is that full compensation, which is the standard legal remedy, is always mandatory. In contrast, according to the weak-continuity thesis compensation might not be required.

In short, by accepting the weak version of the thesis, I grant that there is continuity in the reasons. Nevertheless, the rejection of the strong version entails that there is no continuity in their weight. Without continuity in the weight of the reasons, the breach of a primary duty not to cause harm does not necessarily entail a secondary duty to do the next-best thing to not causing harm. Thus, the continuity thesis is unable to shed light on the link between primary and secondary *legal* duties and, hence, it fails in making sense of the normative structure of tort law.

5. Civil Recourse, Expressive Function, and the Risks of Providing Compensation through Tort Law

In recent years the theory of civil recourse, developed by John Goldberg and Benjamin Zipursky, has gained considerable attention.[15] It is debatable whether civil recourse offers a genuine alternative to the theories of corrective justice, or whether it is simply a particular version of them.[16] In my view, the point is not so relevant. Even if it is a conception of corrective justice, I will argue that the philosophical assumptions of the theory highlight an important value that can only be realized through interpersonal responsibility (and, consequently, through tort law).

Returning to the problem at hand, Goldberg and Zipursky (2020, 28 and 92ff.) emphasized that torts are relational (or private) wrongs. These wrongs involve mistreatment of others, not merely antisocial conduct. Accordingly, the logical form of a relational wrong is "For all x and for all y, x shall not do A to y." Once an x does A to y, the x becomes subject to the normative power that tort law gives to y—a power to hold the defendant accountable. In this way, tort law establishes a "mechanism of accountability" (ibid., 9). This is the sense in which private law is *private*: It empowers *private parties* to hold tortfeasors accountable.[17] Committing a wrong leaves the de-

[15] Two important symposia were published in the *Florida State University Law Review*, vol. 39, no. 1 (2011), and the *Indiana Law Journal*, vol. 88, no. 2 (2013).

[16] Goldberg and Zipursky have always insisted that their theory differs significantly from theories of corrective justice, while Weinrib, in an opinion shared by other authors as well, has emphatically said that "[i]n its essentials, civil recourse is corrective justice" (Weinrib 2011, 297). I trust that the points of disagreement between the two theories (whether real or apparent) are irrelevant to the argument I am elaborating here.

[17] See Goldberg and Zipursky 2010, 945–7. For a different defence of a similar idea, see also Ripstein 2016, chap. 1.

fendant in a position of vulnerability before the victim, and *only before her*. For that reason, exercising the legal power to hold the defendant accountable is at the victim's discretion. The state simply "empowers victims to seek redress if they choose" (Goldberg and Zipursky 2014, 27; 2020, 37–8 and 291).

There is no doubt that this is the way in which tort law reacts to the infliction of wrongful losses. But what justifies this reaction? Goldberg and Zipursky (2020, 110) reject the conceptual version of the unity thesis, for they claim that "it is not true by definition [that] a person whose legal right has been violated is entitled to a remedy." Instead, they suggest that implementing a system of tort law is a political duty of the state towards its citizens (ibid., 113ff.). The idea is that the state, in pursuit of peaceful and civilized coexistence, initially deprives people of the natural right or privilege to respond to mistreatment by others, but, in return, it must offer an alternative route: specifically, a civil recourse against the wrongdoer (Goldberg and Zipursky 2014, 28; 2020, 117ff.).

Let us focus on the idea that implementing a tort law system is a political duty of the state. Presumably, this duty is generated by the fact that the state forbids citizens taking justice into their own hands. However, it is not at all clear that this political duty to offer *some kind* of resource to citizens makes it necessary for the state to implement a tort law system, instead of other alternatives. How can we ground a duty to establish a remedy specifically aimed at the wrongdoer? In other words, how do we go from a duty to implement *some* mechanism for seeking redress to granting the victim the legal power to hold the wrongdoer accountable? Undoubtedly, the argument cannot be that, without a bilateral remedy, the victim of mistreatment would be left powerless or abandoned (Goldberg and Zipursky 2020, 123). That depends on whether the state provides some other adequate mechanisms to compensate the victim and to punish the wrongdoer. Goldberg and Zipursky cast some doubts about the convenience of these alternative arrangements. For example, they fear that criminal-law responses might in some cases (such as unintentional breaches of contract) be too severe or that enhancing nonbilateral solutions might drive us away from the best version of a liberal state (with less criminal enforcement) (ibid.,132). However, none of these considerations are conceptual. In a given context, we might be able to find a configuration of nonbilateral remedies that satisfy the liberal standard for a justifiable response to private wrongs. For instance, think of a landlord who breaches some contractual duty she owes to a tenant. Would a system that compensates the tenant through a special fund created for that purpose, and at the same time imposes a proportionate administrative fine on the landlord, offend any liberal tenet? This seems unlikely.

Goldberg and Zipursky are aware of this. So their next move is to argue that in the end the most fundamental reason for bilateral remedies is that nonbilateral responses undermine the political value of equal treatment. A state that denies the victim a private right of action against the wrongdoer does not take the victim seriously enough (ibid., 134 and 143–4). The argument, however, is inconclusive. The equal treatment clause can be satisfied in many ways. In any case, blocking private actions for *everyone* can hardly be understood as a violation of the principle. Moreover, as I will argue later on, taking the victim seriously might require showing a deep concern for her well-being, and social insurance systems intend to do exactly that: They purport to deliver immediate assistance to ease the victim's suffering. For the reasons given in

Section 3, even the value of self-determination (independence of another person's choices or individual sovereignty), discussed by the authors (ibid., 144ff.), seems insufficient to clarify why bilateral remedies are necessary in a liberal state. Something else is missing.

In my view, that something else may be found in Stephen Darwall's ideas on bipolar obligations, which can be considered to be implicit in civil recourse theory.[18] For our purposes, what stands out is that moral obligations represent a form of mutual accountability between equals. This, in turn, entails "an equal authority we have to address claims and demands *to* one another" (Darwall and Darwall 2011, 17 and 24). The form of accountability and authority embodied in private law conforms to the pattern of obligations *owed to others*, which are in contrast to obligations *period*. Of course, any obligation owed to another is also an obligation *period*. But let's set aside the relationship between the two types of obligation. What I want to point out is that obligations owed to others (or bipolar obligations) are characterized by the fact that infringement of such obligations specifically wrongs a victim (the *obligee*), and it is the victim who is granted an individual authority to hold the wrongdoer (the *obligor*) personally accountable to her. The exercise of this individual authority depends solely on the will of the victim (Darwall 2012, 346–7).

In this sense, tort law can be interpreted as an implementation of these basic ideas regarding bilateral obligations and responsibilities. The idea of mutual accountability and authority reaffirms the respect we all owe to each other as free and equal persons. In this sense, any harm caused to others in violation of their rights is a form of disrespect, and tort actions are a means whereby we can "respectfully demand respect" (Darwall and Darwall 2011, 20). This value is manifested in tort law even when the defendant opposes the plaintiff. The defendant may initially deny the facts, use dilatory strategies, or offer a settlement that is inferior to the actual harm caused and, ultimately, and very reluctantly, pay the agreed sum of money; but even in these cases, the plaintiff will have exercised her legal power to hold the defendant accountable. The institutional recognition of the power to hold the wrongdoer accountable articulates the idea of mutual respect.[19] And this, in turn, is necessary for the institutional recognition of a person's *dignity*. Dignity entails not only a set of requirements on how to treat others, but also the authority to demand from others the same respect by holding them accountable in case of noncompliance with the rules that regulate private interactions. Tort law empowers those who have been mistreated to demand respect for their dignity (Darwall 2006, 13–4 and 33).

From this perspective, with its citizens banned from taking justice into their own hands, there are reasons why the state should fulfil its political duty to offer alternative means of seeking reparation by implementing a system of tort law, rather than

[18] In their contribution to the volume of the *Florida State University Law Review* cited above (n. 15), Stephen and Julian Darwall (2011, 19) make the following point: "In our view, civil recourse theory captures an important truth about the structure of relational or bipolar legal obligations, which we take to be the kind that are normally involved in torts, namely, that injured victims of violated bipolar obligations owed *to them* have a distinctive standing to hold their injurers responsible that neither third parties nor the community at large have."

[19] A similar point is made by Hershovitz (2017, 435–6), but emphasizing the expressive value of tort law. I will say something about expressive arguments below.

any other nonbilateral mechanism. Only a system of tort law provides the appropriate normative structure in which all persons can interact as truly free and equal. Nonbilateral mechanisms of sanction and compensation in independent operations can neutralize normative losses and gains, as far as they can be neutralized, and can certainly eliminate the factual losses and gains. However, they are unable to achieve interpersonal justice, remedy the *lack of respect* inherent in a wrongful interaction, or provide a sufficiently meaningful response to it. Tort law systems, however, are particularly suitable for dealing with this aspect of a wrong, in that they allow *victims to demand from the wrongdoer* the respect they deserve as equal persons. Only tort law restates the equal standing of the parties by conferring on them reciprocal powers to sue for damages. Compensation funds can show a social concern for the interests of the victims but do not give institutional effect to the reciprocal authority to make claims and demands that all equal, free, and rational agents enjoy (Darwall 2006, 121). At the same time, tort law gives the wrongdoer the opportunity to acknowledge the mistreatment the plaintiff has been subjected to, and to do something about it.[20] In sum, it is not so much about warranting *equal treatment*, as Goldberg and Zipursky (2020) argue in a crucial chapter of their book (chap. 4), but *fair treatment among equals*; and it not about *the state taking the victim seriously*, but about *people taking each other seriously*.

These ideas, however, are not completely alien to Goldberg and Zipursky. In the conclusion to their book, they add that tort law "is all about recognizing wrongs," and "equally about recognizing each other" (ibid., 350). They deem that at least part of the value of tort law derives from the fact that it provides a normative framework in which all persons can relate to each other as equals in a civil society (ibid., 344ff.). One wonders whether the civil recourse theory plays any significant role in the justification of tort law once this last value is fully deployed. In any case, a Darwallian interpretation of the civil recourse theory—one that stresses the importance of the reciprocal authority to make claims and demands—captures what I take to be valuable in tort law practices.

Of course, there are further arguments to support the victim's claim for compensation directly addressed to the wrongdoer. In the context of sex slavery, Keren-Paz (2010, 329) argued that there is a significant *symbolic effect* in empowering victims to sue those who treated them as property. However, the point I am making here is different. Only the rules of tort law allow the parties to relate to each other as equals. The expressive value of tort law is a by-product of its normative structure. I do not deny the importance of the expressive dimension of legal institutions. In fact, I have argued in the past that lawmakers and judges should take it into account in regulating and deciding sensitive cases in which gender inequalities might arise (see Papayannis 2016, 286ff.). But I am not convinced that tort law is, to put it in Hershovitz's (2017, 428) words, "primarily, and not just incidentally, an expressive

[20] Let us imagine, as David Enoch (2014, 253) does, a system of social compensation like New Zealand's, to which we add an obligation for the wrongdoer to apologize. Would this mechanism have a value equivalent to that of corrective justice in terms of re-establishing mutual respect? In my opinion it would not. Beyond the fact that ordered apologies might sometimes lack much meaning, an institutional arrangement such as this does not allow the injured party to hold the wrongdoer fully accountable for what she has done. Mutual respect is a matter of equal status among people, and only interpersonal justice can achieve that.

institution." In my view, the main problem with depriving employees of the power to sue their employers for harassment or other kinds of mistreatment in the labour context would be that one party is deprived of her equal standing to hold the wrongdoer responsible. As a corollary, this would send the despicable institutional message that some people are worth more than others—that they are untouchable, immune to their victim's claims and demands. The expressive function is in this sense derivative. Tort law sends the right message when it allows people to relate to each other as equals. Still, the justification of tort law hinges on the terms of interaction it sets, not on the message it sends. It is empowerment that counts, not the symbolic effects of empowerment.

If the argument I have given here is plausible, there is an important liberal value in carrying out interpersonal justice, that is, in implementing bilateral remedies as tort law does.[21] Interpersonal justice brings something that separate mechanisms of responsibility (or sanctions) and compensation are unable to provide. But is this all that matters? There remains a question of political morality concerning the kind of institutional response we must have at hand for the harm we cause each other. Is the value of interpersonal justice sufficient to oblige the state to implement a tort law system? It is a fact that tort law embodies a certain form of mutual accountability and respect for the dignity of others, but there are reasons to think that this fact is, by itself, insufficient to force the state's hand: There is another set of considerations that should also be taken into account.

If the argument so far is sound, then nonbilateral mechanisms fail to recognize the important moral value of interpersonal justice. From this perspective, even a world in which the wrongdoer is held responsible and the victim is compensated is a *normatively defective* world if compensation comes from a social insurance scheme and responsibility takes the form of a fine or some other sanction. Even so, we can evaluate different possible worlds according to how close to or far away they are from a world in which interpersonal justice is done. The ideal outcome after a wrongful interaction in a world of interpersonal justice is bilateral responsibility/compensation. Hence, in the "defective" worlds, we have four different possibilities:

(1) nonbilateral responsibility and compensation;
(2) compensation, but no responsibility;
(3) responsibility, but no compensation;
(4) neither responsibility nor compensation.

I think we can agree on this ordering of the defective worlds that do not satisfy the value of interpersonal justice. We may have doubts about arrangements 2 and 3, as neither manages to assign both responsibility and compensation at the same time (although I do believe there are, in fact, sound reasons to prioritize compensation over responsibility, as it is a more urgent matter to do something to alleviate the suffering of the victim than it is to hold the wrongdoer accountable: Coleman 2013, 172).

[21] For an opposing view, see Kagan (1988, 293) and Zimmerman (1994, 450). In my opinion, however, neither of these authors takes the importance of mutual accountability and respect seriously enough.

In any case, it seems difficult to deny that a strict adherence to tort law could often lead to world no. 4, in which there is no responsibility and, of course, no compensation for the victim, either. This is because in a tort law suit the plaintiff is required to identify the particular wrongdoer, to argue that the grounds for liability are met, and to prove the relevant facts. This means that the plaintiff's claim for compensation may be frustrated by a wide range of circumstances. Some of the sources of frustrated claims are *internal* to the litigation itself: (a) uncertainty about individual causation; (b) uncertainty about the standards of care; (c) inability to produce sufficient evidence according to the relevant standard of proof; etc. Other sources of frustration are *external*. People are free and equal only in formal terms; in the real world, there are instead plaintiffs who (a) are ignorant of their rights; (b) lack the financial capacity to initiate litigation; (c) lack the financial capacity to see the litigation through to the end, and who may therefore accept clearly disadvantageous out-of-court settlements; or (d) have been injured by insolvent wrongdoers. In all these cases, the attempt to deliver interpersonal justice leaves justice undone.[22] Furthermore, it can have serious effects on individual autonomy, to the extent that victims—after the interaction—will have fewer resources to live their lives in the way they had planned even though their loss has not been the result of their own actions, i.e., it was not *their* responsibility.[23]

Seen in this way, implementing interpersonal justice is a risky business because failing to find someone responsible for the harm suffered means failing to obtain compensation. By contrast, other mechanisms in which compensation and liability are addressed separately allows for the possibility that the state will fail to find someone responsible, without this necessarily frustrating the victim's right to be compensated. The nonbilateral mechanism provides much wider protection for victims in matters relating to their welfare, at a cost of renouncing the remedy that deals with the lack of respect expressed in the unjust interaction. The extent to which sacrificing interpersonal justice is justified is a contingent matter.

It is not my aim here to provide a conclusive argument in favour of social insurance schemes. What interests me the most is to show that the argument in favour of a tort law system cannot be altogether conclusive until the social conditions in which it operates are taken into account. The realization of tort law's value in a given community depends crucially on how feasible it is for the victims of unjust interactions (including the most disadvantaged people in society) to successfully sue the wrongdoer and obtain this kind of interpersonal redress. After all, in a world in which tort law is not always fair to the disadvantaged,[24] the choice before us is either (1) attempting to ensure material compensation, devoid of a mechanism that would

[22] Studies in law and economics have provided considerable insight into the limits of private enforcement as well as into the problem of the parties' financial solvency. See Miceli 2004, 284ff. Of course, some sources of frustration, such as the victim's ignorance of her rights, might also be a problem for other compensatory mechanisms. In any case, it is clear that these problems are much more severe in a tort law system than in a social insurance scheme, and also that the former has much less flexibility than the latter to adapt its procedures in order to overcome these sources of frustration.

[23] A general failure of tort law would place the consequences of another person's choices and actions on the victim. As Ripstein (2004, 1813) puts it: "It makes no sense to say that someone is responsible for what he or she makes of his or her own life if what becomes of that life depends in the wrong kinds of ways on the deeds of others, either because he or she is made to bear costs that properly lie with others, or because he or she is free of costs that are put onto others."

[24] See Keren-Paz 2007 for a powerful criticism of the regressive nature of current tort law.

restore mutual respect, or (2) attempting to obtain through tort law both material compensation and the restoration of mutual respect, at the risk of a significant proportion of victims (or at least the most vulnerable subset of them) failing to obtain material compensation *and* recognition of their dignity by the wrongdoer. The search for interpersonal justice might end up leaving the most disadvantaged victims with nothing.

In certain contexts, the option for a tort law system does not seem to be clearly preferable to other mechanisms that would allow the victim to obtain compensation from a special fund simply by showing that the harm was unjustly suffered. It is not easy to see the advantage of implementing a system of *interpersonal justice* when the effect of this justice is that, in many cases, the victim's rights will not be vindicated in any way. That said, sacrificing interpersonal justice altogether is not the only option when the background justice is compromised. The debate sometimes seems to be framed in terms of an all-or-nothing choice (see Coleman 2008). I think that a good balance between all the values at stake can be achieved through the *subsidiary* operation of social insurance schemes in a well-defined range of cases. Mixed schemes such as this are applied in several legal systems.[25] This kind of response reconciles the need to enforce private justice, enabling the restoration of mutual respect, with the state's duty to be concerned with providing material compensation for the victims of unjust losses. The harms that we cause to each other are not merely a private problem, but neither they are a purely public one. That is why even if tort law might not suffice to achieve justice, it cannot be completely replaced by other mechanisms without moral loss.

6. Concluding Remarks

In this paper I argued that the value uniquely expressed in tort law is the value of interpersonal justice, understood in a particular way. This kind of justice is inherent in the relationships between particular persons, if they are to be conceived as free and equal agents. Tort law is the only institution that can secure the normative structure in which people can relate to each other in a mutually respectful manner.

That said, I concluded that the value of interpersonal justice might not suffice to fully justify tort law in a given community. It all depends on whether victims of accidents are able to vindicate their rights against the wrongdoers on a regular basis. If social conditions make this unlikely, then the state might be morally required to implement other forms of compensation, either replacing tort law or supplementing it with social insurance in cases where private-justice mechanisms tend to fail more dramatically.

Although I did not engage with the debate between functionalism and antifunctionalism, it is implicit in my argument that this quarrel is, in a sense, irrelevant for the justification of tort law. Antifunctionalists believe that understanding tort law in its own terms is essential to appreciating its value. Only then can we determine what

[25] This is the case in Spain for automobile accidents (when the harm is caused by unidentified or insolvent car drivers, among other cases) and victims of terrorism. See Royal Legislative Decree 8/2004, October 29, on civil liability and insurance for the circulation of motor vehicles; and Act 29/2011, September 22, on the Recognition and Comprehensive Protection of Victims of Terrorism.

would be lost in moral terms if tort law were abolished to favour other social goals. Hence, identifying a unique value in tort law does not spare us the trouble of weighting it against other requirements of justice. Functionalists, on the other hand, think that tort law's value is dependent on how good it is at achieving a set of collectively decided goals. From this viewpoint, interpersonal justice is just another social goal, that is, something contingently wanted by society (Kaplow and Shavell 2002, 11 and 21). Therefore, if in a particular context the chances of achieving interpersonal justice are sufficiently low, nothing really important is given away in exchange for advancing other important social goals, such as providing a broad and timely response to the victims of wrongful interactions. In other words, the justificatory enterprise seems to be indifferent to the disputes between the functionalist and antifunctionalist approaches in private-law theory.

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