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# TORT LAW AND CONTRACTUALISM

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ABSTRACT. How can tort law be justified? There are well-known difficulties with the three traditional theories of tort law dominating the literature (namely, economic theory, corrective justice theory, and civil recourse theory). Recently, some have turned to moral contractualism in search of tort law's foundation. One of the most prominent attempts was made by Gregory Keating. Keating's account, however, has been subjected to powerful objections. In a recent paper, John Oberdiek, through a sympathetic critique of Keating's account, develops a new version of contractualist tort theory that is alleged to be at once superior to the three traditional theories of tort law and immune to the objections to Keating's account. The aim of my paper is to critically assess Oberdiek's account; I will argue that, while Oberdiek's account does improve upon Keating's in some important respects, it is ultimately unsatisfactory.

## I. INTRODUCTION

In most contemporary Western jurisdictions, tort law forms a major part of society's responses to accidents and injuries. A system of tort law requires wrongdoers to repair wrongful losses.[1] But tort law is not the only possible way to deal with accidents and injuries. For example, we can simply let the loss lie where it falls regardless of whether it is a result of wrongdoing, or adopt something like the Accident Compensation Scheme in New Zealand, where all victims suffering personal injuries would be compensated by a no-fault compulsory insurance scheme instead of the wrongdoers.[2] This pa-

[1] Jules Coleman, *Risks and Wrongs* (Oxford: Oxford University Press, 1992), p. 12. I will focus on loss arising from bodily injury and property damage, since such loss (as opposed to pure economic loss) is uncontroversially covered by tort law.

[2] For some of these alternatives, see e.g., Gregory Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents', *Fordham Law Review* 72(5) (2004): 1857–1921. A system of tort law is compatible with voluntary but not compulsory insurance: see e.g., Richard Wright, 'Right, Justice, and Tort Law', in D. G. Owen (ed.), *The Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), p. 178.

per examines whether we should prefer tort law to alternative ways to deal with accidents and injuries.

Every justification of tort law consists of two claims: first, a normative principle and, second, the claim that tort law follows from the principle. For example, economic theory consists of (1) the normative principle that we should choose the system that maximizes utility/wealth, and (2) the claim that tort law maximizes utility/wealth. A successful theory of tort law, accordingly, must pass two tests:

(1) Justificatory merit:[3] the normative principle on which the theory relies must be morally valid.
(2) Explanatory adequacy:[4] the normative principle, assuming it is morally valid, can explain the preference for tort law over alternative systems.[5]

Unfortunately, the three traditional justifications of tort law dominating the literature – namely, economic theory (which justifies tort law as a means to maximize utility/wealth), corrective justice theory (which justifies tort law by the wrongdoer's obligation to make his/her victim whole), and civil recourse theory (which justifies tort law by the victim's right to hold the wrongdoer accountable through compensation) – have significant difficulty with at least one of the two tests.

Regardless of whether the normative principle underlying economic theory (i.e. the principle that we should choose the system that maximizes utility/wealth) is morally valid, economic theory is explanatorily inadequate as tort law need not maximize utility or wealth.[6]

Corrective justice and civil recourse theories fare better in terms of explanatory adequacy: if we accept the principle of corrective

[3] John Oberdiek, 'Structure and Justification in Contractualist Tort Theory', in J. Oberdiek (ed.), *The Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014), p. 104 (hereafter as 'Structure and Justification').

[4] Ibid. Oberdiek calls this condition 'interpretive adequacy.'

[5] While a successful justification of tort law must account for the central organizing doctrines of tort law by appealing to an attractive normative principle, it does not have to claim that the principle trumps all other principles, or that other principles cannot achieve the same. This understanding of what can be legitimately demanded from a purported justification of tort law is in line with the ambition of many prominent accounts in the literature. See e.g., Arthur Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016), pp. 294–295; Ernest Weinrib, *Corrective Justice* (Oxford: Oxford University Press), pp. 7–8.

[6] See e.g., Coleman, *Risks and Wrongs*, pp. 376–382; Oberdiek, 'Structure and Justification', p. 104.

justice (i.e. the normative principle underlying corrective justice theory, according to which a wrongdoer has a moral obligation to make his/her victim whole) or the principle of civil recourse (i.e. the normative principle underlying civil recourse theory, according to which the victim has a moral right to hold the wrongdoer accountable through compensation), then it seems we can explain why tort law should be chosen over alternative systems. The problem with corrective justice and civil recourse theories lies rather in the justificatory merit condition, as the principle of corrective justice and the principle of civil recourse face difficult challenges that, to many, have yet to be satisfactorily answered. Why exactly is it important to make the victim whole, especially if the victim does not deserve his/her original level of holdings?[7] And, even if we assume the victim has a right to some form of accountability, why exactly must the wrongdoer's accountability take the form of compensation rather than, say, apology?[8]

Some tort theorists have, in light of the above, looked beyond the three traditional theories. Contractualism, according to which rightness depends on hypothetical agreement amongst reasonable people, has been the source of inspiration for some tort theorists. However, the arguably most well-known contractualist account of tort law, offered by Keating and based on Rawlsian contractualism, is often criticized to be explanatorily inadequate on the ground that people who are reasonable in the Rawlsian sense need not choose tort law.[9]

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[7] See e.g., Larry Alexander, 'Causation and Corrective Justice: Does Tort Law Make Sense?' *Law and Philosophy* 6(1) (1987): 1–23; Christopher Schroeder, 'Causation, Compensation, and Moral Responsibility', in D. G. Owen (ed.), *The Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995); Jason Solomon, 'Equal Accountability Through Tort Law', *Northwestern University Law Review* 103(4) (2009): 1765–1822, pp. 1774–1775.

[8] Ripstein, *Private Wrongs*, pp. 281–283. For responses, see e.g., Jason Solomon, 'Civil Recourse as Social Equality', *Florida State University Law Review* 39(1) (2001): 243–272, pp. 265–267.The kind of justification we are looking for, I wish to add, is pre-institutional. So it is insufficient for a defender of tort law to claim that denying compensation to a victim would be demeaning, *given* the expressive effect of tort remedies, as it begs the question of why should we set up a system of tort remedies in the first place. I thank the reviewer for raising this concern.

[9] Oberdiek focuses on Gerald Postema's critique in Gerald Postema, 'Introduction: Search for an Explanatory Theory of Torts', in G. Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001), p. 7. Ripstein has made a similar critique of Keating in Arthur Ripstein, 'The Division of Responsibility and the Law of Tort', *Fordham Law Review* 72(5) (2004): 1811–1844, pp. 1825–1829. Keating actually accepts that contractualism does not necessarily favor tort law over New Zealand's Accident Compensation Scheme: see e.g., Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents', p. 1907; Gregory Keating, 'Form and Substance in the "Private Law" of Torts', *Journal of Tort Law* 14(1) (2021): 45–99, pp. 95–96. See also my conclusion below.

At this impasse, John Oberdiek develops, through a sympathetic critique of Keating's account, a new version of contractualist tort theory in his paper 'Structure and Justification in Contractualist Tort Theory' (hereafter, 'Structure and Justification').[10] Oberdiek's account deserves attention because while it is the most plausible contractualist justification of tort law offered in the literature,[11] it has not yet received extensive critical attention.[12]

I will argue that while Oberdiek's account does improve upon Keating's in some important respects, it is ultimately unsatisfactory. In Section II, I will introduce Keating's Rawlsian theory and the standard objection to it. In Section III, I will assess whether Oberdiek's preferred version of contractualism – which is Scanlonian instead of Rawlsian – can really explain tort law.[13] In Section IV, I will consider, and reject, a possible response by Oberdiek based on contractualism's ability to account for primary rights.

[10] Oberdiek, 'Structure and Justification.'

[11] Emmanuel Voyiakis has also offered a contractualist account of tort law based on Scanlon's contractualism in Emmanuel Voyiakis, *Private Law and the Value of Choice* (London: Bloomsbury Publishing, 2017), though Voyiakis later clarified that he does not believe tort law must be preferred to alternative systems: Emmanual Voyiakis, 'The Significance of Choice in Private Law: A Reply to Priel, Thomas, and Dagan', *Jurisprudence* 10(3) (2019): 434–443, pp. 439–440. (Voyiakis's book has not discussed Oberdiek's work.) See also Yan Kai Zhou, 'Book Review of N. McBride, *The Humanity of Private Law: part 1*', *Modern Law Review* 83(5) (2020): 1112–1116, pp. 1113–1114; Zhong Xing Tan, 'The Enigma of Interpersonal Justice in Private Law Theory', *Oxford Journal of Legal Studies* 43(4) (2023): 699–724, pp. 715–724.

[12] Oberdiek's contractualist account has been briefly discussed in three other pieces. Avihay Dorfman and Peter Jaffey claim, as I do, that Oberdiek's contractualism cannot account for tort's compensatory rights in their book reviews of *The Philosophical Foundations of the Law of Torts*. See Avihay Dorfman, 'Book Review of J. Oberdiek (ed.), *The Philosophical Foundations of the Law of Torts*', *Notre Dame Philosophical Reviews* (2015): https://ndpr.nd.edu/reviews/philosophical-foundations-of-the-law-of-torts and Peter Jaffey, 'Book Review of J. Oberdiek (ed.), *The Philosophical Foundations of the Law of Torts*', *Law and Philosophy* 34(4) (2015): 469–475. They, however, have not offered much support for their challenges in their very brief discussion of Oberdiek's paper. Ben Zipursky raises three concerns about Oberdiek's account in Ben Zipursky, 'Contractualism and Tort Law', *Jotwell* (2015): https://torts.jotwell.com/contractualism-and-tort-law/. His first two concerns – which are about whether Oberdiek's account can do more than explaining bilateralism and how Oberdiek's account is related to other theories offered in the literature – are not the focus of my paper. His third concern – which is that Oberdiek's account cannot explain tort law's primary rights – overlaps with my critique (see Section IV below); but this point will only be one of the many components of my critique.

[13] While I will adopt Oberdiek's labels, according to which his account is 'Scanlonian' and Keating's account is 'Rawlsian', his labels are not uncontroversial as Keating in fact writes, in 'Rawlsian Fairness and Regime Choice in the Law of Accidents', p. 1870 n. 27 (a paper that is cited in Oberdiek, 'Structure and Justification', p. 106 n. 11), that his contractualist reasoning 'is similar to the procedure followed by the more general contractualism of Tim Scanlon.'

## II. CONTRACTUALISM AND KEATING'S RAWLSIAN ACCOUNT

Contemporary contractualism – whether Rawlsian, Scanlonian, or otherwise – is usually offered as a foil to utilitarianism. Utilitarianism consists of several maxims, including the following two.[14] First, consequentialism: the rightness of a conduct depends on whether that conduct will lead to the best state of affairs. Second, aggregation: whether a state of affairs is better than another depends on a comparison of the total sum (rather than the distribution) of goods in these states of affairs.

Aggregation is widely rejected.[15] Consider a choice between two policies. Policy A will result in everyone having a moderate amount of goods. Policy B will result in everyone having slightly more goods – except Chris, who will be penniless and miserable. Utilitarianism implies the counterintuitive conclusion that if the number of people is large enough, then we should prefer policy B. By contrast, according to contractualism, whether a conduct is permissible depends on whether a principle that permits the conduct can be reasonably justified to each person, and whether a person can reasonably reject a principle depends on a 'pairwise comparison'[16] of the strength of that person's objection to the principle with the strength of each other person's objection to the alternative, taken individually. Since Chris's objection to Policy B is stronger than any individual's objection to Policy A, contractualism can explain why policy B is impermissible.

A general worry about contractualist accounts of tort law is that, regardless of whether contractualism is sound as a moral theory, contractualism cannot explain tort law. To illustrate, consider Gerald Postema's objection to Keating's account. According to Keating, our choice of liability systems (such as between fault and strict liability) should be guided by what would be agreed upon by people who are reasonable in the Rawlsian sense,[17] i.e., people who 'seek to coop-

[14] For the three tenets of utilitarianism, see Amartya Sen and Bernard Williams, 'Introduction: Utilitarianism and Beyond', in A. Sen and B. Williams (eds.), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982).

[15] T. M. Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998), pp. 229–230; John Rawls, *A Theory of Justice: revised edition* (Oxford: Oxford University Press, 1999), p. 24.

[16] Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), p. 67.

[17] Gregory Keating, 'A Social Contract Conception of the Tort Law of Accidents', in G. Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001), pp. 22–23, 29–30; Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents', pp. 1864–1870.

erate on fair terms with'[18] others. Postema doubts the relevance of Rawlsian contractualism to tort law, on the ground that people who are reasonable in the Rawlsian sense need not choose tort law. According to Oberdiek, there are two ways to understand Postema's objection.

According to the first version of Postema's objection, Keating's account cannot explain tort law because Rawlsian contractualism, while rejecting aggregation, is nonetheless *consequentialist*:[19] whether a principle would be chosen under Rawlsian contractualism depends on whether it *promotes the state of affairs* that conforms to Rawls's Difference principle, but tort law need not lead to that state of affairs.[20]

Oberdiek claims that this version of Postema's objection is 'misplaced', as Keating's Rawlsian tort theory, properly understood, is not consequentialist at all:

> Keating's Rawlsian tort theory is clearly animated by an *interpersonal* concern with fairness, not a public policy-based *impersonal* concern with bringing about some favored state of affairs.…Keating cannot therefore be charged with simply replacing the impersonal goal of efficiency with the impersonal goal of distributive justice.[21]

Oberdiek believes, however, that Keating's account is vulnerable to Postema's objection, if it is read in a different way. According to it, Keating's account is explanatorily inadequate because Rawlsian contractualism, *even if non-consequentialist,* cannot capture the idea that a tortious conduct is a *relational wrong against a particular victim*. According to Oberdiek, the gist of wrongdoings under Rawlsian

[18] Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents', p. 1866.

[19] See Kevin Kordana and David Tabachnick, 'On Belling the Cat: Rawls and Tort as Corrective Justice', *Virginia Law Review* 92(7) (2006): 1279–1310. This is not the only possible understanding of Rawlsian distributive justice. For a non-consequentialist reading of Rawls's account of tort law, see Samuel Freeman, *Liberalism and Distributive Justice* (Oxford: Oxford University Press, 2018), pp. 184–193, cited with approval by Keating in 'Form and Substance in the "Private Law" of Torts', p. 57 n. 39. See also Stephen Perry, 'On the Relationship Between Corrective and Distributive Justice', in J. Horder (ed.), *Oxford Essays in Jurisprudence: fourth series* (Oxford: Oxford University Press, 2000).

[20] Postema, 'Introduction: Search for an Explanatory Theory of Torts', p. 7.

[21] Oberdiek, 'Structure and Justification', p. 111.

contractualism is simply 'a failure to operate within the terms of the fair cooperative scheme'.[22] Acting unfairly, however, is an 'omnilateral' wrong, in the sense that such conduct wrongs every member of the cooperative scheme *equally*. Under Rawlsian contractualism, then, the victim has no special complaint as compared to other members of the cooperative scheme. Reasonable people would, therefore, have no basis to choose tort law, a bilateral system that picks out the victim and the injurer for special treatment.[23]

## III. FROM RAWLSIAN CONTRACTUALISM TO SCANLONIAN CONTRACTUALISM

In Sections III.A and III.B, I will consider two questions. First, what are the main differences between Scanlonian and Rawlsian contractualism? Second, do these differences enable Scanlonian contractualism to explain tort law?

### *A. Rawlsian vs Scanlonian Contractualism: 'Justification to a Subject as a Subject'*

According to Oberdiek, what sets Scanlonian contractualism apart from Rawlsian contractualism is that the former is based on a distinctive conception of justification articulated by Thomas Nagel, namely, 'justification to a subject as a subject' (to be contrasted with 'justification to the world at large').[24] Oberdiek introduces the idea of 'justification to a subject as a subject' as follows:

> When one is able to justify one's actions to others according to justification to a subject [as a subject], one stands in what Scanlon calls "a relation of mutual recognition," the value of which

[22] Ibid, p. 112. Oberdiek has discussed the work by Keating (and his co-author Dilan Esper) in another paper: see John Oberdiek, 'It's Something Personal: On the Relationality of Duty and Civil Wrongs', in P. Miller and J. Oberdiek (eds.), *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020); Dilan Esper and Gregory Keating, 'Putting "Duty" in Its Place: A Reply to Professors Goldberg and Zipursky', *Loyola of Los Angeles Law Review* 41(4) (2008): 1225–1293. While Oberdiek's critique in 'It's Something Personal' is also framed in terms of an attack against an 'omnilateral' conception of duty, Oberdiek's main points in that paper (such as that an omnilateral conception of the duty of care in negligence law would, in virtue of ignoring morally relevant distinctions between invitees and trespasses, fail to respect our autonomy) are quite different from the challenge laid out here and not raised in the context of developing contractualist tort theory (see 'It's Something Personal', p. 302 n. 10). Here I am only concerned with Oberdiek's critique raised in 'Structure and Justification' since it is most relevant to whether contractualism can justify tort law.

[23] Oberdiek, 'Structure and Justification', p. 112.

[24] Ibid, p. 114. See Thomas Nagel, 'War and Massacre', *Philosophy and Public Affairs* 1(2) (1972): 123–144, p. 136.

> ''underlies our reasons to do what morality requires''…the idea of justification to a subject [as a subject] simply is the idea of a relation of mutual recognition...[25]

But that passage, in itself, does not tell us a lot unless we have an independently clear sense of what amounts to 'a relation of mutual recognition'. A Rawlsian (or even a utilitarian, for that matter) may reply that in treating everyone's interests impartially, its form of justification embodies a certain sense of 'mutual recognition'. Fortunately, Oberdiek has put more flesh on the idea of 'justification to a subject as a subject' in the subsequent parts of his chapter, from which we can distill two distinctive features of such a conception of justification.

First, 'justification to a subject as a subject' takes into account non-consequentialist considerations.[26] In fact, Nagel introduces the idea in the course of criticizing consequentialism.[27] That said, Oberdiek must take the idea of 'justification to a subject as a subject' to imply more than non-consequentialism, as the idea is meant to solve some problems inherent in Keating's account but, as observed above, Oberdiek already accepts that Keating's account is non-consequentialist.

This brings us to the second distinctive feature of 'justification to a subject as a subject', which is that this form of justification focuses on 'personal' reasons.[28] By holding that one's objection to a principle must be based on 'personal reasons', Oberdiek does not simply exclude objections based on impersonal values (e.g., 'it is wrong to destroy great works of art because of their artistic value even if no one benefits from their preservation'),[29] or objections 'on behalf'[30] of someone else (e.g., Mary objecting to a principle on the grounds that it would harm Tom, who is a stranger to her). In addition, Oberdiek intends to exclude 'omnilateral' objections, i.e., objections to a principle that are equally available to every member of the community (e.g., 'it would allow Henry to take an unfair advantage over all fellow citizens including myself').[31]

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[25] Oberdiek, 'Structure and Justification', p. 114 (notes omitted).

[26] Ibid, pp. 112–114.

[27] Nagel, 'War and Massacre'.

[28] Oberdiek, 'Structure and Justification', p. 119.

[29] Scanlon, *What We Owe to Each Other*, p. 219.

[30] T. M. Scanlon, 'Reply to Gauthier and Gibbard', *Philosophy and Phenomenological Research* 66(1) (2003): 176–189, p. 183.

[31] Oberdiek, 'Structure and Justification', p. 112.

### *B. Can Scanlonian Contractualism Explain Tort Law?*

Even if Oberdiek's Scanlonian modifications can avoid the two particular objections directed against Keating's account, it does not, however, follow that Oberdiek's account is explanatorily adequate. Why exactly are alternatives to tort law reasonably rejectable, once we, as Oberdiek recommends, understand contractualist justification as 'justification to a subject as a subject'? I will consider alternatives to tort law that place (part of) the loss on the victim in Section III.B.1, and alternatives that place (part of) the loss on third parties in Section III.B.2.[32]

#### 1. *Tort Law vs Placing the Loss on the Victim*

Suppose the loss cannot be passed to third parties and must be borne by the victim and/or the wrongdoer. Can tort law, which places the loss on wrongdoers, be reasonably justified to all? If 'justification' is understood as 'justification to the world at large', then there are good reasons to be skeptical. Reparation need not lead to the best consequence in terms of distributive justice or efficiency. Moreover, leaving the loss on the victim need not amount to allowing the wrongdoer an unfair advantage over the whole society, especially given that the wrongdoer may otherwise be punished. How does changing the conception of justification in contractualist reasoning – from 'justification to the world at large' to 'justification to a subject as a subject' – tip the balance?

As mentioned above, one difference between the two conceptions of justification is that the latter conception recognizes the *relationality* of wrongs. Oberdiek seems to believe that once it is established that primary wrongs in tort law are relational, then tort compensation can be readily justified within the contractualist framework. The

[32] David Alm has also challenged whether Scanlon's contractualism can justify tort law in David Alm, 'Contractualism, Reciprocity, Compensation', *Journal of Ethics and Social Philosophy* 2(3) (2007): 1–23 (a paper not discussed by Oberdiek). Both Alm and I reached our conclusions by comparing tort law with a system that let the loss lie where it falls and a system that spreads the loss to the public. There are, nonetheless, important differences.On Alm's understanding of contractualism, whether a person can reasonably reject a principle depends on whether that principle is 'bad for' that person, and the concept of 'bad for' is in turn understood in a consequentialist (though not welfarist) sense: whether a principle is bad for a person, according to Alm, depends on 'the *consequences* of [the] principle being generally accepted' (p. 8, my emphasis). Alm's challenge, which is that Scanlon's contractualism cannot make sense of reasons deriving from the value of 'actions' rather than the value of 'persons' (p. 18), targets this alleged consequentialist feature of Scanlon's contractualism. Alm's particular challenge, therefore, can be met once Scanlon's contractualism is understood (as I think it should be) in a non-consequentialist sense. My challenge, by contrast, is meant to show that, even if Scanlon's contractualism is non-consequentialist, it cannot explain why we should adopt tort law.

only passage that explicitly provides the basis of victims' remedial rights in 'Structure and Justification' is the following:

> [J]ustification to a subject isolates a distinctive kind of wrongness: what is wrong is so because it wrongs. The reason one must not do wrong is that those who would be its victims have a claim that one not do so — the wrongful conduct cannot be directly justified to those who would be victimized by the wrong. Likewise, retrospectively, one who has been victimized stands in a special relation to the person who has wronged him or her, giving rise to a claim of redress by the wronged person against the wronging person — a central insight of corrective justice and civil recourse theories that contractualist tort theory so understood seamlessly accommodates.[33]

However, contrary to what Oberdiek seems to believe, there is a considerable distance from the premise that the wrongdoer committed a relational wrong against the victim to the conclusion that the victim can reasonably reject all principles that do not grant the victim a compensatory right against the wrongdoer. That the wrongdoer has wronged the victim in particular may explain why the victim can reasonably reject any principle that does not provide him/her with any special right to call the wrongdoer to account, on the grounds that such a principle would fail to recognize the relationality of the wrong. But, echoing the standard objection to civil recourse theory mentioned above, it is unclear why principles that provide the victim with forms of accountability other than compensation, like apology or punishment, must be reasonably rejectable by the victim.

In fact, the quoted passage suggests that Oberdiek may have simply *assumed* the idea that there is 'a claim of redress by the wronged person against the wronging person' (and since Oberdiek is trying to justify tort law here, the 'redress' here must include 'compensatory redress', the standard form of redress in tort law):[34] in stating that the idea is a 'central insight of corrective justice and civil recourse theories', which contractualism can also accommodate, he apparently treats that idea as an *explanas* rather than an *explanandum*. Of course, *if* we make that assumption, then a contractualist can explain why the victim can reasonably reject a principle that places the loss on him/her rather than the wrongdoer: such a principle neglects his/her claims. But such a move would purchase explanatory adequacy at the cost of justificatory merit, as tort law skeptics would see no basis in making the assumption – just like they would

[33] Oberdiek, 'Structure and Justification', p. 119 (notes omitted).

[34] John Gardner, *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019), pp. 13–14.

see no reason to assume the soundness of the principle of corrective justice or the principle of civil recourse.[35]

2. *Tort Law vs Placing the Loss on Third Parties*

Now consider whether reasonable people must reject alternatives to tort law that place (part of)[36] the loss on third parties, such as New Zealand's Accident Compensation Scheme. Oberdiek does not discuss this issue directly. What I will do is to consider whether a plausible case for preferring tort law to such alternative systems can be constructed using his ideas.

A defender of tort law may wish to draw on Oberdiek's discussion of *Palsgraf v LIRR*.[37] In *Palsgraf*, the defendant (LIRR)'s negligence was a but-for cause of the harm suffered by the plaintiff (Mrs. Palsgraf), and it was reasonably foreseeable that *someone* might suffer harm as a result of LIRR's negligence. However, it was not reasonably foreseeable that Mrs. Palsgraf (or the class of persons to whom she belonged) might suffer harm as a result of LIRR's negligence. In support of the majority judgment for the defendant, Oberdiek claims that the imposition of tort liability in *Palsgraf* cannot be justified to LIRR *as a subject*, even if doing so may improve distributive justice or efficiency and thus be justifiable *to the world at large*.[38]

Oberdiek's argument against tort liability in *Palsgraf* is arguably relevant for our purpose because there is one important similarity between a principle that imposes tort liability on LIRR and a principle that imposes the loss caused by a wrongdoing on third parties: both principles impose the loss on someone who has not wronged the victim. While LIRR may have wronged someone, according to Oberdiek, it has not wronged Mrs. Palsgraf;[39] and a third party to an injurious event – someone other than the wrongdoer and the victim – is someone who, by definition, has *not* wronged the victim. A defender of tort law may, observing this similarity, wish to extrapolate an objection to a principle that places the loss on third parties

[35] See also Alm, 'Contractualism, Reciprocity, Compensation', p. 19; Ripstein, 'The Division of Responsibility of the Law of Tort', pp. 1823, 1829.

[36] The importance of including mixed systems in our comparison is highlighted in Alm, 'Contractualism, Reciprocity, Compensation', pp. 14–15.

[37] *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928).

[38] Oberdiek, 'Structure and Justification', p. 118.

[39] Ibid.

(as the New Zealand system would) from Oberdiek's objection to a principle that imposes tort liability in *Palsgraf*, through arguing that the considerations counseling against the latter would also apply against the former.

What, then, are the considerations counseling against tort liability in *Palsgraf*, according to Oberdiek? We can find two sets of considerations in Oberdiek's work, though Oberdiek does not distinguish between them himself. The first concerns what Oberdiek elsewhere refers to as 'autonomy', i.e., the importance of being 'the author of one's own life', which in turn requires 'a range of valuable options' and 'long-range planning'.[40] According to Oberdiek, if we owe tort liability to a person even if the loss suffered by that person is not reasonably foreseeable, then in order to avoid liability, one must be extremely 'vigilant of others' well-being'; such vigilance is 'incompatible with a valuable, recognizably human life that is not simply given over to the protection of others'.[41]

In reply, autonomy is undoubtedly an important concern, which may indeed provide a good reason against tort liability in *Palsgraf*.[42] The value of autonomy, however, cannot ground a general objection to all principles that place the loss caused by a wrongdoing on third parties. Let us distinguish between loss-shifting principles, which shift the victim's loss to a single third party (a principle that imposes liability on LIRR provides an example) and loss-spreading principles, which spread the victim's loss to a large number of third parties (the New Zealand Accident Compensation Scheme is one such example).[43] Since a loss-shifting principle imposes a heavy burden that is not reasonably avoidable on some persons, such a principle may substantially curtail the range of valuable options and the planning ability of some persons. But the same cannot be said of loss-spreading principles in general. While loss-spreading principles also impose on people burdens that are not reasonably avoidable (e.g., the accident insurance premium in New Zealand is compulsory), such burdens, in virtue of loss-spreading, may be rather light and need not deprive anyone of valuable options so as to prevent

[40] Oberdiek, 'It's Something Personal', p. 315; John Oberdiek, *Imposing Risk* (Oxford: Oxford University Press, 2017), pp. 86, 148. This understanding of autonomy is of course Razian.

[41] Oberdiek, 'Structure and Justification', p. 118.

[42] In 'Contractualism, Reciprocity, Compensation', p. 16, Alm raises another challenge which questions the importance of the value of choice (*vis-à-vis* other values).

[43] See e.g., Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents', p. 1888.

him/her from being the author of his/her own life. The idea that any principle that places the loss arising from wrongdoings on third parties would unacceptably encroach their autonomy may have derived illusory appeal from focusing on a particular version of such a principle, namely, a version that requires a third party to shoulder the victim's loss *so long as* it increases marginal utility.[44] But abolishing tort law and requiring the public to shoulder (part of) the loss when certain conditions are satisfied is a far cry from accepting unconstrained utilitarianism; the slope is not that slippery. The latter may be inconsistent with autonomy and human flourishing,[45] but the former is very different. As a case in point, New Zealanders are clearly not prevented from living 'a valuable, recognizably human life'.

The second consideration to which Oberdiek appeals in criticizing a principle that imposes tort liability in *Palsgraf* concerns 'authority': he claims that such a principle can be reasonably rejected because it, using Warren Quinn's words, does not 'define our proper powers and immunities with respect to each other' in a way that expresses our 'mutual authority and respect'.[46] 'Autonomy' and 'authority' are both concepts that frequently appear in the work of non-consequentialist moral theorists. But they are nonetheless distinct. The distinction is illustrated clearly in Rahul Kumar's critique of consequentialism,[47] an article cited approvingly by Oberdiek.[48]

Kumar asks why reasonable people would reject a principle that permits A to inflict serious harm on an unrelated person B without B's consent, if it is necessary to prevent A's death. Kumar accepts that autonomy cannot be the full answer:

> Such a principle, if carefully formulated, need not fall directly afoul of the autonomy considerations canvassed earlier. For it need not require a person to be on the lookout for possible occasions to help others, resulting in her living in a low-level state of panic, expecting some kind of harm to befall her at any moment, in the name of preventing an even greater harm befalling someone else. And if the permissible grounds for harming another are made suitably restrictive, issues of disruptiveness need not arise. No one need feel unable to form and pursue complex projects because of the constant fear of having to give them up, or radically revise them, because

[44] Oberdiek relates the majority judgment in *Palsgraf* to the standard demandingness objection to consequentialism in John Oberdiek, 'Method and Morality in the New Private Law of Torts', *Harvard Law Review Forum* 125(7) (2012): 189–203, pp. 200–201.

[45] See Oberdiek, 'It's Something Personal', p. 316.

[46] Warren Quinn, *Morality and Action* (Oxford: Oxford University Press, 1993), pp. 173–174, as quoted in Oberdiek, 'Structure and Justification', p. 117.

[47] Rahul Kumar, 'Defending the Moral Moderate: Contractualism and Common Sense', *Philosophy and Public Affairs* 28(4) (1999): 275–309.

[48] Oberdiek, 'Structure and Justification', p. 119 n. 55.

> of some harm that has befallen her in the name of preventing a greater harm from befalling someone else.[49]

Kumar believes, nonetheless, such a principle can be reasonably rejected because of what it expresses about our authority over our bodies:

> [T]he objection to the proposed principle is that it makes it permissible for a person to *commandeer* another's body, for another to assume authority over what happens to that body in order to advance her aims, where there is no relationship between the two persons that might justify one's assuming such an authority over the other.…The proposed principle is objectionable precisely because it grants [A] the authority to decide on [B's] behalf how his body will be used.[50]

Analogously, a defender of tort law may argue that the idea of authority, in addition to grounding an objection against the principle criticized by Kumar, explains why loss-spreading alternatives to tort law are unacceptable. Of course, such alternatives to tort law do not, unlike the principle criticized by Kumar, permit anyone to commandeer someone else's *body*. However, a defender of tort law will be quick to point out that such alternatives nonetheless do permit others to commandeer a third party to give up some of his/her *wealth* to help the victim (for example, as contribution to a compulsory insurance scheme), regardless of whether the third party wants to help the victim.[51]

This authority-based argument has a certain edge over the autonomy-based argument discussed above. The autonomy-based argument, which looks at the extent to which a principle promotes or compromises our ability to lead our lives, may be too consequentialist in flavor to fit within Oberdiek's non-consequentialist general outlook. That said, I believe the authority-based argument for tort law also fails.

It may be true that each of us would have less authority over our own wealth under a loss-spreading alternative to tort law as compared to a system of tort law, as each of us would have less say over how our goods can be used. But this does not show that tort law cannot be reasonably rejected, as it begs the question of whether an

[49] Kumar, 'Defending the Moral Moderate', pp. 304–305 (notes omitted).

[50] Ibid, p. 306.

[51] Wright, 'Right, Justice, and Tort Law', p. 179.

individual would have *too much* authority over his/her wealth under tort law. Setting aside whether we should maximize each person's authority over his/her *body*,[52] the idea that we should maximize each person's authority over his/her own objects is definitely implausible if the relevant object is *wealth* rather than *body*.[53] Everyone except the most extreme libertarians believes that our holdings can be legitimately used for public interest in certain situations. Once we accept that we need not maximize each person's authority over his/her wealth, but should instead strike a fair balance between the interest of a person in having (a certain level of) authority over one's own wealth and the interests of others,[54] a contractualist tort theorist must confront squarely the question of why does tort law, as opposed to systems that grant each person less authority over one's own wealth such as the New Zealand system, represent the optimal balance. I believe Oberdiek has not provided the answer yet.

Again, *if* we assume, as an *input* to contractualist reasoning, the idea that a victim has a claim of compensatory redress against the one who wronged him/her, *then* contractualism can explain why third parties can reasonably object to a principle that places the loss on them, on the grounds that cleaning up the mess is the responsibility of someone else, namely, the wrongdoer. But similar to what I argued in Section III.B.1 above, making such a move would purchase explanatory adequacy at the price of justificatory merit, as this move would beg the question against tort law skeptics.

[52] Jeffrey Brand-Ballard, in the course of arguing against accounts of deontic restrictions offered by contractualists including Kumar, claims that we should not even maximize each person's authority over his/her own *body*. See Jeffrey Brand-Ballard, 'Contractualism and Deontic Restrictions', *Ethics* 114(2) (2004): 269–300, pp. 294–299.

[53] Quinn perceptively observes (in *Morality and Action*, p. 172) that how much authority we should have over an object of ours depends on 'the aspect of ourselves in question': '[w]e feel, I believe, most strongly about assaults on our minds.…We feel less strongly about our persons (at least those parts that do not directly affect our minds) and labor.'

[54] The idea that one's authority over one's body or things should not be absolute is resonant with Oberdiek's writing elsewhere that a proper moral theory must be 'interpersonal' rather than purely 'agent focused' or 'patient focused.' See John Oberdiek, 'Culpability and the Definition of Deontological Constraints', *Law and Philosophy* 27(2) (2008): 105–122, p. 122. I thank Oberdiek for helpful discussions.

## IV. COMPREHENSIVENESS AS THE REAL EDGE OF CONTRACTUALIST TORT THEORY?

My objection to Oberdiek can be restated in the form of a dilemma:

First horn: if Oberdiek's contractualist account does *not* assume, as an input to contractualist reasoning, that a victim has a claim of compensatory redress against the one who wronged him/her, then Oberdiek's account cannot explain tort law.

Second horn: if Oberdiek's account assumes such a controversial moral claim, then his account would fare no better than corrective justice and civil recourse theories in terms of justificatory merit, as tort law skeptics would see no reason to accept that assumption. Since those theories have no problem with explanatory adequacy,[55] Oberdiek's account enjoys no overall advantage over corrective justice and civil recourse theories since it fares better on neither test.

Here I consider a possible reply on behalf of Oberdiek. This reply (which I will call the 'comprehensiveness reply') concedes that Oberdiek's account may not fare better than corrective justice and civil recourse theories in terms of justificatory merit and explanatory adequacy; the reply rather seizes the second horn of the dilemma, by challenging my assumption that justifications of tort law should be evaluated only in terms of their justificatory merit and explanatory adequacy.[56]

[55] See Section I above.

[56] Can a contractualist account of tort law seize the first horn of the dilemma? It may be argued that a successful contractualist account of tort law need not show that tort law *must* be chosen by reasonable people in favor of alternative arrangements, *all things considered*; it is sufficient for such an account to show that there is *a reason* (which may be defeasible) to favor tort law over alternative arrangements, such that reasonable people *may* choose tort law in some circumstances. To this reply, I have two rejoinders. First, if my arguments above are sound, then there is not even a defeasible reason to choose tort law over alternative arrangements. For example, unless we assume that a victim has a claim of compensatory redress against the one who wronged him/her, there is not even a reason to adopt tort law instead of letting the loss lie where it falls. Second, if contractualism is acceptable so long as it can justify tort law in some empirical circumstances, then more needs to be said to explain why we should reject the economic theory, which, after all, can also justify tort law in some situations. I thank Oberdiek for helpful discussions.

To begin, Oberdiek appears to hold a rather unusual view on what makes corrective justice and civil recourse theories problematic. As mentioned above, the common objection to corrective justice and civil recourse theories is that they fail the justificatory merit condition. By contrast, Oberdiek objects to those theories on the less common ground that they are not 'comprehensive'.[57] A 'comprehensive' theory of tort law covers both tort law's primary rights and secondary rights. Oberdiek claims that corrective justice and civil recourse theories can *only account for the secondary rights, but not the primary rights,* in tort law.[58] According to the comprehensiveness reply, Oberdiek's contractualist account is, in virtue of its comprehensiveness, preferable to corrective justice and civil recourse theories *even if* it does not fare better in terms of justificatory merit and explanatory adequacy.

There are two problems with the comprehensiveness reply. The first problem is that, even if we grant that Oberdiek's contractualist account of tort law is more comprehensive than corrective justice and civil recourse theories, and thus has an edge over the two theories in that sense, I submit that the edge is modest. Most people do not regard it as controversial that we owe a primary duty, say, not to negligently inflict bodily injury on others. The difficult question is why it follows that a wrongdoer has a secondary duty to transfer his/her holdings to the victim as compensation, given the possibility of loss-spreading, the injustice of the existing distribution of holdings, and the fact that doing so may be inefficient. There is a reason that the central debate about whether tort law is justified is traditionally perceived to be one about the justification of its secondary rights rather than the justification of its primary rights.[59] If the only edge of a contractualist account of tort law lies in its comprehensiveness, then it does not take us any further in the debate about why tort *compensation* is justified.

The second, and more serious, problem with the comprehensiveness reply is that it is unclear that corrective justice and civil

[57] Oberdiek, 'Structure and Justification', pp. 105, 116–117. See also Gregory Keating, 'The Priority of Respect over Repair', *Legal Theory* 18(3) (2012): 293–337.

[58] Oberdiek, 'Structure and Justification', pp. 116–117.

[59] John Goldberg and Benjamin Zipursky, *Recognizing Wrongs* (Cambridge: Harvard University Press), p. 266. Oberdiek apparently disagrees with this: see John Oberdiek, 'Book Review of J. Goldberg and B. Zipursky, *Recognizing Wrongs*', *Notre Dame Philosophical Reviews* (2020): https://ndpr.nd.edu/reviews/recognizing-wrongs/

recourse theories are necessarily incomprehensive, that is, it is unclear that these theories cannot provide an account of primary rights in tort law. I will illustrate my point with corrective justice theory, but what I say should apply to civil recourse theory as well.

Oberdiek cites Jules Coleman as an example of a corrective justice theorist who does not offer an account of primary rights.[60] But, while Coleman may be guilty as charged, I do not think the same can be said for many other prominent corrective justice theorists.[61] Arthur Ripstein and Ernest Weinrib, for example, have each offered a comprehensive Kantian theory of tort law covering both its primary rights and secondary rights.[62]

I wish to consider two possible rejoinders on behalf of Oberdiek concerning the second problem I just raised. First, Oberdiek may claim that, *by definition*, a theory of *corrective* justice is a theory exclusively about secondary rights. So, while Ripstein and Weinrib have each offered both an account of tort law's primary rights and an account of tort law's secondary rights, *only* their accounts of tort law's *secondary* rights count as their accounts of 'corrective justice'. The fact that they have provided more than accounts of corrective justice in their works does not affect the point that the corrective justice accounts they have provided cannot explain tort law's primary rights.

In reply to this first rejoinder, contractualist tort theorists cannot win the debate by fiat. If we accept this terminology about 'corrective justice', then the question is simply shifted to why we should prefer a contractualist theory of tort law over an equally comprehensive but non-contractualist theory of tort law, which combines a certain non-contractualist account of primary rights with a corrective justice account of secondary rights (say, a Kantian account of primary rights combined with a corrective justice account of secondary rights). *If* it can be established that a contractualist account of pri-

[60] Oberdiek, 'Structure and Justification', p. 105.

[61] This point is also made by Dorfman in 'Book Review of J. Oberdiek (ed.), *The Philosophical Foundations of the Law of Torts*.'

[62] Ripstein, *Private Wrongs*; Weinrib, *Corrective Justice*.

[63] Oberdiek, 'Structure and Justification', p. 117: 'My aim here is not to articulate and defend the content of contractualism's primary obligations, but simply to draw attention to the uncontroversial fact that contractualism does indeed provide an account of primary wrongs.' For doubts about whether contractualism can really account for the primary duties in tort law, see Dorfman, 'Book Review of J. Oberdiek (ed.), *The Philosophical Foundations of the Law of Torts*' and Zipursky, 'Contractualism and Tort Law.'

mary rights is superior to non-contractualist accounts, *then* we have a reason for preferring the former. But it is a task which Oberdiek explicitly refrains from undertaking and the possibility of which is doubted by many.[63]

The second rejoinder on behalf of Oberdiek insists on a more demanding requirement of ''comprehensiveness''. It may be argued that in order for a tort theory to be sufficiently comprehensive, it is not enough for the theory to offer both an account of primary rights and an account of secondary rights. In addition, such a theory cannot be 'concatenated', in the sense that the account of primary rights and the account of secondary rights offered must, in addition to being logically consistent, flow from the same overarching normative principle.[64] According to this rejoinder, the theories of tort law offered by Ripstein and Weinrib, unlike contractualist theory or economic theory, fail to be comprehensive in this more demanding sense, even if they indeed cover both primary rights and secondary rights.

To this rejoinder I have two replies. First, it is unclear that the account of primary rights and the account of secondary rights under a Kantian tort theory do not flow from the same overarching normative principle. A Kantian will probably claim that both accounts flow from Kant's Universal Principle of Right. Second, in any case, it is not obvious to me that it is a virtue to ground primary rights and secondary rights on the same normative principle. These rights seem to take into account different considerations: for example, I think secondary rights are more sensitive to distributive justice considerations than primary rights.[65] Oberdiek may reply that, so long as the relevant principle is stated at a very abstract level, the fact that primary rights and secondary rights take into account different considerations does not entail that these rights cannot be grounded on the same principle. But what is the theoretical pay off in further grounding an otherwise intelligible account of primary rights and an otherwise intelligible account of secondary rights on a principle that does not have much determinate content?

[64] I thank Oberdiek for suggesting this rejoinder in our correspondence. The word 'concatenated' is taken from his e-mail, although he should not be seen as necessarily endorsing the rejoinder I formulated or be held responsible for any errors I may commit in developing his idea here.

[65] See, e.g. Gardner, *Torts and Other Wrongs*, p. 100; Diego Papayannis, 'The Morality of Compensation through Tort Law', *Ratio Juris* 36(1) (2023): 3–25, pp. 13–16.

## V. CONCLUSION

Keating's contractualist tort theory, which is based on Rawlsian contractualism, is widely believed to have difficulty in explaining tort law. Oberdiek tries to overcome this difficulty by offering an account of tort law based on Scanlonian contractualism rather than Rawlsian contractualism. In this paper, I have argued that Oberdiek's account, while improving upon Keating's account in certain respects, ultimately cannot explain tort law.

I will end with a remark about the scope of this paper. To be fair to contractualist accounts of tort law, while I have shown (or at least so I hope) that Oberdiek's particular version of contractualist theory cannot satisfactorily explain tort law, I have not proved that all contractualist tort theories cannot. Perhaps one day some contractualist will tell a plausible story about why reasonable people must favor tort law. That said, I see no reason to be optimistic. At this juncture, I wish to observe that many contemporary contractualists writing on tort law – such as Emmanuel Voyiakis and in fact Keating as well – express ambivalence as to whether reasonable people must choose tort law over alternative arrangements in their final analyses.[66] As such, I am afraid that, despite the excellent recent work on tort law by moral contractualists, of which Oberdiek's paper is an outstanding example, I do not share his view that 'if there is to be a true rival to the economic approach to torts…the contractualist theory...is the best hope'.[67]

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[66] See nn. 9 and 11 above.

[67] Oberdiek, 'Structure and Justification', p. 121.

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