

2004

## Tort, Rawls in Tort Theory: Themes and Counter-Themes

Benjamin C. Zipursky  
*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Benjamin C. Zipursky, *Tort, Rawls in Tort Theory: Themes and Counter-Themes*, 72 Fordham L. Rev. 1923 (2004).

Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss5/24>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# RAWLS IN TORT THEORY: THEMES AND COUNTER-THEMES

*Benjamin C. Zipursky\**

## INTRODUCTION

Several themes in Rawls's moral and political philosophy have inspired variations in the philosophical theory of tort law:

A) The Ex Ante Choice Situation and the Maximin Rule: the idea that a fair order is one that would be selected by a rational person ex ante,<sup>1</sup> and that such a person would seek to maximize the well-being of the least well off;<sup>2</sup>

B) Kantian constructivism: the development of a non-metaphysical constructivism as an approach to fundamental questions about a defensible political order;<sup>3</sup>

C) Reflective Equilibrium: the idea of the independence of moral theory, and more generally, a coherentist approach to the analysis of important moral questions and concepts, as opposed to a foundationalist or reductionistic approach;<sup>4</sup>

D) Reasonableness versus rationality: As the concept of practical reason takes on a guiding role within normative theorizing, and as decision theory based on a roughly economic conception of rationality takes a dominant position within normative theories of practical reason, Rawls's counterposing of reasonableness as a distinctive normative ideal within practical reason is centrally important in moral and political theory;<sup>5</sup> and

E) Justice as the first virtue of social institutions: the post-positivistic and post-Enlightenment re-awakening of the ideal of justice as an aspiration for political and legal institutions.<sup>6</sup>

This Essay will begin by explaining, in general terms, why each of

---

\* Professor, Fordham University School of Law.

1. John Rawls, *A Theory of Justice* § 4, at 15-19 (rev. ed. 1999).

2. *Id.* at 133 & n.19.

3. John Rawls, *Kantian Constructivism in Moral Theory* (1980), reprinted in John Rawls: *Collected Papers* 303-58 (Samuel Freeman ed., 1999).

4. Rawls, *A Theory of Justice*, *supra* note 1, § 9, at 42-46; see also John Rawls, *The Independence of Moral Theory* (1975), reprinted in John Rawls: *Collected Papers* 286-302 (Samuel Freeman ed., 1999).

5. See John Rawls, *Political Liberalism* 48-66 (1993); cf. W.M. Sibley, *The Rational Versus the Reasonable*, 62 *Phil. Rev.* 554 (1953).

6. Rawls, *A Theory of Justice*, *supra* note 1, § 11, at 47.

these ideas has been important to the development of tort theory. Part II, however, turns to counter-themes: reasons to be cautious in carrying the Rawlsian themes to torts, at least in the manner that leading philosophers of tort law have typically done.

## I. RAWLSIAN THEMES IN TORT THEORY

### A. *Evaluation of Policy in Terms of Ex Ante Analysis and the Maximin Rule*

From the original position, from behind the veil of ignorance, an aggregative social welfare function would not be selected.<sup>7</sup> Rather, special emphasis would be given to avoiding very bad outcomes. Offsetting good consequences would not suffice to render a structure with improvable bad outcomes more acceptable than a structure that improved the bad outcomes. This would be true so long as one abstracted from one's actual situation.

The general point here is not just the difference principle.<sup>8</sup> Indeed, the difference principle is one of the conclusions detached from this basic argument form. The form of argument is to depict the legitimacy of a structure of rules as stemming from its agreeability to all those who would be bound by it. Of course, this is a decision-theoretic revision of the basic social contract question. In no small measure, the ability to generate this question was an extremely valuable contribution to social contract theory. And the answer Rawls gave was that average utilitarianism would not be agreed to.<sup>9</sup> Rather, a different social welfare function would be selected. A broader point here is that a value theory that in form looked like utilitarianism would not necessarily have as little room for concepts of fairness as Utilitarians once argued; a generally welfarist framework is non-committal on questions of distribution, and a maximin principle is argued for.<sup>10</sup>

Gregory Keating shows that a concept of fairness of the sort utilized in *A Theory of Justice*, and of the sort that generates the difference principle, offers a distinctive way of viewing an important set of issues in tort law.<sup>11</sup> The question is whether injuries caused by non-negligent conduct should generate liability in the party who caused them. Keating's answer is that if the party who caused an accident is an enterprise that engages in an activity, and the accident is characteristic

---

7. *Id.* § 30, at 160-68.

8. *Id.* § 13, at 65-70.

9. *Id.* § 30, at 144-53.

10. *Id.* § 26, at 130-39.

11. See Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *Fordham L. Rev.* 1857, 1880-81 (2004) [hereinafter Keating, *Fairness*]; see also Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311, 317 (1996) [hereinafter Keating, *Reasonableness*].

of the activity, then the entity should be held liable.<sup>12</sup> And that is because it is a random matter who (among those possibly injured) turns out to suffer an accidental injury. And yet such an accident is a huge blow. And so the question is essentially whether it is fair to require the individual unluckily struck with this injury to suffer the entire burden of it, or whether fairness would require a legal system that spreads the cost among all of those who benefited from the imposition of the risk. Drawing upon a Rawlsian notion of fairness, Keating argues that the cost should be spread.<sup>13</sup> Even if such a cost-spreading system would be less efficient, it would be fairer and thus, all-considered, superior. To permit the accident to go uncompensated for the sake of other savings in the system is to fail to recognize the separateness of persons. The deprivation of the plaintiff herself is not really *offset* by the efficiency enjoyed by other parties. A welfarist approach would attend to the distribution of the enormous loss of utility. Keating rightly points to Fletcher and Fried as ancestors of his Rawlsian view.<sup>14</sup>

### B. *Kantian Constructivism*

A second aspect of Rawls is his revitalization of a non-reductive rights-based conceptual framework—opposed to a utilitarian one—for thinking about issues in moral and political philosophy.<sup>15</sup> A great deal of extant Rawlsian theorizing in law is of course about rights, for just this reason. Rawls is to be credited with elucidating in twentieth-century, non-transcendentalist garb the Kantian principle that the right is prior to the good. Relatedly, he developed a constructivist account of rights and duties in the domain of political morality, now freed from the natural rights and mythical stage-setting of Locke.<sup>16</sup> The key to both of these moves is a depiction of the normative force of principles of political right lying entirely within the domain of *a pattern of reasons that appeal to reasonable people under conditions approximating our own, and aspiring to a regulative ideal*.<sup>17</sup>

The language of *A Theory of Justice* and *Political Liberalism* speaks of constitutional essentials,<sup>18</sup> and of course we naturally began our conference with this meeting place of Rawls and the law. Rawls himself displayed great depth and sensitivity in analyzing what it means for certain patterns of reasons and justifications to be realized

12. See generally Keating, *Fairness*, *supra* note 11.

13. *Id.* at 1885-86.

14. *Id.* at 1858 n.4 (citing George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972)); Charles Fried, *An Anatomy of Values* 183-206 (1970)).

15. Rawls, *A Theory of Justice*, *supra* note 1, § 6, at 27-29; see also Rawls, *Political Liberalism*, *supra* note 5, at 294-99.

16. Rawls, *A Theory of Justice*, *supra* note 1, § 18, at 96-98.

17. Rawls, *Political Liberalism*, *supra* note 5, at 187-90.

18. Rawls, *A Theory of Justice*, *supra* note 1, § 31, at 171-76; Rawls, *Political Liberalism*, *supra* note 5, at 227-30.

in institutional form. We are doubly lucky, in constitutional law, because Dworkin and others have also developed Kantian themes of right and played out their institutionalization with great subtlety and power.<sup>19</sup>

Arthur Ripstein derives from Rawls a Kantian constructivist methodology, and a deontic normative structure, and argues that such an approach elucidates fundamental truths in tort law.<sup>20</sup> His basic idea, like both Kant's and Rawls's, is that certain normative principles provide persons with a sort of normative boundary for the pursuit of a life that is in accordance with their conception of the good. Strikingly, Ripstein asserts that principles of tort law play a substantial role in forming this boundary. Like Keating, he argues that tort law is needed for the protection of security interests that are a primary good. He also argues that liberty is unduly compromised if the scheme of rights and duties imposes liability for acts that are not wrongful. But Ripstein has a more philosophically ambitious approach. We construct, within the private law of torts, a notion of who is responsible for which losses. Part of *having* a domain of equal freedom that respects security and liberty, is having a domain within which one's capacity to conform one's conduct to norms of reasonableness succeeds in preserving, to the extent possible, one's holdings and one's bodily integrity. To put it differently, while one cannot, of course, count on security as against all misfortune, one can count on: not being held responsible for what is not one's own doing; being held responsible for what *is* a realization of one's own failure to comply with norms of reciprocal care; and having a claim against those who are responsible for those of one's own losses that flow from others' conduct in violation of norms of reciprocal care.

### C. *Reflective Equilibrium*

A third aspect of Rawls's work that is relevant to tort theory is quite independent of the substantive theory of justice he provides and of the contractarian approach that he defends. I refer to Rawls's work in moral epistemology. While one aspect of Rawls's reflective equilibrium is methodological, and a related aspect is contractarian, there is a third and equally important aspect that is at root epistemological. There is a strand of thinking most clearly set forth in *The Independence of Moral Theory*,<sup>21</sup> most famously represented by the passages on reflective equilibrium in *A Theory of Justice*,<sup>22</sup> and

---

19. See, e.g., Ronald Dworkin, *Taking Rights Seriously* (1977).

20. Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *Fordham L. Rev.* 1811, 1825 (2004).

21. Rawls, *The Independence of Moral Theory*, *supra* note 4, at 286-302.

22. Rawls, *A Theory of Justice*, *supra* note 1, § 5, at 18-19, § 9, at 42-45, § 21, at 104, § 65, at 379, § 66, at 381.

found in numerous subsequent works of Rawls<sup>23</sup> and Rawlsians, most particularly Thomas Scanlon.<sup>24</sup> This is, very broadly speaking, an anti-foundationalism or coherentism in moral thinking.<sup>25</sup> The point is that the enterprise of analyzing moral concepts and principles does not depend for its legitimacy on the capacity to produce a set of moral primitive concepts that are epistemically basic and transparent.<sup>26</sup> It is, of course, painting with an extremely broad brush to depict Rawls as the great American post-Emotivist in analytical moral philosophy, but I think it is a representation nevertheless worth making. And from this remove, I think we may say that part of the power of Rawls as a coherentist moral epistemologist is that the project within substantive moral and political philosophy that he undertook was as impressive, credible, and substantial as it was.

The reason that I turn to moral epistemology is because knee-jerk skepticism in moral epistemology has an enormously important role in the history of American legal thought, and it is nowhere better exemplified than in tort theory. For tort law abounds with moral notions, broader, and more deeply nested in our culture than those in contracts, crimes, or even constitutional law. The vocabulary of duty, dignity, prudence, care, negligence, obligation—this vocabulary in tort is unfathomably rich. As John Goldberg and I have argued in a number of places, the intellectual history of the dominant trend of American tort theory grows out of Holmes's brash and unapologetic skepticism about concepts of duty and right.<sup>27</sup> Both treatise-writers, like William Prosser, and high theorists, like Richard Posner, developed into reductive instrumentalists about moralistic vocabulary of tort law,<sup>28</sup> at least partly because of a philosophical sentiment that this was the intellectually responsible way to handle moral concepts.

In an era of moral philosophy dominated by Rawlsian coherentism, tort theory has begun to take on a different complexion. We are now beginning to ask whether "Duty" really does mean something, and if so, what: whether concepts of reasonableness in tort really reduce to economic rationality; whether the concept of a special relationship generating a duty of care is merely shorthand for the idea that liability within certain pockets would be efficacious, or whether it really means what it says; and so on for a variety of concerns relating to reputation,

23. Rawls, *Political Liberalism*, *supra* note 5, at 8 & n.8; John Rawls, *Justice as Fairness: A Restatement* 26-32 (2001).

24. See T.M. Scanlon, *Contractualism and Utilitarianism*, in *Utilitarianism and Beyond* 103 (Amartya Sen & Bernard Williams eds., 1982).

25. See Benjamin C. Zipursky, *Legal Coherentism*, 50 *SMU L. Rev.* 1679 (1997).

26. Rawls, *Political Liberalism*, *supra* note 5, at 285-88.

27. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 *U. Pa. L. Rev.* 1733, 1762-64 (1998); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *Vand. L. Rev.* 657, 693-94 (2001).

28. William L. Prosser, *Palsgraf Revisited*, 52 *Mich. L. Rev.* 1, 15 (1953).

bodily integrity, dignity, deception, and a variety of other interests and obligations.

#### D. Reasonableness Versus Rationality

*Political Liberalism* relies upon a distinction between reasonableness and rationality.<sup>29</sup> "Rationality" denotes what is sometimes referred to as "economic rationality." This involves engaging in means-end reasoning that pursues preferences in the manner most conducive to their attainment.<sup>30</sup> To put it differently, it involves acting in a manner that is consistent with one's set of beliefs and desires. Rationality may also involve a game-theoretic component.

Reasonableness, like rationality, is meant to denote an excellence in practical reasoning.<sup>31</sup> Unlike rationality, however, reasonableness involves the attribute of constraining the pursuit of one's desires so as to accommodate the pursuits, goals, and desires of other persons. The reasonable person recognizes that others similarly have demands, and, given the potential for competing claims, the reasonable person recognizes the appropriateness of acceding, to some degree. In *Political Liberalism*, Rawls puts forward the two principles of justice as principles that would be selected by the reasonable person.<sup>32</sup> Among the many offerings of that work is its depiction of reasonableness as distinct from rationality, its claim that reasonableness is an excellence of practical reasoning, and its claim that reasonableness of persons in certain contexts yields certain courses of conduct.<sup>33</sup>

Keating offers a detailed argument that the concept of the average "reasonable person" within English and American negligence law should be understood in terms of Rawlsian reasonableness, not in terms of Posner's economic rationality.<sup>34</sup> Similarly, Ripstein places a Rawlsian reconstruction of the reasonable person at the center of his tort theory.<sup>35</sup> To understand the significance of these positions, it is important to bear in mind that Posner's famous 1972 article, *A Theory of Negligence*,<sup>36</sup> argued that reasonableness in negligence law was economic rationality, and he famously illustrated his thesis with Judge Learned Hand's decision in *United States v. Carroll Towing Co.*<sup>37</sup> Posner's article was enormously influential. Indeed, while Coase's

---

29. Rawls, *Political Liberalism*, *supra* note 5, at 48 n.1.

30. *Id.*

31. *Id.* at 49-50.

32. *Id.* at 54.

33. *Id.* at 48 nn.1-2.

34. See Keating, *Reasonableness*, *supra* note 11, at 382-84.

35. Arthur Ripstein, *Equality, Responsibility and the Law* 6-9 (1999).

36. Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972).

37. 159 F.2d 169 (2d Cir. 1947).

*The Problem of Social Cost*<sup>38</sup> and Calabresi's *The Cost of Accidents*<sup>39</sup> were earlier, among torts professors, Posner's retelling of negligence doctrine in terms of the Hand formula has been dominant. There are many reasons for its success, and many reasons for its equation of reasonableness with economic rationality—which in some ways drew from earlier tort scholars.<sup>40</sup> But it is likely that both Posner and the judges and scholars who preceded him were drawn to their analysis by the absence of plausible alternatives and by the general attraction of American legal thinkers since Holmes to utilitarian thinking. To the extent that Rawls's prominent reconstruction of the idea of reasonableness presented an alternative, that itself has been important to tort theory.

Keating and Ripstein, in somewhat different ways, draw much more substantial theoretical value out of the Rawlsian analysis of reasonableness. Keating's central point is that the balancing among interests in bodily security, freedom of activity, and costs of precautions, does not proceed in a Posnerian manner at all.<sup>41</sup> Rather, a reasonable person with an awareness of the importance of reciprocity will recognize the primacy of security interests, and will constrain his or her activity in a manner that prioritizes security interests. In effect, this means that economic costs and constraint of activity, even if applied to large numbers of people, will not outweigh security interests for the reasonable person. Thus, for example, a critically important safety device for a car is something a reasonable person would not forego, even if it predictably will be critically important for a small number of people, and its cost will be felt by millions.

Ripstein shares Keating's view that reasonableness involves a higher level of attentiveness to the non-sacrificeability of security interests.<sup>42</sup> His principal claim (and, indeed, the source of his argument for the latter) regarding the concept of the reasonable person is that this concept is, importantly, objective and value-laden, not subjective and preference-generated, as the Bayesian would have it. Built into the Rawlsian notion of reasonableness is an idea of equality and reciprocity, and this idea precludes the subjectivism of the Bayesian. A Bayesian will demand that the modicum of precautions required is a function of the preferences of others. The Rawlsian reasonable person tailors his or her conduct to the well-being of others, not to their preferences per se. Thus, if someone has

38. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

39. Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (1970).

40. See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 Vand. L. Rev. 813, 831-42 (2001) (tracing scholarship that preceded Carroll Towing on balancing).

41. See Keating, *Reasonableness*, *supra* note 11, at 329-32, 337-41.

42. See Ripstein, *supra* note 35, at 116.



idiosyncratic preferences, the reasonable person need not accommodate him. Conversely, however, the ground of the requirement of reasonable care relates to others' rights to primary goods, not to their preferences.

### E. *The Primacy of Justice*

Finally, and in many ways most obviously, I come to the topic of justice itself. To some extent my initial remarks about the topic of justice are merely a summary of the prior comments. Theorizing of American tort law, more than any other area of the law, underwent a transformation in the twentieth century.<sup>43</sup> Just as its concepts were reconceived instrumentally, so its very point was conceived of in an entirely utilitarian manner. Yet on its face, this is not what tort law is about. On its face, tort law is about doing justice. A natural retort is that tort law is about accidents, and accidents do not call for a justice-seeking system so much as a system for deterrence and compensation.<sup>44</sup> There is something to this response, but ultimately it strikes me as driving the point home. For tort law did not used to be about accidents, and it is not defined that way historically, or even by today's courts and treatises. It is about wrongs, not accidents. And yet the wrongs-based framework so plainly calls out for a justice-based conception that we have literally tried to change the subject.

By providing contemporary, hard-headed thinkers with a theory that really is a theory of justice, Rawls re-awakened hope that tort theory would take seriously the normative notion that would seem, somehow, to be built into it. We need not be afraid of justice as something to talk about, think about, and aim for. And of course, that is what numerous contemporary philosophers of tort law, such as Coleman,<sup>45</sup> Weinrib,<sup>46</sup> Perry,<sup>47</sup> and Ripstein,<sup>48</sup> have undertaken. Indeed, the philosophical analysis of tort law is referred to by legal scholars generally, today, as "corrective justice theory," indicating now a central place for justice in legal theory, particularly in torts. It is no exaggeration to say that prior to Rawls's theory of justice, no one considered defining their theoretical aspirations in tort law in any way but in terms of the social ends of tort law. Rawls's assertion that "[j]ustice is the first virtue of social institutions"<sup>49</sup>—backed up by a non-metaphysical and rigorous theory of justice—is undeniably a

---

43. See, e.g., G. Edward White, *Tort Law in America: An Intellectual History* (expanded ed. 2003).

44. Cf. Calabresi, *supra* note 39 (rethinking tort law in terms of reducing accident costs and compensation costs).

45. Jules L. Coleman, *Risks and Wrongs* (1992).

46. Ernest J. Weinrib, *The Idea of Private Law* (1995).

47. Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449 (1992).

48. Ripstein, *supra* note 35.

49. Rawls, *A Theory of Justice*, *supra* note 1, §1, at 3.

large part of the intellectual history behind the transformation that occurred, wherein scholars have now returned to the idea that theorists of tort law should ask the question: What does this area of the law have to do with justice?

## II. RAWLSIAN COUNTER-THEMES IN TORT THEORY

I now want to revisit each of these points for the purpose of sounding a cautionary note. In fact, I will suggest that each of these ideas tends to point toward a set of possible concerns about misapplication, and often conflict among, these Rawlsian ideas. This is not meant to undercut the significance of these Rawlsian ideas, but merely to indicate that they point toward quite a rich and nuanced area of theoretical inquiry, one in which scholars can easily slip.

### A. *Maximin and Ex Ante Analysis*

It is easy to confuse Rawls's deontological framework for thinking about the two principles of justice with certain aspects of his *ex ante* analysis of political arrangements. Hence, for example, it is tempting to say that it does not matter whether a certain liability scheme will, in total, expend a fairly high level of resources by utilizing a lot of time in the courts, because this is a mere financial cost, whereas the right not to be interfered with in a manner that cuts into the security of primary goods is a fundamental political right. In Rawls's work, this kind of idea is expressed by saying that primary goods are lexically ordered above the difference principle, and that the two principles of justice are built into the constitutional essentials in a manner that is not made available for legislative compromise.<sup>50</sup> In Dworkin's work, it is made available in the idea that rights are trumps.<sup>51</sup> In this vein, one might think that Keating would respond to an argument that enterprise liability is too expensive by arguing that because this is a deontic rather than a utilitarian framework, cost cannot defeat this point of fairness.

I think that one form of this move may be viable but one is not. Perhaps it is cogent to argue that the chance to make the point about cost was in the *ex ante* analysis to begin with, and that once the enterprise liability is decided upon as demanded in the *ex ante* analysis, the time is over to make it. I am not sure about that. Perhaps Keating's *ex ante* analysis provides an argument about what fairness requires, but leaves open the question of whether the requirements of fairness are the only consideration on the table in deciding upon a tort system.

However, even if one argues that fairness should be an overriding

---

50. Rawls, *Political Liberalism*, *supra* note 5, at 229-30; Rawls, *A Theory of Justice*, *supra* note 1, § 31, at 174-75.

51. *See* Dworkin, *supra* note 19, at 82-130.

criterion, it is still appropriate to put the costs of the system into the ex ante analysis. Now it might appear that Keating has already included it: that when he focuses on the individual with the uncompensated accident, he is focusing on the worst off. That person is in a better situation in a society with, say, higher taxes and higher costs of goods and services, but compensation in the case of catastrophic accident occurring within an activity to which an enterprise is attached. Leaving aside the question of whether Keating has really dealt with that issue, what concerns me is that I do not think that Keating can help himself to maximin as a general rule of choice for tort liability rules. Maximin is not an analysis of what is fair in an ex ante analysis. It is rather a decision-theoretic embodiment of aspects of Rawls's Kantian framework, brought to the question of what the basic principles should be for a political order. Thus, for example, the question behind the veil of ignorance is not, in truth, a question under probabilistic uncertainty. The question for liability rules is such a question. To put the point differently, Keating is vulnerable to the criticism that his chooser is simply incredibly risk-averse. But Rawls in *A Theory of Justice* is not, because it is not probability as such behind the veil of ignorance.<sup>52</sup>

Now what one might argue, and what I think Ripstein believes, is that this implies that it is illegitimate for Keating to use the framework at all for torts. I think that this misses a large and legitimate aspect of Rawls and Rawlsian work, which is arguably detachable, with care. This is, as I said, the idea that ex ante analysis of liability rules ought to be open-minded as to distributional questions, and that there are reasons to be deeply suspicious that a pure aggregative function will unjustifiably ignore considerations of fairness and equality, which other social welfare functions might better respect. Where this leaves me on enterprise liability is that I want to hear a lot more about how much it will cost not only shareholders, but courts, and especially, consumers. It seems to me that an average consumer of automobiles might well prefer a system of first-person automobile insurance, and either first-person or socialized health insurance, and then simply no coverage for those perhaps quite significant costs that fall in-between—no coverage at all, but cheaper automobiles and cheaper automobile insurance. The unfairness of one person occasionally suffering this is, I think, something a person might well choose to risk, ex ante. However, I think that Keating is right that Rawls gives us the vocabulary to think about the mitigation of the random distribution of life's misfortunes as something an aggregative function does not capture.

Rawls has indeed inspired an interesting domain of work in tort theory that focuses on ex ante analysis and selections of putatively

---

52. See Rawls, *A Theory of Justice*, *supra* note 1, § 26, at 134-35.

egalitarian social welfare functions. Economists have actually been more forthcoming and creative than philosophers in offering such views, at least within tort theory.<sup>53</sup> As I and others have offered, there are reasons to be skeptical about the value of economic models as interpretations of pieces of the law.<sup>54</sup> But from a practical point of view, one may want to know whether certain changes in the structure of tort law would be justifiable. To a significant extent, these are questions for which one would want to know how the distribution of welfare would be affected. And one would also want to know whether the function against which one ought to be measuring welfare changes and distribution ought to be purely aggregative, or ought to be something else. Several contemporary analyses have advocated alterations because they better comport with a Rawlsian/egalitarian picture of distributive justice.<sup>55</sup>

### B. *Kantian Constructivism*

Let's turn to the Kantian constructivist possibility. I want to suggest one point of concern about the general form of theory Ripstein is offering. What makes it appealing to think that there is a Kantian structure of reciprocity that somehow relates to primary goods is the idea that norms of conduct—particularly involving permissible risk levels—constitute an evenhanded framework for delimiting liberty in light of the threat to security that a failure to delimit liberty would entail.<sup>56</sup> Yet if this is so, then tort law—insofar as it is depicted as an embodiment of a constitutive feature of a political system—seems to be about regulating behavior among private parties, i.e., primary rules of conduct, primary duties, and primary rights. Tort law, so conceived, sets forth rules of conduct that would provide reciprocally acceptable levels of liberty and security for persons whose activities

---

53. The most widely disseminated examination of liability rules from the point of view of different social welfare functions is Louis Kaplow and Steven Shavell's *Fairness Versus Welfare*. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (2002). Kaplow and Shavell's work curiously harks back to weak, quasi-emotivist criticisms of a variety of moral concepts by which they purport to be mystified, or of which they purport to have complete psychological reductions. But all the while, they purport to concede that distributive questions cannot be answered in any obvious way by an aggregative function, and therefore to leave distributive questions open. *Id.* at 24-28. They then offer an interesting and controversial argument that any divergences from an aggregative function should be handled by the tax system, and that therefore there is no reason to use anything other than an aggregative utilitarian analysis in selecting liability rules within the domain of tort. *See id.* at 33-38.

54. *See, e.g.*, Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *Legal Theory* 457 (2000).

55. *See, e.g.*, Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 *Harv. L. Rev.* 1785 (1995) (using a Rawlsian framework to argue for the worth of pain-and-suffering damages).

56. *See* Ripstein, *supra* note 20, at 1811.

both display their freedom and risk the security of others. Tortious conduct, so conceived, is conduct that crosses the line.

There is now a rich Kantian literature on tort law so conceived, and Ripstein's contribution to this symposium pushes that literature yet further; I do not have the space here to do it justice. And yet it still seems to me that a fundamental problem remains with the explanatory strategy, a problem that Stephen Perry has noted, both here<sup>57</sup> and elsewhere.<sup>58</sup> The problem is that a great deal of what we want in a tort theory goes beyond saying what forms of conduct will be deemed to have crossed the line—will be deemed tortious. We also need an account of why the legal system *responds to tortious conduct the way it does*, by creating civil liability owed to a private party. Criminal punishment or civil sanctions would seem equally appropriate, in many cases—so far as the Rawls/Kant aspect of Perry's view goes. Does the Rawlsian and Kantian picture of reciprocal restraints on conduct tell us anything about why civil liability is the right response?

A converse problem arises if one uses the Rawls/Kant framework, in the first instance, to decide who, as a matter of fairness, should be allocated which sorts of damages as liability. Both Fletcher and Keating have tried this route.<sup>59</sup> If fairness and reciprocity are used to determine not which conduct is acceptable, but who should pay for which losses as a matter of fairness, then we are at least addressing the important questions of liability. But the problem just reappears, for then we have little to say that is probative on what the primary rules of conduct ought to be from a Rawlsian and Kantian point of view. In short, a Rawlsian "fairness and reciprocity" analysis can be done at the level of primary rules of conduct or at the level of liability, but it is unclear how it could be done on both levels. But since tort law involves both the concept of an obligation of conduct, and the concept of liability for the failure to live up to that obligation, we want a Rawlsian and Kantian analysis that hits at both levels.

Ripstein anticipates this dilemma, and aims to solve it by offering a profound extension of a tenet of Rawls's Kantian constructivism to tort law. The Kantian constructivist root is that part of what a state does, qua state, in order to enable individuals to live lives in pursuit of their own conception of the good life, is to define (constructively) the raw materials out of which such a life is constructed; bodily integrity and basic property are parts of what the state constructively protects. Now, Ripstein's point is that, in the absence of tort law, both bodily

---

57. Stephen Perry, *Ripstein, Rawls, and Responsibility*, 72 *Fordham L. Rev.* 1845 (2004).

58. Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune, and Tort Law*, in *Analyzing Law* 141-62 (Brian Bix ed., 1998).

59. See Fletcher, *supra* note 14; Keating, *Fairness*, *supra* note 11, at 1863-64, 1870-71.

integrity and physical property are not well-defined. The promise of a scheme within which they can exist—a promise that is essential to there being primary goods—is breached without rules that both prohibit conduct that interferes with (or unduly risks interfering with) these goods, and that permits redress for such interferences by allocating responsibility for them.

I find the basic root of this argument quite plausible, both as an interpretation of Kant's general argument for the necessity of private law (for one can see how property and contract might follow), and as a Rawlsian argument for the necessity of private law in general and accident law in particular. But to say that there is a Rawlsian and Kantian constructivist argument for the proposition that we need some form of law like tort law is not to say that a Kantian or Rawlsian framework is likely to be useful in illuminating the structure and concepts of extant Anglo-American tort law. In particular, it is not clear why this line of argument would be likely to thread the horns of the dilemma posed above.

### C. *Coherentism in Moral Epistemology*

Parts II.A. and II.B. respond with counter-themes to Parts I.A. and I.B., aiming to temper the enthusiasm attached to those themes with recognition of peculiar features of the tort scenario. The counter-theme of this part contrasts with those insofar as its aim is to amplify the importance of the moral epistemology theme for tort theory. On the other hand, it arrives at the same place, again suggesting that substantial portions of extant Rawlsian tort theory would benefit from greater caution.

The match between tort theory and Rawls was made most strikingly in George Fletcher's *Harvard Law Review* article, *Fairness and Utility in Tort Theory*.<sup>60</sup> While Fletcher utilized Rawls against utilitarians and economists, and in particular against Posner's theory, in another—and much more general—respect, his view resembled that of the utilitarians. Fletcher was forwarding a grand theory of torts, utilizing a paradigm of fairness (as opposed to utility). Grand theorists in legal theory typically aspire to explain a great deal with a modest number of concepts. There are many reasons within both political and moral theory, and within the very enterprise of theory construction, to attend to this sort of goal; “elegance,” “simplicity,” and “parsimony” are some of the terms of commendation we often hear. Some grand theories—such as utilitarianism, for example—purport to use building blocks that are not only few in kind (utilities, probabilities), but also particularly simple and uncontroversial in their nature. Thus, reductive instrumentalist utilitarianism or wealth-maximizing views have been a particularly prominent form of grand

---

60. Fletcher, *supra* note 14.

theory. Fletcher's Rawlsian tort theory did not aim for this kind of reductivism, even though it aimed for a kind of simplicity and elegance. Indeed, Rawls's own theory of justice is certainly beautifully structured, elegant, and sweeping, and it is not reductive.

Nevertheless, I suggest that Rawls's coherentist methodology in moral theory, including the method of reflective equilibrium, counsels against certain kinds of grand theory in torts. What is important for Rawls, especially in his article, *The Independence of Moral Theory*,<sup>61</sup> is what I would call the methodological primacy of the first-order, in normative theorizing. Perhaps this is just a fancy way of saying that Rawls was an anti-foundationalist in moral theory. But I think not. Rawls argued in *The Independence of Moral Theory* that it is a mistake to think we should satisfy ourselves in moral epistemology *prior to* engaging in our best attempts to describe the moral landscape fully, as we see it.<sup>62</sup> Perhaps this was, in part, because Rawls thought we are likely to skew the moral landscape if we start with epistemic precepts. Undoubtedly, Rawls was not particularly confident that abstract moral epistemic demands, and philosophers' intuitions about how these demands should be applied, would be more defensible than the first-order normative claims themselves, a view that Dworkin has made much of.<sup>63</sup> And it seems Rawls believed (and argued by example) that we might be in a better position to address thorny epistemic questions after we had done more work at the first-order level. But beyond all of these reasons, Rawls in a pragmatic, Habermasian, and pragmatist way thought that in the end what we really want is the development of a certain kind of ordering of our convictions and judgments that can play a certain role in both an internal and a public enterprise of normative construction. Undoubtedly, there is a very nuanced epistemic and metaphysical question about whether the fruits of reflective equilibrium constitute moral knowledge, but—aside from the fact that Rawls and his Quinean and post-Wittgensteinian colleagues actually had some very interesting answers to those questions—Rawls maintained a philosophically steady position that the reason-based activity of seeking reflective equilibrium was a valid—and perhaps the best—way of conducting normative theorizing.<sup>64</sup>

It seems to me that these methodological ideas have importance in the normative methodological theory of common law scholarship, and here I shall focus on tort scholarship. Just as it is common for moral thinkers to demand a persuasive moral epistemology or metaphysics prior to a first-order moral theory, so it is common in tort scholarship

---

61. Rawls, *The Independence of Moral Theory*, *supra* note 4.

62. *Id.* at 286-91.

63. See Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *Phil. & Pub. Aff.* 87-139 (1996).

64. See Rawls, *The Independence of Moral Theory*, *supra* note 4, at 288-91.

to demand a persuasive normative theory of the function or value of tort law prior to engaging in first-order tort theorizing. An extension of the Rawlsian point would be that there is value to exploring the connections among the normative concepts and principles of tort law and ascertaining how they fit together within the law. First, it is likely to enhance our ability to render the law more coherent and predictable, both of which are virtues of a legal system. Second, it is likely to reveal, in an important sense, what the animating principles of the law are. Third, it is likely to reveal the normative questions about the validity of the law that we ought to be asking ourselves. And finally, it is likely to clarify a number of epistemic questions about the law.

The point is clearer, I think, when put in the negative. Do we need to know what would justify the tort law, or what its fundamental purpose is, before we describe its normative structure? I am suggesting that the answer is no; that, indeed, Rawls's anti-foundationalist argument in favor of reflective equilibrium supports a normative methodology not only of anti-reductionism, but also one that eschews the priority of justification in the analysis of law. We need not be Langdellians to appreciate Tony Sebok's point that there is a sense in which legal theory better resembles the sciences of zoology and botany than physics.<sup>65</sup> Understanding the law means, in part, grasping its complexity and its variety of parallel categories and nested categories, and understanding how they all fit together. If this is correct, then the moral language of tort law does not channel thoughts into a category of fairness or responsibility, any more than into utility or efficiency.

Rawls the coherentist moral epistemologist may be a better guide for torts than Rawls the theorist of distributive justice or Rawls the Kantian constructivist. Happily, Keating and Ripstein—and numerous other leading philosophers of law—have themselves displayed great interest in tort doctrine, and are not guilty of prioritizing abstract principle above the actual concepts of law, in their interpretive theorizing. Yet, as Steven Shavell and Louis Kaplow's book<sup>66</sup> indicates, the archetype of the philosopher of tort law is the top-down Rawlsian fairness theorist. I believe that Rawls himself would have rejected such a position.

#### D. Reasonableness and Rationality

The prior counter-theme telegraphs my concern about Rawlsian theories of the reasonableness of the reasonable person standard in tort law, but it will be useful to make it explicit. Although a Rawlsian notion of reasonableness is more illuminating than a Bayesian notion

---

65. Anthony J. Sebok, *Legal Positivism in American Jurisprudence* 92-94 (1998).

66. Kaplow & Shavell, *supra* note 53.



of rationality in accounting for the reasonable person standard, several cautionary points must be noted, in light of both the complexity of tort doctrine, and the situatedness of tort law within an institutional context:

A) Negligence law is only part of tort law, and the reasonable person standard is not an explicit part of most other aspects of tort doctrine; and it is not clear whether it is (at least prior to dogmatic rewriting of parts of tort doctrine) really part of most other torts;

B) Theorizing about what standards of tort law would be a reasonable accommodation of liberty and security in establishing the contours of tort law is not the same as asking what a reasonable person would do: The concept of reasonableness plays a part in the legal theory of the former, and in the black letter law of the latter;

C) Reasonable care within negligence law is often phrased in terms of "ordinary care" or the "average prudent person"; the latter two concepts are quite distinct from a Rawlsian conception of reasonableness;<sup>67</sup>

D) Particularly in the United States, where jury trials prevail in negligence cases, the reasonable person standard gets its content in substantial part from its role in framing a jury consideration of community norms;<sup>68</sup>

E) In many categories of negligence cases, questions of negligence are normally framed by "standards of care" extant in a subcommunity (e.g., medical malpractice);<sup>69</sup>

F) While many negligence cases involve questions of appropriate levels of advertent risk-taking, to which the "reasonableness" inquiry has a certain connection, many other negligence cases (e.g., car crashes) involve failures of execution, often inadvertent, to which the reasonableness inquiry is not particularly clearly related.<sup>70</sup>

In light of these concerns (and doubtless others), there are reasons to be skeptical on the question of how much work Rawlsian reasonableness will do in tort theory.

---

67. Cf. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 Chi.-Kent L. Rev. 1431 (2000) (analyzing breach standard in terms of virtue of prudence).

68. See Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 Fordham L. Rev. 407, 424 (1999); cf. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 Mich. L. Rev. 2348 (1990) (depicting aspects of tort law as structured to permit juries to make justice-based decisions).

69. Cf. Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 Fordham L. Rev. 649, 677-79 (1998) (noting that legal malpractice, like medical malpractice, defines breach in terms of an extant standard in the legal profession).

70. *Id.* at 688.

### E. *Theories of Justice*

Now let's turn again to the topic of justice. My concern here is that Rawls's extraordinary analysis of distributive justice only crystallizes a critical negative point in tort theory: Insofar as tort law is a concrete, institutionalized effort to realize a form of justice, and insofar as successful tort theory elucidates that form of justice, the form of justice in question *is not distributive justice*. A wonderful literature including Coleman, Weinrib, Ripstein, Perry, and others has, of course, developed the Aristotelian idea of corrective justice,<sup>71</sup> and has explored its connections and perhaps tensions with distributive justice. I would urge that the familiar Aristotelian contrast between corrective justice and distributive justice may understate the fundamental distance between the justice named in *A Theory of Justice* and the justice we explore in trying to understand tort law. For tort law appears to involve the idea of *justice being done*. Tort law is about responses to certain kinds of conduct or mishaps or wrongs or injuries.<sup>72</sup> A theory of justice for this area would focus, in the first instance, on what kinds of responses to these events there ought to be, what kinds of responses would count as just responses. Rawls's theory of justice treats justice as an attribute of a political and/or legal system. Justice in tort is not about that.

Of course, there have been efforts to link the two.<sup>73</sup> But it strikes me that the openness, the candor, and the anti-reductivism of Rawls's overall philosophical mindset and moral epistemology points us in another direction—the direction of trying to understand the sense in which a form of law is committed to a different kind of idea, a different order of justice.

### CONCLUSION

It is a mark of Rawls's greatness as a philosopher that in legal theory, an area outside of his own, he is regarded as having caused a massive shift in ways of thinking. George Fletcher's tort theory, like Ronald Dworkin's constitutional theory, was important in part because it imported our leading political philosopher's ideas into law, and thereby changed the terms of debate. The Rawlsian frame shift in legal theory, as in international human rights, virtue theory, and numerous other areas where Rawls had not initially worked, is a testament to the power of his ideas.

But here, too, there is a counter-theme. Although Rawls's theory of justice will undoubtedly be one of the most enduring contributions

---

71. See *supra* notes 42-48 and accompanying text.

72. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *Geo. L.J.* 695 (2003).

73. Cf. Stephen R. Perry, *On the Relations Between Distributive and Corrective Justice*, in *Oxford Essays in Jurisprudence* 237 (Jeremy Horder ed., 2000).

to moral and political philosophy, we should ask whether the normative concepts at the pinnacle of his theory—fairness, equality, distributive justice—will really do all the work legal theorists of the past few decades have asked of them. Rawls's own critique of utilitarianism stemmed from a certain kind of candor and skepticism; although he was extraordinarily able, as a philosopher, to retain large domains of normativity within a utilitarian framework,<sup>74</sup> and although he took the improvement of human welfare and the avoidance of suffering as enormously important from a normative point of view, Rawls was eventually skeptical of the possibility of squeezing everything into a utilitarian framework, and believed the distortive effect of over-using the utilitarian framework counseled against doing so. What arose, for him, was the challenge of taking seriously other dimensions of normativity—particularly equality, fairness, and distributive justice.

My own inclination, as I hope the counter-themes reveal, is that tort law, in its broadest sense as the law governing “wrongs” and the legal redress that the victims of those wrongs are entitled to, provides a similar reason to move beyond Rawlsian themes in distributive justice.<sup>75</sup> We can learn much from Rawlsian ideas, from Rawlsian critiques of utilitarianism, and from Rawlsian tools in policy analysis. And a fundamentally Rawlsian conception of equality and liberty will be essential, just as a healthy utilitarian concern for consequences and for human welfare was important to Rawls. But the Rawlsian philosophical virtue of openness to the substance of our first-order normative domain should lead us to doubt whether a Rawlsian conception of distributive justice will really tell us how to understand the law of wrongs.

---

74. See, e.g., John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955), reprinted in John Rawls: *Collected Papers* 20 (Samuel Freeman ed., 1999).

75. Cf. John C.P. Goldberg, *Reconstructing Liberalism: Rights and Wrongs*, 97 *Mich. L. Rev.* 1855-56 (1999) (reviewing Ripstein, *supra* note 35) (expressing skepticism about the capacity of Rawlsian liberalism to explain tort law).