

Rawls and Tort Law: Against the Consequentialism Thesis

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ABSTRACT: Rawlsian accounts of tort law have argued for one of two extreme positions. Sometimes it is affirmed, as does Arthur Ripstein, that tort law must remain indifferent to the distributive goals that animate most part of Rawls's conception of justice (e.g. the difference principle). For others, like Kevin Kordana and David Tabachnick, tort law is only defensible from a Rawlsianism perspective to the extent the former's distributive effects are desirable. Distancing itself from both these extreme views, the paper explains why parties in Rawls's original position cannot disregard issues of convergence between law and interpersonal morality. On one hand, convergence prevents tort law from being a mere tool to the pursuit of distributive goals. On the other hand, assuring convergence between tort law and interpersonal morality still allows for some distributivism in the realm of torts.

KEYWORDS: Tort Law; Rawls; difference principle; consequentialism; Shiffrin.

CONTENTS: 1. Introduction; – 2. The consequentialism thesis; – 3. Against the consequentialism thesis: convergence and moral powers; – 4. Tort law, convergence, and distribution; – 5. Conclusion; – 6. References.

TÍTULO: *Rawls e responsabilidade civil: contra a tese do consequencialismo*

RESUMO: *Posicionamentos rawlsianos sobre a responsabilidade civil têm sustentado uma de duas teses extremas. Por vezes se afirma, como faz Arthur Ripstein, que a responsabilidade civil deve permanecer indiferente aos objetivos distributivos que animam a maior parte da concepção de justiça de Rawls (i.e., o princípio da diferença). Para outros, como Kevin Kordana e David Tabachnick, a responsabilidade civil apenas é defensável em uma perspectiva rawlsiana na medida em que seus efeitos distributivos forem desejáveis. Distanciando-se dessas duas visões extremas, este estudo explica por que as partes na posição originária de Rawls não podem desconsiderar questões de convergência entre o Direito e a moralidade interpessoal. Por um lado, a convergência evita que a responsabilidade civil seja um mero instrumento para a persecução de objetivos distributivos. Por outro, assegurar a convergência entre a responsabilidade civil e a moralidade interpessoal ainda permite algum distributivismo na seara do ilícito civil.*

PALAVRAS-CHAVE: *Responsabilidade civil; Rawls; princípio da diferença; consequencialismo; Shiffrin.*

SUMÁRIO: *1. Introdução; – 2. A tese do consequencialismo; – 3. Contra a tese do consequencialismo: convergência e poderes morais; – 4. Responsabilidade civil, convergência e distribuição; 5. Conclusão; – 6. Referências.*

1. Introduction

In a paper published some years ago, Arthur Ripstein¹ asserted that Rawls's theory of justice requires tort law to conform to a principle of corrective justice. Such conclusion was supported by three different claims. The first was that comparisons based on the

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¹ Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004).

principles chosen by the parties in Rawls's original position are doomed to be consequentialist comparisons, and, as such, incompatible with tort law's deontological structure (*the consequentialism thesis*). The second was that consequentialism is consistent with arguing for a corrective justice account of tort law on Rawlsian grounds, since the principles chosen in the original position are meant to apply only to society's basic structure, from which tort law (and private law in general) is barred (*the limits of the basic structure thesis*). The third, finally, was that a view of tort law in accordance with corrective justice ideal is entailed by Rawls's account of a division of responsibility between society and individuals (*the division of responsibility thesis*). This division of responsibility, on one hand, confers to society, through its basic structure, the task of assuring to every citizen a fair share of the primary goods (such as liberties and wealth) usually needed to pursue a conception of the good. Individuals, on the other hand, are charged with defining their life goals and using the means put at their disposal by the basic structure (the primary goods distributed by social institutions) to accomplish those goals. According to Ripstein, such division of responsibility is premised on citizens abstaining from unjustly taking other citizens' resources in order to advance their ends. As a consequence, trespasses of one's person or property must give rise to duties of repair on corrective terms, thus preserving the fair distribution of primary goods effectuated by the basic structure.

Among the three theses above referred to, the second one, regarding the limits of the basic structure, was already criticized. Against this thesis, it is argued that there is no reason, in the context of Rawls's theory, to exclude private law (and hence tort law) from the basic structure of society.² Once the second thesis is refuted, a problem arises for the third one, since it cannot be at the same time true that tort law belongs to society's basic structure (what entails conforming to the distributive principles governing this structure, like the difference principle) and that the division of responsibility according to Rawls would entail a tort law based exclusively on a corrective principle and hence indifferent to distributive demands. A way out of this conundrum would be, against Ripstein, accepting the division of responsibility while adding, less ambitiously, that this division only requires well-defined property rights, instead of property rights with the features given by corrective tort rules.

This paper's focus, in turn, is on the first, consequentialism thesis. Its aim is to

² See Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598 (2005); *On Belling the Cat: Rawls and Tort as Corrective Justice*, 92 VA. L. REV. 1279, 1288-89 (2006); Samuel Scheffler, *Distributive Justice, the Basic Structure and the Place of Private Law*, 35 OXFORD J. LEGAL STUD. 213, 219-23 (2015).

challenge the view that principles of justice governing the basic structure give place to evaluations based exclusively on consequences, thus neglecting issues about justification and structure. The upshot is that there is a role, in the end of the day, to a law of torts inspired by an ideal of corrective justice under justice as fairness (the way Rawls refers to his account of justice). Allegiance to the form of corrective justice is needed to preserve some interests valued by the parties in Rawls's original position. On the other hand, the role performed by corrective justice considerations in a Rawlsian account of tort law does not prevent tort rules from attending distributive demands. After arguing against the consequentialist view of tort law under justice as fairness, the paper clarifies how this area of law can be distributive to some extent, despite the constraints imposed by its corrective structure.

The paper is organized as follows. The second section presents Ripstein's thesis about the consequentialism entailed by the original position and its incongruence with tort's structure. It also shows that Kevin Kordana and David Tabachnick's response to Ripstein leaves untouched the assumption of consequentialism, instead addressing other features of Ripstein's account, such as the narrow view of society's basic structure and the error of ascribing to Rawls a pre-institutional view of property. The third section draws on Seana Shiffrin's³ account about the relationship between law and interpersonal morality. It tries to demonstrate that parties in Rawls's original position would not be indifferent to the problem raised by divergence between some moral norms and the content and justification of legal rules. The circumstances of the original position rather favor a view that Shiffrin refers to as "accommodationist", demanding a certain degree of convergence between law and morality. The fourth section asserts that treating tort law as a mere tool for achieving distributive goals is incompatible with accommodationism. It explains, at the same time, why tort law, while conforming to accommodationist requirements, can remain, at least to some extent, attentive to distributive desiderata. The fifth section concludes the paper.

2. The consequentialism thesis

³ Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007)

Ripstein states that consequentialism is entailed by Rawls's contractarian argument.⁴ In the original position, the parties choose under some knowledge constraints ("the ignorance veil") the principles that best suit the interests of the citizens they represent. Rival conceptions of justice are hence assessed in view of their consequences to citizens' interests – as these interests are conceived by the parties in the original position. Now it could be imagined that citizens' interests were not circumscribed to state of affairs, but also include compliance with some deontological norms. Ripstein denies this, however,⁵ and instead refers to the parties in the original position as focused exclusively on how different states of affairs fare in matters like freedom and safety.⁶

Understood in this way, the contract argument asks us to assess principles and institutions solely in accordance with the states of affairs they give rise to and the extent to which these states of affairs advance citizens' interests (in freedom, safety etc.). But this exclusive focus on consequences, Ripstein observes, is at odds with tort law's deontological structure. Tort law is not, for example, just about caring for victims receiving compensation; were this the case, tort rules would not incorporate, as they do, concepts such as wrongfulness and causation. A tort law focused only on states of affairs would have to deal with harm in general, not just harm caused by the wrongful agency of someone else. The contract argument and the consequentialism it entails, in sum, do not fit tort law's structure.⁷

For Ripstein, though, the incompatibility between the consequentialism implied by the original position and tort law's structure is not a problem for Rawlsians. Such incompatibility only counts against those who mistakenly wish to use the contract argument as an algorithm for every issue of institutional design.⁸ The contract argument should be understood as an argument concerning only the principles of

⁴ Ripstein follows on this respect Thomas Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 12 Soc. Phil. & Pol'y 241 (1995). For Pogge, consequentialism is a natural feature of any moral evaluation having institutions rather than behavior as its subject matter. While behavioral assessments are sensible to the difference between doing and allowing (or between the intended and the only foreseeable results of one's agency), institutions are judged exclusively in accordance with their consequences. This bears on the way as, in contractualist arguments such as Rawls's, parties deliberate on the principles aimed to regulate social institutions. When discussing principles in such scenario, says Pogge, "prospective participants (or their representatives) will be interested exclusively in results: in the quality of life they can expect under this or that institutional scheme. They will not care how these results come about: through desert or luck, through decree or voting, through birth or the market – except insofar as these mechanisms themselves affect the quality of their lives" (*id.* at 244).

⁵ Ripstein, *supra* note 1, at 1821.

⁶ See Ripstein, *supra* note 1, at 1822-23. Ripstein paraphrases Bernard Williams's objection against utilitarianism and asserts that the problem with the contract argument is that parties only attach value to states of affairs. Later (*id.* at 1823) he assesses and rejects as *ad hoc* the idea of including among citizens' interests that of not being forced to pay damages for events one cannot be deemed responsible.

⁷ See *id. ibid.*: "This deontological structure of tort doctrine poses an immediate difficulty for any explication or adjudication of it within the structure of a Rawlsian contract argument." In a similar way, see John Oberdiek, *Structure and Justification in Contractualist Tort Theory*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 108-112 (John Oberdiek ed., 2014).

⁸ Ripstein, *supra* note 1, at 1812.

society's basic structure, a structure that does not embrace private law in general. Ripstein draws, at this stage, on Rawls's idea of institutional division of labor.⁹ This division puts on one side the institutions (such as the income and inheritance tax) whose task is to correct the results of individual transactions in order to preserve background fairness. On the other side of the institutional division lie the institutions governing individual transactions, like contract law and other parts of private law. Rules of these last sort must be simple, in order to guide individuals in their personal endeavors.

Drawing on this account of institutional division, Ripstein concludes that private law enjoys a relative independency, which differentiates Rawls's account from libertarian and some liberal-egalitarian views.¹⁰ Unlike libertarians, Rawls acknowledges that individual transactions may lead to injustice, an injustice that thus must be faced by public law – so private law is not, in this sense, fully independent. Private law displays, however – and now in contrast with some liberal-egalitarian views – a certain degree of independency, since it is regulated by its own standards, which differ from the distributive standards to which public law is subjected.

Ripstein then completes the argument, explaining that a corrective justice account of tort law is entailed by the Rawlsian concept of division of responsibility. Following this division, justice as fairness assigns to society's basic structure the mission of conferring to every citizen a fair share of the primary goods (like liberties and wealth) usually needed to pursuing a conception of the good. In turn, individuals take responsibility for defining a conception of the good and pursuing it with the means put at their disposal by social institutions.¹¹ In order to sustain this division, individuals must be protected against wrongful interferences in their persons and material resources. Were this not so, a resource declared by the basic structure to belong to someone would not be truly owned by anybody, since the others would be free to dispose of the same resource against the will of its owner without owing any compensation for doing so.¹² This is why, according to Ripstein, tort law conceived in a corrective way is entailed by the division of responsibility.

⁹ See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993), at 268-269.

¹⁰ Ripstein, *supra* note 1, at 1814-15.

¹¹ Rawls discusses the division of responsibility in a paper called *Social Unity and Primary Goods*, later included in JOHN RAWLS, *COLLECTED PAPERS* (1999). There Rawls describes the responsibility of each individual as being that of revising and adjusting her life ends in view of the share of primary goods she is entitled to under a just basic structure (*id.* at 371). Ripstein, in contrast, additionally ascribes to individuals the responsibility for how much each one's goals are fulfilled. See Ripstein, *supra* note 1, at 1812: "The other aspect of the division of responsibility is that each citizen has a special responsibility for how his or her life goes."

¹² Ripstein, *supra* note 1, at 1833.

Ripstein's argument about the compatibility of justice as fairness and a corrective tort law has raised criticism, but the same does not hold for the consequentialism thesis on which this argument relies. The view taken by Kevin Kordana and David Tabachnick is illustrative in this respect.¹³

On one hand, Kordana and Tabachnick reject the narrow conception of basic structure – the conception corresponding to the institutional division of labor – upon which Ripstein draws his argument. According to Kordana and Tabachnick, the basic structure encompasses any institution (even non-coercive ones) with substantial impact on citizens' prospects.¹⁴ This includes, of course, private law.¹⁵ Kordana and Tabachnick agree, on the other hand, that justice as fairness requires assessing institutions in a consequentialist fashion. They agree that the deontological features of Rawls's view are wholly incorporated into the description of the original position. Once this position is constructed, the principles derived from it would indeed assume the shape of consequentialist principles, hence deciding between different institutions on the basis of their consequences over the distribution of primary goods like liberties, opportunities, income and wealth.¹⁶ This entails that, instead of being guided by some ideal of corrective justice, tort law would be justified from the standpoint of justice as fairness only by taking part on the institutional scheme which, taken its global impact, best conforms to the principles chosen from the original position.

According to this view, there would be hence no principled difference between tort law and other branches of law (e.g., criminal law and social insurance) sharing tort law's goals like deterrence and compensation. Furthermore, it is quite possible that nothing similar to tort law would figure among the ideal set of institutions that justice as

¹³ Kordana and Tabachnick, *Rawls and Contract Law*, *supra* note 2; *On Belling the Cat: Rawls and Tort as Corrective Justice*, *supra* note 2.

¹⁴ Kordana and Tabachnick, *Rawls and Contract Law*, *supra* note 2, at 607.

¹⁵ Rawls seems to validate this interpretation when he states that the basic structure is the primary subject of justice because "its effects are so profound and present from the start". See JOHN RAWLS, *A THEORY OF JUSTICE* (2nd ed. 1999), at 7. As Kordana e Tabachnick, *Rawls and Contract Law*, *supra* note 2, at 604-05 acknowledge, however, Rawls's writings support contradictory interpretations on this subject.

¹⁶ See Kordana and Tabachnick, *On Belling the Cat: Rawls and Tort as Corrective Justice*, *supra* note 2, at 1281.

fairness requires.¹⁷

Although their views substantially diverge about the proper design of tort law under justice as fairness, both Ripstein and Kordana and Tabachnick rest therefore their accounts on the consequentialism thesis. Their disagreement lies rather in the reach of the principles chosen by the parties in the original position, which, on Ripstein's view, would be circumscribed by public law, while, for Kordana and Tabachnick, is far broader and encompasses private law. Kordana and Tabachnick also accuse Ripstein of constructing the division of responsibility argument upon a pre-institutional account of ownership. In contrast, Kordana and Tabachnick advance the view that property rights under justice as fairness must be delineated solely in accordance with principles of justice and the institutions prescribed by them. There is no place, in this way, for a property right (as a corrective justice right of compensation for wrongdoings) prior to social institutions and exempt, as such, from distributive demands. This does not mean, of course, that Rawls's theory of justice rejects private ownership, but only that claims of ownership are conditioned by institutions (and, indirectly, by distributive principles).

3. Against the consequentialism thesis: convergence and moral powers

This section refutes the consequentialism thesis. Its point of departure are the ideas developed by Seana Shiffrin¹⁸ about the relationship between law and interpersonal morality. My aim is to explain why those ideas matter for Rawls's theory of justice, as well as how, once incorporated to this theory, they contradict the consequentialism assumption found so far in Rawlsian accounts of tort law.

Shiffrin focuses on the relationship between law and morality in cases where social relationships sanctioned by law are also within the scope of interpersonal morality¹⁹ – as it happens, for example, with contractual relationships, which are, at the same time, subordinated to a branch of law (contract law) and to promissory morality. Shiffrin

¹⁷ *Id.* at 1306-07. After arguing for a broad view of the basic structure, Scheffler, *supra* note 2, at 224-25, concludes that Rawls's theory of justice subjects private law to a strong form of distributivism. He alludes to the fact that the first principle of Rawls's conception (the principle of basic liberties) and the first part of the second principle (the principle of fair equality of opportunity) do not have many implications for private law institutions. As a consequence, private law would remain virtually attached to the second part of the second principle (the difference principle). Private law would accordingly be governed by the distributive goal of the difference principle, namely, the goal of maximizing the prospects of the worst-off citizens regarding the distribution of income and wealth. For Scheffler, this implication is disturbing, since a distributive goal like that is not compatible with the "bilateral values" found in the private law realm.

¹⁸ Shiffrin, *supra* note 3.

¹⁹ Norms of interpersonal morality are non-institutional moral norms as the ones holding for relationships between promisor and promisee, victim and wrongdoer, parents and their children etc.

criticizes two opposed views on the relationship between law and morality in such instances.²⁰ One asserts that legal rules should replicate moral norms as far as possible (reflective approach). Other, in contrast, treats that law and morality as fully independent and accordingly asseverates that the content of legal rules be determined by independent standards, unrelated to moral prescriptions (separatist approach). In lieu of both these extreme approaches, Shiffrin advocates for an intermediary position, referred to by her as accommodationism. According to accommodationism, law's content and justification are allowed to diverge from morality, but only to some extent. This is because legal rules and their justification cannot be a hindrance to citizens' moral development (or civic virtue). In Shiffrin's view, a law that diverges from interpersonal morality can be, in some circumstances, such a hindrance.

Shiffrin defends three accommodationist principles to be followed by law in order to incentivize moral agency. First, legal rules must not prescribe actions "inconsistent with leading a life of at least minimal moral virtue."²¹ Second, law and its justification must be public, that is, legal rules and their rationale must be, if not known, at least apt to be known by citizens, and this knowledge "should not present a conflict for the interested citizen qua moral agent."²² Third, legal rules must contribute to a cultural environment favorable to virtues.²³ On this, it is important to clarify that a culture of virtue is not always favored by legal incentives to virtuous behavior. To some extent, a virtuous culture may hang upon an intrinsic motivation to behave in the right, and this sort of motivation is potentially undermined by incentives and external control.²⁴

The main goal of Shiffrin's article is to stress the divergence between promissory morality and certain features of U.S. contract law, such as the preference for expectation damages in lieu of specific performance as a remedy for breach. For our present purposes, on the other hand, the important thing is to understand why Shiffrin's accommodationism is roughly coherent with Rawls's theory of justice.

Hereinafter, let us call as "convergence" the constraints accommodationism imposes on law's content and justification. A convergent law is hence a law attending to the three principles exposed above. What I wish to show now is that convergence is not meaningless from the standpoint of justice as fairness.

²⁰ Shiffrin, *supra* note 3, at 713-15.

²¹ *Id.* at 718.

²² *Id. ibid.*

²³ *Id.* at 719.

²⁴ See, e.g., Bruno Frey, *A Constitution for Knaves Crowds Out Civic Virtues*, 107 *ECON. J.* 1043 (1997) (criticizing economists' exaggerated emphasis on the role of legal incentives and warning against the detrimental effects of these incentives on trust and civic virtues).

To begin with, let us consider basic liberties and their relation to moral powers. In addenda to the first version of his theory,²⁵ Rawls explains that the first principle of justice as fairness, the basic liberties principle, is neither a principle about freedom abstractly speaking nor a principle of freedom maximization. That principle should be rather understood, continues Rawls, as asking for a “fully adequate scheme” of guarantees,²⁶ the latter being conceived as a scheme whereby social conditions needed to the full and informed exercise of two moral powers, the capacities for a sense of justice and for a conception of the good, are assured.²⁷ The capacity for a sense of justice is defined as the capacity “to understand, to apply, and normally to be moved by an effective desire to act from (and not merely in accordance with) the principles of justice as the fair terms of social cooperation.”²⁸ The capacity for a conception of the good, in turn, is the capacity “to form, to revise, and rationally to pursue such a conception, that is, a conception of what we regard for us as a worthwhile human life”.²⁹

For Rawls, the interest in developing and exercising these two moral powers (together with the interest in achieving a particular conception of the good, whose content is, notwithstanding, hidden from the parties in the original position) figures prominently among the interests taken into account by the parties while deliberating on justice principles.³⁰ The capacity for a conception of the good is a good in itself, not only a means to whichever goals we happen to pursue. To see why, consider, first, the risk that our current views about the good be mistaken, thus failing to represent what is most rational for us. This is why the capacity for a conception of the good, which includes the capacity for revising our life projects, is intrinsically valuable.³¹ Second, the capacity for a conception of the good allows us to affirm our goals from the standpoint of our rational agency and, in this sense, makes these goals our own. Such attachment between the way we live and our rational deliberations, Rawls points out, is part of the particular conception of good each of us professes.³²

The interest in the capacity for a sense of justice, in turn, is supported in the following terms. The development of this capacity conforms to citizens’ interests as represented

²⁵ As Rawls himself acknowledges, this revision of the basic liberties was mainly prompted by Hart’s critique made in Herbert L. A. Hart, *Rawls on Liberty and its Priority*, 40 U. CHI. L. REV. 534 (1973).

²⁶ RAWLS, *supra* note 9, at 291.

²⁷ *Id.* at 332.

²⁸ *Id.* at 302.

²⁹ *Id. ibid.*

³⁰ *Id.* at 310.

³¹ *Id.* at 312-13.

³² *Id.* at 313.

in the original position first because it matters, for the achievement of everyone's personal ends, that other citizens act from a sense of justice and be aware that others do likewise. As Rawls says, "the public knowledge that everyone has an effective sense of justice and can be relied upon as a fully cooperative member of society is a great advantage".³³ Second, the sense of justice is also a condition of self-respect.³⁴ The development and exercise of the moral power at stake lead citizens to perceive themselves as fully cooperative members of society, which is, on Rawls's view, one of the components of self-respect (the other one is the sense of one's own value and that one's conception of the good is worth carrying out). The third and final argument refers to the good of social union. A well-ordered society is, in Rawls's terms, a "social union of social unions,"³⁵ a common endeavor that enhances human potentialities by coordinating the use of diverse talents. Social life can accordingly be "a far more comprehensive good than the determinate good of individuals when left to their own devices or limited to smaller associations."³⁶ In order that the good of social union be a good for us, however, we must see ourselves as coauthors of social life, which in turn requires us to be able to recognize that society's basic structure incorporates principles fitted to our status as free and equal people – hence principles reflecting the value of reciprocity. Without perceiving the basic structure in this way, Rawls argues, "we cannot regard the richness and diversity of society's public culture as the results of everyone's cooperative efforts for mutual good; nor can we appreciate this culture as something to which we can contribute and in which we can participate."³⁷ The good of social union hence requires the capacity for a sense of justice.

If this sort of considerations can justify the priority of liberties needed to the adequate development and exercise of the capacities for a sense of justice and for a conception of the good, they might also warrant further providences whose contribution to the same capacities is found crucial. Among two different sets of principles, the least one can say in the law of the above exposition is that parties in the original position would have a reason to choose the set rendering easier the development of the two moral powers. This reason must further carry a special weight from a Rawlsian standpoint, since interest for both moral capacities is what warrants, on Rawls's account, the lexical priority of the first principle over the second.

³³ *Id.* at 316.

³⁴ *Id.* at 318-19.

³⁵ *Id.* at 320.

³⁶ *Id. ibid.*

³⁷ *Id.* at 322.

What must be ascertained now is whether convergence between law and interpersonal morality in the sense explained above counts among the circumstances favoring the development and exercise of the two moral powers, and why this is so. Let us start again with the capacity for a conception of the good. It seems beyond doubt that developing this capacity is made easier by a given degree of convergence between law and interpersonal morality. Consider, first, that the capacity at stake includes the capacity to assess what morality requires in routine matters, since our good may involve, to a greater or lesser extent, doing what morality commands us to do in such stances.³⁸ As a consequence, institutions giving rise to a scenario where it becomes hard for citizens to understand and follow moral norms (as it happens, following Shiffrin, when principles of convergence are disregarded) constitute an obstacle to the development of the capacity for a conception of the good.

Institutional practices diverging from interpersonal morality may be also detrimental to the capacity for a conception of the good to the extent that this capacity depends from social interaction. Among the conditions favoring the capacity for a conception of the good are the conditions of social interaction. Social interaction allows one to contrast their ideas of the good with those of their fellow citizens. But when flourishing of the virtues belonging to interpersonal morality is inhibited, the tendency is that social exchanges of points of view about the good become impoverished.

Let us take now the capacity for a sense of justice. The way this capacity is attached to interpersonal morality is less patent. Since the capacity for a sense of justice is conceived as the capacity to understand, apply and act from (and not merely in accordance with) principles of justice governing the main institutions for social cooperation (that is, society's basic structure),³⁹ it seems at first glance that capacity for a sense of justice and interpersonal morality pertain to different domains. Some accounts of justice, nevertheless, may found support in moral norms of day-to-day interactions, so that internalizing these norms becomes at least an useful condition, when not a necessary one, to the development of the capacity for a sense of justice. Contractualist views about justice, such as Rawls's, are an example of justice conceptions whose internalization may be helped by familiarity with interpersonal

³⁸ This does not amount to stating that everyone's good involves allegiance to interpersonal morality (although it is plausible to think that it does do, at least to some degree). A possible convergence between ideals of the good and interpersonal morality is out of question here, since we are interested in the relationship between moral norms and the capacity for a conception of the good, not the particular conception of the good someone happens to endorse. The point made above is that developing such capacity would be disturbed by circumstances where moral norms become unintelligible, since this unintelligibility prevents us from even wondering about the role such norms should play in our life projects.

³⁹ RAWLS, *supra* note 9, at 302.

moral norms, since the plausibility of these conceptions may be easily assessed in the light of interpersonal moral norms about promises or mutual cooperation. By cultivating the virtues of interpersonal relationships, institutions can hence give rise to an environment more suitable to the development of a sense of social justice.⁴⁰

One possible objection to the reasoning above is that, by appealing to interpersonal morality, the present account exceeds the boundaries of a political view of justice such as Rawls's, which, in contrast with comprehensive doctrines on the right and the good, limits itself to the basic structure of society. The answer to this objection is, first, that a political approach to social justice does not deny the existence of comprehensive doctrines, but only avoids drawing upon them. Second, a political conception is not bound to ignore the effects of comprehensive doctrines on the moral capacities of citizens, as long as the reasons for valuing these capacities and assessing the impact of comprehensive doctrines on them remain political reasons. It is true that, to the extent that convergence between law and interpersonal morality can only be assessed through the lens of a comprehensive doctrine, testing for convergence would give place to a sort of considerations (e.g. regarding the content of interpersonal moral norms) that would better be avoided in order to maintain the account strictly political. But, three, these considerations may be at least abstract enough to remain palatable to a great variety of comprehensive doctrines. One can, for example, state that promises are part of interpersonal morality without endorsing any controversial view about the sources of promises' moral force.⁴¹

Let us return now to the consequentialism thesis. If the argument just stated is right, then there is a good reason why a theory of justice like Rawls's should not be indifferent to the problem of divergence between law and interpersonal morality. But a theory sensible to the divergence problem of divergence is not consequentialist – not, at least, in the sense of comparing institutions exclusively according to how primary goods such as income and wealth are distributed. Beyond distributive considerations like these, a theory of the sort envisaged here must also care about the ways law and interpersonal morality and the effects of these divergence over citizens' moral powers. There is, clearly, a broad sense in which considerations of the latter order are also consequentialist. Taking convergence into account suffices, nonetheless, to rebuke important criticisms raised against Rawls's theory of justice in general and its

⁴⁰ Shiffrin, *supra* note 3, at 712 seems to agree when she states that moral development is important both intrinsically as well as “because a just political and legal culture depends upon a social culture in which moral agency thrives.”

⁴¹ In a roughly similar way, Shiffrin, *supra* note 3, at 717 states that promissory morality is not controversial “in the ways that create the need for a system of justice.”

application to private law. For example, Thomas Pogge⁴² affirms that contract theories like Rawls's conduct to unpalatable results in what comes to liberties, since consequentialism renders these theories unable to differentiate between liberty infringements caused by state actions and infringements ascribable only to state omissions. By ignoring the difference between doing and allowing, one is led to endorse absurd policies – such as death penalty against drunk drivers – as long as they reduce overall threats to freedom (including threats coming from state action and private action condoned by state omission). Pogge's objection hence assumes that adepts of contractarian conceptions are unable to differentiate between outcomes caused by state action and those that public authorities just fail to avoid (as well as other distinctions one may have deontological reasons to draw, such as the distinction between intended and foreseeable outcomes). Yet if the difference between what one does and what one allows doing carries some weight from the standpoint of interpersonal morality – as it likely does – a law that fails to account for that difference is prone to give rise to what Shiffrin⁴³ calls a conflict situation, since its lies on grounds that contradict moral reasons applicable to individuals in their personal interactions.⁴⁴ Similarly, Ripstein's claim about the incompatibility between the principles chosen in the original position and the deontological structure of tort law⁴⁵ disregards that a law of accidents showing no concern for this structure would likely run against interpersonal morality and hence citizens' interests in the development and exercise of moral powers – interests that the parties in the original position are not admitted to ignore. It is relevant, from the standpoint of the parties in the original position, that legal rules diverge from interpersonal moral norms on harm causation and compensation in ways detrimental to moral capacities. In sum, if the argument from the original position entails assessing institutions in a consequentialist fashion, this is a kind of consequentialism that, in what refers to harmful events, does not require an exclusive focus on distributive goals such as deterrence and cost-spreading.

⁴² See Pogge, *supra* note 4, at 257.

⁴³ Shiffrin, *supra* note 3, at 718.

⁴⁴ It could be argued that ignoring the difference between state action and omission does not give rise to a divergence problem because there is no parallelism between the domains of state policies and interpersonal morality. It is easy to draw, however, an analogy between state and individual behavior, so that a discrepancy between the standards followed by state agents and interpersonal moral norms would still run the risk of producing the disturbing effects feared by accommodationism. Citizens would be allowed to ask why they should give any weight to the difference between doing and allowing when this difference is ignored by state policies. There may be, of course, a good answer to this query. See, e.g., David Enoch, *Intending, Foreseeing, and the State* 13 *LEGAL THEORY* 69 (2007) (arguing that the difference between intending and foreseeing is void of moral force in what concerns state actors). However, a theoretical answer to this question is only able to avoid conflict situations to the extent that the reasons why one should avoid drawing the analogy between state and individual behavior become common knowledge.

⁴⁵ Ripstein, *supra* note 1, at 1820.

It remains possible, on the other hand, employing tort rules to advance distributive justice without infringing accommodationist requirements. I shall try to show how in the next section.

4. Tort law, convergence, and distribution

This section first supports the claim that a sort of tension between distributive principles and tort law's deontological structure raises a divergence problem. In order to avoid this problem, some constraints on the pursuit of distributive goals (like the goal of maximizing worst-off citizens income and wealth prospects) through tort law must be acknowledged. It will also be asserted, on the other hand, that compliance with Shiffrin's accommodationist requirements is compatible with some sort of tort distributivism.

A clear problem with the idea of subjecting the whole bulk of tort law to a distributive principle is the problem of justification. Reasons deriving from a distributive principle dislocate the "internal" reasons attached to the particular relationship between victim and wrongdoer.⁴⁶ Thereby instead of claiming that *A* owes compensation to *B* by having wronged the latter, a distributive principle of justification leads us to claim that *A* owes compensation to *B* in order to attain the distributively desirable result *x*. But this sort of distributive justification of *A*'s duty regarding *B* violates one of Shiffrin's accommodationist predicaments, the one according to which:

the law and its rationale should be transparent and accessible to the moral agent. Moreover, their acceptance by the agent should be compatible with her developing and maintaining moral virtue. Although knowledge of the justifications of law is not required or expected of every citizen, understanding the law's rationale should not present a conflict for the interested citizen qua moral agent. This is not merely because the agent is subject to the law and that to which she is subject should be justifiable to her. Within a democratic society, the law should be understood as ours – as authored by us and as the expression of our joint social voice.⁴⁷

That someone who wrongfully harms another person is under a duty to compensate the victim is a highly plausible moral prescription. Yet distributive justifications condition the duty to repair on the distributive state-of-affairs it is likely to lead to rather than on

⁴⁶ See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

⁴⁷ Shiffrin, *supra* note 3, at 718.

causation of harm per se. This justification strategy thereby conflicts with a reason that *A* as a moral agent plausibly has to compensate *B*.⁴⁸

The justification problem is not, however, the only one faced by a distributivist account of tort law. Remember that divergence may also arise out of a contrast between what is commanded by legal rules and what qualifies as life of minimal virtue from the standpoint of interpersonal morality.⁴⁹ We cannot discard beforehand the possibility that legal rules animated by some distributive principle would impose someone to harm another under immoral circumstances, or proscribe compensation to innocent victims in cases where compensation is morally required or at least desirable.

A further problem is that a distributivist tort law may fail to encourage virtuous behavior. Virtue can be encouraged by law, says Shiffrin, “by affording opportunities to be virtuous and by refraining from offering strong incentives or encouragements to misbehave”.⁵⁰ One plausible hypothesis in this respect is that legal sanctions undermine wrongdoers’ intrinsic motivation to assist their victims.⁵¹ Another is that tort rules be unable to deter wrongful behavior.⁵² A distributive tort law disregards both problems save to the extent that detrimental effects from the point-of-view of civic virtue turn out to be distributively relevant too, as when, for example, insufficient deterrence also affects the prospects of the worse-off citizens.

A strict sort of distributivism in tort law is hence inconsistent with accommodationism. Yet this does not entail that accommodationism cannot be made compatible with pursuit of distributive goals. From now on, let us focus on the justification problem raised by distributivism, the one that seems more fiercely to oppose accommodationism and distributive principles. One reason to claim that a distributive tort law need not present a conflict from the standpoint of interpersonal morality is that reasons internal to the relationship between victim and wrongdoer are unable to account for law’s selectivity. Consider a sort of internal justification like the one stating

⁴⁸ The concern expressed above is analogous to that manifested by Shiffrin about the use of efficiency arguments in contract law.

⁴⁹ See Shiffrin, *supra* note 3, at 718: “what legal rules directly require agents to do or to refrain from doing should not, as a general matter, be inconsistent with leading a life of at least minimal moral virtue.”

⁵⁰ Shiffrin, *supra* note 3, at 719.

⁵¹ See Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives* 123 *YALE L. J.* 1070 (2014) (discussing the moral importance of motivational crowding out effects of legal incentives).

⁵² See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 *UCLA L. R.* 377 (1994) (assessing empirical evidence on the deterrence effect of tort rules); W. Jonathan Cardi, Randal D. Penfield & Albert H. Yoon, *Does Tort Law Deter Individuals? A Behavioral Science Study* 9 *J. EMPIRICAL STUD.* 567 (2012) (reporting results from an experiment showing tort rules to have minor deterrent impact on individuals).

that a duty pay damages arises from the fact that *A* has wrongfully caused harm to *B*. While plausibly congruent with an interpersonal moral norm, a reasoning such as this remains incomplete for legal purposes, since it does not account for why law is concerned with relationship between *A* and *B* in the first place. Imagine that, in circumstances analogous to those where *A* harmed *B*, *C* harmed *D*, but that, unlike *A* towards *B*, *C* is legally exempted from indemnifying *D*. This renders clear why the justification regarding the case of *A* and *B* is incomplete. To claim that *A* has a legal duty arising from the fact of wrongly harming *B* is not enough; one still has to clarify why law picks relationship between *A* and *B* unlike similar others, like the one involving *C* and *D*. Furthermore, any further justification accounting for this legal selectivity is bound to be external to the relationship between *A* and *B* – internal reasons cannot do the job. At this stage, therefore, distributive grounds may be adduced without risking conflict with what interpersonal morality prescribes regarding *A* and *B*. For example, one could justify that relationship between *A* and *B* is legally sanctioned (unlike the one involving *C* and *D*) because picking *A* and *B* instead of *C* and *D* maximizes the advantage of the worst-off citizens.

The idea that legal selection of harmful events is distributively sensitive is advanced in similar lines by John Gardner:

In deciding whether something should be a tort, then, it is never enough to conclude that it is a wrong calling for repair. It is not even enough to conclude that it should be recognized by the law as a wrong calling for repair. The question that must be confronted, in addition, is whether the law should give it this kind of recognition – the tort law kind of recognition – complete with its generous terms for power-sharing and cost-sharing as between the aggrieved party and the legal system. That question is a question of distributive justice. The law is selecting some people for a measure of official support in their personal affairs that most other clients of the welfare state can only dream of. Even among those who have been wronged, not all can possibly enjoy this level of support in putting things right, and the question is always live of who should be the privileged ones who qualify for it.⁵³

Let us face some possible objections to the above argument, starting with the complain that tort law need not be selective. Let us grant, *arguendo*, that some minimal conditions to a legal obligation, like wrongdoing, causation and harm, can be delineated without resource to distributive standards. The objection envisaged here states that law could grant legal status to every relationship attaining to these conditions instead of selecting just some of them. But to provide legal assistance to a whole group of cases is just one among many possible ways to solve the selection issue. One would still be

⁵³ John Gardner, *What is Tort Law For? Part 2. The Place of Distributive Justice*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 340-41 (John Oberdiek ed., 2014).

forced to justify (necessarily through external reasons) why all cases where harm were wrongfully caused by a person to another (including the cases of *A* and *B* and *C* and *D*) are selected to be a source of legal obligation instead of just some or none of them.

Another objection is that selectivity may draw on non-distributive arguments. But this, even if true, is irrelevant for our purposes. What matters for the present argument is whether selecting cases on the basis of distributive criteria diverges from interpersonal morality in a way that a conception of justice like Rawls's is not allowed to ignore. Furthermore, it is arguable most reasons lying behind the choice of providing legal support to some harmful events instead of others are of a distributive kind. One may think here of efficiency reasons leading to a refuse of granting legal status to cases where harm caused is not large enough, or privacy reasons bearing on the non-legal character of harm arising in familiar contexts. To be sure, non-distributive arguments may play a part in excluding some cases from the legal domain. Yet the important thing is that legal selection must be grounded on reasons external to the relationship between victim and wrongdoer.

There is a second role that distributive concerns may play in tort law in a way consistent with the sort of internal justification fitting interpersonal morality. After a case is selected by law, legal assistance to victims of harm may be provided with more or less urgency, and the selected level of urgency must be supported by external reasons – possibly distributive ones. To illustrate this new point, it is useful to think, as does Gardner,⁵⁴ on legal assistance to harm victims as analogous to state allocation of other resources, as education or health services. Besides deciding who is entitled to these resources and who is not, the state must also decide on who is entitled to get them first. In the case of tort law, the urgency decisions take place mainly through procedural rules. Like in the former case, these decisions cannot draw on considerations pertaining to the relationship between plaintiff and defendant. Rather one must add external reasons – possibly distributive ones – for justifying greater or lesser urgency to victim *B* as compared to *D*.⁵⁵

⁵⁴ *Id.* at 341.

⁵⁵ Giving priority to *B*' claim may involve taking steps to encourage *A* to indemnify *B* spontaneously – that is, without the need of judicial intervention. From an accommodationist standpoint, however, there may be some limits to be observed in this respect, since threatening *A* with excessive punishment for the sake of *B*' priority right may contravene norms of interpersonal morality or conspires against *A* having adequate feelings regarding what she owes to *B*.

A third and final reason to subscribe at the same time the accommodationist thesis and tort law's distributive role is related to the concepts involved in legal obligation.⁵⁶ According to Peter Cane,⁵⁷ for example, the idea of justice suited to tort law's bilateral structure is that of corrective justice. Cane claims, however, that corrective justice lacks any content ("corrective justice has no substantive content"),⁵⁸ which thus renders issues concerning conditions and limits of tort duties into distributive issues. As a consequence, concepts commonly employed to specify the conditions of the duty of repair, such as those of duty of care and harm, would be best viewed as concepts whose content is distributively oriented. At the same time, Cane acknowledges that the distributive potential of tort law is constrained by its corrective structure. Such structure, which is called by him correlative (in allusion to the correlativity between right and duty), is inconsistent with certain distributive standards like "deepest pocket" and "best loss-spreader".⁵⁹

Yet the inconsistency found by Cane seems to be just a matter of justification. Assuming that corrective justice is merely formal, it is not clear how one could avoid distributive (or other external) standards from being assimilated to the corrective justice reasoning. There is clearly a difference between affirming that *A* is under a duty to pay damages to *B* because of the harm caused and affirming the same on grounds that *A* is best positioned to spread the losses of the harm suffered by *B*. This difference is compatible, nonetheless, with acknowledging that any wished result on distributive terms can be reached through the corrective form.

On the other hand, accommodationism is not likely to be satisfied just by allegiance to the form of corrective justice (even if Cane is right in taking corrective justice to be void of content). The conflict arising from divergence between legal justification and interpersonal morality is not plausibly avoided only by the formal features of the former. One must not take a stand here on the issue whether interpersonal morality has some non-conventional content. Even if some conventionalist view about interpersonal morality is the correct one, the fact remains that a sort of legal justification complying with the form of interpersonal morality while at the same time ascribing to this form a content that citizens find unintelligible is prone to have the same disruptive effect on

⁵⁶ This last argument is distinguishable from the previous one regarding selectivity. Consider a decision that, in spite of acknowledging *A* as having negligently harmed *B*, invokes policy reasons to exempt *A* from any legal obligation towards *B*. This decision is distinct from another that, in order to describe the relationship between *A* and *B*, relies on policy reasons in order to deny that *A* has been negligent or caused harm to *B*.

⁵⁷ Peter Cane, *Distributive Justice and Tort Law*, 2001 N.Z. L. REV. 401 (2001).

⁵⁸ *Id.* at 416.

⁵⁹ Cane, *supra* note 57, at 418.

citizens' moral development to the one caused by replacing the internal form with an external one. In order to be helpful in what concerns civic virtue, the content of interpersonal morality must be somewhat fixed, and legal justification exposes agents to conflict when it ignores this content.⁶⁰

Nonetheless, the relatively fixed content of interpersonal morality does not prevent construction of legal concepts from being sensitive to distributive concerns. Interpersonal morality is never fixed to the point of fully impeding conceptual malleability, and one may take advantage of such malleability for distributive purposes. Consider, for example, the proposal advanced by Tsachi Keren-Paz⁶¹ on the topic of negligence. According to Keren-Paz, the concept of negligence should be constructed in a way sensitive to the wealth of the involved parties, so as, for example, in order to assess whether a person using cheap coal in her residence is to be found culpable of the environmental harm suffered by a neighbor, wealth of the parties should be taken into account. The same behavior (in this example, using cheap coal) should be deemed negligent were the agent richer than the victim, but not in the opposite case.⁶²

Without assessing the merits of Keren-Paz's proposal, it seems that accommodationism has no *a priori* reason to reject it. Suppose we wish to justify a duty of neighbor *A* (who uses cheap coal at her home) towards neighbor *B* (who suffers from the pollution caused by the former). We could begin affirming that *A* must pay damages since she wrongfully harmed *B*. In case we were then asked why *A* is to be found negligent, the answer would be that *A* is rich and so could, without great sacrifice to herself, employing a cleaner sort of coal (thus suggesting that a different judgment would be reached were *A* not able to buy a more expensive coal without sacrificing some urgent need of hers or her family). It is plausible to claim that, in what concerns interpersonal morality (at least as usually constructed), the concept of negligence is not fixed to the point of impeding this distributive switch. There is no apparent bilateral reason to assess *A*' negligence in a way or another (although, as said, accommodationist concerns may require us to avoid constructing the negligence in flagrant opposition to citizens' common views). Furthermore, if asked about why *A* is (or not) at fault, it seems we would not be in a position to dispense with external reasons. Thereby if these reasons remain in this case a focus of divergence, such focus is arguably an ineludible one even for partisans of pure corrective justice interpretations of tort law.

⁶⁰ This does not avoid the criticism that the content of interpersonal morality is historically ascribable to long-standing distributive goals, or that, by imposing limits on conceptual construction, accommodationism assumes a conservative bias.

⁶¹ TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE (2007).

⁶² *Id.* at 91-92.

5. Conclusion

It has been argued that parties in Rawls's original position must be concerned with convergence between law and interpersonal morality in the sense of Shiffrin's accommodationist thesis. In what regards the implications of Rawls's theory of justice for legal institutions in general, including tort law, this leads to some constraints on the pursuit of distributive goals. Instead of only on the basis of their distributive outcomes, tort rules and their rationale must also be evaluated by their convergence with interpersonal moral norms about causation of harm and compensation. This is compatible, however, with performing some distributive functions. Distributive concerns may inspire tort law without risking divergence from interpersonal morality in several ways: when it comes to select cases of harm to grant legal status, to define the urgency of legal assistance and to construct the concepts marking the conditions and limits of civil liability.

What remains to be fixed is, first, the weight convergence concerns should have under Rawls's theory of justice, as well as the nature (sufficientist, maximizing or another) of the convergence requirement. Regarding the first point: should we grant to convergence the status of a first principle (identical to the one conferred by Rawls to basic liberties), with the consequence of convergence becoming a trump against second principle distributive demands? Regarding the second: should we, as Shiffrin suggests, be satisfied by a degree of convergence between law and interpersonal morality enough to prevent legal rules and their justification from hindering the development and exercise of crucial moral powers? If that is the case, so that convergence beyond a certain point would be no longer desirable, should tort law incorporate distributive goals in far more instances than the ones mentioned above?

There is also need for a more detailed analysis of the implications of the present argument for the design of tort rules. If I am right, the law of accidents should be attentive to both interpersonal morality and distributive goals. But what would this entail, for example, for the status of strict liability rules or for the allowance of punitive damages? More generally, would tort law be needed at all, or could it be replaced, in whole or part, by other regulatory instruments, like social insurance? The analysis presented above urges Rawlsians to resist answering questions like these in strict consequentialist terms, but it remains an open issue to ascertain how distributive factors are to be moderated, in these and other instances, for the sake of the moral

powers so prized by Rawls's account of justice.

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