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LIABILITY AND FAULT IN *REASONABLENESS AND RISK*

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ABSTRACT. This comment examines *Reasonableness and Risk*'s pluralist account of strict liability, based on sovereignty rights and fairness. It begins by explaining the book's cogent arguments for some strict liability, and elaborates on how they might further be strengthened. More critically, it suggests that it is unclear why the book rejects more wide-ranging wrongs-based strict liability, and that its fairness justification needs further refinement.

There is seemingly almost universal agreement that legal liability to compensate may permissibly attach in the event of a failure to take reasonable precautions, i.e. when A invades B's right-grounding interests as a result of A's failure to take reasonable precautions against the invasion. Less agreement exists on the chestnut question of the domain of strict liability, i.e. liability that attaches even when reasonable precautions have been taken.[1] Broadly, we can distinguish the following views in the non-consequentialist literature, albeit that variants can be envisaged:

(1) *No strict liability*. While those who cause harm through conduct that takes reasonable precaution have reasons to compensate, they do not have *duties* of compensation.[2]
(2) *Limited wrongs-based strict liability*. The breach of certain rights is not sensitive to whether the duty-bearer has taken reasonable precautions against the infringement. Thus, these rights can be breached even when the duty-bearer reasonably, but mistakenly, believes that their

[1] For a treatment that shows the opposing arguments have been exchanged for several hundreds of years, see Nils Jansen, *The Structure of Tort Law* (Oxford: Oxford University Press, 2020).

[2] See John Oberdiek, 'Specifying Rights Out of Necessity', *Oxford Journal of Legal Studies* 28(1) (2008): pp.127-146.

action is permitted. In this way, these rights are, at least in part, 'fact-relative': whether a person breaches the right depends on the facts, not the duty-bearer's reasonable beliefs about the facts. Other rights, by their nature, only ground duties that require reasonable precautions to be taken. Whether a precaution is reasonable, for these rights, depends in part on the duty-bearer's evidence: if the duty-bearer reasonably believes that an action does not impose a risk of harm, this is relevant to determining whether the right is breached. These are, in this sense, evidence-relative rights.[3] In short, on this view, some rights, by their nature, generate strict liability, other rights do not, and strict liability is only justified when the nature of the right demands it.

(3) *General wrongs-based strict liability, subject to countervailing institutional considerations.* Morality includes general prohibitions on fact-relative harming and fact-relative use of others without their consent. The basic moral position is strict liability. Considerations of, for instance, over-deterrence, the rule of law, and insurability, may prompt the law not to institutionalise the basic moral position, and build in fault-based cutbacks.[4]

(4) *Limited wrongs-based and limited non-wrongs-based strict liability.* As in (2), but with the additional acceptance of some rights to compensation that are not conditional upon a prior wronging act (even if the failure to pay compensation is a wrong).[5] For instance, suppose one runs an enterprise, taking all reasonable precautions against the risks created by the enterprise, yet there is an ineliminable probability that the operation will cause harm to others' basic interests. On this analysis, the enterprise does not *wrong* those harmed, but it may nonetheless be required to compensate them. In short, for (4), some permissible strict liability is wrongs-based, some not.

Reasonableness and Risk (*RR*) defends a distinctive version of (4), arguing that 'tort law's strict liabilities are predicated either on violations of autonomy rights, or on secondary failings of conduct – on

[3] See Arthur Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016), who defends a distinction between use-based wrongs, which are fact-relative in the sense that the duty-bearer's reasonable, but mistaken, belief in a permitting fact does not affect liability, and harm-based wrongs, in relation to which reasonable, but mistaken, beliefs about the harm-causing potential of an act are relevant. On the distinction between fact-relative and evidence-relative wrongdoing, see Derek Parfit, *On What Matters: Volume 1* (Oxford: Oxford University Press, 2011), ch 7. The distinctions are employed in Gregory Keating, *Reasonableness and Risk* (Oxford: Oxford University Press, 2022), ch 6.

[4] J Gardner, *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019), ch 4, ch 8. Gardner's position is more complicated however: he also thinks that morality contains 'fault-anticipating wrongs', wrongs whose commission necessarily involves 'fault' (albeit 'fault' only in the sense of impermissibility).

[5] J Goldberg and B Zipursky, *Recognizing Wrongs* (Cambridge: Harvard University Press, 2020).

conditional, not primary, fault'.[6] These conditional duties to compensate, *RR* argues, are justified by a fairness principle which seeks to achieve 'the proportional alignment of burden and benefit across a plurality of persons…a state of the world in which burdens and benefits are properly aligned'.[7] This principle has various legal manifestations, according to *RR*: vicarious liability, enterprise liability, products liability, liability for extra-hazardous activities, liability in cases of harming justified by necessity.[8] Keating endorses, then, what might be termed a 'twin-track' view of strict liability in tort: one track is based on wrongdoing, the other track is based on interpersonal fairness.[9]

RR stands as a powerful and elegant case against (1) and (2).[10] In this paper, I will first explain *RR's* case against (1), and elaborate on how it may be still further strengthened. Then, somewhat more critically, I will (a) suggest that it is unclear why *RR* rejects a more expansive wrongs-based account of strict liability such as (3), and then (b) suggest that the fairness principle defended in *RR* needs further refinement.

I. JUSTIFYING *SOME* STRICT LIABILITY

The purpose of this section is first to explain why strict liability might be considered *prima facie* morally objectionable, and then how Keating's arguments can be understood to address these objections. In doing so, I will briefly analyse different species of strict liability, what makes them potentially objectionable, and further strengthen Keating's arguments for some form of strict liability.

At the outset, strict liability was characterised as involving liability in respect of an invasion regardless of whether reasonable precautions have been taken against the invasion.[11] This encompasses at least the following kinds of liability:

> *Liability for fact-relative permissible harm*. A's harming B was permissible (e.g. A harmed B's property to save A's life).

[6] G Keating, *Reasonableness and Risk* (Oxford: OUP, 2022), 260.

[7] Keating (n 6), p. 263.

[8] Keating (n 6), *passim*.

[9] On 'twin-track' theories of strict liability, see Jansen (n 1), who argues against such views in favour of a unified 'outcome responsibility' theory of liability to compensate.

[10] The book also provides a superb critique of consequentialist, economistic, accounts of fault and a persuasive defence of the role of interests in normative theorising about liability. Here I focus only one, if important, strand of the book.

[11] I use 'invasion' to cover harmful interferences and other interferences with a person or their resources that are right-infringing.

Liability for evidence-relative permissible harm. A's harm-causing conduct was permissible based on the evidence reasonably available to A at the time of A's harm-causing conduct (e.g. A harmed B based on a reasonable mistake about B's being about to attack A).
Liability for excused harm. A's harming B was not permissible, but nor was it culpable (e.g., arguably, A damaged B's leg because C threatened to break both of A's legs unless A did so).[12]
Liability for non-responsible harm-causing. A harmed B without A's agency being implicated directly in the harm-causing (A falls on B during a heart attack, damaging B's leg).

A's *prima* facie objection to liability plausibly varies across these types of strict liability.[13] As to the first, A's objection might simply be that A is required to bear the cost of undoing B's harm, despite A not having acted contrary to what morality required in harming B. If A was free of a requirement not to harm B *ex ante*, then, the objection goes, A should be free of a requirement to undo the harm *ex post*. A second *prima facie* objection that A can raise in relation to some forms is that A had no reasonable opportunity to avoid harming B. A third, overlapping, *prima facie* objection is that, under some forms of strict liability, whether A is made to bear a cost for the sake of B is a matter of brute luck: A bears a potentially harmful cost without being able to control through A's choices whether that cost materialises.

Keating defends the permissibility of instances of strict liability of the first three kinds. Essentially, there are two main strands to his thinking: a fairness principle and a rights principle. Each of these is considered in greater detail below; my aim here is simply to explain how these ideas could in principle meet apparent objections to strict liability.

The rights-based principle defended by *RR* seeks to meet the first objection by arguing that some rights are fact-relative rights, primarily because of the nature of the interest which justifies those rights.[14] Thus, if A uses B's property based on a reasonable, but mistaken, belief that B consents to the use, A nonetheless violates B's rights. If successful, this meets the first objection and justifies liability for evidence-relative permissible harm, when this amounts to the violation of a fact-relative right. In some cases, the second and third

[12] This is still liability regardless of 'reasonable precaution' so long as 'reasonableness' is understood more broadly.

[13] A's prima facie objection is not that that A is being *blamed* without A being at fault. Being morally or legally 'liable' to compensate could mean at least three things: (i) that one is subject to another's power to be placed under a duty to compensate, (ii) that one simply has a duty to compensate, (iii) that a cost may be imposed upon one, without one's consent, to compensate another without one being wronged. Simply being in one or more of these normative positions does not involve anyone *doing anything* or *holding any attitude*. So none of them necessarily involves *blaming*, which is an act or an attitude. Nor does acting upon any of these normative positions, by holding a person liable, necessarily involve such acts or attitudes.

[14] See below, Section "Justifying strict liability wrongs".

objection – that the person liable cannot reasonably avoid the invasion and that the cost is a matter of brute luck – will still stand, but since A has violated B's fact-relative right, these objections might be overcome.

In support of liability for evidence-relative permissible harm on the basis of a fact-relative right violation, Keating might also have appealed to the permissibility of defensive action against persons who mistakenly, but reasonably, threaten harm in putative self-defence. For instance, suppose that I reasonably believe that you are attacking me, but this is not in fact the case. Relative to the evidence, it is permissible for me to harm you in self-defence if this is a necessary and proportionate means of avoiding the putative attack. It is typically thought, however, that you are entitled to defend yourself against this attack, which is impermissible relative to the facts. If you are entitled to harm me in self-defence *ex ante*, it's not clear why you can't then impose the cost of compensation *ex post*, on me, in the event that I did in fact harm you. If harming evidence-relative permissible threats in self-defence is sometimes permissible, then imposing compensatory costs on evidence-relative permissible harm-causers in compensation must also sometimes be permissible. For example, suppose that the only way you can defend yourself in the mistaken attacker hypothetical is by throwing my chest containing £10,000 at me, thereby preventing the harm. If that is permissible, it is unclear why taking the £10,000 after the fact is impermissible if that is a necessary means undoing the harm.[15]

The fairness principle defended by *RR* is what is said to justify liability of the first kind – for instances of fact-relative permissible harm-causing, and some instances of liability of the second kind, such as enterprise liability. This fairness principle is primarily concerned with the distribution of benefit and burden of harmful agency.

To illustrate, consider *Vincent v Lake Erie Transportation Co*: A knowingly damages B's commercial property in the course of saving A's employer's considerably more valuable commercial property during an emergency.[16] A was held liable to compensate B. *RR* agrees with this outcome:

[15] For a more extended treatment of this, see Sandy Steel, 'Defensive and Remedial Liability' in J Oberdiek and P Miller (eds) *Oxford Studies in Private Law Theory* (Oxford: OUP, 2022).

[16] 124 N.W. 221 (Minn. 1910).

> It is unfair for the shipowner to save his ship by damaging the dock and then refusing to repair the damage to the dock. The benefit of doing that damage is borne by the shipowner, and the burden is borne by the dock owner. Fairness prescribes proportionality of benefit and burden. Making reparation for the harm done prevents the injustice of shifting the cost of the ship's salvation from the shipowner who profits from it onto the dock owner who suffers from it.[17]

How, then, does this fairness argument meet the objection that the shipowner had no *duty* not to damage the dock? If morality has determined that the harm-causing is permissible then there is no (all-things-considered) *duty* not to inflict the harm. If so, the objection runs, it is puzzling why there could be a *duty* to undo the harm. Duty in, duty out; no duty in, no duty out.[18]

RR in effect argues that interpersonal fairness goes beyond a concern for respecting the primary duties grounded in another's rights. Even if A's act of harm-causing was permissible, and so not a right-violation to B, this does not entirely settle, Keating argues, the question of whether it is fair for A to compensate B. If it were otherwise, then one innocent person could foist upon another innocent person the *entire* cost of protecting their own property interests.[19] *If I destroy your car to save my house in an emergency, this might be permissible, but how could it be consistent with fairness for the whole cost of protecting my property to be borne by you, at least assuming background distributive justice? At a minimum*, fairness would require us to *share* this cost.

To buttress this observation, it might also be noted that if the damaged owner is not entitled to compensation, then the injurer is permitted to impose a cost upon the owner which is significantly greater than the cost that the owner would have been required to bear to protect the injurer's property interests. Many of us think that we morally owe each other some minimal positive protection when another person's *life or fundamental interests* are in imminent danger and we can assist them at low cost. But notice how limited this duty is: it requires imminent danger to a person's *life* or *fundamental interests* and the cost to the duty-bearer must be low. If there were no entitlement to compensation in *Vincent*, then the damaged owner would have to bear substantial cost to save another's *commercial property*. So the cost that the property-holder is being required *de*

[17] Keating (n 6), at 251.

[18] See Oberdiek (n 2), above.

[19] See also Keating (n 6) pp. 55–56.

facto to saddle goes *far* beyond a plausible conception of what they are morally required to bear for the sake of others.

Now, it might be objected that in *Vincent* the plaintiff *would have been required to allow the dock to be damaged* – for instance, they could not have exercised their right to exclude the shipowner in the circumstances. Thus, it might be said, the plaintiff *does* have a duty to bear the cost of saving the shipowner's property. Plausibly, however, when only property is at stake, that should be precisely when and because the damaged owner can reasonably expect compensation to be paid for the infringement.[20] If the owner *knew for certain* that the defendant would not be able to compensate after the fact, they could justifiably – as a matter of morality – prevent the docking – at least on the assumption that the *only interests at stake are fungible, property interests*, and not risks to life and limb. It is not obvious why I should be required to allow damage of my fungible property to save your more valuable fungible property unless I can be reasonably confident you will compensate me after the fact. Such a requirement (to allow property harm without compensation when the only interests at stake are financial) goes far beyond any plausible conception of interpersonal moral *duties* of assistance.

Finally, in relation to the fairness principles, it is worth noting that Keating also plausibly attributes significance, as a matter of fairness, to whether the harm, or risk of harm, can be considered a *chosen* aspect of some activity. Part of the fairness-based case for enterprise liability is that certain risks of harm are a statistically known, and so choose-able, incident of certain activities. The more that the decision to enter a risk-imposing activity can be understood as a matter of free choice, the less the force of the brute luck and avoidability objections. For instance if we have exquisitely safe and cheaply available AI-powered vehicles, the choice to drive a non-autonomous vehicle, even if not *so* risky as to be wrongful in itself, may meet the *prima facie* objection to strict liability on this kind of basis.

[20] The position is plausibly different when a person's life or comparable interests are endangered: Kenneth W. Simons, 'Self-Defence, Necessity, and the Duty to Compensate', *San Diego Law Review* 55 (2018): pp.357-380, at p. 377.

II. JUSTIFYING STRICT LIABILITY WRONGS

Central to *RR's* account of rights-based strand of strict liability is the notion of 'sovereignty'. Some rights confer 'a power of control over some physical object…or control over one's own self'.[21] In these cases, infringing upon the object protected by that power of exclusive control violates the right, even if 'entirely reasonable and justified'.[22] Unlike Arthur Ripstein's Kantian account of these rights, according to which the rights and their correlative duties are reflections of the normative equality of the parties governed by them, *RR* grounds these rights in underlying autonomy interests.[23] When one of these rights is violated, the right-holder is *wronged*: these are strict liability wrongs.

Three central points are made by Keating in favour of the *strictness* of the liability here. First, if interferences with the object protected by the right were permitted simply because the interference produces greater net benefit overall, or even overall benefit to the right-holder, the underlying autonomy interest would be compromised: 'the right itself would be unacceptably compromised by tolerating all reasonable (or justified) boundary crossings without regard to whether consent was given'.[24]

Second, if A innocently damages B's property, reasonably believing that the property is A's, there is a choice to be made between two innocents: the innocent right-violator and the innocent victim. In these circumstances, '[r]equiring someone whose rights were violated through neither fault nor action on their part to suffer the unrepaired consequences of that wrong is surely more unjust than holding the party who innocently wronged them responsible for having done so'.[25]

Third, if nominal damages were not awarded for an interference with another's property that benefits the owner nor restitution of proceeds made from an unauthorised sale of another's thing, this is

[21] Keating (n 6), p. 56.

[22] Keating (n 6), p.56. Initially, it was not clear to me why *Vincent* is not then a case in which the harm-causing conduct is still a wrong: the conduct was 'entirely reasonable and justified'. In which case, at least one strand of the 'conditional duties to compensate' would be based on a primary wrong (contrary to the book's claim). The answer may be that 'reasonable and justified' is here being understood in this passage as 'cost-justified'.

[23] Keating (n 6) pp. 84–85; 89–90; 245–246.

[24] Keating (n 6) p. 57.

[25] Keating (n 6) p. 245.

'tantamount to denying that the plaintiff, in fact, owned the property'.[26]

A. Why not more strict liability for fact-relative wrongs?

The main point I wish to make is that these arguments – at least the first two – also *prima facie* support the existence of a general fact-relative right not to be damaged by others' action in relation to one's body, psychological integrity, and property. It can similarly be argued that the interest(s) grounding one's rights against others in relation to these matters would be 'unacceptably compromised' if the violation of that right depended upon others' reasonable beliefs about whether their conduct posed a substantial risk of harm. And it can be argued that, as between the innocent violator of a fact-relative right not to harmed in relation to these interests, and the victim of such a violation, fairness demands that the latter be favoured. If this were accepted, *RR*'s position would be more like (3) in the list at the beginning of this paper: damaging another's body (etc.), even with reasonable precautions, would be an innocent *wrong*, and fault would then need to be justified as an exceptional cut-back to generalized strict liability for wrongs.

Can a line between 'strict liability for violations of sovereignty rights' and 'strict liability for harmful damage to others' right-grounding interests' ultimately be defended? One possibility is that fact-relative rights against *intentional*, non-consensual interference with our bodies and property represent the most grave risk to our status as free and equal persons and the 'fact-relativity' of the duty represents this fundamental importance. Unauthorised *intentional* interference with a person, even if innocent, is still inconsistent with each person standing to the other as an equal. By contrast, innocent evidence-relative permissible *risks* of harm which accidentally ripen, as a side-effect, into fact-relative impermissible harm are not inherently inconsistent with each person's equality. Standing alone, it's not clear to me that this is a sufficient justification – our fundamental interests in bodily integrity and psychiatric integrity might also be considered to justify fact-relative protection, and innocent causation

[26] Keating (n 6) p. 245.

of harm to those interests also inherently inconsistent with our standing as equals to each other.

A different argument points to the costs – broadly understood – to putative duty-bearers of fact-relative duties not to cause harm to right-grounding interests. As a general matter, we can know whether we will impermissibly violate another's sovereignty rights. In the event of doubt, one can normally simply seek explicit consent. Or one can simply decide not intentionally to interfere with another person's body. Consequently, none of us is cowering at home as a result of the risk of violating a fact-relative sovereignty-based duty in relation to others' bodies. By contrast, the argument goes, liability for fact-relative duties not to cause harm to right-grounding interests would lead to a paralysis of action: every action would carry the risk of liability for innocent causation of harm. The connection that must exist between the agent and the interference in trespass is largely bound up with what counts as the agent's 'doing' and is limited to cases in which the interference is intentional. By contrast, the concept of causation extends far beyond an agent's doings, and is not limited to an initial *intended* interference. There is thus a significantly greater probability of such liability and the risk cannot realistically be avoided.

This 'paralysis' argument seems unlikely to hold, however, if strict liability were restricted to known or reasonably foreseeable risks, when these risks are permissibly imposed for one's own benefit. More fundamentally, concerns about the empirical effect on behaviour seem irrelevant to what rights a person has against other. These are rather relevant to whether duty-bearers should be *immunised* from fact-relative liability. Compare: suppose that medical negligence liability overdeters medical professionals. It simply does not follow that patients do not have a right to careful treatment; whether professionals should enjoy a limited immunity because of the negative effects of ordinary liability is a separate question.

Finally, it might be contended that general fact-relative duties not to cause harm to right-grounding interests stretches the concept of duty beyond breaking point. Fact-relative duties do not 'guide' in the sense that there can be occasions on which one will not, reasonably, be able to know facts which would allow one to avoid breaching the duty at the time when, relative to the facts, one ought to abstain

from the act mandated by the duty.[27] Moreover, one can (for the same reason) breach such duties without being apt for blame. What normative role do such duties have if they are not conduct-guiding in this sense, nor markers of the *pro* tanto aptness of blame? Whatever one makes of that, the difficulty remains that this is a *general* objection to fact-relative duties: it would encompass fact-relative sovereignty-based duties as well as others.

One final try: perhaps what is distinctive about fact-relative trespass is that it is permissible, within the limits of necessity and proportionality to *stop*, with force, the act constitutive of the trespass. By contrast, the argument runs, there is no *act* that can be permissibly stopped in the case of fact-relative duties not to harm. Your act of *driving* may not be stopped simply because of the tiny risk of your car careening out of control and killing me. Indeed, there may be no *act* at all to be stopped – it may just be that the detrimental causal consequences of some earlier innocent act of yours are headed my way. Suppose you innocently use some chemical in treating your crops and it turns out, despite all reasonable precaution, it is toxic and the toxin has made its way to my land, several miles away. There is no 'act' of yours that can be stopped. But this isn't comparing like with like. If we knew that your act of treating your crops was toxic, it would be the kind of act that it would be permissible to stop. It's just that agents typically do not have sufficient evidence to know of the risk prior to its being about to ripen into harm in such cases, whereas in trespass situations at least third parties could frequently reasonably have evidence that the act is impermissible relative to the facts *at the time of the act* constitutive of the trespass.

B. Why not permissible wrongs?

As we have just seen, *RR's* account of strict liability *wrongs* is limited to sovereignty rights. It is also limited in further way: in cases in which a person *permissibly* interferes with another's right-protected interest, *RR* holds that there is no wrong, only a conditional duty to compensate. In this way, *RR* diverges from the position defended by, among others, John Gardner, Arthur Ripstein, and John Goldberg; these authors hold that the defendant's conduct in certain cases of

[27] On the 'guidance' objection to objectivist views about obligation, see Peter Graham, *Subjective versus Objective Moral Wrongness* (CUP, 2021).

permissible harm-causing that generates liability is a *wrong* (but, at least in Gardner's case) not all-things-considered wrongful.[28] On this view, there can be justified or permissible wrongs, but since there is still a wrong, the damage-causer can justly be required to compensate for it. In *Vincent*, for instance, damaging the plaintiff's dock in the emergency in order to save the cargo was permissible, on this view, but still a wrong to the dock-owner.

Keating rejects this view. His central point is that duties determine what one *must do*, and so in cases in which it is not true that one *must* do x, then it is incorrect to describe one as having a duty. In *Vincent,* since it is not true that the shipowner ought not to damage the dock, the shipowner had no duty not to damage the dock in the circumstances.

Should we prefer the Gardnerian view that liability is conditioned in *Vincent* on a permissible wrong or Keating's view that liability is conditioned on a non-wrong? Gardner's most persuasive examples of the alleged phenomenon of permissible wrongs involve moral tragedies. That one can permissibly wrong another is the 'galling lesson' of *Sophie's Choice*, in which the Auschwitz Kommandant tells Sophie she must choose which of her children to send to their death, else he will send both:

> As a parent Sophie has a duty to protect her children – both of her children – from being killed. Neither the fact that she was justified in handing over one of her children in order to save the other, nor the fact that handing over her daughter was the only way she had to do her duty to protect her son, entails by itself that she did not thereby breach that same duty as owed to her daughter. That thanks to his proposal Sophie could not but breach her duty to at least one of her children was the main point of the Kommandant's sadistic plan.[29]

Sophie, on this view, permissibly wrongs her daughter. Whatever we think of this, it seems inapt as a description of cases like *Vincent*. *Vincent* is not the stuff of tragedy. Should the defendant in *Vincent*, if he pays compensation, remain anguished by moral guilt about the action? Surely not. Ought he or she distinctively to *regret* the damage? Plausibly, yes, but the aptness of regret need not imply that the action was a wrong. If compensation is paid there is plausibly no normative remainder at all, or no normative remainder that is downstream of a wrong, in cases where one person damages

[28] See John Gardner, 'Wrongs and Faults', *Review of Metaphysics* 59(1): pp.95-132; John Goldberg, 'Inexcusable Wrongs', *California Law Review* (2015) 103: pp.467-512; Ripstein above (n 3).

[29] John Gardner, 'Criminals in Uniform', in Antony Duff, Lindsay Farmer, Sandra Marshall, Massimo Renzo and Victor Tadros (eds), *The Constitution of Criminal Law* (Oxford: Oxford University Press 2012).

commercial property to save more valuable commercial property.

Nonetheless, there might still be room for *some* cases of permissible harm in which this description is apt; for instance, if I had to destroy your home to save my life, the act may be permissible, but it's more than you can reasonably be expected to bear for my benefit, potentially even with compensation. In such a case, describing the conduct as a permissible wrong seems to capture the moral tension in such cases, and marks out such conduct as seriously problematic, despite being permissible all-things-considered. But this isn't *Vincent*.

III. FAIRNESS AND BENEFITS

As we have seen, in relation to cases of intentional or knowing infringement of another's rights, such as *Vincent, RR*'s analysis focuses on the *benefit* the harm-causer obtains from damaging the other person's property to justify liability:

> It is unfair for the shipowner to save his ship by damaging the dock and then refusing to repair the damage to the dock. The benefit of doing that damage is borne by the shipowner, and the burden is borne by the dock owner. Fairness prescribes proportionality of benefit and burden. Making reparation for the harm done prevents the injustice of shifting the cost of the ship's salvation from the shipowner who profits from it onto the dock owner who suffers from it.

This explanation draws a plausible contrast between cases in which one person altruistically intervenes to injure one person to save another and cases where one person injures another to protect their own interests. Interpersonal fairness strongly demands compensation in the latter, but not the former cases. This is another reason why the *wrongs* view of such cases seems problematic: it suggests that there should be a duty of compensation in *both* situations. At most, an altruistic intervener has a reason to compensate, not a duty, except perhaps when compensation would be required by easy rescue, or by the general duty to protect from future harm that one has when one is an innocent creator of another's harm.

Despite its appeal, Keating's fairness principle faces some difficulties. First, if it is *the benefitting* from harmfully infringing another's right which is the central explanation of why it is unfair not to compensate, this seems too restrictive. The result should be the same if the shipowner had reasonably tried to save his or his employer's cargo by damaging the dock, but had not succeeded. *Actual* benefit is not required. Yet if the principle is extended to action

which is permitted because of its *expected* personal benefit, it is less clear what the rationale for the principle is. If the injurer actually benefits to an extent than the harm caused then one can at least say, by way of justification of their liability, that the liability makes them no worse off. However, if benefit extends to *expected* benefit, then liability may well make the injurer worse off since the cost of compensation may well exceed the actual benefit from the harm.

Here is a different, related, suggestion: it is the fact that your interests, or the interests of someone to whom you stand in a special relation, give rise to the permission – including an evidence-relative permission – to interfere with another person's non-forfeited right which explains the duty to compensate. It is not necessarily the *fact* of benefit, but the role your interests play in grounding the permission to interfere with a non-forfeited right which matters. This suggestion preserves, however, the plausible distinction between harm resulting from permissions grounded in one's own interest and harm resulting from permissions grounded in the interests of others. It also reaches the plausible result that the person(s) whose interests ground the permission which was harmfully acted upon for their benefit owe duties of compensation to the persons harmed. In the standard trolley problem, then, the five beneficiaries would owe duties to compensate the estate of the single person killed.

Second, although Keating's benefit-oriented fairness principle, or a modified version thereof, seems intuitively apt to justify compensatory duties when one person intentionally infringes another's right for their own benefit, it is not obvious how or why it can be contained to such cases. All of our actions pose some risk of harm on others and our own interests in freedom of action and pursuing our own projects permit the imposition of those risks. Unless we are pursuing the ends of others, when we act and impose risk we are always implicitly relying upon a permission grounded in our own interest.

There is a gap, however, between permissible *intentional or knowing harm-causing* for one's benefit and permissible *risk imposition* for one's benefit that leads to harm.

It might be suggested this difference is significant because in the former case the agent *chooses* to impose the harm, whereas in the latter, this is not necessarily so. The thin sense in which the agent

'chooses' to save his life rather than die, however, in a modified *Vincent* type scenario where the injurer's life is at stake is unlikely to be capable of bearing such moral weight, however, so as to justify compensation in one case but not the other.

A generalisation of the fairness principle that justifies liability in *Vincent* might also be resisted on the basis, already mentioned above, that there are special moral restrictions on intentional or knowing harm-causing to innocent persons (in relation to their right-protected interests). On this view, it is the fact that one is exceptionally permitted to act contrary to these restrictions for one's benefit which justifies, as a *quid pro quo*, compensation. There is no parallel special restriction, it might be said, in relation to *risk* imposition.[30] This also seems partly to underpin *RR's* distinction between the world of 'acts' and 'activities': in the latter case, the agent knows that, as a statistical matter, they will cause harm to someone or other. In the 'acts' case involving individuals this is only true in trespass-like situations.

A different way of opening up a gap here is to resist the idea that every risk imposition somehow calls for justification by the benefit of freedom of action or pursuit of one's project. Some risks are 'ordinary' in the sense that they are necessarily incidental to being an agent in the world, and one doesn't need to justify the risks that one needs to impose simply to operate as a choosing being. It is then only in relation to 'additional' risks that one should bear liability for the materialisation of the risks into harm. This idea would still generate more wide-ranging strict liability than *RR* allows: I doubt that the risks imposed by driving count as 'ordinary' risks in this sense.

Third, it is not clear, fundamentally, when benefitting from harm is duty-generating. As Keating recognises, benefitting from certain setbacks to a person's interests does not generate a duty to compensate. If A's coffee shop is better than B's coffee shop, A may benefit from the worsening of B's economic interests, yet A does not owe B compensation. The principle needs limited to cases in which B has not lost a certain kind of moral objection to bearing a cost by their act, or where B's having an immunity from bearing that cost would otherwise not be reasonable. For instance, if A has voluntarily assumed a duty to protect B from serious harm, and A must suffer harm to discharge this duty, B benefits from A's being harmed, but A

[30] For a similar separation between (effectively) trespass and negligence in the self-defence literature, see J Quong, *Defensive Force* (Oxford: Oxford University Press, 2020).

owes no compensation (except any agreed upon). Likewise, to the extent there are any non-acquired moral duties to benefit others by protecting them from serious harm at minimal cost, it is not obvious why benefitting from the performance of those duties requires compensation. *If* others can reasonably be expected, i.e. required, to bear *some* cost to benefit us by protecting us from serious harm, then surely we are not always required to compensate them for doing so.[31] In these cases, the fact that A benefits at the expense of B is trumped by the duties owed between A and B in relation to those benefits and harms or by B's otherwise having liability to bear a cost.

It seems, then, that the fairness principle needs to be restricted to cases in which B does not have a duty to provide the benefit to A nor is B liable to bear the harm. In these cases, A benefits from harm to a person who retains their moral protection against bearing the harm. Now a further difficulty arises. If the rationale of liability in such cases simply focusses on the fairness of the distribution of benefits and harms, it becomes unclear what role A's agency – A's doing the harm – plays in the justification of the principle. Clearly, A could benefit from harm to B that is not caused by A's agency. Suppose B's car is in front of A's car on the highway, and C's faultlessly out-of-control vehicle smashes into B, such that the damage to B's car protects A from physical injury. Perhaps the better view is that in cases in which A innocently causes harm to an innocent B, A has a reason to compensate B, and fairness provides a further, independent reason for compensation when A benefits from this harm, but that fairness goes beyond such cases of innocent agency.[32]

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[31] This is consistent with there being duties to assist which are conditional upon rights to compensation. Sometimes the cost of assistance will be too high unless it is coupled with a right to compensation for the assistance.

[32] For a defence of the view that benefitting from harm provides an independent ground for a duty to compensate, in the absence of agency, see Adam Slavny, *Wrongs, Harms, Compensation* (Oxford: Oxford University Press, 2023). Slavny also appeals to intuitive fairness in this regard.

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