

2004

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Recommended Citation

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

Available at: <http://ir.lawnet.fordham.edu/flr/vol72/iss5/22>

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RIPSTEIN, RAWLS, AND RESPONSIBILITY

Stephen Perry*

Arthur Ripstein's article, *The Division of Responsibility and the Law of Tort*,¹ is primarily concerned with an age-old but nonetheless perennially intriguing question, which is, what is the proper relationship between corrective and distributive justice? The answer he offers to that question is complex and subtle, and while it is advanced within a Rawlsian framework, it does not represent Rawls's own explicit position. As Ripstein notes, Rawls does not address this subject in any detail. Rawls maintains that corrective justice—the justice of interpersonal transactions—presupposes a just distribution,² and also that it has a certain independence from distributive justice.³ There are well known difficulties with reconciling these two claims,⁴ and Rawls himself says little to show how the required reconciliation can be achieved. Ripstein's very interesting suggestion is that the solution to this problem is implicit in Rawls's notion of a "social division of responsibility."⁵ In this Essay, I want very briefly to sketch Ripstein's proposal and offer a couple of preliminary observations about its viability.

Ripstein argues that the deeper Rawlsian solution to the corrective/distributive problem cannot be regarded as having its roots in the methodology of the original position. This is so for two reasons. The first is the fairly straightforward point that the original position is an expository device, so that we can only get out of it what we have already put in. The second and more serious reason, however, builds on Thomas Pogge's argument that the methodology of the hypothetical contract is unavoidably consequentialist and aggregative in character.⁶ This is because the parties in the original position are choosing principles that govern very general and pervasive

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1. Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *Fordham Law Review* 1811 (2004).

2. See John Rawls, *A Theory of Justice* 9-10 (rev. ed. 1999); John Rawls, *Political Liberalism* 266 (1993).

3. Rawls, *Political Liberalism*, *supra* note 2, at 266-69.

4. See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *Oxford Essays in Jurisprudence*, 4th Series 239 (Jeremy Horder ed., 2000).

5. John Rawls, *Social Unity and Primary Goods*, in *Utilitarianism and Beyond* 159, 165 (Amartya Sen & Bernard Williams eds., 1982).

6. Thomas Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 12 *Soc. Phil. & Pol'y* 241 (1995).

institutional arrangements—the basic structure of society, in Rawls's phrase—and in doing so they focus exclusively on outcomes rather than on, say, individual actions: “[T]he problem with the contract argument is that the parties in the original position attach value only to states of affairs.”⁷ It is, however, individual actions, rather than states of affairs, that comprise the domain of corrective justice. Beyond that, the structure of corrective justice and tort law is, as Ripstein correctly observes, deontological in nature: It assumes that there are universal obligations, in the form of constraints on action, which every individual owes to every other individual. The hypothetical contract does not offer a promising foundation for explaining this structure because in the original position “the distinction between harms that I suffer in general and those harms that are brought about through the wrongdoing of others is invisible.”⁸ Ripstein thinks that Rawls's arguments for his two principles of justice nonetheless survive this criticism of the methodology of the original position, thereby deflecting challenges from libertarianism, utilitarianism, and skeptical egalitarianism, because those arguments are ultimately grounded in Rawls's conception of the person rather than in the hypothetical contract as such. That conception supposes that moral persons are moved by two highest-order moral interests, which are the interests such persons have in realizing and exercising the two capacities of moral personality. Those capacities are, in turn, “the capacity for a sense of right and justice . . . and the capacity to decide upon, to revise and rationally to pursue a conception of the good.”⁹

Ripstein argues that the independence of corrective from distributive justice can likewise be established within a Rawlsian framework without appeal to the hypothetical contract or the original position. As a practical matter, “independence” here means the establishment of institutions of tort law, and of private law generally, which assess interactions between persons in their own terms, and thus without direct reference to background distributive concerns. Ripstein's starting-point in defending this claim about independence is, as was noted earlier, Rawls's “division of social responsibility” between society and the individual. Rawls maintains that once we have all been provided with a just and adequate share of primary

7. Ripstein, *supra* note 1, at 1823. The argument is reminiscent of Ernest Weinrib's criticisms of Charles Fried's early attempt to defend a Kantian interpretation of tort law. Fried attempted to ground that interpretation in a “risk pool” that was viewed from the perspective of a contractarian original position. See Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* 61-66, 183-200 (1970). Weinrib argued, among other things, that such an approach “would lack the required structure of corrective justice.” Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *Law & Phil.* 37, 46, 56 (1983).

8. Ripstein, *supra* note 1, at 1823.

9. Rawls, *Social Unity and Primary Goods*, *supra* note 5, at 164-65.

goods, we each have a special responsibility to make what we will of our own lives within the constraints set by the two principles of justice.¹⁰ Ripstein suggests, plausibly enough, that this division of responsibility entails that we may not demand more than our fair share of resources if we make a choice that we come to regret, nor is it up to society to choose a conception of the good on our behalf.¹¹ Each individual uses his fair share of primary goods to choose and pursue a conception of the good for himself; each uses those goods, in other words, to exercise the second moral power.

The crucial step in Ripstein's argument is the claim that there is a further dimension to the Rawlsian division of responsibility. The special responsibility of moral persons extends, he argues, beyond the relationship between individuals and society to encompass relations among individuals themselves. It is, on Ripstein's view, this extension of the notion of special responsibility that grounds both the independence of corrective justice and its deontological content. The special responsibility we each have for our own lives would be seriously undermined, he suggests, if individuals were allowed to displace some of the costs of their own life-plans onto others.¹² If someone wrongs me by using what is mine without my consent, she violates my special responsibility for my own life "by making use of powers or goods that are mine in pursuit of something that is not part of my conception of the good."¹³ If she wrongs me by damaging some of my resources as a by-product of her own activities, "[she] interfere[s] with my ability to take responsibility for my own life . . . [by depriving] me of the means I [previously] had to do so."¹⁴ One of the appropriate institutional responses to either type of wrong—there may be others, such as criminal punishment—is the paradigmatic tort remedy of an award of damages, the purpose of which is to make the victim whole. The imposition of such a remedy will, of course, change the pattern of holdings in society, but Ripstein argues that the change is acceptable from a Rawlsian point of view precisely because it is traceable to the special responsibility of the wrongdoer.¹⁵ Rawlsian distributive justice calls for certain institutional arrangements, such as

10. *See id.*

[S]ociety, the citizens as a collective body, accepts the responsibility for maintaining the equal basic liberties and fair equality of opportunity, and for providing a fair share of the other primary goods for everyone within this framework, while citizens (as individuals) and associations accept the responsibility for revising and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation.

Id. at 170.

11. Ripstein, *supra* note 1, at 1831.

12. *Id.*

13. *Id.* at 1833.

14. *Id.*

15. *Id.* at 1840-41.

progressive taxation, rather than for a specific pattern of holdings. Part of the reason for adopting an institutional approach is to allow for changes in holdings that result from the choices of individuals, and the changes that are associated with the rectification of a wrong are appropriately viewed as flowing from just such a choice.¹⁶ Ripstein puts the point by saying that if I wrong you and I have to pay damages as a result, “[i]t is as though I had injured myself, or damaged my own property.”¹⁷

This is a very interesting argument, and I believe that it contains an important kernel of truth about the relationship between corrective and distributive justice. But I also believe the argument cannot bear the entire weight of the conclusions that Ripstein hopes to derive from it. My discussion, which will inevitably be too brief to do justice to Ripstein’s rich and subtle development of Rawlsian themes, will focus on two related issues. The first concerns the methodology that is presupposed by Ripstein’s argument. The second concerns the range and character of the possible social arrangements that the underlying methodology would recognize as permissible.

Let me discuss the methodological issue first. As was noted above, Ripstein accepts Pogge’s argument that the reasoning of parties in the original position will inevitably be consequentialist in character, because the parties are concerned with the assessment of states of affairs rather than with the assessment of individual actions. I agree with Ripstein that Pogge’s argument is compelling and, consequently, also agree that the deontological content of tort law cannot be derived from the methodology of the hypothetical contract. But this rejection of Rawls’s own preferred methodology very quickly leads us to ask what methodology underlies Ripstein’s Rawls-inspired argument from the division of responsibility. Ripstein is clearly emphasizing and relying upon the Kantian strand in Rawls’s thinking. But if we are not simply to turn Rawls into Kant there must presumably be something distinctively Rawlsian about the argument. Kant’s own methodology for establishing first-order moral conclusions is essentially conceptual in character, and it makes strong metaphysical assumptions about noumenal selves. Rawls introduced the notion of the original position precisely in order to avoid these aspects of Kant’s approach:

The original position may be viewed, then, as a procedural interpretation of Kant’s conception of autonomy and the categorical imperative within the framework of an empirical theory. The principles regulative of the kingdom of ends are those that would be chosen in this position, and the description of this situation enables us to explain the sense in which acting from these principles

16. Elsewhere I have defended essentially the same view of how it is that corrective justice can change the pattern of holdings without affecting the justice of those holdings. See Perry, *supra* note 4, at 253-63.

17. Ripstein, *supra* note 1, at 1841.

expresses our nature as free and equal rational persons. No longer are these notions purely transcendent and lacking explicable connections with human conduct, for the procedural conception of the original position allows us to make these ties.¹⁸

As this and many other passages in both Rawls's early and later work make abundantly clear, the ultimate foundation for his theory of justice is his conception of the person as free and equal. The equality of persons is embodied in the capacity for a sense of right and justice, while freedom is embodied in the capacity to decide upon, to revise, and rationally to pursue a conception of the good. It is important to note that in the quoted passage Rawls recasts the categorical imperative "within the framework of an *empirical* theory."¹⁹ This is a point to which I shall return shortly. It is also important to remember that Rawls characterizes his conception of the person in terms of two highest-order *interests* that individuals have in exercising their two moral powers.²⁰ Any distinctively Rawlsian methodology must preserve this feature, and Ripstein's argument does, in fact, preserve it. For example, he endorses Rawls's conclusion that the rules governing individual transactions between persons must include rules permitting contracts.²¹ Ripstein characterizes the two main premises that support this conclusion as follows. First, "[m]y interest in having both my own powers . . . is an interest in having those things at my disposal, that is, to have them available to me, so as to pursue and revise my own conception of the good."²² Second, "[t]he power to enter into contracts makes distributive shares valuable to people in pursuing their own conceptions of the good."²³ It is this idea of making fair shares of primary goods valuable for purposes of choosing, revising and pursuing a conception of the good that is key. This idea must of course be given effect within a context of equality. Rawlsian persons do not want as much freedom as possible. Rather they want "as much freedom to set and pursue [their] own conception of the good as [they] can have in a way that is consistent with others having the same."²⁴ Still, the core of the argument is the idea that "[d]istributive shares are important because they enable choice[;] . . . they are the things wanted by parties concerned to protect their own ability to decide for themselves how to live their lives."²⁵

There are two main points to note about the methodology of Ripstein's argument, as thus construed. The first is that it preserves

18. Rawls, *A Theory of Justice*, *supra* note 2, at 226.

19. *Id.*

20. *See supra* note 18 and accompanying text.

21. *See Rawls*, *Political Liberalism*, *supra* note 2, at 265-69.

22. Ripstein, *supra* note 1, at 1837.

23. *Id.* at 1838.

24. *Id.* at 1832.

25. *Id.* at 1834.

the empirical character of Rawls's recasting of the categorical imperative. I will speak of the means for "enabling choice," to use Ripstein's convenient phrase, as shorthand to refer to the means for protecting the ability to decide for oneself how to live one's life. It is clear that different social arrangements can enable choice in different degrees, so that the preferable set of arrangements is the one that enables choice to the greatest degree that is consistent with equal enablement for all. But the determination of which set of arrangements that might be is an empirical question. At times Ripstein's argument from the division of social responsibility seems to be an almost purely conceptual argument about what it means to "have" one's fair share of resources, as when, for example, he maintains that "I only have things as my own to use in forming, pursuing and revising my conception of the good inasmuch [as] others are under an obligation to avoid interfering with them."²⁶ This proposition is undoubtedly true, but its truth is consistent with many different conceptions of what the obligations of others are, and the determination of which conception is optimal from the perspective of equal enablement of choice is clearly an empirical matter. Even more importantly, Ripstein is only in a position to make the conceptual claim because he implicitly assumes (along with Rawls) that "having one's share" is to be understood by reference to what Honoré calls "the 'liberal' concept of 'full' individual ownership."²⁷ This means, more particularly, that individuals have both a liberty to use and a right to exclusive possession. Once we have a right to exclusive possession then of course it follows as a conceptual matter that others are under a correlative duty. But what is minimally required to set and pursue a conception of the good is simply *access* to resources, i.e., a liberty to use resources. The argument that persons should also have a right to exclusive possession must be that the recognition of such a right will *improve* their (equal) capacity to set and pursue a conception of the good, as compared to a mere liberty to use.²⁸ This is a plausible enough claim, but the important point for present purposes is that it is empirical in nature. More generally, the meaning of "having one's fair share" must be determined *at every point* by an empirical inquiry into the optimal means for enabling choice in the requisite sense.

26. *Id.* at 1840.

27. A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence*, 1st Series 107, 107 (A.G. Guest ed., 1961).

28. Ripstein does not discuss the concept of property in any detail in *The Division of Responsibility and the Law of Tort*, but he says more elsewhere. See Arthur Ripstein, *Authority and Coercion*, 32 *Phil. & Pub. Aff.* 2, 11-12 (2004). He argues there that the concept of "secure title" involves both possession and use, and that "[s]ecure title in things is prerequisite to the capacity to both set and pursue ends." *Id.* at 12. For the reasons given in the text, this is too strong a claim.

The second point to be observed about Ripstein's methodology is that it must be characterized as consequentialist in character. The key element of his argument concerns the choice of institutional arrangements that will best advance an individual interest, namely, the interest that moral persons have in the exercise of their capacity to set and pursue a conception of the good. The choice among different institutional arrangements is simply a choice among different states of affairs, and it is thus consequentialist in precisely the sense that Ripstein recognizes in accepting Pogge's criticism of the methodology of the original position. It is true that Ripstein concludes that the optimal social arrangement will be one that incorporates distinct institutions to regulate redistribution on the one hand and interaction among individuals on the other, but this conclusion must ultimately depend on an empirical determination that such an arrangement best advances the interest that Rawlsian persons have in enabling choice. The content of the conclusion does not call into question the consequentialist character of the argument that must be advanced to support it. It is also true that the supporting argument must respect the equality of persons, but this point too is completely consistent with the argument's consequentialist character. After all, Rawls's purpose in introducing the idea of the original position was simply to make perspicuous the constraints that equality places on the choice of principles that are to regulate the basic structure; as Ripstein observes, the original position is at bottom an expository device. Ripstein's argument from the division of responsibility does not employ that device. But, because the argument makes a case for one institutional arrangement over others on the grounds that a particular interest that all persons have will be optimally advanced under conditions of equality, it is fundamentally similar to arguments that do. If you are a Rawlsian, it is not as easy as all that to escape from the original position.

This brings me to the second of the two related issues that Ripstein's argument from the division of responsibility raises. This issue, which follows naturally from the methodological questions that have just been considered, concerns the range and character of the possible institutional arrangements that the methodology of Ripstein's argument would recognize as permissible. In light of the discussion in the preceding two paragraphs, a fundamental premise of the argument must be the empirical claim that recognizing and enforcing interpersonal rights and obligations having a strong deontological content will not only advance the interest that Rawlsian persons have in enabling choice, but it will do so better than any other possible institutional arrangements. Perhaps this claim is true. But, because it is an empirical claim, it is perfectly conceivable that other institutional arrangements, which either recognize interpersonal rights and obligations that deviate from the content of traditional deontology or

which do not draw a strict line between corrective and distributive justice, might be justified instead. It is important not to be misled here by Ripstein's dual use of the term "responsibility." "Responsibility" for how one's life goes is not the same as "responsibility" for (certain of) the effects that one's actions have on others. For anyone with deontological sympathies it is of course natural to think that there *is* responsibility of the latter kind. But I take Ripstein to be arguing that deontological rights and obligations can be *derived from* the special responsibility that Rawlsian persons have for how their own life goes. For the reasons that were examined earlier, the derivation must depend on the empirical—and hence contingent—claim just described. There is thus nothing inevitable about the conclusions Ripstein reaches regarding the content and independence of corrective justice. Given the consequentialist character of the argument, it must in the end be regarded as essentially a coincidence that the rights and obligations to which it points happen to be coextensive with those recognized by traditional deontological theory.

Let me illustrate the point of the preceding paragraph with some concrete examples. As I remarked earlier, once the idea of "having one's fair share" is understood in terms of the liberal conception of full individual ownership, it follows as a conceptual matter that others are under a duty to respect my right to exclusive possession. This is the kernel of truth in Ripstein's argument from the division of responsibility. But, as I also remarked earlier, a Rawlsian defense of the conclusion that distributive justice should be understood by reference to full individual ownership must rest on the empirical assumption that this is the best way to advance the interest that Rawlsian persons have in enabling choice. Even when reciprocal duties to respect others' right to exclusive possession of their shares have been recognized, however, there is no reason why the duties that individuals owe to one another should be limited to the negative duties of traditional deontological theory. Consider, for example, Ripstein's discussion of the misfeasance/nonfeasance distinction. He argues that because free and equal persons "can only be interested in shares of primary goods if they have them in the requisite sense,"²⁹ they cannot be under any obligation to confer benefits on one another, no matter how significant the benefit or how easy it might be to confer it. "Such an obligation would undermine the sense in which what they have is their own."³⁰ But why should this be? While the argument has a conceptual flavor, there is no reason why the *idea* of having one's share should be undermined by, say, a duty of easy

29. Ripstein, *supra* note 1, at 1839.

30. *Id.* at 1840.

rescue.³¹ The claim must rather be psychological, and therefore empirical, in character. Understood in that way, however, it is not particularly plausible. Moreover, this does not even seem to be the right kind of argument. As we saw earlier, on a Rawlsian approach the appropriate conception of fair shares must be spelled out *at every point* by reference to empirical claims about what set of institutional arrangements best advances the interest in enabling choice. If, as might well be the case, that interest would be better served by a general duty of easy rescue than by a regime of pure negative duties,³² then the conceptual contours of “having one’s share” are determined accordingly. There is no *independent* conception of that notion that is available to be undermined.

The example of the preceding paragraph showed that the interpersonal rights and obligations that could permissibly be justified under the methodology of Ripstein’s argument might not coincide with the content of traditional deontological theory. Consider next a set of examples that shows how the line between institutions of corrective and of distributive justice might be blurred. Assume that distributive shares are properly defined by reference to the liberal conception of full individual ownership; individuals thus have a duty to respect one another’s rights of exclusive possession. Perhaps the existence of a right of exclusive possession conceptually entails the existence of a right to be compensated by someone who violates the primary right; I express no view on that issue here. However, even if there is such a conceptual entailment, it does not follow that there cannot be public rights of compensation that might supplement or even replace individuals’ private remedial rights. Consider victim compensation schemes, workers’ compensation plans, or a general New Zealand-style compensation program. All of these involve compulsory redistribution to provide compensation for private wrongs. All could in principle be justified under the methodology of Ripstein’s argument from the division of responsibility. From a Rawlsian perspective, the superiority of one such institutional arrangement over others depends entirely on whether that arrangement best advances the interest in enabling choice under conditions of equality.

31. This is true, it should be noted, even if the duty extends beyond dangers to the person so as to apply to at least some cases of danger to property.

32. It is sometimes argued that a duty of *easy* rescue cannot be justified because there is no principled basis for limiting the duty to situations where one could rescue another with little or no danger or inconvenience to oneself. See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 190 (1973). This objection has some force within traditional deontological theory, but it has no purchase against a Rawlsian argument for a duty of easy rescue. This is because the existence and scope of the duty depend entirely on the degree to which it advances the interest in enabling choice, and a duty of easy rescue might well be superior in this respect to a more onerous duty.

As I noted at the beginning of this Essay, Rawls does not say a great deal about the relationship between corrective and distributive justice. It is nonetheless striking to observe that the arguments he does offer in support of the independence of the two forms of justice have exactly the pragmatic, consequentialist character that our earlier discussion of methodology would lead us to expect. Rawls appears to take corrective justice as a given, and then argues that because background (i.e., distributive) justice will be eroded "even when individuals act fairly," "we require special institutions to preserve background justice."³³ He discusses the reason why we require *special* institutions in the following passage:

[T]here are no feasible and practicable rules that it is sensible to impose on individuals that can prevent the erosion of background justice. This is because the rules governing agreements and individual transactions cannot be too complex, or require too much information to be correctly applied; nor should they enjoin individuals to engage in bargaining with many widely scattered third parties, since this would impose excessive transaction costs. The rules applying to agreements are, after all, practical and public directives, and not mathematical functions which may be as complicated as one can imagine. Thus any sensible scheme of rules will not exceed the capacity of individuals to grasp and follow them with sufficient ease, nor will it burden citizens with requirements of knowledge and foresight that they cannot normally meet.³⁴

Rawls apparently does not think that there is any deep issue of principle at stake here. He is, rather, expressing a highly pragmatic concern with keeping the rules for individuals as uncomplicated as possible.

It is worth drawing attention to one other aspect of the argument that Rawls makes in the passage quoted in the preceding paragraph. He begins with the assumption that constraints of corrective justice are already in place and then argues that, for pragmatic reasons, we require special institutions of *distributive* justice. But Ripstein's argument seems to have a different structure. He begins with distributive principles and then argues that the related ideas of having one's fair share and being responsible for how one's own life goes require special institutions of *corrective* justice. If I have understood him correctly, Ripstein's argument in fact goes beyond this claim about institutions. He also maintains that the *content* of corrective justice, which he takes to be coextensive with the requirements of

33. Rawls, *Political Liberalism*, *supra* note 2, at 267. Notice that Rawls does not himself use the term "corrective justice." But he clearly has in mind the concept of interpersonal justice, which comes to the same thing. While Rawls's discussion focuses on contract law, most of what he has to say carries over fairly readily to the law of torts.

34. *Id.* at 267-68.

traditional deontological theory, can itself be derived from these ideas. There is, however, much to be said for the order of explanation proposed by Rawls. It suggests that corrective justice, understood as a set of deontological constraints, is normatively and conceptually prior to distributive justice. There is, on this view, no need to derive those constraints by means of a consequentialist argument that begins with the idea of having one's fair share. Rather the principles of distributive justice, and hence the meaning of having a fair share, must conform to the pre-political principles of corrective justice. How, it might be asked, can the content of deontological constraints be specified in the absence of defined entitlements to resources? In responding to this question it is natural to suggest that the foundation of such constraints must reside in the inviolability of the person or some similar notion.³⁵ When distributive justice enters the picture, the constraints are extended to fair shares of external resources and help to define the conceptual boundaries of such shares.³⁶ I believe that this general understanding of the relationship between corrective and distributive justice informs, at least implicitly, much contemporary deontological theorizing. To say anything more about these very fundamental matters is, however, well beyond the scope of this Essay.

35. Cf. F.M. Kamm, *Nonconsequentialism*, in *The Blackwell Guide to Ethical Theory* 205, 217 (Hugh LaFollette ed., 2000). Another possibility is, of course, Kant's own argument for a principle of equal right. The relationship between the right to be secure in one's person and the right to property is a controversial issue in Kantian scholarship, and cannot be discussed here. For differing views on this question, see Paul Guyer, *Kant's Deductions of the Principles of Right*, in *Kant: Metaphysics of Morals* (Mark Timmons ed., 2000), and Ripstein, *Authority and Coercion*, *supra* note 28, at 11-14. In the article under discussion in this Essay, Ripstein argues as follows:

[T]he division of responsibility mandates that we treat each person as free to do as he or she sees fit with the means at his or her disposal, that is, to use both bodily powers and income and wealth in pursuit of his or her own conception of the good, in a way consistent with others having the same freedom to pursue their conception of the good. All of this is done within a broader framework of redistributive institutions, the other half of the division of responsibility. Personal powers and property are alike in their significance to the claims of other private parties, and so subject to a parallel treatment in tort.

Ripstein, *supra* note 1, at 1836. Personal powers and property may well be alike in this respect, but that is quite consistent with the idea that integrity of the person has moral priority over property rights and that the reason these interests are subject to a parallel treatment in tort is that property rights receive protection similar to those accorded to security of the person. I take Ripstein to be suggesting, in effect, that the argument goes in the other direction: Security of the person is protected because bodily powers are, like property rights, means for pursuing a conception of the good. It is perhaps worth remarking in this regard that Rawls treats integrity of the person as falling under the first principle of justice (the principle of equal liberty), while property falls under the difference principle, which is part of the second principle. See John Rawls, *Reply to Alexander and Musgrave*, 88 Q.J. Econ. 633, 640 (1974). The first principle has, of course, lexical priority over the second.

36. Cf. Perry, *supra* note 4, at 253-63.

Notes & Observations