

## The Body as Property and the Problem of Damages

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### **1. The Principle of Equivalence**

Suppose the City of Buenos Aires plans to build a highway to allow us to travel faster within this congested metropolis. For this to be possible, the government must expropriate and knock down a number of houses. As we all know, eminent domain means that, in pursuit of a public purpose, government can take people's property against their will. To use the terminology coined by Calabresi y Melamed,<sup>1</sup> in the face of eminent domain, the right to property of the owners of these houses is not protected by a property rule but by a liability rule: government has the power to buy this right compulsively in exchange for compensation.

However, for eminent domain to be consistent with the right to property, compensation must be *sufficient*, i.e. it must be such that the owner's property, as a whole, is not impinged. The idea is that the owner has to receive something equivalent to what she has lost. The same applies to cases where the asset is unlawfully destroyed. For example, if a truck crashes against my house, my right to property demands that I receive an amount of money equivalent to the harm.

Thus, a central aspect of the right to property over an object is the right to receive proper compensation should that object be lawfully expropriated by government

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<sup>1</sup> See "Property Rules, Liability Rules and Inalienability. A View of the Cathedral," 85 Harv. L. Rev. 1089-1128 (1972).

of unlawfully destroyed by a third party. In both cases, the right to property requires that the owner should receive an amount of money *reasonably equivalent* to the object. I will call this requirement the principle of equivalence.

The principle of equivalence does not demand that compensation should leave the owner in the same position she had before the harm, contrary to what we are sometimes told. In order to determine damages, it does not matter, in principle, what subjective value the asset had for its owner. We rather seek its objective value. Thus, if I am particularly attached to my house because my family has dwelled there since time immemorial, and therefore I am unwilling to sell it at market price, this would be irrelevant at the time of compensating me if the house is expropriated or destroyed. For different reasons —the epistemological difficulty of discovering subjective value among them— the principle of equivalence aspires to find out what level of compensation would satisfy not *all* of us, but *most* of us.

To establish the conditions under which the principle of equivalence is fulfilled, the court has to quantify the harm, i.e. find its intrinsic value. Circumstances external to the harm, such as the victim's wealth or the social value of the activity which caused the harm, are generally irrelevant to calculate damages. This is not inconsistent with the fact that such factors as the victim's job or her present or expected income are, indeed, taken into account, since those factors affect the amount of lost income, and therefore are an intrinsic element of the harm. We can hence identify a crucial implication of the principle of equivalence: the quantification of the harm must be independent of its circumstances.

## 2. Houses and Legs

It may seem rather obvious that the principle of equivalence faces substantial difficulties when the harm consists in the loss of a leg, the ability to see, or one's life. However, this difficulty should not make us jump into conclusions. To begin with, it is worthwhile to consider what it is that makes these cases different from those involving harm to material objects. After all, it does not suffice to say that we are dealing with irreplaceable items, since the problem of absence of replacements is not limited to the human body. Such objects as a letter handwritten by Borges or a Picasso painting are not replaceable either. Yet there are prices in exchange for which the owners of these rare objects are willing to sell them. If I pay the owner of the Borges letter I negligently ruined an amount of money similar to what most people would have demanded to sell it, it could be said that the principle of equivalence is fulfilled, although this person cannot replace the lost object because it was unique. In these cases, compensation thus conceived is the closest one can get to the goal of giving the victim something reasonably equivalent to what she had. Most people in the position of the victim would be indifferent between (a) having the object and (b) having the amount of money they would have demanded to sell the object voluntarily.

There is no conceptual reason why this analysis cannot be applied to bodily injury. Think, first, of a relatively minor injury, such as a broken leg. The absence of a market for legs —the impossibility of replacing a broken leg by a healthy one— does not *conceptually* impede to compensate the person who suffered such injury in such a manner that the principle of equivalence is reasonably fulfilled. In theory, there is a price in exchange for which most people are willing to sacrifice certain aspects of their bodily integrity. In principle, one could think that it is that price, and no less, that

adequately compensates the victim of these harms —at least, that is, if one wishes to stand by the principle of equivalence in the face of bodily injury.

An important clarification is in order. Bodily injury includes material harm as well. If I break my leg, compensation must take into account such aspects as the value of medical care and lost income. Both these harms have a market value. What remains to be compensated is the Civil Law's moral damage or the Common Law's pain and suffering.<sup>2</sup> The boundaries of this type of damage, of course, are far less precise. But this lack of precision should not lead us to justify anything. If one took the goal of compensating the victim in accordance with the principle of equivalence seriously, damages for pain and suffering should be such that, adding them to medical expenses and lost income, we should approach the value of indifference of most people. If, for instance, medical expenses (drugs, medical care, crutches, etc.) arising from a broken leg are of \$5,000, and lost income is \$1,000, how much should the victim be paid as damages for pain and suffering so that the total award leaves her indifferent?

Another way of making this analysis is by asking, if a person is assured that losing her finger will not cause her any medical expenditure or any other expenditure, nor any lost income, how much would she demand in exchange of sacrificing her finger? To answer this question, this person shall take into account the mental and physical pain derived from the loss of her finger, not only at the time of losing it but throughout her life. Thus, if this person plays the piano and losing a finger makes that activity more difficult, this fact will impact on the indifference value.<sup>3</sup> This suggests

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<sup>2</sup> I believe that moral damage is actually a broader concept than pain and suffering, since it includes such things as the Common Law's dignitary loss, *inter alia*. Although I will use the Common Law term, I have in mind a rather broad understanding of it.

<sup>3</sup> This applies both to the professional and the amateur player. However, for the former, but not for the latter, loss of a finger would imply substantial loss of income, in addition to moral harm.

that pain and suffering, understood in light of the principle of equivalence, will be in many cases a source of compensation greater than medical expenses and loss of income.

We must remember that the principle of equivalence does not require us to meet the *subjective* value of the object, i.e. the amount of money the particular person who suffered the injury would have demanded to be indifferent, but its objective value, defined as the price that would leave *most people* indifferent in a comparable situation. The issue, then, is what amount of money would be sufficient for most people in order to sacrifice a certain aspect of their bodily integrity.

Needless to say, calculating damages thus understood would be very complex, especially in the case of pain and suffering, which, as we saw, probably would be the largest portion of compensation under the equivalence principle. However, I am not interested in determining the quantum of these damages more precisely; my goal is far more modest: all I wish is to make clear that if we intended to compensate bodily injury following the same criteria we apply to material objects (the equivalence principle), compensation would be much higher than today. Perhaps the former examples, where the aspect of our bodily integrity being affected was relatively minor, are not telling enough; but, what is the price in exchange for which most people would be willing to sacrifice important aspects of their bodily integrity, such as a leg, an arm or their life? When we attempt to answer this question, numbers look colossal, far greater than the actual damages awarded in any country.

This forces us to wonder about the legitimacy of the system in force. This system is based on the principle of equivalence as a manner to preserve property: a fair compensation is that which grants the victim something reasonably equivalent to what she lost. Once we realize that, when it comes to the human body, damages are well

below the *real* value of the loss —understanding the *real* value in terms of the value most people attribute to their body— the scaffolding of the system shakes.

It certainly does *not* follow from this that we should replace our current system with one that reflects the body's real value. However, it seems inevitable to revisit a few issues. The logic of the principle of equivalence entails replacing the lost object with something of equivalent value, so that the victim's property remains unaltered. If that is not what we are doing (and, by the way, it is not something we *could* do), then a reconsideration of the goals that compensation of bodily injury pursues might be in order.

But perhaps I am moving too fast. In fact, someone may even think that not only current damages are not inferior to the real value of the human body, but they are superior. Law and Economics provides an important argument along those lines. I will analyze it, and reject it, in the next section.

### **3. The Theory of Risk-equivalence**

The difficulty of quantifying bodily injury presents a tough challenge for Law and Economics, since it is impossible to perform a cost-benefit analysis and claim that this or that solution is efficient if one cannot ascertain, with some accuracy, the value of the assets involved. After all, with what authority could you argue that it is efficient or inefficient to prevent certain kind of accident that causes a given amount of casualties if it remains unclear how much those lost lives are worth?

Now you may think that the economist could simply base her calculations on the average awards given by courts to compensate bodily injury, regardless of what the real

value of such injury is. However, the economist cannot do such a thing. All his analysis depends on the correspondence between awarded damages and the body's objective value.

Suppose a firm in charge of building a gutter system for the city must decide which precautions to take in order to prevent harms on neighboring houses. This decision will depend on an estimate of the damages that will be awarded should those harms occur. The firm will only adopt those precautions whose cost is lower than the expected cost of damages. Beyond that point, it would be inefficient to invest in further precautions—it is cheaper to let the harm take place and then compensate it. According to the economist, we should prefer, as a society, that inefficient measures are not taken, since that would make us all poorer.<sup>4</sup>

Note that the economist does not merely claim that saving money by not taking inefficient precautions would be good for the construction company, which would be trivially true, but insists that such outcome is socially good because squandering social resources is avoided. The whole of society, argues the economist, is richer if we avoid inefficient precautions—those whose cost is higher than the expected costs of the harms such precautions would prevent.

Regardless of what one may think of the arguments in general, I am interested in emphasizing that it rests on the assumption that courts award damages that reflect the real value of the assets at risk. Imagine that courts in a given country believe that compensation for harms caused to real estate must be determined by the tax value of each property; and this value, as in some places in Argentina, is on average 75% lower than market value. In this context, the construction company of the example would

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<sup>4</sup> This is the logic underlying the so called Learned Hand test, which compares the cost of the harm discounted by its probabilities with the cost of preventing the harm. There is fault, under this test, when the first term of the equation is larger than the second. G. Calabresi analyzes (and criticizes) this test in depth in *The Cost of Accidents* (1970) and, with J. Hirschoff, in "Toward a Test for Strict Liability in Torts," *Yale Law Journal*, vol. 81 no. 6 (1972).

decide to refrain from adopting precautions that are not justified given the expected cost of damages as awarded by the courts, but that would, indeed, be justified if the market value of the assets at risk were taken into account instead. In this case, while it would still be true that the decision is efficient for the company, we could no longer say that it is socially efficient as well. For this latter claim to be plausible, judicial damages must reflect the value society attributes to the assets, and this, clearly enough, is not achieved in our hypothetical.

This concern has led scholars in Law and Economics to look for a method to calculate the value of life and limbs. In this regard, Cooter y Ulen propose the method of risk-equivalence, which bases on an extrapolation of the value a person assigns to his bodily integrity when he assumes a number of risks in the marketplace.<sup>5</sup> Think of a person who takes a dangerous job to get a higher wage, although he could pick safer, but worse paid, jobs. Drawing a correlation between the additional wage he gets and the additional risk he takes, the method of risk-equivalence intends to calculate how much that worker values his own life. Thus, if a job entails a death risk of 1% and its wage is \$1,000 higher (all things equal) than a job which does not increase death risk, it could be said that the worker who takes that job “buys” a death risk of 1% for \$1,000; this means, we are told, that the worker should be willing to buy a death risk of 100% for \$100,000. In other words, this worker values his life \$100,000. The assumption is that the worker is fully aware of the risk he is taking and other options are available to him.

A similar analysis could be applied to a person who chooses a riskier airline because it is cheaper, or who, for the same reason, buys a car without airbags and ABS. In fact, every person is constantly making decisions where safety and price are traded;

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<sup>5</sup> Robert Cooter and Thomas Ulen, *Derecho y Economía* (1998), p. 435-7.

these decisions, says the economist, can help us estimate the value a person assigns to her life or bodily integrity.

I believe this analysis is wrong for a number of reasons. Back in 1970, Guido Calabresi, in his path breaking book *The Cost of Accidents*, already mentioned risk-equivalence as a way of relying on the market to determine the value of bodily injury, but acknowledged that implementation difficulties were decisive.<sup>6</sup> First, rarely shall we find two jobs or two products which are equal in all aspects but their level of risk; in general, the amount of variables and their possible combinations will render extrapolation impossible. Secondly, since a job or product does not entail one single risk (say, death) but many (death, pain, loss of an arm, blindness), it is practically impossible to isolate one of these risks in order to monetize it. Finally, the analysis assumes perfect mobility between jobs or products, which will hardly obtain in real markets.

To these difficulties, which are practical, we could add a more theoretical one: the theory of risk-equivalence presupposes risk-neutrality, whereas it would be more reasonable to assume risk-aversion, a consequence of declining marginal utility of income.

However, there is a deeper problem affecting the method of risk-equivalence. Remember that the theory's goal is epistemological. It aspires to help us find out the value that a person attributes to certain aspects of her bodily integrity that lack a market price. This theory is not intended to prescribe the value that a person should attribute to her body, but rather shed light on the value she actually attributes to it. Now if we asked the worker of the example, who purportedly values his life in \$100.000, whether he is actually willing to sacrifice his life for that price, he will surely say "no". We can assume his answer will not change if we increase the number, for example to

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<sup>6</sup> G. Calabresi, *The Cost of Accidents* (1970), p. 206-8.

accommodate risk-aversion. This might reveal that this worker is not rational about the risks he takes,<sup>7</sup> yet there is nothing quite surprising about that, since we all tend to be irrational about certain risks. If I am told that one every one thousand people who drive die or suffer severe injury in a car accident every year, I will probably think that I will not be the unlucky one; but one every one thousand people who think like me will actually be wrong. This excess of confidence, if that is what it is, may lead me to refrain from taking precautions whose cost may be justified, such as buying a car with airbags. However, rather than revealing the value of my life, this will only show that I, like most people, am not fully rational when it comes to taking risks. If the theory of risk-equivalence aspires to perform the epistemological function described above, it cannot overlook such an extended pattern of irrationality.<sup>8</sup>

Someone could reply that perhaps the purpose of the theory of risk-equivalence is not epistemological but, indeed, prescriptive. The argument would be that the fact that market decisions taken by a given person reveal a (relatively) low valuation of her life justifies awarding to this person equally low damages in case of bodily injury.

But why would that be so? Moreover, no one would think of making a similar argument in connection with material objects. The mere fact that a person, for example, chose not to build a fire- and earthquake-proof house because it was too expensive to do so by no means would justify the government's paying below-market price compensation in the event of expropriation. Such a claim, in fact, would be ridiculous. Why, then, should we take it more seriously when it refers to the body?

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<sup>7</sup> Assuming, *arguendo*, that this worker has *true* alternatives, which, as we noted, is too strong an assumption already.

<sup>8</sup> It is possible that some people are not irrational in this sense, but that would not affect the argument that people *in general* act in the manner described. Bear in mind that this irrationality refers only to certain types of risks. A typical feature of the risks we are analyzing is that they affect real people, not corporations, of whom we could expect a higher level of rationality to evaluate risks. True, sometimes damages for pain and suffering affect corporations because its employees suffer them, but the question is how much a person, no her employer, values life. Cost-benefit analysis performed by firms in order to decide which precautions to take are informed by what statutes and courts say, not by what the victim thinks her life is worth. It is the latter that the Cooter and Ulen test purports to reveal.

#### 4. Against Moral Damages

While the theory of risk-equivalence proposed by scholars in law and economics entails a full endorsement of the principle of equivalence, but fails to honor it, an alternative theory which in fact rejects such principle has been advanced from the same quarters. I will argue that this alternative is not acceptable either, but exploring the reasons for its departure from the equivalence principle may help us glimpse a more promising road.

Toward the late '80s, different reactions against the high levels of compensation for bodily injury awarded by courts and especially juries started to arise in the United States. In this context, the Insurance Theory of Compensation was born. One of its proponents was Alan Schwartz.<sup>9</sup> Schwartz defends the idea of consumer's sovereignty, pursuant to which the relation between producers and consumers must be governed by contract clauses that a hypothetical consumer who is rational, well informed and free would have accepted. This rule is used both to judge the validity of the clauses actually signed and to establish which clauses should be applied by default. Schwartz finds the philosophical basis of the theory of consumer's sovereignty in Rawls and Scanlon.<sup>10</sup>

Aided by this analytical tool, Schwartz analyzes which the optimal contract governing products liability is. Since damages paid by the producer are reflected in the product's price, one could say that torts law functions as compulsory insurance. For example, if the law is that the manufacturer of a food processor shall compensate any consumer who is injured by the machine while diligently using it, this means that

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<sup>9</sup> Alan Schwartz, "Proposals for Products Liability Reform: A Theoretical Synthesis", Yale Law Journal, vol. 97 (1988), p. 353.

<sup>10</sup> Schwartz, op. cit, p. 360-1. There is more similarity between Schwartz's approach and Ronald Dworkin's "Equality of Resources", since both emphasize the normative force of the hypothetical decisions that an individual would make in an ideal insurance market. See *Sovereign Virtue: The Theory and Practice of Equality* (2000). However, neither for Dworkin, Rawls, or Scanlon utility maximization plays the role Schwartz reserves to it.

consumers of food processors are being forced to buy insurance against that particular risk. The premium of such insurance is part of the price the consumer pays when she buys the appliance. Therefore, pursuant to the principle of consumer's sovereignty, we must ask ourselves whether a hypothetical consumer who is rational, well informed, and free would choose to buy such insurance.

To answer this question, Schwartz bases on three assumptions: first, that consumers wish to maximize their expected utility; second, that consumers' utility depends upon their post-harm situation; and, third, that producers charge premiums that are actuarially fair. With these assumptions in mind, it is rational for a person to buy insurance against a given harm only if the marginal utility of money would be increased should that harm take place. For example, if the harm is that your house burns down, it is clear that it is rational for you to buy insurance —the marginal utility of money is higher once your house is burnt because, since you are poorer, you obtain more utility from money than before. In other words, it is rational for you to transfer dollars from the pre-harm stage to the post-harm stage because those dollars would be worth more (utility-wise) in the post-harm stage. The same logic applies to all material harms, including not only direct harm but also lost income, and therefore it is rational to buy insurance against them.

However, argues Schwartz, this ceases to be true once we move to non- material harm. For example, is it rational to buy insurance against mere pain? Leaving aside the material harm due to pain and suffering, such as medical expenses and lost income (which material harm, in fact, would not be pain and suffering proper), *mere* pain and suffering do not necessarily increase your need for money; i.e. they do not increase the marginal utility of money.

To illustrate, Schwartz offers the following example. Suppose a businesswoman who runs for recreation loses a foot in an accident. Would this event increase the businesswoman's need for money? Not necessarily. If she decides to read instead of running in order to obtain the same amount of recreation as before, her need for money would be actually less; if, in turn, she chooses to attend concerts to make up for her lost recreation, her need for money would increase.

Schwartz's more general point is that we cannot tell in advance how people will react to non-material harm, and whether they will need more money than before or not. This uncertainty prevents us from claiming that rational consumers would buy insurance against pain and suffering. Therefore, courts should not invalidate contract clauses limiting the manufacturer's liability for pain and suffering, nor should they impose a default rule establishing such liability when the contract is silent on the matter. Otherwise, consumers would be forced to buy insurance they would not voluntarily buy, in violation of the principle of consumer's sovereignty.<sup>11</sup>

The Insurance Theory of Compensation has given rise to criticism both internal and external to law and economics. Internal critics have argued that individuals not only wish to increase utility but also to equalize it throughout their life; the idea would be to avoid having very little utility at any given point—for example, as a result of bodily injury—even if sacrificing utility at that point would allow for proportionally greater utility some other time.<sup>12</sup> External critics have argued, in turn, that the insurance theory

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<sup>11</sup> Scholars in Law & Economics come to the same conclusion based on the fact that the market offers no insurance against pain and suffering. They infer from this that there is no demand for such insurance. See, e.g., Patricia Danzon, "Tort Reform and the Role of Government in Private Insurance Markets", 13 *J. Legal Stud.*, p. 524. This empirical finding has been criticized by authors who so find evidence of such insurance. See Steven Croley and Jon Hanson, "The Nonpecuniary Costs of Accidents: Pain and Suffering Damages in Tort Law", *Harv. Law Rev.*, June 1995, p. 1785. Schwartz himself is skeptical about the evidence of lack of demand, given certain market failures such as adverse selection and the difficulty in categorizing clients on the basis of their tolerance to suffering. Schwartz, *op. cit.* p. 365.

<sup>12</sup> Croley and Hanson, *op. cit.*, p. 1814-22.

of compensation fails to understand the needs and preferences of the sick and handicapped.<sup>13</sup>

I wish to point out a different problem. A crucial limitation in Schwartz's argument is that it only applies to *inevitable* harm. Suppose a very rich person suffers severe but brief pain as a consequence of an accident. It might very well be true that this person will not gain much if she is compensated for that severe pain—we could even concede that she is indifferent to such compensation. All this is quite plausible. However, it has nothing to do with the fact that this person has reasons to *prevent* this harm from taking place. She surely would be willing to pay a large amount of money to avoid this awful pain, which is totally independent from the fact that such money would be of little or no use once the pain has occurred and ceased.

This distinction refers to the two different functions torts law serves: on the one hand, to compensate the victim; on the other, to provide incentives for the adoption of safety measures. Schwartz's approach makes sense only when this second function becomes irrelevant because there is nothing that can be reasonably done to prevent a harm, and the only question is distributive—how to distribute the harm among the victim, the injurer, and third parties (including the community). When, in turn, the harm is avoidable (in the sense that reasonable things can be done to prevent it), the victim has good reasons to wish that the potential injurer has incentives to take precautions, even if she has fewer or no reasons to seek damages after the harm has taken place, which, indeed, may depend on the type of harm. Since compensation for pain and suffering provides incentives for potential injurers to take precautions that would *prevent* pain and suffering, rational consumers must certainly care about it.

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<sup>13</sup> Ellen Smith Pryor, "The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation", *Virginia Law Rev.*, Feb. 1993, p. 101.

For this reason, I do not find Schwartz's argument persuasive. But I think he is right in focusing on an issue frequently overlooked: a person may have *ex ante* reasons not to choose a high level of damages if such damages would render certain goods too expensive, and regardless of the extent to which those damages approach the true value of the potential loss. In other words, it is far from obvious that the principle of equivalence is the best way of advancing the victim's rights, at least as a general principle applicable in all cases without further refinement. I explore this matter next.

## **5. The Access-Compensation Trade off**

If bodily injury were compensated in accordance with the principle of equivalence, damages would be so high that many activities that tend to cause such injury would disappear. Within the framework of the principle of equivalence, none of that should matter: the disappearance of some activities that put the body at risk would be the logical consequence of the great importance that we attribute to our bodily integrity.

The problem is that the principle of equivalence, faithful to the logic of preserving property, entails too narrow a perspective of what is at stake. In deciding whether a given activity should become more expensive or even non-existent, we cannot forget that potential victims of that activity sometimes have an interest not only in its survival, but also in its being accessible at reasonable cost.

Think of medicine. While this activity causes a great deal of bodily injury, no doubt it prevents more such injury than it causes. Therefore, consumers of medicine — its potential victims— have good reasons to wish that this activity does not become too

expensive, even if that implies that compensation for bodily injury will not reach the value most people attribute to their body.

Thus, we can see that from the point of view of the potential victims of an activity such as medicine, two interests are in tension: on the one hand, being compensated as fully as possible; on the other, having access to the activity at the lowest possible cost. The principle of equivalence attends only to the first of these two interests; in so doing, it favors a result that may be detrimental to the very people it supposedly protects.

However, it does not follow from this that, as in Schwartz's proposal, the best way to resolve that tension is to eliminate compensation for pain and suffering. As we saw, Schwartz's approach overlooks an essential function of torts law: compensation not only repairs the damage, it also creates incentives for risky activities to be conducted in safer ways. It is true that someone may be skeptical that, in the case of medicine, the connection between the level of damages and the level of safety is as straightforward as the prior line of argument suggests. To what extent does the threat of paying damages work as an incentive for the health service provider to be more cautious? Is this not a remote connection in a context where the physician or hospital in fact will buy insurance against malpractice? The matter is a complex one and could only be analyzed in depth at the empirical level, which would exceed the framework of this paper. I will just note that a physician that is more harmful than the average will have a poorer record, and this will sooner or later make her pay a higher insurance premium. In a competitive environment, this additional cost will not be fully transferred to patients, since if it were, the physician could not match the prices charged by her less harmful competitors. Therefore, the availability of insurance does not render the threat of

damages ineffective as an incentive to take further precautions.<sup>14</sup> Moreover, there is no such thing as a *full* insurance; certainly not at a reasonable price.

It is not my claim that the only incentive physicians have not to harm their patients is the threat of damages or of higher insurance premiums. Bodily injury may result in criminal sanctions, and that threat must work as a strong incentive as well. Without reaching that extreme, we should not overlook the negative impact on a physician's or a hospital's reputation (and, consequently, on their ability to attract consumers) of causing harm. Finally, ethical reasons lead physicians and hospitals to look after their patient's bodily integrity, and probably these reasons weigh more than any of the incentives mentioned above. Thus, torts law can only provide some incentives within a larger context. However, the standard of diligence imposed by criminal law, professional ethics, or the health provider's own sense of ethics may be inferior to what the patient wishes, and even if it is not, the patient may have good reasons to resort to as many incentives as she can, given what is at stake. All of this reaffirms the importance of the incentives torts law may provide.

In sum, patients wish medicine to be accessible at the lowest possible cost compatible not only with (a) compensation for material harms, as Schwartz points out, but also (b) a reasonable level of precautions. Therefore, when determining how bodily injury shall be compensated, we must strike a balance between the different interests at stake.

I believe that this tension may not be resolved in the same manner in all societies —nor, more controversially, *in all activities*. In this sense, there is something singular about medicine: the group of potential victims (who are interested in getting the highest possible compensation) and the group of beneficiaries (who are interested in getting the

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<sup>14</sup> In truth, the matter is more complex. The physician or hospital does not choose to be more or less cautious, but takes a number of decisions that do determine more or less safety for the patient. These decisions include such things as the technology used, the personnel hired, the length of the shifts, etc.

cheapest possible access) tend to overlap in full. This feature is by no means common to all activities that cause harm.

This goes back to a crucial implication of the principle of equivalence I identified in the beginning. Under this principle, the court must find out the harm's intrinsic value, which implies ignoring all circumstances external to it. Which particular activity caused the damage is one such circumstance. It is of no relevance whether the harm was caused by an activity from which the victim profits or by one from which she obtains nothing at all —say, whether it was caused by a physician who was treating the victim or by someone who was sport hunting while the victim had the bad idea of walking in the woods. However, the victim has *ex ante* reasons to reduce the cost of medicine, yet she has no reason to reduce the cost of sport hunting. The balance between access and compensation, therefore, must be different in the two cases.

If my argument is correct, the resolution of the tension between access and compensation must be sensitive to the activity involved; more specifically, it must vary depending on the *ex ante* interest of the victim in accessing the activity. The principle of equivalence is completely at odds with such a distinction.

## **6. Some Implications**

So far, I have argued that, contrary to a basic tenet of the principle of equivalence, the amount of damages for bodily injury should be sensitive to the extent to which the potential victims of an activity match its beneficiaries. While current torts law does not actually follow the principle of equivalence to its natural implications —it does not compensate bodily injury in accordance with the objective value of the assets

involved—, it does abide by the principle’s commitment to avoiding any inter-activity distinction. To that extent, the approach I am offering would imply, indeed, a departure from tort law as we know it.

What would be, then, the practical implications of this shift of approach? While I cannot answer to this question in full here, I wish to offer some general thoughts. However, it should be clear that I am less interested in (and, at this point, less capable of) giving precise answers than in providing a framework that allows us to make the right questions.

To begin with, it should not surprise us if such activities as medicine became cheaper, especially in countries where damages have contributed substantially, via insurance, to the excessive cost of medicine. Although I have rejected the Schwartzian idea of eliminating compensation for pain and suffering, my impression is that the equilibrium point between access and compensation must be closer to access than it is now. In any case, any reasonable implementation of this idea should leave ample space for the parties to agree on an equilibrium point which is higher (or, perhaps, lower) than the one applied by default.

Conversely, we should expect other activities where potential victims and beneficiaries do not tend to coincide to become more expensive —and, therefore, less common and less harmful— as a consequence of higher damages. However, it would be a mistake to assume that raising damages should be the only collective reaction to curtail these activities and to make them safer. The above analysis also justifies resorting to the kind of measures that Calabresi labeled “specific deterrence,”<sup>15</sup> namely, criminal and administrative laws and regulations. Once we de-mystify the principle of

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<sup>15</sup> *The Cost of Accidents* (1970).

equivalence, it is much easier to justify qualifications to the right to put the body of others at risk, especially when they are not participants in the risky activity in issue.

There are also reasons to revisit certain mechanisms through which government literally sells the right to harm the body, as occurs in the United States with the right to pollute. In particular, it seems that, in determining the plausibility or at least the price of such right, authorities should look not only at how much pollution is generated, but also at what industry generates it, and in particular at the extent to which the people who would suffer from such pollution would also benefit from the existence of the industry in issue, for example, as consumers of its products.

The case of pollution suggests that the concepts of victim and beneficiary must be understood in a prospective or dynamic manner. But it further suggests that these concepts may be, in some cases, rather vague. Suppose we must discuss what level of damages best serves the interests in conflict in an activity consisting in the provision of some form of public transportation. Although not all potential victims of the activity are users of it, the interconnection between this activity and many others may be so broad that, in a sense, almost everyone benefits directly or indirectly from it. In this situation, it is probably justified to consider the whole of society as the group of potential victims and beneficiaries, which, in turn, favors an understanding of the benefits generated by the activity in terms of its social value.

The logic of property that informs the principle of equivalence presupposes a narrow definition of the interests at stake and focuses on a concrete victim. The alternative approach I have offered, conversely, broadens the range of relevant interests and evaluates them not with reference to a concrete victim, but to a larger group—the potential victims of an activity, which, in some cases, can be identified with society in general. In a sense, this move entails a “de-privatization” of damages, which cease to be

an issue between the injurer and the victim to become part of a more general debate on the level of accessibility and safety that should govern a given activity. The question is no longer how much the human body is worth, but rather how our society should regulate the activities that put it at risk.