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In this brief comment on the very interesting paper by Blumstein, Bovbjerg and Sloan,[1] I want to question the desirability and defensibility of their proposal to substitute contracts-for-care for the traditional damage award in an important subclass of tort cases. In doing so, I want to draw attention to the connection between one way of understanding of what it is that makes something tortious and the appropriateness of various kinds of remedies given that understanding. The thesis I advance, which I am calling "connectedness" or continuity between offense and remedy, is important not only to our understanding of tort law, but to our understanding of legal liability more generally.

In the theory of legal liability, it is common to distinguish between two kinds of questions. The first asks why certain conduct is criminal or tortious. The second asks whether a particular penalty or liability is a suitable response to criminal or tortious conduct. The first question explores the *substance* of the law; the second explores the justification of *liability* for failure to comply with law's substantive demands.[2]

Crimes are one thing; punishment for crime is another. The grounds or justification of one need not coincide with the grounds or justification of the other. I will call any theory that disconnects the grounds of the offense from the grounds or the justification for liability a detached or *disconnected* theory.[3]

For most of the last decade, I have been exploring and developing one such theory about the nature of *tort*, not criminal, law.[4] At the heart of my account has been the distinctions between the grounds of recovery and liability on the one hand, and the grounds and modes of recovery (or liability) on the other. Recently, I have come to have certain doubts about disconnected theories generally, and my theory in particular. I have not yet published these doubts because I have not made up my mind about their ultimate force. The paper by Blumstein, Bovberg and Sloan provides me with an opportunity to air some of the implausible implications of detached or disconnected theories. To

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1. Blumstein, Bovbjerg, & Sloan, *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991) [hereinafter Blumstein].

2. For example, one might hold the view that conduct is justifiably criminalized only if it is morally wrong or socially harmful, while maintaining that individuals should be punished for performing criminal acts because punishment is likely to deter others from doing so. In that case, one would be advancing a moral theory of the substance of crime and a deterrence theory of punishment for crimes.

3. Certainly there is no *logical* contradiction in advancing such a view, a position that limits crimes, to use James Fitzjames Stephens' phrase, to the grosser forms of vice, and which advocates punishment, not as something deserved or fitting as a response to moral wrongdoing, but as something essential to a general policy designed to reduce the incidence of such activities.

4. Coleman, *Corrective Justice and Wrongful Gain*, in MARKETS, MORALS AND THE LAW (1988); Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5 (1983).

explore the consequences of detached and connected theories, I need first to present an account of what a *connected* theory entails.[5] I want to illustrate by drawing upon examples from criminal law theory.

I. The Continuity Between Crime and Punishment

If one accepts a, loosely speaking, Kantian conception of the person as a rational, autonomous agent,[6] then one would be committed to the view that the law must respect both the autonomy and rationality of agents; it must respect agents as ends in themselves and not merely as instruments of the will of another or of the collective as a whole.

Legal rules are norms; they are action-guiding. Legal rules guide by providing reasons for acting. Thus, the substantive demands of the law are essential elements in the structure of an agent's practical reasoning. The Kantian conception of the person characterizes a particular account of the nature of practical reasoning in the sense that it constrains the kinds of reasons that the law can provide.

Conjoining these two thoughts, that the law is a set of norms that seek to provide authoritative reasons for acting and that the persons whose actions are to be guided by law must be treated as ends-in-themselves, yields the conclusion that the sorts of reasons law provides cannot be *manipulative*. If I put a gun to your head and demand your money, I provide you with a reason for giving me your money, but the reason I provide does not appeal to your autonomous will. Rather, I seek to compel your compliance by force or threat. Rather than respecting your autonomy, this sort of reason is designed to manipulate you, to force you to act as an instrument of my will, not yours. Reasons that are manipulative fail to treat individuals as ends in themselves. If the law is to provide reasons for action consistent with the Kantian conception of the person, it must do so in ways that respect the individual's rational, autonomous will.

Law's reasons must be internal to the norm itself. Take the prohibition against murder. Normally, in a statute, the prohibition against murder is followed by a series of punishments for murdering under various conditions. In the Kantian view we are articulating, none of these punishments provides a reason for not murdering. Whatever it is that makes murdering wrong and incapable of constituting a universal norm of conduct provides the reason for individuals complying with the law's demands. This reason appeals to each

5. My distinction between connected and disconnected theories may remind the reader of Dworkin's distinction between detached and dependent conceptions, which he exploits in his discussion of democracy. *Cf.* Dworkin, *Political Equality*, 22 U.S.F. L. REV. 89 (1987).

6. Now it is no doubt true that economists also think of individuals as being rational, but their notion of rationality as utility maximization has little to do with the Kantian conception.

agent's rational, autonomous will in a way that the punishment which does no more than threaten sanction for non-compliance does not. As we noted, these reasons manipulate and do not, therefore, appeal to the agent's will. Another way to see this is to realize that the same sanctions could be applied to very different substantive prohibitions. The sanction would provide the same reason for acting whatever the substance of the law with which rational autonomous agents would comply. In all cases, the reason the threat of punishment provides is a manipulative one unconnected to the underlying reasons for doing what the law demands. Indeed, in at least some cases, there may be no underlying reason for doing what a specific law demands.

Even though the threat of punishment can never be a reason to act according to the law's demands, punishment itself can be an appropriate response to noncompliance. It can be appropriate, however, only if it too treats individual criminals as rational, autonomous agents. Criminals are wrongdoers; they are often dangerous. They are persons nevertheless. Thus, if punishment is to be understood as an institution that respects the agent's personhood, it must treat the individual as a rational autonomous agent, rather than as an object of manipulation. Punishment aimed at general deterrence, that is, at reducing the level of crime throughout the community as a whole, treats the individual as a means to some collective end. The same can be said of punishment aimed at *treating* the criminal as if she were, for example, sick and in need of a kind of medical attention. However desirable the goal of reducing the incidence of crime in the community may be, it cannot make punishment justifiable. The reason it cannot, of course, is that it treats the crime as an opportunity for engaging in crime reducing policies, and the criminal as an instrument of them. The same line of argument applies to punishment when viewed as a form of treatment.

In order for an act to count as punishment, it must be directed at the agent for what she did; it has to respect her agency with respect to the offence. It must be *backward-looking* at least in this sense. Moreover, since what the agent did was wrong, punishment, directed at her, must *communicate to her* the judgment that what she did was wrong. Punishment is both *cognitive* and *communicative* in this sense. Moreover, at least part of the purpose of punishment is to provide the criminal with the opportunity to come to recognize that what she did was wrong and to accept the judgment of the community. Rather than treating the criminal as someone who provides the state with an opportunity, through her incarceration, to reduce the level of crime in the community, this account of punishment treats the
criminal as a person capable of acting on the basis of reasons that respect her rational, autonomous will.[7]

7. Morris, *Persons and Punishment*, 52 THE MONIST 475 (1986).

The Kantian conception of the person not only constrains the possible understandings of punishment, but those of the nature of crimes as well.[8] This is one way in which the two can be said to be continuous with one another. One does not have to be a Kantian to make sense of this internal coherence requirement. Consider Jean Hampton's view that a criminal wrong is essentially a communication by the perpetrator of a judgment that the victim is less worthy of respect than she, the perpetrator is.[9] In other words, the perpetrator feels it is appropriate to use the victim as a means to her ends or personal fulfillment and this can only make sense if the wrongdoer holds the view that the victim has no right not to be used in that way; and the victim then would, in effect, count for less than would the wrongdoer. The former would be an instrument; the latter a willful agent. Punishment, then, is just the public practice of rejecting the validity of that implicit judgment made by the injurer. Punishment is the denial of the judgment made implicitly or explicitly in criminality.[10]

In Hampton's view, the continuity between crime and punishment does not follow from some underlying normative theory of the person or from a precommittment to a liberal theory of legal liability, as it does in Duff's. Instead it follows from a *conceptual analysis* or account of the essence of criminality. Criminality is propositional; criminal conduct expresses a judgment. To be continuous with criminality, punishment itself must also express a judgment, in this case a meta-judgment: to wit, the judgment that the judgment of the defendant is wrong. Here we have a case of continuity that seeks to make sense of our practice by seeing it as coherent in this sense. However, the coherence does not derive from a more general normative theory of the person.

There are at least two different kinds of connected theories: those fueled by normative considerations in which the underlying justification of the law's substance suggests a constraint on the way we must think about responses to its demands; and others fueled by a theory of explanation in which to understand our practices, say, of crime and punishment, is to see them as connected

8. A. DUFF, TRIALS AND PUNISHMENTS (1986).

9. *See* J. MURPHY & J. HAMPTON, FORGIVENESS AND MERCY (1988).

10. Whether theories of the sort advanced by Duff that rely upon Kantian conceptions of the person or those advanced by Hampton that do not rely on Kant, but do rely on the communicative or cognitive dimension of criminality, are correct will not detain us here. I introduce them not to defend them, but only to employ them as illustrations of what I have in mind by refering to a theory as connected in the relevant sense. Continuity is a kind of internal coherence or consistency. It is a normative, and not a strictly speaking logical relationship. In Duff's case, the consistency grows out of the Kantian constraint on any liberal theory of crime and punishment. The law applies to persons. We need a conception of persons. One such conception is Kantian. Understanding the Kantian conception of the person affects both how criminal standards function in the agent's structure of practical reasoning and how punishments must also operate. The view we ultimately have of both is continuous or connected, and that connection derives not from any internal logic, but from our acceptance of a particular conception of the person. That conception in turn needs to be defended normatively as essential in some way to liberalism. Whether it can be will not detain us further. Internal consistency or continuity has no pull on us, other than its connection to a more fundamental normative conception.

internally. Duff's Kantian account of crime and punishment is an example of the first sort; Hampton's account of the two is an example of the second sort. In the realm of tort law, Ernie Weinrib's views are examples of the second sort of connectedness.[11] Connected theories of this sort emphasize "unity" as a condition of understanding and explanation, not as an implication of a justificatory strategy.

I now want to outline a connected theory of tort law of the first sort, one in which the underlying justification or understanding of tortiousness gives rise to an account of the point of the damage remedy. I will then employ this account to ground the objection to the proposals of Blumstein *et al.* that what they are suggesting does little more than add an element of institutional insult to personal injury.

II. Continuity, Liability, and Recovery

How should we think about torts? Why is some conduct deemed tortious and other not? How should we think about the damage remedy? Economic analysis provides one theoretical model for thinking about these problems, a model in which the nature of the offense is viewed as continuous with the nature of the remedy for it. In the economic account, torts are essentially unjustifiable or impermissible reductions in wealth or utility. Typically, an injurer takes from a victim and in doing so reduces that person's welfare. Damages are designed to compensate for loss in this sense and, thereby, to render the victim whole as best as is feasible. The principle of efficiency upon which economic analysis is based can be analyzed in terms of welfare, wealth or utility. Torts are wrongs to be understood in terms of individual welfare, utility or wealth. For similar reasons, remedies for torts can be analyzed in terms of the ways they try to compensate for or offset these wealth reductions. If torts are a category of (forced) wealth transfers, compensation and liability in torts are also forms of compelled wealth transfers designed to reestablish, as far as possible, the *status quo ante*.

Economic analysis provides a connected or continuous conception of torts. Nevertheless, a good deal more would have to be said on its behalf before we could consider it an entirely defensible conception of the law. Not every action that leads to a dimunition in another's welfare constitutes a tort. Therefore, it cannot be the case that the essence of those offences that are torts is the fact that one person's conduct decreases the welfare of another. Nor can it be the case that a tort is always an inefficient dimunition in wealth, since for at least some strict liability torts the taking is efficient whether or not compensation

11. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989); Weinrib, *Understanding Tort Law*, 23 VAL. U.L. REV. 485 (1989); Weinrib, *Legal Formalism: on the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

is paid. Indeed, in some sense, tort liability is imposed to insure efficient forced transfers when transaction costs prohibit *ex ante* voluntary exchanges.

This is not the place for a full scale treatment of the economic analysis of torts. I mention the economic model, primarily because it is within that framework that the reforms the authors suggest make most sense. Tort law should seek to make the victim who has suffered an unjustified loss whole. The loss is analyzed in terms of individual utility, wealth or welfare. Any remedy must itself focus on replacing the loss in utility, wealth or welfare. The remedy fits the nature of the offense. The authors argue, however, that it should do so in ways that are compatible with the general constraints of justice and efficiency. The current practice of having juries determine damage awards without the benefit of sufficient guidance has led to widely divergent awards that cannot be squared with any plausible conception of efficiency or fairness, either between particular victims and injurers, or between victims as a class and injurers as a class.

Thus, the present system fails to satisfy the demands either of justice or efficiency. Reform is in order. The authors' proposal to institute a damage schedule as a way of satisfying the demands of justice (by imposing similar awards for similar injuries) and efficiency (by encouraging settlement and reducing uncertainty generally) is plausible and long overdue.[12]

However, I have doubts about their second proposal. I want to develop my concerns in the context of the general discussion about continuity between the nature of the offence and the nature of liability and recovery. The authors focus on a special category of serious injuries. Those victims who sustain these injuries are likely to require substantial care in the form of medical, social, educational and other support over an extended period of time, in some cases over the rest of their lives. Under current practice, once a finding for the victim has been made, the jury awards damages to the plaintiff based on its assessment of the present value of the relative costs of such services. Normally these payments are lump sum transfers, but they can come in the form of periodic awards.

This current system has several shortcomings. The first is that the damages awarded may not accurately reflect the costs of the services the victim needs and deserves. In reaching its assessment of the damages owed to the victim, the jury relies primarily on cost assessments made by expert witnesses from both sides. There is no reason to think that these assessments are accurate or that the jury is in a good position to develop a more accurate evaluation on its own. Neither the plaintiff nor the defendant has sufficient incentives to produce fully accurate assessments of the relevant costs. Secondly, lump sum payments

12. *But see* Schuck, *Scheduled Damages and Insurance Contracts for Future Services: A Comment on Blumstein, Bovbjerg, and Sloan*, 8 YALE J. ON REG. 213 (1991) (problems of implementation).

can be poorly managed by victims or by their agents. In either case, the victim runs the risk of not being able to provide the required services over the period of her lifetime. Moreover, she may well possess some *ex ante* incentive to adopt riskier strategies with respect to her resources as long as she believes that society as a whole will provide at least some benefits should she fall below the safety net by squandering her damage award.

As an alternative to the present system, Blumstein, *et al.* suggest a different form of damage award. They propose defining the damage award in terms of a package of services that would provide for the victim's needs over the relevant time horizon. The defendant's obligation would be to provide for this package of services. Presumably contracts for such services would be available in the market, though they would differ in some details. The plaintiff may prefer contracts with certain properties, perhaps those that provide more options, greater flexibility, and more extensive care. The defendant may be inclined to offer packages that involve more conservative treatment strategies. Thus, the plaintiff's and the defendant's attorneys would have an incentive to bring forth different contracts that provide for substantially the same services. The parties would reach an agreement on the contracts package or their disagreement would go to arbitration. Eventually some contractual arrangement for care would emerge. It is to the provision of that package that the victim is entitled and the defendant obligated.

There are some technical difficulties with this proposal. Two are obvious. The first is that insurers might not underwrite such packages.[13] The second is that the overall costs, administrative and other, might not be less under the reform than they are under the current system. But these technical matters are not central to my objections. I want to explore instead the inappropriateness of their approach given an alternative conception of the nature of the tort offence.

Under the authors' proposal, if I commit a tort against you, then the duty my conduct creates is the duty of being a kind of caretaker or provider of care for you. In other words, if I injure you seriously, I owe you the duty of arranging for your care by contracting for certain services. And what of you? How has your normative status changed in virtue of my having wronged or seriously injured you? Under the reform the authors suggest the answer is that you must be taken care of in ways specified by the package of service contracts. Of course, you have some input in the choice of packages, but your general position is not of your own choosing. What you want now to make of your life is in many ways out of your control. The tort changes the nature of our normative relationship, both to one another and to our respective resources. Prior to the injury, you are presumed to be autonomous with respect

13. Schuck makes and develops the same point. *Id.*

to your resources in a sense that I will specify in a moment. However, once injured, you must be cared for. What of me? Prior to injuring you, I have the duty of showing reasonable care. After it, I do not have the duty of making good the losses I have created by not satisfying that prior duty. Instead, I become a caretaker of sorts.

Let me frame the problem in terms of the discussion of continuity. Torts may be thought of as economists do, primarily as invasions of interests that diminish an individual's welfare or utility, but we are not compelled to think of them in that way. Indeed, I think it would be a mistake if we viewed all torts in that way. At least in part, torts are offences that wrest away an individual's autonomy or control over her person or property. That is the point of sometimes thinking of them as private takings. They are not just dimunitions in value or welfare; they are dimunitions without consent or approval. Torts are offences against an individual's integrity; they are not simply non-market exchanges or wealth transfers that may or may not be efficient. Now, if part of the point of referring to such conduct as tortious is that it involves this sort of offence to autonomy and integrity, then the "penalty" suitable for the offence, if it is to be continuous with the nature of the offence, ought to bear some relationship to it. That is, liability and recovery should be designed or understood to be designed to reaffirm the victim's autonomy and integrity, not simply to provide for her welfare or utility. The authors' proposal does precisely opposite of that. Rather than reaffirming the victim's autonomy, it adds institutional insult to personal injury by compelling the victim to accept a set of contracts for care.

Damages should be designed to make the victim as whole as is feasible. But how the victim decides to make herself whole, how she determines her life is best spent, how the resources put at her disposal are to be distributed in the light of her projects, plans and ambitions, are no less her decisions to make now than they were prior to victimization. That is the essence of the claim that within liberal theory agents are autonomous. They form projects and plans, entertain a variety of possible ways of life, determine the resources they need, and seek to match the resources to their chosen endeavors. It would be a tragedy if, in addition to altering the course of a person's life forever, the wrong of an injurer's conduct would also have the effect of altering the normative status of the victim with respect to her autonomy. Prior to the injury, we think of the victim as someone who is free to put the resources at her disposal to those uses she thinks will contribute to her conception of the life she wants to live, the life that is best for her, as judged by her. That relationship of individual to resources characterizes our understanding of personal autonomy within the liberal tradition. It is, moreover, in this sense that the principle of corrective justice that, in my view, is expressed in our current tort practices is connected to the principle of distributive justice, and may be thought of as

a component of it. Distributive justice concerns the principles for allocating resources among autonomous agents, individuals who form projects, plans and choose the life they believe will be most fulfilling or satisfying for them. Torts may change the life plans of victims, but it cannot change the normative status of individuals with respect to their autonomy with respect to the choice of plans and the decisions they make about how their resources are to be spent. The point of liability and recovery is to provide *compensating* resources, not to alter the agent's control over them.

The fact that someone has suffered an injury does not in morality or in justice rob her of her autonomy in this sense. She does not lose the right to control her resources in a way that allows her to formulate and act upon life plans and that encourage her to contemplate and execute projects. An injury may rob her of the capacity to live certain lives, to entertain certain projects and plans. That is almost always a misfortune; often it is a wrong to her. The point of tort liability is to rectify for wrong done, not to compound it. Rather than rectify the wrong, so understood, the authors' proposal compounds it.