Ripstein on Private Wrongs and Torts

Peter Vallentyne, U. Missouri.

Jurisprudence: An International Journal of Legal and Political Thought,

https://doi.org/10.1080/20403313.2018.1451467, 2018

Arthur Ripstein has written an elegant and insightful book on private wrongs and tort law. Like Ernest Weinrib, Jules Coleman, and Robert Stevens, he defends an account of tort law as a system of corrective justice for rights infringements, rather than as an instrument for the attainment of economic efficiency (as advocated by law and economics theorists). Roughly speaking, his thesis is that (1) individuals have certain moral rights against each other (i.e., they are wronged when these rights are infringed), (2) these rights require realization in positive law in order to be determinate and effective, and (3) much of the common law of torts can be understood as giving institutional effect to those rights that do not involve contracts or fiduciary obligations. The rights in question are the rights to control the use of one's body, one's things, and one's reputation. They are based on the core ideas that no person is in charge of another's purposes and that no one needs to clear her name.

1. The Relevance of Rights to Tort law

When I first read the book, I thought that Ripstein was offering a general "theory" of tort law in the sense of identifying the core organizing ideas of tort law in general (applicable to any jurisdiction and time). A theory of law in this sense must adequately fit, for a given jurisdiction and time, actual legal history (e.g., decisions and enactments), but the fit need not be perfect in that it can allow for mistakes by judges. Moreover, theoretical virtues or moral virtues may be

relevant for selecting among those accounts that adequately fit the history. Ripstein says (pp. 20-21), for example, that his account is *descriptive* but not purely so (since it is organizational and need not capture all cases), *prescriptive* but not from a perspective external to the law, and *interpretative* (portraying the law as the best it can be) but not in the Dworkinian Herculean sense of a complete determination of every possible case.

With Arthur's generous help via correspondence, I came to understand that his claim about tort law is much weaker than I suggested above. First, he is addressing only the tort law of *contemporary common law* (Canadian, American, U.K, and Commonwealth case law). He is not addressing all tort law systems (although he believes that much of the analysis can be extended to Roman tort law). Nor is he addressing statutory tort law. Second, he is not attempting to give a full account of such tort law. He is only claiming that *much* of that law can be understood as giving institutional effect to the rights he postulates. This is good, since it makes his claims much more plausible.

Let us start by asking what kind of morality Ripstein appeals to when he appeals to moral rights. There are two main possibilities: prevailing social morality and critical morality. The former is an empirical matter and concerns the moral norms generally endorsed by members of society at given time. The latter is more detached from prevailing societal moral norms and provides a basis for criticizing those norms. Critical morality may be based on some kind of mind-independent moral law (a kind of moral realism) or on something more mind-dependent (e.g., the norms we would endorse upon full information and reflection). I leave that open here. Ripstein is not clear in the book about the kind of morality that is relevant for the rights he invokes, but, in correspondence, he has clarified that the rights that he invokes are those of some kind of critical morality.

Ripstein's generic claim is thus that much of today's common law of torts gives institutional effect to the (non-contractual and non-fiduciary) rights of critical morality. The plausibility of this thesis depends, I think, on how detached critical morality is from prevailing social morality. Common-law judges, it seems to me (although I'm not an expert on the law), base their judgments primarily on custom and legal precedent. Custom includes customary (or prevailing) social morality. So, it seems highly plausible that much of common law tort law gives institutional effect to the rights of *social morality*. This seems true in any common law jurisdiction—not just contemporary ones.

Of course, judges may sometimes give effect to what they believe the rights of *critical morality* to be, especially when social morality is indeterminate, but the driving force seems to be social morality. For example, in a society in which prevailing morality recognizes slave-ownership, but critical morality does not, judges will tend to make judgments recognizing slave-ownership. My claim—that when judges appeal to moral rights, they tend recognize what they believe the rights of social (as opposed to critical) morality to be—is, of course, an empirical thesis. Given that I'm no expert on this, I could easily be wrong.

Let us now turn to some claims that Ripstein makes about the rights of critical morality. He connects them with the organizing idea of tort law, but given the problems raised above, I will not discuss that connection. I start with two general comments on rights.

2. Rights in General

Ripstein makes no distinction between *infringing* a right (which wrongs the rightholder, but may be permissible, if there are overriding justifications, such as saving six billion lives) and *violating* a right (infringing without an overriding justification). I'm assuming throughout that he intends

to be discussing rights infringements (which wrong the rightholder).

One of Ripstein's main claims is the Kantian claim that moral rights require realization in positive law in order to be determinate and effective. It is certainly true that moral rights are neither perfectly determinate nor perfectly effective, if they are not recognized, specified, and protected by a well-functioning legal system. I would argue, however, that, in many societal situations, they are sufficiently determinate so that social conventions and agreements (rather than state law) can fill in indeterminacies and that individuals and non-state organizations can adequately protect them.

Ripstein would object that such non-state enforcement violates the core moral requirement that no one is in charge of another's purposes. I would argue, however, that that principle (which I endorse as piece of critical morality) is not unconditional. It does not apply with full force when someone will infringe the rights of another (including rights of rectification for past infringements). In such cases, the rightholder, and those authorized by her (perhaps the state), are partially in charge of the infringer's purposes. By being suitably disposed to infringe the rights of others, one can lose some of one's authority over one's life. The matter is, of course, complex, and I merely flag the issue, rather than address it carefully.

Let us now consider the primary rights over one's body and things that Ripstein advocates. The right to one's reputation is slightly different and will be discussed in a later section.

3. Primary Rights over Means: One's Body and One's Things

The core rights recognized by Ripstein are rights over the use of means. They are rights to control the use of one's body and one's things. His view is thus a kind of *proprietarian* theory of

rights (although Ripstein doesn't use that term), since it views rights as primarily property rights over bodies and things. The core idea is that the rightholder, and not someone else, has the authority to determine how her means (body or things) will be used. Ripstein does not specify the exact content of these rights, but it's clear that he holds that rights over one's body are very strong (e.g., one owes no one a general duty of easy rescue) but the rights over things need not be so. Moreover, he leaves completely open how rights over things are determined (and in no way invokes a libertarian historical appropriation process).

Ripstein understands use in a *plan-based sense*. One uses an object in his sense, I think, when one's plan involves physical contact with it, by one's body or any other thing: one intends the physical contact (with one's hand, or a rock) as a means or as an end. Thus, contact that is the result of non-autonomous behavior (e.g., stumbling) is not a form of use (and I agree). I'm guessing that contact that was an unforeseen (or at least unforeseeable) result of an autonomous choice (e.g., choosing to back up a car, not aware that this involves running over someone) is not a form of use either (since it is not part of the agent's plans).

It's important to note that use of things can also be understood as mere physical contact initiated by an autonomous choice of an agent, even if not part of his plans. If the rights to one's body and one things are understood as rights against use in this sense, they are stronger rights than those Ripstein endorses. They are infringed by autonomous choice, even if physical contact was not foreseeable by the agent. Although I'm inclined to endorse rights to control use in this stronger sense, I won't pursue this here.

Ripstein insightfully distinguishes *use-based wrongs*, which wrong someone in virtue of *using* her body or her things (e.g., you intentionally destroy a car, which in fact is hers), and *damage-based wrongs*, which wrong someone when an agent uses her own body or things in

inappropriately dangerous ways with respect to someone else's body or things (e.g., you intentionally set off your explosives on your land, which destroys her car, but this was not intended, or even foreseen, by you). Use-based wrongs involve the offending agent using something that in fact belongs to the victim, but it does not require that the agent *believe* (or even suspect) that that thing *belongs* to the victim. Intentionally physically contacting an object is enough for the contact to wrong someone, if the object belongs to her and she has not given permission.

Use-based wrongs are wrongs, even if there is no damage (e.g., harmless trespass). They wrong another merely in virtue of using her body or her things without her authorization. By contrast, damage-based wrongs occur only when there is damage and only when the agent is at *fault* (e.g., the agent knew, or should have known, that the activities were unduly dangerous). I have a few questions about each.

First, is *intentionally* imposing a (perhaps small) *risk* of physical contact with another's body or things a use-based wrong? That depends on whether *use* includes only intending 100% certain physical contact or also includes cases where mere risk (less than 100%) of contact was intended. The requirement of intending *certain* physical contact seems too demanding (since few things may be certain). Moreover, it's hard to see any deep moral significance between intending a 100% certain physical contact and intending a 99.999% risk of physical contact. So, I'm assuming that Ripstein includes intentional imposition of less than 100% risk as a form of use-based wrong (but see below for liability for damages). Indeed, it would seem that intentionally imposing any risk (no matter how small) counts as a form of use (although Ripstein may wish to exclude the inevitable risks of everyday normal living).

Second, for damage-based wrongs, it seems strange to hold that the wrongs occur only if

damages occur. Whether an action wrongs someone (or more generally, whether it is impermissible), I would argue, is determined by the facts *at the time the action is performed*, and not how things happen to turn out. Setting off explosives with (non-intentional) undue risk of damage to other people's bodies or things wrongs, those individuals, I would argue, even if the individuals are not harmed (although they are owed damages only if harmed). Indeed, it is precisely because such action wrongs individuals that some kind of rights of prior restraint apply in such cases. Of course, tort law does not work this way, but here I'm addressing the rights of critical morality.

4. The Primary Right to One's Reputation

In addition to the moral right to control use of one's body, the right to one's *person*, according to Ripstein, includes the right to one's reputation (i.e., a right against defamation). Unlike the rights to one's body and one's things, the right to one's reputation is not based on the idea that others are not entitled to determine the purposes for which it is used. This is because one's reputation is in the minds of others. The right is based instead on the idea no one ever needs to clear her name.

The right to one's reputation is a right that others not make false statements, made to others, about one's person (body, mind, behavior, character, plans, etc.) when they portray one in a certain kind of negative light (e.g., as involved in wrongdoing) and when not made in certain privileged contexts (e.g., in parliament).

Like used-based wrongs (e.g., trespass or battery), the wrong of defamation does not, Ripstein claims, require fault or loss. Unlike those rights, however, defamation does not involve the use of things that one is not authorized to use. One is normally authorized to use one's body and one's things to communicate with others. Instead, like damage-based wrongs, defamation is

a side effect of one's use of things one is authorized to use.

Ripstein mainly discusses the burden of proof issue in the law, which I'll address below, but it would have been useful to discuss *the moral right* against defamation in more detail. After all, it's a puzzling right. Suppose you cross someone's field every day, with her permission, and it saves you an hour's time. Suppose that I lie to the owner by telling her that significant diseases are easily spread when people walk on fields. As a result, she no longer gives you permission to cross her field. I have wronged the owner (by lying), and you suffer a loss, but I do not wrong you. I believe that Ripstein would accept that. Why is it any different when I lie to the owner by telling her that *you* carry significant diseases that are easily spread when you walk on fields (thereby defaming you)? Here too I wrong the owner by lying, and you suffer a loss. If you are not wronged in the original case, why are you wronged in the second? I mention this only because I find the moral right to one's reputation quite puzzling (even though it seems intuitively very plausible). It would have been useful for Ripstein to say more about the moral right involved.

For the legal institutionalization of the right against defamation, truth and privileged context are typically deemed defenses, with the burden of proof on the defendant. For moral rights in general, and the moral right against defamation in particular, there are no issues of burden of proof (which are merely evidentiary issues). One's right against defamation (assuming one has one) is infringed when another makes certain kinds of statements about one, which in fact are harmful to one's reputation. Ripstein, however, has some interesting things to say about the burden of proof, and so I shall consider them here.

Ripstein notes that normal tort law, as a system of accountability, requires that plaintiffs have the burden of proof for establishing that that the defendant wronged them. In defamation

cases where the defendant claims that the plaintiff *wronged someone*, the plaintiff, of course, has the burden of proof for establishing that the defendant made the relevant claims and that this was harmful to the plaintiff's reputation. The plaintiff, however, typically does not have the burden of proof for establishing that the claims are false. Instead, the defendant has the burden of proof of establishing that they are true. Ripstein argues that, for legal systems involving personal accountability for actions, *the burden of proof is always with the person who claims that someone acted wrongfully*. Thus, in defamation involving claims of wrongful behavior, the defendant (not the plaintiff) has the burden of proof for establishing their truth.

This is a neat idea, but it's not clear that this will offer a general account of the burden of proof for defamation. As Ripstein recognizes, one can be defamed by false claims that one has engaged in non-wrongful behavior that is deemed disgraceful (e.g., failing to contribute to a local relief fund), ridiculous (e.g., fussing over trivial details), or disgusting (e.g., certain bathroom habits). Such claims need not involve the claim that one has wronged someone. It is enough that one's reputation is harmed. Ripstein (pp. 203-16) discusses how his account can be extended to include "social understandings". I'm guessing that he means social wrongs, where these are socially unacceptable actions, even if they are not morally (or legally) wrong. He says, however, that this does not include disgusting acts. I did not, however, understand how this extension is supposed to work. It would have been useful to say more on this topic.

So far, we have discussed primary rights. Let us now consider rights to remedies when a primary right has, or will be, infringed.

5. The Purported Unity of Right and Remedy

Ripstein correctly holds that a wrong is an action that is inconsistent with another person's rights

(e.g., to body, property or reputation) and that a remedy restores the consistency to the extent possible. He further holds some more specific views that I do not adequately understand.

First, he claims that rights survive their violation (ch. 8). This is clearly true in the sense, for example, that my right that you not hit me is still in full force after you hit me (e.g., you would wrong me a second time, if you hit me again). Ripstein, however, claims that "[A] person can lose a right to something only through a voluntary act (and not always that way). An involuntary transaction in which someone else takes, damages, or destroys something that is yours doesn't change your rights." (p. 248). I fully agree that, where someone *takes* your property, your original rights over the thing are unchanged. They wrong you, for example, by keeping it. I also agree that, where someone *damages* your thing, you still have the primary rights over the thing. If, however, the object is completely *destroyed*, it seems implausible, or at least confusing, to say that your rights over the thing are unchanged. How can you have a right over a non-existent object? Rights over a thing can be lost when the object is destroyed by another. Of course, there is still a right to a remedy in such cases.

Ripstein maintains further that there is a "unity" of right and remedy. The survival of the right calls for the remedy. There is a sense in which this is true. Consider my claim-right that you not hit me. On most views, that primary claim-right, against you, is accompanied by another, secondary, claim-right: if you hit me, without my permission, then, under certain conditions, you owe me damages. There is nothing mysterious here. It is simply that two distinct rights are bundled together. There is the primary right against using my things and the secondary (remedial) right to *damages*. Moreover, it would be natural to bundle those rights with a secondary right to *enforce* those two rights (i.e., for the rightholder, or someone authorized by her, to use a certain kind of force to prevent you from infringing those rights). It is not, however,

incoherent, to have a right not to be hit, without a right to damages, and without a right of enforcement. Of course, such a right isn't much of a right, but it is enough to establish that one is wronged when one is hit without one's permission.

Ripstein raises an objection (pp. 249-51) to John Gardner's reason-based appeal to primary and secondary rights, but I don't see what his objection is to the generic idea that a primary claim-right need not be bundled with a secondary remedial right. If he is simply claiming that, as a matter of moral fact (as opposed to conceptual necessity), they are typically bundled, then I agree, but this still doesn't establish that the primary right always survives its infringement.

Ripstein further claims (p. 232) that provision of damages makes it as if a wrong had never happened. He doesn't really mean this, however, since he acknowledges that sometimes it is not possible to provide full damages. Moreover, it seems very strange to hold that even full damages can make it as if a wrong never happened. Nothing can erase the fact that a wrong happened. I'm guessing that what he means is that full damages can fully *rectify* a past wrong, in the sense that that are no further rectificatory implications, but that is simply true by definition. So, I'm not sure why Ripstein stresses this issue. In any case, it does not seem essential to his argument. The crucial point is that critical morality typically bundles primary rights with remedial rights.

In short, I found the following claims very mysterious: rights always survive their infringement, there is an important special unity between right and remedy, and full remedies make it as if the infringement never happened. Fortunately, these claims seem inessential to his core project.

Let us now consider some more specific claims that Ripstein defends about remedies.

6. Remedies

Ripstein argues that third parties are not owed remedies for harms they suffer when someone else is wronged. After all, they were not wronged. I agree with this in the case where the wronger is not *agent-responsible for wronging* the rightholder (e.g., the agent reasonably thought the rightholder was wrongfully attacking someone). If, however, the wronger is so responsible (e.g., he knew he was wronging the rightholder), then I'm more inclined to hold that third parties have rights to compensation against the wronger. For example, my wife may be owed damages for her loss of household help (and her emotional suffering; see below) when I am wrongly assaulted. Infringing rights when one knows that one is doing so can make one liable for harms to third parties of the wronging, even when the rights of third parties are not infringed.

Ripstein also argues that punitive damages are never morally owed for infringing a right, and I agree. He argues that any legal imposition of punitive damages is either an indirect basis for imposing corrective justice (e.g., for aggravated damages or ill-gotten gains) or is based on policy considerations (e.g., via incentives) that override corrective justice.

What then does a wronger owe the rightholder when he infringes her rights? For use-based wrongs (e.g., battery, theft or trespass), Ripstein argues that wrongers are *strictly liable* in the sense that they owe damages even when the wronging is faultless. He advocates this on the ground that such wrongs involve the use (e.g., intentional physical contact) of another's body or things. This seems mistaken to me, since the agent need not be agent-responsible for the full (or any) damages. Limitations of knowledge (e.g., that lightly striking someone would cause them to bleed to death) and limitations of ability to resist certain pressures (e.g., threats to one's life) may make the resulting damages less then fully attributable to the agent's exercise of her agency. In

such cases, I would argue, the agent owes compensation for damages only to the extent that she is agent-responsible for them (e.g., the foreseeable and reasonably avoidable consequences of an autonomous choice). The mere fact that the agent intentionally used something that in fact belongs to another is (I agree) sufficient to established that he wronged her, but it is not, I would argue, sufficient to establish moral liability for all the resulting damages. Compensation for harms for which the agent is not agent-responsible may be owed by the members of society generally.

For damage-based wrongs, which are roughly acts that are more dangerous than ordinary background level of risk that careful people typically impose, Ripstein argues that agents are liable for the *full* extent of injury *of the type that makes the act wrongful*. Thus, for example, if you carelessly drive over people's feet (thereby wronging them), you owe full damages for the resulting injury—even if you could not foresee some of the harms that would result (e.g., infection from a previously unknown virus). Again, it seems more plausible to me that non-culpable agents are morally accountable only for the wrongful harms for which they are agent-responsible. If the harms were not reasonably foreseeable, then, there is no special reason for the agent (as compared to the rest us) to compensate the injured party. (Again, I here address the rights of critical morality. I realize that tort law tends to agree with Ripstein's view.)

In all cases, Ripstein argues (e.g., p. 252) that compensation is owed for damages to one's means, but not for mere welfare losses from "[s]entimental attachment to property and experiential connection to [one's] body". Such losses, he claims "aren't things that can be replaced and so that they can't be compensated". I realize that tort law takes this general line, but it seems a very strange view with respect to moral rights. Surely, if you intentionally physically impose extreme pain on my body, but in ways that leave no damage in function, you owe me

compensation for the welfare harm. There may be legitimate practical concerns for limiting, in the law, appeals to welfare losses, but as a matter of moral principle such appeal seems essential.

For remedial rights, Ripstein focuses on compensation for damages, but I think that there is also a right, against the wrongdoer, to something like: (1) public recognition of his wronging and the resulting harm to the rightholder, (2) a public statement of regret, and (3) a public request for forgiveness. Although these are not generally recognized by the law, they should be, if, as many have argued, there is an underlying right to such. Ripstein addresses the issue very briefly on p.14, but some additional discussion would have been useful (given his focus on remedies).

Another issue that Ripstein does not discuss much are rights of prior restraint (or enforcement rights). What moral rights do individuals have to stop others from infringing their primary rights, and how does the state institutionalize this with injunctions? With respect to rights to rectification for past wrongs, Ripstein claims (p. 273) that "the plaintiff cannot exercise his or her power—cannot compel the defendant to make it as if the wrong had never happened—except by enlisting a court". One might question whether, even in the presence of a sufficiently just state, one has no moral self-enforcement rights with respect to rectification (e.g., using minor force to retrieve one's stolen computer). More controversial, however, is Ripstein's claim (p. 273) that "the defendant is entitled to refuse to do anything until the plaintiff has established [in a court] the wrong." Of course, the defendant may be legally entitled to do nothing, but I assume that Ripstein is focusing on the underlying moral rights. It seems extremely strange to hold that the wrongdoer has no moral duty to rectify his wrong until the plaintiff has established the wrong in court. Obviously, I'm missing something here.

7. Conclusion

I've expressed doubts about the various primary and secondary rights of critical morality that Ripstein posits and about his claim that contemporary, English-derived common tort law institutionalizes many of these rights (as opposed to rights of prevailing social morality). Nonetheless, the book is full of insightful discussion of a wide range of cases, concepts (strict liability, duty of care, malicious wrongs, etc.), and doctrines (e.g., economic analysis of the law, and civil recourse theory of Goldberg and Zipursky). Anyone with strong interests in tort law theory needs to read this book.[1]

---

[1] Thanks to Arthur Ripstein, Ben Zipursky, and Bruce Chapman for helpful comments on a previous draft. Special thanks to Arthur for patiently walking me though several issues that I didn't understand.