

Compensation and Continuity

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Wrongdoers may incur duties to compensate the victims of their wrongs. A prominent explanation of this fact, endorsed in different forms by John Gardner, Joseph Raz, Arthur Ripstein, and Ernest Weinrib, is that an aspect of the pre-wrong normative situation continues in some way and now requires the wrongdoer to compensate. This type of explanation has been attacked on various grounds.¹ This paper defends the modest claim that *some* compensatory moral duties arise in virtue of a continuation of the duty breached, right infringed, or reasons not conformed to by wrongdoers in committing wrongs. Its main contribution is a refinement and defence of the continuity explanations of compensation developed by others, while demonstrating their limits. It also sketches how compensatory duties may arise beyond the limits of continuity explanations.

The paper is in six sections. The first introduces and contrasts this type of explanation of compensatory duties with others, and demonstrates the importance of a defence of continuity theses. The second section defends a version of ‘duty continuity’: the idea that the duty breached continues to bind the duty-bearer in such a way as to require compensation post-breach. The third section defends a version of

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¹ See below, X.

‘reasons continuity’: the idea that the reasons which grounded the duty breached continue to demand conformity post-breach and that compensation is often the next-best way of conforming to those reasons. The fourth section defends ‘right continuity’: the idea that the right infringed justifies both the duty not to interfere with the right and the duty to compensate. The fifth section examines the scope of the compensatory duties justified by these continuity theses and identifies some important limits to continuity explanations, and sketches how other compensatory duties may arise. The sixth section considers objections.

Two clarifications are in order. First, what is a ‘compensatory’ duty? As I will understand it, a duty to compensate is a duty to place a person in the position they would have been in had some event not occurred, or to put the person in a position which is close to that position. Second, the article is only concerned with compensatory duties that arise from wrongs. It understands a wrong as the breach of a *pro tanto* moral duty.² It is not assumed that all wrongs give rise to duties of compensation nor that duties of compensation only arise from wrongs. But the focus is upon those duties that arise after the commission of a wrong.³ A parent might have a duty to compensate their child who is injured as a result of an earthquake, but this need not arise from any wrong on the parent’s part.

(1) Continuity theses: introduction

² Some may deny that the conduct in these cases is wrongful in any sense, even *pro tanto*. See, for example, RJ Wallace, *The Moral Nexus* (Princeton, 2019), X. Readers who have this view can replace references to ‘*pro tanto* duties not to X’ with ‘reasons not to X’.

³ This leaves open whether the duty to compensate arises *in virtue of* the wrong. The paper’s starting point is the intuitive idea that wrongdoing sometimes gives rise to duties to compensate. It leaves open at the outset whether the compensatory duty is grounded in the wrong or whether wrongdoing is merely one important causal occasion for the triggering of compensatory duties: see further below, X.

Consider the following example:

Arm. A intentionally removes B's arm without justification. A prosthetic arm, which will have the same functionality as B's removed arm had, costs £500.

Intuitively, if B demands that A do so, A has a duty to provide B with the prosthetic arm, or provide A with the means of acquiring it (i.e. £500).⁴

The explanations for this phenomenon that I examine here hold that the way things stood, normatively, between the victim and injurer, pre-wrongful-harm, explains the normative position between them, post-wrongful-harm. As these explanations rely upon the idea that the pre-breach normative position 'continues' in some way post-breach, I refer to them as 'continuity theses', following John Gardner.⁵ There are essentially three continuity theses in the literature.

Duty continuity: the duty-bearer's duty continues post-breach, and post-breach requires the duty-bearer to compensate.

Right continuity: the right of the person that has been violated or infringed continues after violation or infringement and requires the violator or infringer to compensate.⁶

⁴ The relevance of B's demand is considered below, X.

⁵ J Gardner, 'What is Tort Law for? Part 1. The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1.

⁶ See especially A Ripstein, *Private Wrongs* (HUP, 2016) 248: 'Rights survive their own violation...'

Reasons continuity: the reason or reasons grounding a duty continue post-breach, and next-best conformity to those reasons may require compensation.⁷

Applied to *Arm*, *Duty continuity*, for example, holds that there is a continuing duty on the part of A which requires A to compensate B. One possible such duty is A's duty not to harm B. To the extent that B's condition is truly reparable, A's paying compensation to B may make it the case that B will not be harmed, or harmed to the same extent, by B's conduct.

Two points about the relationship between these theses may be briefly made here.

First, on certain interpretations, they are not inconsistent: one could rationally endorse each thesis. For instance, if a person's right is simply their being situated such as to be owed a duty with a certain content, then *Duty* and *Right continuity* are not competitors. Second, on certain interpretations, they do not entail each other. For example, if one believes that not all duties correlate with rights, and that those duties breach may give rise to compensatory duties, then it will be important to defend *Duty continuity*. It may be suggested that since rights and duties are simply special kinds of reason for action that *Duty* and *Right Continuity* are entailed by *Reasons continuity*.⁸

As formulated, however, *Reasons continuity* refers to the reasons which ground a duty.⁹ Even if a duty is reason, it is not a reason which grounds the duty which is

⁷ Gardner (n 5).

⁸ On one view, a duty is a protected reason: J Raz, *Practical Reason and Norms*, X.

⁹ On the version of *Reasons continuity* I endorse, however, *Duty* and *Reasons continuity* are the same thesis. This is because I endorse the idea that it is the reasons which *constitute* rather than *ground* the duty which continue. It seems to me that *values* ground duties, not reasons. To my mind, *Reasons continuity* as formulated in the text should really be:

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constituted by that reason.¹⁰ There is related idea which does, however, entail the other two theses. This could be formulated thus:¹¹

Conformity principle. If an agent fails to conform to a reason, and that reason persists, the person has a reason to come as close to conformity to the reason as possible.

I believe that the *Conformity principle* is true and entails the continuity theses. Nonetheless, I will proceed to consider each continuity thesis separately partly since there may be reasons to endorse the narrower continuity theses, and partly because the theses have been offered as distinct in the literature.

For any of these theses to be established, the following two conditions need to be made out. First, it must be shown that the pre-breach normative feature relied upon – the duty, the reason, the right – continues in the existence after the breach. Second, it must be shown that this continuing feature justifies a duty of compensation. It will be convenient to consider *Duty continuity* and *Reasons continuity* first before turning to *Right continuity*. In each case, the discussion focuses upon establishing these two conditions. The discussion will also be primarily focussed upon compensation in

Value continuity. The values which grounded a duty play a role in justifying both duties of non-interference (or whatever duty is appropriate to the value: promotion, respect, etc.) and duties of compensation.

Value continuity is uncontroversially true.

¹⁰ A duty may ground further duties in combination with certain requirements of practical rationality.

¹¹ J Raz, *From Normativity to Responsibility*, X.

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respect of interference with a person's bodily rights. In Section 4, I consider the extent to which these explanations can be extended beyond bodily rights.

Before moving to my qualified defence of continuity thesis explanations of duties to compensate, it may be helpful – in order to see what is at stake in this defence – briefly to contrast this kind of explanation with others. Consider, first, then, the idea that compensation is justified as a matter of 'corrective justice'. This idea merely postpones the question of *why* it is a requirement of justice that compensation is owed for harm caused by wrongdoing. The explanation may simply be that justice demands that a wrongdoer conform to their continuing duty, or the continuing reasons for their original duty.¹²

Next, consider the idea that compensation is required, when it is, in order to undo the impairment of a relationship between the wrongdoer and the victim.¹³ It is possible to describe each of us as in a moral relationship with every other member of the moral community. This relationship seems constituted by a set of reciprocal duties such as duties not wrongfully to harm each other. To impair this relationship seems then simply to be to *breach* the duties that constitute the relationship. The question then arises why the breach of the duty should give rise to a duty to compensate. It takes us little further to say that the breach (which is or was constitutive of the relationship) must be 'repaired'. Why? Even if this theory is restricted to special relationships which are constituted not simply by a set of reciprocal duties (but also certain attitudes and patterns of conduct), it remains unclear *why* the impairment of such a relationship calls for compensation.

¹² The responsibility account mentioned below is sometimes offered as a deeper account of why corrective justice demands compensation.

¹³ L Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (Oxford University Press, 2009).

Third, it has been argued that compensation is morally required in order to express sincere regret for the wrong.¹⁴ There are two problems with this. Intuitively it is sometimes permissible to take a wrongdoer's resources to compensate the victim of the wrong even if the wrongdoer is incapacitated such that they are unable to express regret. This permission is naturally explained by the existence of an independent duty to compensate. Furthermore, the reason why compensation can be taken, when other conditions are met, to express regret seems to be explained by the prior fact that doing so is morally required. The reason why a heartfelt apology may sometimes not be enough is precisely because further, as yet unmet, moral compensatory duties still call for conformity.

Fourth, it could be argued on rule consequentialist grounds that moral duties to compensate will make things go best. If people are under such duties, it will incentivise them to conform to their duties not to wrongfully harm. This is one way of interpreting Pufendorf's view that without duties to compensate, duties not to injure would be an empty requirement.¹⁵ It seems odd, however, that the content of moral duties is so contingent upon people's imperfect motivational willingness not wrongfully to harm other people: were moral agents more motivated to conform to their duties not to harm in virtue of the aptness of so acting, then there would be no moral duties to compensate. While not conclusive against such a view, this is an unfortunate implication.

Fifth, compensatory duties are sometimes justified on the basis of a person's 'responsibility' for a harm. On its own, it is unclear how responsibility justifies a compensatory duty. An argumentative bridge is needed from 'X is [causally,

¹⁴ E Encarnacion, 'Corrective Justice as Making Amends' (2014) 62 Buffalo LR 1.

¹⁵ *De Officiis* Bk I, Ch VI.

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attributively, or otherwise] responsible for a harm' to 'X is under a duty to compensate for that harm'. A plausible bridging argument is that responsibility is relevant to the fair allocation of harm between persons. This is one role the concept of responsibility plays in arguments about the justification of liability to defensive harm.¹⁶ More generally, it is widely accepted that responsibility, in some thicker sense than causal responsibility, is relevant to the fair allocation of benefits and burdens.¹⁷ I do not reject this view, but I argue later that it provides an independent ground for a compensatory duty, or qualifies the demands of a duty justified by a continuity thesis.¹⁸

(2) Duty continuity

Consider, again, *Arm*. If *Duty continuity* is to explain the existence of a compensatory duty in this case, then it must identify a duty owed by the wrongdoer which continues in existence after that duty has been breached. I will consider four candidate duties: (a) the duty not to damage another's body by one's action without justification; (b) the duty to respect another's bodily rights; (c) the duty not to harm a person's bodily functioning without justification. I will argue that all of these duties continue in a sense after their breach, but that only (c) provides an illuminating explanation of the wrongdoer's duty to compensate.

¹⁶ J McMahan, 'Self-defence and the Problem of the Innocent Attacker' (1994) 104 *Ethics* 252, 259: "[I]n cases in which a person's [wrongful] action ... has made it inevitable that someone must suffer harm, it is normally permissible, as a matter of justice, to ensure that it is the [wrongdoer] who is harmed rather than allowing the costs of his wrongful action to be imposed on the [other(s) on whom they might instead have fallen]".

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¹⁸ Below, X. **Sadly, incomplete.**

Consider, first, (a). The first question is: does (a) continue after its breach? In one sense, the duty does continue: it continues in the sense that the wrongdoer is still under (a) in relation to future conduct in relation to the victim. But in another sense, the duty does not. If the arm is irreparably damaged, then the duty not to damage the arm does not continue. Just as there is no duty not to kill the killed, to keep in confidence information that is no longer confidential, there is no duty not to damage an irreparably damaged arm (in the precise respect in which it was irreparably damaged).

An objection to this last point is that it would be ‘absurd’ if breaching a duty were a mode of discharging it.¹⁹ Three responses may be made. First, this objection gains intuitive purchase by using the word ‘discharge’ rather than ‘cause not to exist’. Discharge means ‘fulfil’; clearly, to breach is not to fulfil a duty. There is nothing absurd about the idea that a person who kills their friend causes an abrupt cessation of the duties of friendship. Second, once it is realised that the duty continues in the first sense identified in the last paragraph, the counterintuitiveness of the claim is reduced further: there *is* a sense in which the duty continues. Third, if breach of a duty gives rise to a new duty to compensate, then the idea that the wrongdoer benefits from breaching the duty, which may be at the root of the appearance of ‘absurdity’, evaporates.

The second question, then, is: does (a)’s continued existence in the first sense justify a duty to compensate for the breach? It does not. If the wrongdoer is subject to a continuing duty not intentionally to damage the victim’s arm in relation to future conduct, it is obscure how conformity to this duty could require, now, compensation

¹⁹ E Weinrib, *Corrective Justice* (OUP, 2012) 91.

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in respect of the damage done. Compensating will not amount to not damaging the arm.

Consider now (b): the duty to act in conformity to the victim's rights over his body. This is possibly how Weinrib understands the relevant continuing duty in this passage:

The defendant's breach of duty did not of course bring to an end the duty with respect to the plaintiff's right, for, if it did, the duty – absurdly – would have been discharged by its breach. To be sure the specific action required of the defendant has been transformed by the defendant's tort. Just as the plaintiff's right is no longer embodied in the specific object, which has been destroyed, but in an entitlement to receive the object's equivalent from the defendant, so the defendant's duty is no longer to abstain from its destruction, which has already taken place, but to provide the plaintiff with the object's equivalent. The specific action that the duty requires is different, but the defendant is not under a different duty.²⁰

On this view, the duty that survives is not *identified*, then, with the duty not to damage or injure (though Weinrib sometimes seems to say this).²¹ It is a more abstract duty. It might be formulated as a 'duty to respect the victim's right to their body'.²² *Ex ante*,

²⁰ E Weinrib, *Corrective Justice* (OUP, 2012) 91.

²¹ Weinrib (n 6) 90: 'At its most general, having a right in private law means that the right-holder is normatively so connected to the object of the right that another person is under a duty not to interfere with that object'. This suggests that what survives is the duty not to *interfere*.

²² Drawn from Weinrib (n 6) 90: 'Even if the object no longer exists as a physical entity, the parties continue to be related to each other through the object's normative connection to the plaintiff and the consequent duty on the defendant to act in conformity with that connection.'

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the duty of respect for another's right requires non-interference with the object of the right. *Ex post*, the duty of respect requires compensatory action. On this view, there is a single, continuing, duty with different incidents at different times, the changing requirements of the duty changing with the alteration in circumstances effected by the breach.

Once the relevant duty is defined so abstractly as a duty to respect the victim's rights, however, it becomes unilluminating as an explanation of the compensatory duty. The starting point was that we had reason to think that the injurer had a duty to compensate, so we already thought that respect for the injured's rights required compensation. But what we wanted was some kind of explanation for this. Simply restating that respect for the victim's right after infringing it requires compensation leaves us largely in the dark as to *why* this is so. So, Weinrib's explanation fails the second condition: it does not provide a sufficient justification why the continuing duty justifies compensation.

Consider now (c), the duty not to harm a person's bodily functioning without justification. A has breached this duty by removing B's arm: this harms B's bodily functioning during a period. But A can still conform to this duty in the future. Whether B will suffer impaired bodily functioning in the future as a result of A's conduct depends, let us suppose, upon obtaining a substitute arm. A can make it the case that A does not harm B's bodily functioning in the future by providing the means to obtain the arm.

An objection to this argument is that it does not justify a duty of *compensation*. Consider again *Arm* where the arm has not yet been acquired. If A provides B with the means to acquire the arm, this does not *compensate* B, but provides B with the means to prevent future harm occurring. Compensation, it may be objected, involves

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placement of a person in the position they would have been in had no breach occurred *through negating or counterbalancing harm*. In *Arm*, the harm – the future loss of bodily functioning – is not being negated or counterbalanced, but prevented from occurring.²³ If a court ordered a person to build a wall to prevent future flooding after a wrongful flooding, this would not be described as an order to *compensate*.

I have two replies to this objection. First, in many cases, the distinction between prevention and compensation is unclear and either description is apt. In *Arm*, A's wrongful act puts B at risk of future harm. In providing B with means to acquire the arm, A could be said to be restoring B to B's no-breach position by reducing the risk that B currently (wrongfully) faces. In this way, the preventive measure can be understood as restorative. Second, even if compensation, *stricto sensu*, involves restoration to the position that would have existed had an event not occurred *through* negating an existing harm or counterbalancing it, the duty not to render a person financially worse off through wronging them covers such cases. One could be described as *negating* a financial harm that would otherwise persist through compensation.

A second objection is that duties are properly individuated by the act token they mandate. A duty not to impair bodily functioning by one's act is different, then, from a duty to repair that impairment. But it is usually thought to be intelligible that there be general duties with more specific entailments at particular times. For instance, suppose there is a duty to maximise utility. This duty may entail one act token at t and another at $t + n$. The duty not to impair a person's bodily functioning has this character: it entails more specific duties at different times.

²³ On the distinction between negating and counterbalancing harm, see A Slavny, 'Negating and Counterbalancing: A Fundamental Distinction in the Concept of a Corrective Duty' (2014) 33 *Law and Philosophy* 143.

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In sum, then, *Duty continuity* can justify a compensatory duty if the following conditions hold: (a) a person is subject to a duty not to produce, or contribute to the production of a state of affairs (for example, that a person is harmed); (b) whether that state of affairs obtains is not fixed at a particular moment in time; (c) whether the state of affairs occurs depends on whether compensation is provided from a source (d) if the state of affairs obtains without compensatory action being taken by the person subject to the duty, the person will be said to have produced or contributed to the production of the state of affairs.

(3) Reasons continuity

Consider now *Reasons continuity*:

Reasons continuity: the reason or reasons grounding a duty continue post-breach, and next-best conformity to those reasons may require compensation.

On this view, the continuing normative entity is a reason or set of reasons. More precisely, it is the reason(s) which grounded the duty breached. What does it mean for a reason to ground a duty? Proponents of this view are not clear on this issue. One possibility is that a duty is *constituted* by certain reasons: a reason to do X, or set of reasons to do X, and a reason not to act on certain reasons against X-ing; or a duty is constituted by the balance of reasons favouring X-ing. Another possibility is that by grounding reasons one really means grounding *values*. On this view, the value of well-being for example, in conjunction with certain other facts, grounds duties not to set back others' well-being. Values are not usually individuated by the act tokens

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which serve, promote, or respect those values. By contrast, reasons are individuated by the act tokens (a reason to eat green beans), or at least act-types (a reason to promote my health), which they are reasons for or against. Although we might speak of the ‘reasons of love’, where it seems that reasons are not tied to any particular actions, what this expression means is ‘the reasons to do particular acts to which the value of love gives rise’. In what follows I will avoid the idea that it is merely the same *values* which ground the duty. I take it that this is uncontroversial. Instead, I will argue that there are reasons to do certain things that either constitute or ground duties to do those things, which continue.²⁴

Consider, again, our first question for any continuity thesis: does the normative entity – here a reason – continue after the breach of duty? A possible theoretical argument why reasons ‘stick around’ after acts which do not conform to those reasons is that, otherwise, there is no sense in which there was a reason in the first place. Compare Ripstein’s argument that if *rights* didn’t survive their violation, there would be no sense in which one had a right in the first place. He writes: ‘If I could unilaterally dissolve your entitlement to constrain my conduct, there would be no sense in which you were entitled to constrain it’.²⁵ Unfortunately, this argument fails. A person who denies the existence of duties to compensate is not logically required to deny the existence of a primary duty not to injure. She can say: yes, I wronged you by breaching a duty not to injure, but that is past history now. She does not thereby deny that there was *any* ‘sense in which you were entitled to constrain

²⁴ See generally J Gardner, ‘What is Tort Law for? Part 1. The Place of Corrective Justice’, above n x. Gardner endorses this view because he considers that duties are individuated by the act tokens they mandate. If we accept the possibility of general duties with specific entailments at different times, however, this is not a powerful motivation for shifting to *Reasons continuity*.

²⁵ Ripstein (n 4) 248. Similarly, Weinrib (n 6) 91: ‘The defendant’s breach of duty did not of course bring to an end the duty with respect to the plaintiff’s right, for, if it did, the duty – absurdly – would have been discharged by its breach.’

[her conduct]’. The fact that a person can cause a duty not to exist does not entail that the duty not exist. This becomes even clearer when we consider the primary function of a duty. A duty is a certain kind of constraint on practical reasoning. If one has a duty, certain reasons are excluded from the set of reasons one can rely upon in deciding what one ought to do. This function can be performed even if the duty is brought to an end upon breach. The fact that a duty will cease to exist if it is not conformed to has no impact upon whether the reasons excluded by the duty are excluded at the time of the breaching action. It will still be impermissible (and make no sense) to reason in this way: ‘I may breach this duty because it will cease to exist upon breach’.

A better argument is provided by Gardner. His argument for the conclusion that reasons may continue after breach seems to be based upon an inference to the best explanation. He presents an example from Neil MacCormick in which a parent promises their child to take them to the beach on Saturday.²⁶ The parent as a result of an emergency cannot do so. Intuitively, Gardner claims, the parent will feel still constrained by the promise, albeit that that it is now impossible to comply with the promise. The best explanation for this phenomenon is that the reasons for the promise – the conferral of pleasure, for instance – continue to exist and call for conformity. This is what best captures the sense, he claims, in which the duty leaves a rational ‘trace’. Call this the ‘intuitive’ argument.

Gardner’s argument can be bolstered with a simple observation: if one has a reason to X at t, at t+1 it is still possible to X, and the reasons why (which may be a more general reason that entails X-ing at t) one had the reason to X continue to obtain at t+1, it is difficult to understand why the reason to X disappears entirely. Reasons to X

²⁶ Gardner (n 3) 28.

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cease to exist by it becoming impossible to X or by the reasons to X being cancelled in virtue of a change in the circumstances sustaining the reason to X. It may be, of course, that at t+1 there are new countervailing reasons not to X. But these do not eliminate the reason to X, they simply compete with it. Call this the ‘theoretical’ argument.

An important objection to the claim that the grounding reasons for a duty continue after the duty’s breach is made by Smith. In his view, the ‘ordinary understanding’ of duties and reasons poses a problem for the claim that the same reason continues. He gives the example of a person destroying another’s chair:

In the ordinary understanding, then, your duty not to interfere with my chair (or the reasons underlying that duty) is contingent on the chair’s existence. If the chair does not exist, for whatever reason, then it makes no sense to speak of a duty not to interfere with the chair or of reasons not to interfere with the chair.²⁷

Smith is correct: happily, there is no reason not to interfere with non-existent chairs. The reason that continues, if any reason does in Smith’s example, cannot, then, be identified as such. But Smith neglects the possibility that the reason which continues is a reason which generates one reason ex ante (a reason not to interfere) and a different reason (a reason to compensate) ex post. This feature of reasons – that they can generate further reasons – is commonplace. Compare: I have a reason to maintain my health. This reason gives rise to many other reasons: a reason to eat green beans, a

²⁷ S Smith, ‘Remedies for Breach of Contract: One Principle or Two?’ in Letsas and Saprai (eds) *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 348.

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reason to go for a run, a reason to drink less beer. I have reason to do these acts in virtue of my reason to maintain my health because these acts contribute towards conformity to that reason. A possible reason that continues in Smith's example is a reason to maintain the level of a person's existing resources. This reason generates a reason not to interfere *ex ante* and a reason to compensate *ex post*.

Whether such a reason exists is not crucial for the success of *Reasons continuity* as a thesis about compensatory duties in general. For *Reasons continuity* to be successful, all that needs to be shown is that there is a significant class of compensatory duties that can be explained by it. It is open to serious doubt whether there are always reasons for persons to maintain other people's holdings at their existing level. But it is far less doubtful that there are no genuine continuing reasons in *Arm*. Suppose, plausibly, that part of the justification of the duty not culpably to damage another's body by one's action is the reason not to make a person's body worse off in how it functions. If you culpably cause my arm to be destroyed, and it is possible to restore the functionality of my body by providing me with a prosthetic arm (or the means to obtain one), then it is still possible to conform to this reason, by providing the arm or the means. Here one continuing reason generates reasons to perform different actions: the reason not to cause a person's body to be worse off by your act generates a reason not to damage the body at all, then a reason to restore its functionality afterwards. So there are at least some important cases where the relevant reasons do, *contra* Smith, persist. But they need to be described at an appropriate level of abstraction.

Now consider two objections. The first objection is that I fall foul of the objection I made to Weinrib's account of *Duty continuity* – namely, that *Reasons continuity* becomes so abstract as to be unilluminating. There is a difference,

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however, between merely asserting that respect for a person's right to X requires such and such at different times (ex ante: non-injury; ex post: compensation) and explaining how a chain of reasons generates a compensatory duty. Consider giving a person advice: 'respect the right you have breached' is less informative advice than 'the right you violated was based upon maintaining a person's healthy functioning of their body – you can still conform to that reason by providing the means to restore that functioning'.

The second objection is that, if one has a reason not to X – say, a reason not to worsen a person's bodily functioning – and one has worsened their bodily functioning irreparably *to some extent*, then the reason not to worsen cannot continue, because it is now impossible not to worsen their bodily functioning. At best, the reason which continues is a reason to do the next best thing to not worsening a person's bodily functioning, which is to *minimise* the extent of the worsening. But a reason not to X and a reason to do the next best thing to not X-ing are different reasons. This objection is valid. It should probably be conceded that the reason that exists post-breach is either the same or a *very similar* reason. In the latter case, there is strictly no continuity in the sense of the persistence through time of a single reason. But there is continuity in the sense that the post-breach reason has a very similar content, and justificatory basis, to the pre-breach reason – the reason not to harm at all is very similar to the reason not to harm in part.

If the intuitive argument and the theoretical argument are accepted, then we ought to believe that, at least sometimes, the grounding reasons for a duty continue after the duty's breach. The next question is: do the continuing reasons ever generate a duty to *compensate*? Hopefully, it is relatively clear now how this is possible, once the relevant description of the continuing reason has been identified. If the continuing

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reason in *Arm* is the reason not to worsen a person's bodily functioning, then, in light of the acts constituting the breach – damaging the arm – conformity to this reason requires that one takes steps to prevent the worsening of functioning that the damage is likely to cause. One such step is the payment of monetary compensation. If one of the grounding reasons of duties not to damage others' bodies is a reason not to worsen significantly a person's well-being more generally, then, to the extent the breach has reduced or poses a substantial risk of reducing their well-being, then one has a reason to provide monetary compensation to the extent that will prevent a worsening of well-being. Notice that the continuing reason can justify radically different actions pre-breach and post-breach. The reason not to worsen significantly a person's reputation justifies a duty not to defame *ex ante*. *Ex post* it could require significant monetary compensation – to the extent that the payment of this compensation conveys the message to others that the statement made is false and thereby restores the person's reputation.

(3) Right continuity

Right continuity can be understood in at least two ways corresponding to different understandings of the notion of a moral right. If a moral right is simply the Hohfeldian correlative of a moral duty, then everything I have said about *Duty continuity* can simply be transposed into the language of *Right continuity*. Every case where *Duty continuity* justifies compensation is also a case where *Right continuity*, on a Hohfeldian understanding of rights, justifies compensation, too. This is because rights are simply the logical correlatives of duties.²⁸

²⁸ See generally WN Hohfeld, *Fundamental Legal Conceptions* (Yale UP, 1919).

Moral rights can alternatively be understood, with Raz, as interests sufficiently important to justify duties upon others.²⁹ On this understanding of rights, *Right continuity* shares a virtue of *Reasons continuity*: it explains how one normative entity (a right, a reason) could justify different normative incidents (different duties). Consider a person's interest in bodily integrity. Plausibly, this is sufficiently important to justify certain duties of non-injury upon others. Plausibly, this interest is also sufficiently important to justify a duty to compensate for bodily injury once it has been interfered with.

This version of *Right continuity* is true, but it is also relatively unilluminating in the same way as Weinrib's version of *Duty continuity* is unilluminating. A person's interest in their bodily integrity is something of sufficient importance to justify duties in others, but it requires further elucidation why it justifies a duty of compensation, and a duty of compensation in the injurer in particular.

The elucidation could be developed as follows. If an interest is sufficiently important to justify negative duties of non-injury, it must also be sufficiently important to justify at least *some* positive duties to promote the interest, especially given the stringency of the negative obligation, which is partly a function of the importance of the interest.

A more difficult problem is to explain why *Right continuity* on the Razian understanding of rights justifies a duty of compensation in the injurer. The damaged interest in bodily integrity could be promoted by a wide range of people – why pick on the injurer? At least part of the answer must, of course, be the injurer's responsibility for the injury to the right. This responsibility matters because it singles out the injurer beyond others as an appropriate bearer of the positive duty to promote

²⁹ J Raz, *The Morality of Freedom* (OUP, 1986), 166.

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a person's interest. It might be objected that appeal to the injurer's responsibility means that this version of the continuity thesis appeals to the fact of *breach* to explain the injurer's compensatory duty: the breach explains the injurer's responsibility, which in turn explains the compensatory duty. If this is true, then this version of the continuity thesis is relatively uninteresting. A possible response, however, is that the breach is only significant in showing that the injurer had a reasonable opportunity to avoid injuring the right; the normative significance of the breach lies not in its wrongfulness as such, but in its indication of the existence of such an opportunity.

In sum, *Right continuity* is also defensible. On a Hohfeldian reading, it has the same virtues as *Duty continuity*. On a Razian reading, it justifies compensatory duties, albeit that the full story of why this is so needs to be developed further in the way I have very briefly sketched.

(4) Scope of the compensatory duties generated by continuity theses

The discussion so far implies that continuity theses explanations of compensatory duties apply in cases of (a) breaches of duties not to impair a person's bodily functioning; (b) where the breach is in some measure reversible; (c) where the compensation has not been obtained from a source independent of the wrongdoer *or* where the non-payment of compensation by the wrongdoer will significantly impair the victim's flourishing. In this section, I argue that the explanation extends beyond situations where (a) and (c) obtain, but that the justification of compensatory duties for some invasions of property rights, and for consequential losses arising from the violation of rights sometimes requires separate justification. I sketch alternative

sources of duties to compensate in these cases, and their relationship to the continuity theses.³⁰

Where the harm has been independently repaired

The continuity explanations I have developed can only justify a compensatory duty in *Arm* in rather limited circumstances. Defenders of these explanations do not note that if B, or a third party has already paid for the arm, then it cannot be said that preventing wrongful harm to B's bodily functioning justifies A's compensatory duty. If the arm has already been independently acquired, then the payment of money will not contribute to the prevention of A's causing harm to B's bodily functioning: there is no risk of this occurring. Such a duty could only be justified on this argument if there was a substantial risk that neither B nor a third party would provide the means to obtain the arm.

Can this type of argument be extended so as to justify a compensatory duty in A when B has already paid for preventative measures? It can be if A has a duty not to make B financially worse off as a result of A's wrongfully damaging B's body. If B pays for the arm, then B is at risk of being financially worse off than B would B had A not wrongfully harmed B's body. I say 'at risk of' because, again, it is an open question whether B will actually be financially worse off as a result of A's wrongful conduct. This is because whether one is financially worse off as a result of a person's conduct is not fixed in a moment in time.³¹ Suppose a bank makes an unauthorised reduction in the amount of funds in a person's account. Whether the person is worse

³⁰ I explore these in greater detail in S Steel, 'Legal Remedies and Moral Duties' (in progress).

³¹ See D Nolan, 'Damage and Loss' (2017) OJLS

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off as a result of this wrongful reduction depends on what happens next. If the bank simply presses a button to restore the fund to its previous level then, if there is a duty not to render a person financially worse off as a result of one's wrong, the bank is simply conforming to its duty not to render the account holder financially worse off. It still does something wrong: it made an unauthorised reduction, but it conforms to its further duty not to render a person financially worse off as a result. In *Arm*, if B has already paid for the arm, A would conform to his duty not to render B financially worse off as a result of A's wrongfully damaging B's body by compensating for this.

An objection to this elaboration of *Duty continuity* is that it posits a duty which does not exist. There is no duty, the objection runs, not to cause a person to be financially worse off as a result of a wrong, only a duty not to commit the wrong. For instance, it might be said that there is only a duty to keep one's promises not, additionally, a duty not to render a person worse off as a result of breaching one's promise. Alternatively, it might be considered question-begging to justify a duty to compensate for a loss caused by a wrong by appealing to a duty not to cause a person to suffer a loss as a result of a wrong; the duty not to cause a person to suffer a loss as a result of a wrong just is, one might object, a duty to compensate a person as a result of a wrong.

The idea that there are some primary moral duties not to cause people to be financially worse off through wronging them is defensible, however. Such a duty could be considered simply to be a reflection of a general moral duty not to cause (by one's action) easily avoidable suffering without justification. This is duty (d) above: the duty not intentionally to cause suffering to a person without justification. Depriving a person of financial resources can, sometimes, have a very significant impact on their ability to lead a flourishing life, especially in states with relatively

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modest welfare provision, or where insurance is prohibitively expensive. It can do this in various ways: by depriving of them the means to obtain or continue to have shelter, by reducing their ability to enjoy valuable relationships or by reducing their ability to participate in valuable activities.

Clearly, not every time a person is caused to suffer financial loss do these effects occur. Indeed, a reduction in a person's finances may have no effect whatsoever on their well-being. This is true even once we take into account subtle harms that a reduction in one's resources may cause. Gardner argues that a reduction in one's ability to pursue one's existing goals can be a serious matter, simply because they are one's adopted goals (and possess a minimal level of value).³² The reason is that life is finite. There is a limit to how much one can change course and move on.

Consequently there can be a value in protecting you in what you have simply because you have it (and it is minimally valuable). But the idea (not one that Gardner espouses) that *all* of one's tangible property or intangible wealth is adopted into one's life goals seems extremely implausible, at least for most people, or even that the possession of all of one's existing wealth is necessary for the maintenance of one's existing goals. Whether the law might be justified in adopting the presumption that reduction in wealth has a substantial impact on a person's goals is another question.

An independent argument for a compensatory duty can be given in cases where the harm has already been repaired. It seems *unfair* that the victim should have to bear the entirety of this cost. This unfairness could be explained, with the assistance of the continuity thesis, on the basis that the victim has involuntarily discharged the injurer's duty. By purchasing the arm, the victim removes the basis for the injurer's duty to pay compensation – in virtue of (c). At least if the victim requested the injurer to pay

³² J Gardner, *From Personal Life to Private Law*, (Oxford University Press 2018), ch 5.

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the compensation, it seems unfair that the victim should be left with the cost of discharging the injurer's duty. The continuity thesis still enters into the justification of the injurer's duty to pay: it enters into the explanation of why it is *unfair* that the victim be left with the cost of bearing the burden of their injury as between the victim and the injurer. This is because it explains the basis of the duty that the victim causes to be discharged. The continuity thesis, then, in combination with a principle of fairness, can justify duties to compensate even where the means to repair the injury have already been obtained.

Beyond bodily rights

Consider (a). *Arm* concerns relatively uncontroversial duties, and relatively uncontroversial reasons or rights. Most people will be willing to accept that there are reasons not to worsen people's bodily functioning (without their consent). But in many cases where a person intuitively has a duty to compensate, it is not obvious what reason has not been conformed to, and thus what reason remains to justify a compensatory duty. I will consider two problem cases: (i) destruction of property; (ii) breach of promise.

In a significant range of cases, the destruction of property is relatively unproblematic. To the extent that the property contributes significantly to one's well-being, it can justify the existence of relatively stringent duties upon others not to destroy it. The continuing reason in such cases could be one's reason not to significantly worsen a person's flourishing. But in many cases, the continuing existence of a person's property makes no such contribution. For instance, it is difficult to believe that the moral justification of property rights of the extremely

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wealthy in non-essential goods that are not adopted into their life goals are justified by their well-being.³³ The same is generally true of corporate property rights.

Nonetheless, it is possible to justify duties of non-interference with these property rights, and duties to compensate, on at least two grounds. First, there is a collective interest in having valuable resources available for productive use, and thus free from certain kinds of damaging interference. In these cases, the duty to compensate can still, however, be justified by a continuity thesis, if there are continuing reasons, partly constitutive of duties, not to damage these resources in the collective interest.

To the extent that payment of compensation will make available those valuable resources for exploitation, then the continuing reason could justify this payment.

Second, duties to compensate can be justified in these cases on the grounds of general deterrence in order to maintain public order, under certain empirical assumptions.

Suppose that there would be many more harmful violations of property rights were people not legally empowered to trigger legal duties to pay compensation in respect of the violations of property rights in any kind of property. Perhaps the incentives created by individuals being so empowered are greater than those provided by morally permissible criminal law sanctions. If people have moral duties not to decrease the security enjoyed by others' valid moral property rights, they may have duties to bear compensatory burdens which incentivise others not to interfere with these rights.

Objections

³³ For a compelling defence of this claim, see R Cruft, 'Against Individualistic Justifications of Property Rights' (2006) 18 *Utilitas* 154, 165-167.

(a) *Justified harm*

Consider this case of justified harm:

Dock. A wholly unforeseeable storm arises while A is sailing on A's boat. The only way for A to prevent himself being swept away by the storm to certain death is by anchoring to, and thereby damaging, B's dock.

The generally accepted view in the literature appears to be that, although A acted permissibly, A ought nonetheless to compensate B for the damage done to the dock. *Reasons continuity* can explain this on the basis that the reasons which constituted A's *pro tanto* duty not to damage the dock continue after the breach of that duty. These reasons were not cancelled by the damage to the dock (as they probably would have been if the dock owner had consented to the damage³⁴). They were merely outweighed and persist, calling for conformity; the call is answered by compensatory action.

So far, so good. But not every case of justified harming gives rise to a duty to compensate. An innocent does not owe compensation to a highly culpable unjust attacker for harm imposed upon the attacker in justified self-defence. Call such situations *Self-defence*. Yet, if justified self-defence is properly considered a case where the general reason against harming the attacker is outweighed by a

³⁴ It is plausible that the injurer ought to compensate the owner in *Dock* even where the owner consents. Perhaps this is because owner, morally, had no real choice but to allow the dock to be damaged for the benefit of the injurer.

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countervailing consideration, it seems that, by virtue of the continuity thesis, there is a *pro tanto* duty to compensate the unjust attacker.

This is a serious (and undiscussed) problem for continuity thesis justifications. There are at least three possible solutions. First, it might be argued when a person is liable to self-defence, this cancels the reason against harming them and does not merely outweigh it. This is perhaps one implication of the idea that an attacker ‘forfeits’ their rights in such circumstances. By contrast, in *Dock*, B has clearly done nothing to forfeit their right. Second, it could be that while there is a continuing reason in self-defence cases for the compensation, this reason is outweighed by a countervailing distributive consideration. The culpable wrongful attacker is entirely responsible for the harm that befalls them. Given this overwhelming responsibility for their own harm, it is fairer that they bear its costs. A third possibility is that the continuity theses ought to be restricted to right violations rather than infringements, breaches of all-things-considered duties, and reasons that are not outweighed. This would deal with the self-defence case, but at the cost of being unable to explain the compensatory duty in *Dock*.

All three solutions are problematic. Consider a variation on *Dock*:

Dock 2. A is struck by lightning while sailing and becomes unconscious. The only way to prevent A being swept away to certain death is for C to anchor A’s boat to B’s dock, thereby damaging B’s dock.

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Unlike in *Dock*, my intuition is that C ought not to be liable to B. But it is not clear what resources the continuity theses have to explain this. B has not forfeited his right, so the first proposal as to why there is no duty to compensate for harm imposed in justified self-defence is not available.

As to the second proposal, it could be said that C is not responsible in *Dock 2* for the damage to B because C had no reasonable alternative but to act as C did. But in what sense does A have a reasonable alternative to damaging the dock in *Dock*? The alternative to damaging the dock is death. If the absence of a reasonable alternative precludes a compensatory duty in *Dock 2*, it must also do so in *Dock*.

It may, however, be argued that C is morally required to damage the dock in *Dock 2*, whereas A is not so required in *Dock*.³⁵ Given that A acts without being morally required to act, it might be argued that A's choice makes A responsible for the right infringement. In *Dock*, the alternative of death is not morally impermissible.

Although this reaches intuitively correct results in *Dock*, *Dock 2*, and *Self-defence*, it faces at least two problems. First, if we imagine a *Dock 3*, where C acts in a morally supererogatory manner, then C will be under a duty to compensate – for instance, suppose that the only way C can prevent A's death is by interposing C's legs between two logs on the dock, knowing that this will result in his own paralysis. C is not morally required to do this, but it is morally permissible. Yet it seems counterintuitive that C is therefore under a duty to compensate in *Dock 3*, but not *Dock 2*.³⁶ Second, if

³⁵ McMahan, Killing in War X

³⁶ McMahan would extend the notion of acting on a requirement to cases of supererogation (in conversation).

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the basis of responsibility is choice within a reasonable set of options, it is not clear that a distinction can be sustained between alternatives that are morally impermissible and those that are extremely contrary to a person's prudential interest.

Consider now the third proposal as to how intuitions about *Dock*, *Dock 2*, and *Self-defence* could be reconciled. This is by restricting the continuity theses to right violations, breaches of all-things-considered duties, and non-outweighed-reasons. This itself is problematic: the theoretical motivation for this is unclear other than it helps explain some intuitions. It also faces the problem that the intuition in *Dock* itself cannot now be explained. To address the latter problem, suppose this third proposal were supplemented by the idea that in *Dock*, A will not be harmed overall by a duty to compensate because the satisfaction of such a duty will still leave A better off than had A not damaged the dock. This hybrid proposal faces the problem that, intuitively, A would still owe compensation to B if A damaged B's dock, reasonably believing that this would prevent his being severely injured, but it so happens that he is severely injured anyway. Here A is not benefitted.³⁷ It also fails to reflect the intuition that A is somehow an especially appropriate duty-bearer.

It seems to me that the best view is to accept that C does have a duty to compensate in *Dock 2*, but not in *Self-defence* because the attacker forfeits their right. This is the only view which does not require us to accept both (i) an unsatisfying theoretical distinction and (ii) sacrifice an important intuition. By contrast the second proposal requires an unsatisfactory distinction between moral constraint and other forms of

³⁷ B obtained a chance at life which is valuable. But for reasons explained elsewhere, this benefit is relatively minimal and would not be greater than the detriment caused by the duty to compensate. See S Steel, 'Rationalising Loss of a Chance in Tort' in Pitel, Neyers, Chamberlain, *Challenging Orthodoxy in Tort Law* (Hart, 2014).

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constraint so far as it bears on choice, and creates an implausible distinction between supererogation cases and others. The third proposal arbitrarily limits the continuity thesis and cannot explain justified harm imposed without a benefit to the harm-doer cases.

(b) *Implausible concept of harm*

A further objection is that compensation cannot truly be considered to make it the case that a harm does not eventuate. In *Arm*, B is immediately and irreversibly harmed, it might be said, by the removal of the arm: we do not need to wait and see whether compensation is paid to determine whether B is harmed. There is a concept of harm according to which harm occurs in a moment in time. On this kind of view, if a person's arm is broken, this is harm – there is no need to consider any temporally extended counterfactual inquiry. Causing certain bad states is harming. Call this state-harm. My reply to the objection is that even if there are duties not to cause state-harm, there are also plausibly (more stringent) duties not to make a person worse off than they would have been in relation to their right-protected interests. Whether a person is worse off in this sense is not always fixed at a particular moment.

(c) *Different burdens*

This objection is that continuity thesis explanations of the duty to pay compensation fail to alleviate a concern that conformity to this duty can be very significantly more burdensome than conformity to the primary duty from which the secondary duty is said to arise. McBride and Bagshaw discuss a hypothetical (itself

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similar to a famous example given by Waldron³⁸) where a person's momentary, but negligent, lapse of concentration leads to momentous losses to an unfortunate motorcyclist. In such a case, the law might hold that person liable to pay millions of pounds. Continuity theorists, McBride and Bagshaw claim, move illegitimately from the thought that the imposition of, say, a primary duty to take reasonable care (which is relatively easy to comply with) is justified to the thought that a secondary duty to pay compensation for the breach of that duty is justified, when compliance with the latter duty might be much more burdensome than compliance with the former.³⁹

This objection fails for two reasons. First, the fact that a duty is very burdensome is not a very strong reason for believing that it does not exist. There can be duties to kill oneself, for example. If I throw a missile at you without justification, and the only way I can prevent the missile from killing you is to throw myself in front of the missile, I am obligated to kill myself. If the primary duty is justified by a very powerful reason, then it will not be at all surprising that the secondary duty of compensation exists, despite the costs of compliance being very high. Second, the continuity thesis merely says that the reasons for the primary duty continue and *typically* stack up to a duty to compensate. This is compatible with those reasons being outweighed by more powerful countervailing reasons, such as, possibly, the high cost of compliance.

(d) *The role of wrongdoing*

³⁸ J Waldron, 'Moments of Carelessness and Massive Loss' in D Owens (ed) *Philosophical Foundations of Tort Law* (OUP, 1995).

³⁹ NJ McBride and R Bagshaw, *Tort Law*, 5th edn (Pearson Publishing) 803.

Smith objects to the continuity thesis in so far as it might be taken to imply that conformity to a secondary duty to pay compensation is just as good as conformity to a primary duty not to injure. It risks this implication, says Smith, in so far it claims that payment of compensation can undo the violation of a right or undo a wrong.⁴⁰

That one has duties to compensate by virtue of the continuity thesis does not, however, imply that conformity to a secondary duty is just as good as conformity to a primary duty. The continuity thesis does not have this implication because not all the reasons to which one did not conform in breaching the primary duty are available now for perfect conformity in the post-breach world. It is a virtue of *Reasons continuity* that in cases where the loss is *purely* financial that it implies that the person who conforms with their secondary duty has substantially mitigated the moral problem with their primary failure.

But Smith has a further objection.⁴¹ According to Smith, the continuity thesis embodies a ‘model in which wrongs qua wrongs have no significance’.⁴² The reason for this is that the fact of wrongdoing is not itself a normative reason for the existence of a compensatory duty under *Reasons continuity*. Recall that it is the reasons which justified the existence of the primary duty which, according to *Reasons continuity*, continue to demand conformity. Clearly, the fact that the primary duty was breached is not a reason which justified the existence of the primary duty. So the breach of the duty is not one of the reasons which justifies the compensatory duty under *Reasons continuity*.

⁴⁰ S Smith, ‘Duties, Liabilities, and Damages’ (2011) 125 Harvard Law Review 1727 1753.

⁴¹ I should stress that Smith raises this objection in the context of a discussion of *legal* duties, but given his Razian understanding of legal duties as the law’s understanding of our moral duties, I think his objections here can be transferred to the purely moral duties.

⁴² Smith (n 20) 1753.

Smith offers this point as a descriptive objection to *Reasons continuity* as an account of the law's understanding of why compensatory legal duties arise. But should this objection be worrisome from a purely moral perspective? It might be considered counterintuitive that under *Reasons continuity* wrongdoing is not itself a justificatory reason for the existence of a compensatory moral duty. A response to this point, however, is that wrongdoing typically changes the non-normative circumstances such that we can usually say that the duty to compensate arises 'because of' the wrongdoing. Compare one's duty to take reasonable care. Suppose you are an employer and, by virtue of this duty, you need to set up a safe system of work, call it system A. But now suppose that, in virtue of new technologies, your workers could be made substantially safer at little cost. These new circumstances require system B. Under the continuity thesis, the duty to pay compensation arises in the same way as the duty to install system B – the breach of the duty is just a changed factual circumstance to which the original reasons for that duty now apply. One's rational failure is just a background fact, rather than itself a normative reason for the duty. But this is consistent with the idea that compensatory duties arise *in a sense* because of wrongdoing, to the extent that wrongdoing changes the non-normative facts.

It is also compatible with the continuity thesis that the fact of wrongdoing itself may give rise to reasons for certain other kinds of response to wrongdoing, which are constitutively bound up with one's being a wrongdoer. For instance, if one has reasons to feel remorse or to apologise, these reasons arise in virtue of the fact that one has failed to conform to reason. The fact that one has failed to conform necessarily enters into the justification of such reasons.

However, it may be objected that *Reasons continuity* cannot account for the stringency of moral compensatory duties arising out wrongdoing.⁴³ Suppose that A has wrongfully damaged B's body in a car accident and A can either take steps which will prevent harm of size n arising from this event to B, or effect an easy rescue of another person, C, averting harm of size n to C, where A has a moral duty of easy rescue to C. Intuitively, A has a duty to take steps to prevent harm to the person A has wronged: B. Other things being equal, this suggests, one has a more stringent duty to compensate for wrongful harm than to fulfil a duty to protect from harm. In both cases, however, the reasons for the duty are the same: a person's interest in not suffering bodily injury justifies the duty in both cases. If the reasons justifying the duty are the same in both cases, then why are the duties not of equal stringency?

This objection can be met in three ways. First, one might simply observe that *Reasons continuity* is an account of when and why a compensatory duty arises, not its stringency. This would reduce the theoretical ambition of *Reasons continuity*. Second, similarly, one might say that *Reasons continuity* provides a defeasibly sufficient condition of the existence of a compensatory duty, while there may be others, such as wrongdoing. Third, and most persuasively, it can be argued that the reasons for the primary duties *are* importantly different in the example above. They are different in a way which explains the differing stringency of the compensatory duty. In the car accident, one's compensatory duty is justified by the reasons not to *harm* that persist post breach, not merely reasons of well-being in general. If one does nothing in relation to the potential harm caused by the negligent car accident, then one will be *harming*, not merely not aiding.

⁴³ I am grateful to Hasan Dindjer here.

(e) *Liability, not duty*

Gardner takes as the moral explanandum *duties* to compensate.⁴⁴ The continuity thesis is the explanans. One might wonder, however, whether this accurately reflects the moral landscape. The argument has been made that the law only recognises a liability to pay compensation upon breach, not a duty.⁴⁵ Should we think that this is true in morality, apart from the law? Call the view that the secondary normative relation upon breach is immediately a duty to compensate, the ‘duty view’. Call the view that the normative relation is immediately only a liability, the ‘liability view’.

The starting point in thinking about this is that it would be odd if the primary right-duty relation transformed into a power-liability relation. If the original reasons stacked up so that I had a *duty* not to injure you, and those reasons can still be conformed to up to a point, why does the original duty transform into a liability? What has changed in the post-breach world is that some of the original reasons for the duty, and, perhaps, the reason given by the duty itself, cannot be conformed to, but it is not clear why the fact that the governing reasons are less-conformable-to in the post-breach world should change the normative relation between the parties.

The duty view also explains why wrongdoers have certain other duties upon wrongfully causing loss. If you bash your car into my car in a car park, smashing the taillight, when talking on your phone, surely you have a duty not to drive off without doing anything. At a minimum, you have a duty to leave your contact details on my car and explain what happened. This duty is naturally explained by the fact that you

⁴⁴ Gardner, (n 33) 33.

⁴⁵ See below, X.

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have a duty to compensate me. This duty explains why you must take steps towards its fulfilment.⁴⁶

The duty view also explains straightforwardly why it is that a person who breaches a duty and thereby incapacitates their victim surely has a duty to contribute towards measures which reduce that incapacity. For instance, you culpably render me unconscious by knocking me over in your car. You now have a duty to protect me from dangers risked by this act (for instance, by calling an ambulance or moving me to the side of the street). Since a liability is correlative to a normative power, and since a power must be exercised by an intentional act, it cannot be that this duty is sourced in such a power, since, incapacitated, I could not exercise any such power. The liability view would need to treat this as an exceptional case where a compensatory duty arises independently of the exercise of the power.⁴⁷

However, there are two reasons that might be offered as to why the normative relation changes to a power-liability relation. The first is that wrongdoing affects the communicative message of compensation. Suppose you brutally snap my arm and then immediately transfer the cost of a prosthetic arm to my bank account. Doing so will repair harm but also probably lead to further harm, or at least distress. It will lead to the latter in so far as your immediately transferring money to me suggests that you think it is permissible to harm me so long as you pay me afterwards. By substituting a duty to compensate for a liability, morality puts control in the victim's hands, so to speak, and thereby obviates the possibility of this message. This is unconvincing, however. Whether immediately paying compensation has the alleged message

⁴⁶ For the suggestion that liabilities can give rise to duties in and of themselves, see NJ McBride, 'Stephen A Smith on Duties and Liabilities': available here https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668742.

⁴⁷ In English law, where A puts it out of B's power to communicate the exercise of a legal power to A, the requirement of communication to A is dropped: *Universal Carriers Corp v Citati* [1957] 2 QB 402.

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depends on a variety of contextual factors; sometimes immediately paying compensation could communicate that one deeply regrets the wrongful harm. Furthermore, even if an immediate duty of compensation did increase the probability of this kind of communicative harm, morality may still require it. Part of the moral difficulty of being a wrongful injurer may be that one has a duty that needs to be performed sensitively in order to avoid adding insult to injury.

A second reason is that it may often be very unclear what ‘next-best’ conformity to an original reason for a duty requires. Perhaps the victim will suffer loss in the future, the extent of which is difficult to determine, and only determinable with the co-operation of the victim, and perhaps the steps needed to make it the case that harm does not eventuate are dependent significantly upon the victim’s desires (what kind of new arm do you want?).⁴⁸ This epistemic uncertainty might make it unfair that the wrongdoer has an immediate *duty* to compensate, rather than a liability to compensate, which crystallises into a duty when the victim declares what compensation is owed. Again, however, the fact that a duty is difficult to comply with seems insufficient reason for doubting that it exists. The best view may be that where next-best conformity is genuinely undetermined, and depends upon the victim’s identifying what next-best conformity will amount to, that only a liability exists, not a duty, but generally there is indeed a duty to compensate immediately upon breach.

Regardless of whether we believe that a duty or only a liability exists at the time of breach, the continuity thesis is still true and interesting if it helps to justify either normative relation. If the victim’s normative power, if that is what exists, is a power to impose a duty of next-best conformity, then it is clear that the continuity thesis

⁴⁸ Smith above (n 20).

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helps to explain the existence of the liability. In this way, the truth of *Reasons continuity* is independent of the truth of the duty or liability view.

Conclusion

I have defended the idea that compensatory duties arise as a continuation of the normative situation that existed prior to breach, but that this idea is only part of the landscape of compensatory duties. The landscape is probably also comprised of duties which arise in virtue of the combined force of a continuing normative feature and the requirements of fairness, and duties grounded entirely in the fair allocation of harm between responsible agents.