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DELEGATION AND THE CONTINUITY THESIS

Review of John Gardner, From Personal Life to Private Law (Oxford: Oxford University Press, 2018), pp. 256, \$44.95, and Torts and Other Wrongs (Oxford: Oxford University Press, 2020), pp. 384, \$90.00.

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ABSTRACT. This essay reviews John Gardner’s recent books, *From Personal Life to Private Law*, and *Torts and Other Wrongs*. Both books offer profound insights into private law’s concerns with justice and our reasons for action. The essay focuses on Gardner’s continuity thesis, and in particular on his idea that a third party (such as the state) may act on behalf of a wrongdoer as her delegee. Three settings are considered. First, I will discuss settings in which the state or another third party acts to remedy a wrong without the wrongdoer’s consent. Second, I will review settings in which the legal remedies at issue – e.g., general damages or punitive damages – may not fit well with the idea that the state is acting on behalf of a wrongdoer. Third, I will analyze settings in which the state may be acting on behalf of right holders (including plaintiffs), yet still be concerned with the continuity thesis. Assessing each of these contexts offers further insights into the purpose of private law remedies.

The late John Gardner’s new books overflow with ideas, and it is a testament to his genius that so much was said in such limited space. Each book – *Torts and Other Wrongs*, and *From Personal Life to Private Law* – contains enough insights to reward multiple readings. For private law theorists, these works will be indispensable.

Torts and Other Wrongs (“TOW”) is a collection that gathers foundational papers on the relation between corrective and distributive justice, on the taxonomy of private law fields, on strict liability, and on negligence and the reasonable person. Two new papers offer major contributions on the role of policy in private law, and on contract as a subset of tort. This volume also includes Gardner’s seminal paper on the continuity thesis – ‘What Is Tort

Law For? Part 1. The Place of Corrective Justice'. This last paper is important for many of the arguments Gardner develops in his other recent writings.

From Personal Life to Private Law ('FPL') is a monograph, and it covers a range of topics, including: the relationality of private law duties, the limits of causal responsibility, the meaning of apologies, the proper aim of damages, a wronged party's standing to pursue a remedy, and the limits of autonomy as an explanation for private law. It also elaborates on how the continuity thesis handles a difficult challenge: irreparable harms. Stylistically, this book is more literary, but it is just as densely filled with original material. As the title suggests, this work is as much concerned with our personal life as it is with private law.

As these brief summaries suggest, Gardner's books cover a great deal of interesting and important philosophical terrain. This essay will focus on a narrower though still important topic: the legal application of Gardner's continuity thesis. This essay will first introduce the continuity thesis, and it will then turn to a set of puzzles that bear on the thesis's role. In each case, the central challenge will be to figure out what it means for a court to act on behalf of someone. Gardner sees courts as acting on behalf of wrongdoers, enabling these wrongdoers to conform to their reasons for action under the continuity thesis. I will explore three questions that this theory generates in private law settings.

The first question is whether courts and other third parties are in a position to act on behalf of a wrongdoer even if that is the third parties' wish. In many cases, they are incapable of doing so, if acting on behalf of someone means acting in their stead. The result is that damages awards will ordinarily not assist a wrongdoer in conforming to her duties of repair under the continuity thesis. Suppose, however, that we assume courts and other third parties actually are acting on behalf of a wrongdoer in the usual case. The second question is whether certain remedies – e.g., punitive damages, general damages – can only achieve their aims if courts are acting on behalf of plaintiff right holders rather than defendant wrongdoers. I will suggest that under plausible interpretations of private law these remedial challenges are significant.

Suppose we assume that courts are well-suited to act on behalf of wrongdoers, and also that there are no conceptual difficulties involved in effectuating remedies. With these worries set to one side, we can next consider how the role of the continuity thesis shifts depending on which party courts serve. Courts could act on behalf of defendants, or they could act on behalf of plaintiffs. The third question is how this difference in the courts' objective affects the role of the continuity thesis. I will suggest that the continuity thesis can have an important role in private law no matter which party courts serve, and also that right-based reasoning can have an important role alongside the continuity thesis. Recognizing these possibilities helps us to better understand monetary awards, and as we will see, it sheds light on the law of equity. More generally, I hope that it will show how Gardner's ideas offer powerful insights even for theories of private law that emphasize a plaintiff's rights.

I. THE CONTINUITY THESIS AND ITS RELATION TO CORRECTIVE JUSTICE

I will begin with a brief review of the continuity thesis and its significance for private law. On Gardner's view, norms of corrective justice govern the undoing of transactions (most prominently, the undoing of wrongs) – a process he calls 'allocation back' (*TOW*, 35). More precisely, norms of corrective justice govern allocations back by the party from whom a corrective transfer is to be made, or by third parties acting on their behalf (*TOW*, 37). So understood, private law is filled with examples of courts bringing about corrective justice through a variety of legal remedies. The great puzzle is why courts engage in this practice of undoing transactions. From Gardner's perspective, the corrective justice in private law – its practice of allocation back – is properly seen as the *explanandum* (*TOW*, 42–43). Accordingly, if we just point to corrective justice as our explanation for private law's remedies, we risk circular reasoning.

Still, there is a way in which corrective justice can help explain private law, even if the law's norms of corrective justice are the thing to be explained. Gardner notes that there could be *moral* norms of corrective justice that justify the legal norms of corrective justice in tort law (*TOW*, 44). That would avoid a circularity problem because these norms of corrective justice occupy different spheres. In turn,

the continuity thesis provides a moral norm that could justify private law's corrective justice.¹

Notably, Gardner rejects the idea that obligations survive their breach, thus ruling out some justifications for corrective justice.² The reasons that support our primary obligations, however, can remain in existence even after the obligations are violated. In fact, on his view this is precisely what these reasons do; the reasons that support a primary obligation continue in existence after its breach, supporting new secondary obligations to do the next best thing. Thus, if one promised to take the kids to the beach on Saturday and had to cancel, one must now take them to the beach on the next available occasion, or do whatever else would be the next best thing, all things considered. Accordingly, Gardner's continuity thesis is this: 'It is the thesis that the secondary obligation is a rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due' (*TOW*, 61).

II. DELEGABLE DUTIES VERSUS DELEGATED DUTIES

If we accept the continuity thesis, it need not follow that it helps us understand the law's practices of corrective justice. Courts have to be the right kind of actors to bring about corrective justice. Is corrective justice something that can only be performed by a wrongdoer herself? Gardner sees corrective justice as an agent-neutral concern, and accordingly third parties such as the state can engage in corrective justice on behalf of a wrongdoer (*TOW*, 37). Importantly, he also holds a parallel view of the continuity thesis. A wrongdoer's reasons to repair a wrong under the continuity thesis are not 'the sole preserve of the wrongdoer' (*FPL*, 107). These reasons are not personal to the wrongdoer, and indeed they can be conformed to by someone acting in the place of the wrongdoer (*FPL*, 112). That someone might be the state, or it might be whomever the state commands (such as insurers, employers, or banks).

¹ In most cases but not all. Gardner sees unjust enrichment cases as corrective justice cases because they involve allocation back, but they are not explained by the continuity thesis. (*TOW*, 49).

² For a helpful comparison of different versions of the continuity thesis, see Sandy Steel, 'Compensation and Continuity', *Legal Theory* 26 (2020), p. 250.

For Gardner, various parties can act on behalf of a wrongdoer, as the wrongdoer's vicarious agent. Note, however, that the phrase 'on behalf of' has a particular meaning here. Some may use that phrase loosely to refer to instances where one person acts in the best interests of another. In this broad sense, one could act 'on behalf of' a friend by gratuitously putting in a good word with a colleague who might hire that friend. Gardner's usage suggests something more; it suggests that the state is acting on behalf of wrongdoers such that the state's actions should be attributed to the wrongdoer, counting as her actions for corrective justice purposes. From this perspective, the state can be a wrongdoer's stand-in for continuity thesis purposes, and third parties like employers or banks can be as well. I will use 'on behalf of' in Gardner's sense for purposes of this essay.

As a matter of legal interpretation, I doubt that the state ordinarily acts on behalf of wrongdoers when it orders damages.³ If the state acts on behalf of anyone in such cases, it is likely to be the plaintiff right holder or the citizenry as a whole. But even if the state intends to advance the interests of wrongdoers in repairing their wrongs, even if it wishes to act as a wrongdoer's agent, and even if legal systems represent the state in such terms, it is a separate moral question whether the state's conduct should count as partial conformity to reasons by the wrongdoer himself. Similarly, it is a separate moral question whether the conduct of insurance companies, banks, and employers should count as partial conformity by the wrongdoer himself.

Gardner offers an account of how such vicarious agency is possible, drawing on the realm of personal life to illustrate. He begins with an example from Larry David's *Curb Your Enthusiasm* television show. As he tells the story, Larry's character has damaged the tail light of a car belonging to Ben Heineman (FPL, 102–103).⁴ After Larry pays for it to be fixed, he discovers to his dismay that Heineman never fixed the tail light. And, in turn, he then confronts Heineman to find out why. Heineman spent the money on plastic surgery for his daughter, and Larry is not pleased. In response, Heineman tells Larry that it's none of his business.

³ See Andrew S. Gold, *The Right of Redress* (Oxford: Oxford University Press, 2020), pp. 28–29.

⁴ Gardner references a November 2005 episode of the *Curb Your Enthusiasm* show. (FPL, 102, n. 17) (citing 'The Korean Bookie', *Curb Your Enthusiasm* (dir. Bryan Gordon, HBO, 27 November 2005), at 11:18). As I have not watched this episode myself, I rely entirely on his account.

Note that Larry is reliant on Heineman to complete the task of fixing the tail light. This raises a question of why Larry has a continuing interest in the case after he pays Heineman. As Gardner asks: 'How can it be that the wrongdoer's reasons to repair, under the continuity thesis, do not end their special hold over the wrongdoer now that the reparative process has been taken out of the wrongdoer's hands?' (*FPL*, 107). Indeed, the law raises the same question, for 'the law sometimes authorizes or requires the wrongdoer's insurer, bank, employer, or successor in title, or the rightholder's bailiff, to finish the reparative job without much, if any, cooperation from the wrongdoer' (*FPL*, 107).

In Gardner's view, Larry is able to partially conform to his reasons for action by means of Heineman's act of repair. In which case, Larry very much does have an interest in Heineman's conduct in light of the continuity thesis. We need to know, then, how this is logically possible. How can it be, Gardner asks, that Larry's reasons for action can be conformed to by Heineman?

Gardner's answer is that reparative duties under the continuity thesis are *delegable*. To show how, he imagines that he has a duty to pick up his teenage stepdaughter from a drama rehearsal (*FPL*, 111). If the important thing is to show his commitment by picking her up from rehearsal, then a substitute performance by someone else will not work. Yet he may also have a duty to pick her up from rehearsal in order to see that she is collected from school. In this case, it is ok if someone else takes his place and picks her up. The latter duty is delegable, while the former is not. In each case, the duty is Gardner's to perform, but in one case the acts must be performed by him in person, while in the other case Gardner can perform his duty through a delegate performer (*FPL*, 111).

Interestingly, non-delegable primary duties may implicate delegable secondary duties. Assuming a non-delegable primary duty to pick up his stepdaughter after rehearsal, Gardner imagines that he has a flat tire and cannot arrive on time. 'So I call her friend's mother, who is already on her way to the school, and ask if she will help out by collecting my stepdaughter too' (*FPL*, 114). This is a partial conformity to his reasons under the continuity thesis: 'Just by setting out (trying to collect her) I have reassured my stepdaughter that I was serious when I conceded her point, last week, that I should

show more commitment to her theatrical activities' (*FPL*, 114). More will be required under the continuity thesis, but he has partially conformed to the reasons for picking up his stepdaughter.

Yet this account still faces a substantial hurdle. Imagine the same hypothetical, except this time the friend's mother steps in unannounced. She sees that the stepdaughter is waiting and unilaterally decides to drive her home. She then calls the stepdaughter's father after the fact to tell him that his stepdaughter has returned safely. I do not see how this counts as the father acting in partial conformity to his reasons for action under the continuity thesis. The problem is not simply that the friend's mother may be wronging the stepdaughter's father in this hypothetical. The problem is that it is unclear why the friend's mother's actions should be attributed to him. *Delegable* duties – which we can stipulate that this case involves – are not the same thing as *delegated* duties.

In Gardner's original hypothetical case where he has asked the friend's mother for help, he notes that '[s]urely I have already done *something* towards that conformity' (*FPL*, 114). That is clearly correct; he set things in motion when he called her. But isn't part of what allows him to make this claim the reality that he chose to call up the friend's mother to arrange the pick up? The difficulty is that a duty's status as a delegable duty does not get us far enough on its own.

A wrongdoer does not act through a third party in partial conformity to his reasons simply because the wrongdoer could have delegated performance to that third party. It is important whether the wrongdoer in fact acted through that third party. This might be brought about by an order or a request; it could also result more passively from tacit consent. At the very least, it seems the wrongdoer must be aware of the third party's conduct and accepting of it. Such actual delegated duties are not always present in personal life – even where third parties intervene to repair a wrong – and they are certainly lacking for many private law remedies.

In legal settings, couldn't we solve this problem by viewing the state as a delegee? We might think that the state is acting on a wrongdoer's behalf when its officials, specifically courts, order third parties like banks or insurers to transfer assets as a means of repairing a wrong committed by a party whose assets are held by the bank, or who is insured by the insurer. In that case, perhaps these third party

banks or insurers are instrumentalities for the wrongdoer's acts of repair, even if they don't wish to be. The wrongdoer could act in conformity with her reasons for action by means of her delegee, the state, causing these other third parties to assist in an act of repair. Unfortunately, this answer just moves the puzzle to a different location. For then we need an argument as to why the state should count as the wrongdoer's delegee in the absence of the wrongdoer's consent.

Recognizing these challenges, however, also offers a further insight into the implications of the continuity thesis. Under the continuity thesis, doing the next best thing is a way to conform to one's reasons for action to the extent possible. But there is always a rational remainder; there is always a residual cause for regret that one committed a wrong in the first place (*TOW*, 62–63; *FPL*, 140). In the event that a third party has repaired a wrongdoer's wrongs without her consent, how does this affect her reasons for regret? It does limit those reasons for regret, even if there is a rational remainder, for the wrongdoer at least doesn't have to regret that her wrongs went unrepaired. Yet, there is greater cause for regret than there would be if the wrongdoer had fixed her own wrong, of her own volition. The rational remainder is larger where a non-delegate third party has repaired her wrong. Sensitivity to the continuity thesis may thus support legal doctrine that facilitates voluntary wrongdoer acts of repair (e.g., the law on settlements).

III. APOLOGIES AND OTHER PLACEBOS

We can now look more closely at the rational remainder. As noted, much of the analysis of the continuity thesis in *From Personal Life to Private Law* is devoted to irreparable harms; in such cases, harms leave an especially large cause for regret. One of the most interesting discussions in the book focuses on apologies as an answer. It proposes that apologies are a response to what can't be repaired; they are a response to the rational remainder. For Gardner, apologies do not ordinarily fall within the continuity thesis (the exception is a late apology after a wrongdoer has failed to provide an apology that was already owed) (*FPL*, 151). They are instead a way to take into account our reasons for action even when we can't conform to them.

Yet there is still a linkage to the continuity thesis. As Gardner suggests: 'We might be tempted to generalize: where it is too late for any measure of conformity with a reason, sensitivity to that reason in one's reactions is the next best thing' (*FPL*, 150). A successful apology is capable of a kind of repair, albeit in a distinctive form. In Gardner's view, apologies can serve derivatively to repair. Even if apologies do not provide conformity with a reason under the continuity thesis, they may repair relationships or make their addressee feel better.

How can they do this? Through a placebo effect. Gardner illustrates through an explanation of general damages – legal remedies which he sees as 'closely modeled on apologies' (*FPL*, 153). Much like apologies, damages for pain and suffering, for disappointment, for the bare loss of a right can provide consolation and a sense of satisfaction (*FPL*, 154). And, much like apologies: 'An award of general damages (of the kind under discussion) is likewise in a sense reparative; it is unusual only in being reparative with no reparative value independent of the thought, on the part of the recipient, that it has such value' (*FPL*, 154). Like a placebo, it is the belief in the remedy's value that generates its value.

Note, however, that this argument is more than an argument concerning apologies in personal life; it is also an argument about private law. There is an interpretive claim here, and not just a claim about what general damages might accomplish if they were put to the test. In Gardner's view, general damages are supposed to function in an apology-like way; the law is trying to accomplish this end (*FPL*, 153). The law, on his account, is not just inducing an apology-like effect by happenstance.

Still, why think courts interpret general damages as akin to an apology? Courts are generally reluctant to order apologies, and if their reason is that it is wrong in principle to force an apology, then it is not apparent why they would make an exception for general damages. Gardner indicates that some coerced apologies may be morally acceptable (see *FPL*, 206), but it need not follow that courts agree. Setting that concern to one side, there is an additional reason to doubt an apology-linked interpretation of private law remedies. Certain legal remedies are ill-suited for courts to bring about if they are acting as delegates of wrongdoers. Even if the continuity thesis is not directly involved, Gardner's understanding of private law

remedies is still one in which courts act on behalf of wrongdoer defendants. General damages could more convincingly be seen to result from courts acting on behalf of right holder plaintiffs.

Apologies are not the only mechanism available for obtaining a placebo effect. Indeed, Gardner himself queries whether apologies are a historical artifact that might exist in a different form. As he notes, '[c]orrectly carried out, the duel was regarded as a way of settling the parties' differences, even if it had to be posthumous on the part of at least one of them' (*FPL*, 95). We might think that this practice, too, offers a kind of placebo effect. It is hard today to see how a duel could repair much beyond a sense of lost honor – and harder still to see how it is worth it – but nonetheless if the disputants once perceived duels as reparative, they may have been. In their day, duels may have been reparative placebos.

Duels are now obsolete, but other responses to wrongs that differ structurally from apologies may not be. These other practices may likewise serve as placebos. More significantly, they may be unsuited for initiation or even participation by the wrongdoer. Some of these other placebo-like acts may specifically require right holder authorship – or authorship by a party acting on the right holder's behalf – and the wrongdoer may be incapable of providing the desired placebo effect on her own.

Consider the example of punishment. On some understandings, punishment can only be provided by someone other than the wrongdoer; we cannot self-punish. Stephen Smith has recently argued for this view, suggesting that a wrongdoer's duty to self-punish is unintelligible.⁵ Could remedies that aim to punish serve as placebos, much like apologies but without wrongdoer authorship? Punitive damages are the obvious candidate for this category. If so, the continuity thesis is a poor fit for this particular remedial context. Furthermore, the idea that courts are acting on behalf of wrongdoers will also be a poor fit, at least in this setting.⁶ Even if courts are

⁵ See Stephen A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019), pp. 118–119.

⁶ Another possibility is that some private law remedies are understood as a substitute for revenge. See Scott Hershovitz, 'Tort as a Substitute for Revenge', in *Philosophical Foundations of the Law of Torts* (John Oberdiek, ed.) (Oxford: Oxford University Press, 2014). Gardner rejects revenge-based justifications for private law (*FPL*, 2–3). I agree with him on this, but, like punishment, revenge offers a conceptual structure that fits poorly with courts acting on behalf of wrongdoers. If courts adopted such a picture, it would challenge Gardner's interpretation of private law in those settings where revenge was incorporated into private law reasoning.

perfectly well-suited for meting out punishment in general, they may not be well-suited for that task if acting on behalf of the wrongdoer (i.e., as a stand-in for that wrongdoer).

What of holding someone accountable – a prominent formulation in John Goldberg and Benjamin Zipursky’s account of civil recourse?⁷ It is reasonable to think that at least some tort remedies are designed with accountability in mind, and general damages are an especially likely instance. Moreover, on a plausible reading of this idea, holding someone accountable involves responsive conduct that needs to be performed by the right holder or someone acting on her behalf, rather than provided by the wrongdoer. If many tort law remedies are conceptualized as a means to hold someone accountable, the wrongdoer and her delegates may be inapt parties for doing so. Thus, while Gardner’s account is congenial to some theories of civil recourse, it may not mesh well with all of them.

This essay does not resolve the interpretive puzzle concerning general damages; my aim is to show that this puzzle merits attention for proponents of the continuity thesis. But I also wish to suggest something else. Let us hypothesize that general damages are understood in a way that creates conceptual problems for the view that courts are assisting defendants in conforming to their reparative duties. Gardner’s account can offer a major step forward even then. Some critics of allocation back theories of private law have looked to general damages as a sign that the courts are actually doing something other than allocation back. Gardner’s approach, however, suggests a response.

Perhaps general damages do provide a placebo effect, even if their effectiveness is not parasitic on the continuity thesis. Courts might enable plaintiff right holders to obtain consolation by allowing right holders to do something about a wrong they suffered – by getting satisfaction, holding accountable, or even by avenging themselves – and these right holders might experience that action as somehow repairing the wrong they suffered. The repair would not be an illusion, despite its fictive basis. A placebo theory is thus important even if it turns out that the law is not aiming at the wrongdoer’s conformity to her reasons; indeed, even if the law is not aiming to assist wrongdoers at all.

⁷ See John C. P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge, MA: Harvard University Press, 2020), pp. 143–144.

IV. A CONTINUITY THESIS FOR PLAINTIFFS AND DEFENDANTS

I will now turn to a final set of puzzles concerning the legal relevance of the continuity thesis. In *Torts and Other Wrongs*, Gardner makes a convincing argument that distributive justice and corrective justice concerns are interwoven in private law. (*TOW*, 102). Perhaps right-based and duty-based concerns are also interwoven in private law. Indeed, the continuity thesis may have bearing on private law even if, as civil recourse theorists suggest, courts generally act on behalf of plaintiffs when they order damages in response to a wrong. Gardner downplays a right-based picture of private law, in part for reasons of clarity (*FPL*, 56, 202–203).⁸ Yet the continuity thesis may have a role to play even if rights sometimes take priority over duties in private law reasoning, and even if courts act on behalf of plaintiffs rather than defendants when they provide a remedy.

These suggestions may sound counterintuitive. One might think that if courts act on behalf of defendants when they order damages this means a wrongdoer's duties should take center stage. Right-based legal reasoning might seem like an afterthought, and one which obscures more than it illuminates. One might also think that if courts concern themselves with the continuity thesis then they must act on behalf of defendants when they do so. After all, who else could the courts be helping to conform to their duties? I will argue below that neither view is correct. Courts that act on behalf of defendants may engage in right-based reasoning as part of their analysis, even if the result is that some wrongdoers are less successful in repairing their wrongs. Indeed, courts may be justified in doing this. Furthermore, courts that seek to assist wrongdoers in light of the continuity thesis may be acting on behalf of plaintiffs. Plaintiffs can be wrongdoers, too, and the law is sensitive to this fact.

First consider whether application of the continuity thesis consistently calls for duty-based reasoning. Let us return to the broken tail light case. Larry, you will recall, was unhappy with Heineman because Heineman did not spend the money Larry gave him on repairing the broken tail light. It went instead to plastic surgery for his daughter. Gardner's view is that Heineman has reason to fix the tail light, in recognition of Larry's obligations under the continuity

⁸ Gardner does, however, suggest a right-based counterpart to the continuity thesis. (See *TOW*, 73) (describing a 'right-in, right-out' principle).

thesis (*FPL*, 106). If we accept that premise, there is an interesting puzzle for private law theory. When the courts order money damages, they do not follow up to make sure that those damages are spent on fixing the losses occasioned by the defendant's wrongdoing. Why don't they?⁹

One basic reason is that oversight of how damages awards are spent would get courts tangled up in costly monitoring of plaintiff behavior. Perhaps the judicial avoidance of such oversight is akin to the reluctance courts show toward awarding specific performance when money damages will suffice (see *FPL*, 227). Gardner suggests an additional reason why courts may avoid further involvement. In many cases, the wrong has so changed the plaintiff's life that there is no going back to the way things were – not only with respect to the wrong's immediate effects, but also with respect to the narrative arc of the plaintiff's life as whole (*FPL*, 227–228).

This kind of loss is another challenge for the continuity thesis, and it again raises the specter of irreparable harm. Gardner responds that the continuity thesis can still apply. It does so, however, in an unusual way: 'Applying the continuity thesis at this point, one ends up thinking about how the plaintiff's future life, although unrecognizably different in its ingredients from the life she led before, could nevertheless be *as good as* the life she led before' (*FPL*, 229). It goes without saying that there is no ready way for courts to calculate this. Their proxy, Gardner suggests, is to give the victim 'a life *no more expensive than* the one that went before' (*FPL*, 230). Money damages are an attempt at such a proxy, and the law recognizes it is only providing a proxy by allowing the plaintiff to figure out how to spend this money.

This is a very intricate way of solving a puzzle that can also be solved in another, simpler way – indeed, in a way that bridges private law and personal life. Here is an alternative. If a right holder is not a proper party to enforce her own rights, similar limitations may constrain those who act on *behalf* of the right holder. This is true in personal life, and with appropriate adjustments it is true for the state.

⁹ As Gardner puts it: 'When a tort plaintiff claims for the cost of replacing a faulty or damaged roof but uses the money instead for a three-week cruise, leaving the roof unrepaired, why is that not a breach of trust, or a deceit, or an abuse of process, or at any rate something such that the misapplied damages can now be recovered by the poor schmuck who paid them?' (*FPL*, 226).

Imagine that Jack has committed a wrong against Jill – say, for example, that he has broken a promise. If it is also the case that Jack has repeatedly suffered from Jill’s broken promises, or if Jack broke his promise in order to address an emergency created by Jill’s own wrongdoing, she may have forfeited the right to complain about Jack’s broken promise.¹⁰ Perhaps she has also lost standing to demand performance, or even to enforce his promise. If so, a friend who seeks to complain, demand, or even enforce on Jill’s behalf may derivatively lack standing in light of Jill’s status as a wrongdoer.

The case of the broken tail light can illustrate the same moral phenomenon as the Jack and Jill example. In this case, the right holder Larry is also the original wrongdoer who precipitated the whole mess, and that is significant. Assuming Larry has a valid moral claim regarding the use of the money he paid Heineman,¹¹ we can still ask whether Larry has the standing to complain if Heineman refuses to spend his money repairing the broken tail light. We might likewise wonder if Larry is the right party to enforce his claim to having the tail light repaired with the money he paid. If we conclude that Larry does not have standing to enforce, it is a short step to the conclusion that Larry’s friends also lack this standing if they are acting on Larry’s behalf. And, it can now be added, the state may face similar moral constraints if it is acting on a defendant’s behalf.

In short, when one party acts on behalf of another in a delegor/deegee relationship, the deegee’s capacity for bringing about certain remedies may be limited by whatever constraints exist on the delegor’s capacity to engage in this conduct directly. If we are trying to figure out whether Larry’s deegee can force Heineman to repair the broken tail light, we may need to know whether Larry himself can force Heineman to repair the broken tail light. A full understanding of the continuity thesis’s implications may thus require us to take into account questions of right holder standing. Indeed, taking such questions into account can help explain why courts do

¹⁰ On loss of standing to complain, see Nicolas Cornell, ‘A Complainant-Oriented Approach to Unconscionability and Contract Law’, *University of Pennsylvania Law Review* 164 (2016), pp. 1131, 1159–1163.

¹¹ One might doubt whether Larry has any moral claim regarding Heineman’s decisions on how to spend the money Larry paid him. For insightful arguments against Larry’s holding such a claim, see John C. P. Goldberg, ‘Taking Responsibility Personally: On John Gardner’s *From Personal Life to Private Law*’ (ms on file with author).

not generally monitor how plaintiffs spend the money they receive from a damages award.

An interlacing of the continuity thesis and right-based reasoning is also possible from the other side. We can change our starting point by assuming that courts act on behalf of plaintiffs instead of defendants when they order damages. Imagine an account of private law that focuses on civil recourse from the right holder's perspective – an account concerned with enforcement rights, getting satisfaction, or holding accountable. On such an account, the court's role in the ordinary case is to assist the plaintiff right holder in this endeavor, acting as her delegee. The plaintiff's standing to demand relief or to enforce her remedial rights would then bear on the court's readiness to provide a remedy.

We might think that the concern now is entirely a concern with figuring out when and how a plaintiff should be able to enforce her rights, get satisfaction, or otherwise hold the defendant accountable. Notice, however, that the court in occupying this role could still be helping *someone* conform to her reasons for action. That approach need not fall away with our shift in perspective. The adjustment is that the court acts on behalf of a different party from the one Gardner proposes. When would it be acting on behalf of a duty bearer despite a plaintiff-focused legal perspective? The context I have in mind is the law of equity.

The law of equity is sometimes concerned (in part) with a right holder's conscience, and the courts reference this explicitly.¹² Equitable remedies are withheld at the court's discretion, and, in some of these cases, a reason why is a moral wrong committed by the right holder who seeks these remedies. Thus, a plaintiff with unclean hands may be refused injunctive relief, and she is not permitted to benefit from her own wrong. Some cases of estoppel have a similar cast. Courts in these cases may still act on behalf of the right holder, yet they may also conclude that relief should be limited or unavailable in order to help the right holder act as her conscience should require of her. Such courts may help private parties act in conformity with their reasons for action.

But is this a case in which the continuity thesis directly applies? That is unlikely, absent an expansive interpretation of the continuity

¹² For helpful analysis of conscience and the law of equity, see Irit Samet, 'What Conscience Can Do for Equity', *Jurisprudence* 3 (2012), p. 13.

thesis. Instead, this is an instance of not adding insult to injury. Whatever wrong the plaintiff with unclean hands may have committed, this wrong is not repaired by the court's refusal to help the plaintiff obtain subsequent benefits from his wrong (it is not repaired even in the way that placebos repair). That doesn't mean that the continuity of reasons post-wrong is irrelevant. Recall the idea that apologies are a way of showing sensitivity to reasons, even if not conformity (*FPL*, 150). When courts refuse specific performance or an injunction to someone with unclean hands, this may also qualify as a form of sensitivity to reasons, a way of derivatively respecting the continuity thesis. It is a way of taking into account the reasons that were violated by the party with unclean hands, reasons which, per the continuity thesis, still have a rational pull.

V. CONCLUSION

Torts and Other Wrongs shows us how the continuity thesis works when repair is possible. *From Personal Life to Private Law* shows us how that thesis remains relevant when harms are irreparable. In either event, there is a challenge in determining whether third party conduct should count as a wrongdoer's conformity with her reasons for action. Figuring out how that challenge can be resolved offers further insights into the legal role of the continuity thesis. All is not lost, however, if courts act on behalf of someone other than defendants when they order damages. Notably, the continuity thesis still has a role to play even if courts generally act on behalf of right holders.

This review has focused on the continuity thesis as elaborated in Gardner's recent books. There is another kind of continuity worth mentioning. John Gardner's voice is clearly audible in these pages. In *From Personal Life*, the literary examples are more than occasions for legal or moral philosophy, and the autobiographical examples are more than interesting fact patterns for discussion. These are books about law, but they are also books about our reasons outside the law. It is very fortunate that so much of John's personality resides in his last two books, allowing us to share his evident joy in studying both law and life.

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