

# Finishing the Reparative Job

## Victims' Duties to Wrongdoers

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### 1. Introduction

The literature on reparative justice focuses for the most part on the grounds and content of wrongdoers' duties to their victims. An interesting but neglected question, which John Gardner raises in *From Personal Life to Private Law*, is whether a victim is under a duty to her wrongdoer to (as Gardner puts it) help him "finish the reparative job" by accepting his amends and, when the amend takes the form of financial reparations, by using it so as to repair the wrong.<sup>1</sup>

Gardner answers in the affirmative with respect to financial reparations. It is fair to say, I think, that he raises the question without fully answering it. In this chapter, I use his remarks as a springboard for an account of victims' duties of that kind. I argue that victims have much greater latitude than he grants them. Section 2 sketches in broad terms two standard approaches to reparative justice, namely the restorative approach and the backward-looking approach of which Gardner's own account is an example. Section 3 rejects a duty to accept financial reparations, while section 4 rejects the duty to use reparative payments in conformity with reparative ends.

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<sup>1</sup> J Gardner, *From Personal Life to Private Law* (OUP 2018) 107 ("FPLPL"). Some way into the drafting of this chapter, I became aware of John CP Goldberg's (then) forthcoming review of the book, in which he takes up the question of victims' duties. He is critical of Gardner's view, as I am, but places greater emphasis than I do here on the question of how to construe those duties in the first instance, and less emphasis than I do on normative grounds for resisting them. (JCP Goldberg, "Taking Responsibility Personally: On John Gardner's *From Personal Life to Private Law*" (2021) 14 *Journal of Tort Law* 3.) The question of victims' duties to wrongdoers in a reparative context arises in the literature on forgiveness. Outside the issue of forgiveness and aside Goldberg, Linda Radzik is to my knowledge the only other philosopher who gives serious attention to victims' reparative duties to wrongdoers. However, her heavily qualified argument in favor of victims' duties "lumps" reparations together with apologies. (L Radzik, *Making Amends* (OUP 2009) 126–36; L Radzik, "Tort Processes and Relational Repair" in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 243–244.) RA Duff and V Tadros cursorily claim that victims are not under duties to accept compensation but do not mount a sustained argument to that effect. (RA Duff, "Repairing Harms and Answering for Wrongs" in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 216; V Tadros, "Secondary Duties" in PB Miller and J Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (OUP 2020) 200.)

In those two sections, I rely on the following simplifying assumptions: the wrongdoing is relatively minor; the wrongdoer and the victim are not tied by bonds of friendship or family; there is only one wrongdoer and one victim. I relax those assumptions in section 5 and show that those additional features sometimes impose on victims duties of acceptance and use which they would not have otherwise.

Some preliminary remarks. First, I focus on cases in which an agent violates some right(s) of another person's. Within the category of rights-violations, I focus on private wrongs. I do not address reparations in the aftermath of large-scale political conflicts; nor do I consider cases in which the state is deemed to owe reparations for its (officials') wrongdoings (save for a brief comment at the close of section 5). I also set aside cases in which the breach is a violation of a contractual right. My concern is with violations of rights to property and physical integrity in interpersonal, non-contractual contexts.<sup>2</sup>

Second, I am mostly interested in victims' duties to wrongdoers. Whether victims are under moral duties to parties other than wrongdoers to accept the latter's payment or to use those payments in conformity with reparative ends is a separate question which I postpone until the final section. Accordingly, unless otherwise specified, when I speak of victims' duties, rights, or prerogatives, I mean *vis-à-vis* wrongdoers.

Third, individuals owe it to one another not to humiliate one another, not to seek to exercise domination over one another, and so on. Victims' latitude to refuse reparations is constrained by those moral considerations. Turning down a payment in order to make the wrongdoer feel worse or in one's debt is morally wrong. I take that point as fixed throughout and assume that the victim's attitude towards the wrongdoer is of the right kind.

Finally, my concern is solely with victims' *moral* duties. If my defense of victims' entitlements has relevance to or interesting implications for the law, all the better for it. But I leave it to those more competent than I am to say so.

## 2. Reparative Justice: A Primer

Suppose that Walter crashes into Violet's car in a bout of careless driving. He is under a *pro tanto* duty to her to remedy the wrong he has inflicted on her, for example to have her car fixed at his expense and to compensate her for the inconvenience she has suffered as a result of the crash. Correlatively, she has a right against him that he take the appropriate measure.<sup>3</sup> This intuitively appealing claim raises serious

<sup>2</sup> Thanks to Sandy Steel for inviting me to consider contractual breaches—even though I regretfully decline the invitation for lack of space. I consider postwar reparations in C Fabre, *Cosmopolitan Peace* (OUP 2016), ch 6. Furthermore, nothing I say in this chapter should be taken to imply that remedial measures are necessarily responses to rights violations: I take no stand on this particular point. Stephen Smith offers a useful typology of damages some of which, he claims, are not properly construed as compensation for losses or harms while others are not responses to a wrong. See SA Smith, "The Significance of a Civil Wrong" in PB Miller and J Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (OUP 2020). For a typology of remedies which are not responses to rights violations, see N Cornell, "What Do We Remedy?" in PB Miller and J Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (OUP 2020).

<sup>3</sup> I adapt Gardner's own example, which he borrows from an episode of the series *Curb Your Enthusiasm*. *FPLPL* (n 1) ch 3.

complications, notably with respect to how much one may reasonably ask wrongdoers to do to repair their wrong, whether monetary compensation is an appropriate remedy for non-financial harms, and whether Walters owes it to Violet all things considered to repair the wrong. I prescind from addressing those complications. Instead, I take it as a given that Walter owes financial reparations to Violet—say, for the sake of expository simplicity and as a placeholder, £500—and thus, correlatively, that she has a right to it.

Before considering whether Violet is under a duty to accept the payment and, if so, to use it to the ends for which it is meant, it is worth saying a few words about the grounds of Walter's duty. On the restorative or reconciliatory approach to reparative justice, by acting as he did, Walter caused damage to his relationship to Violet. He owes it to her to repair their relationship. In order to do that, he must atone for his wrongdoing. When atonement must take the form of, *inter alia*, financial reparations—he owes it to her to do just that.<sup>4</sup>

On such a view, to the extent that victims are under duties to wrongdoers to repair and promote a good relationship and that accepting and using payments serves such ends, it seems intuitively plausible to say that victims are under *pro tanto* duties to wrongdoers to help the latter finish the reparative job. However, there are at least two familiar problems with the restorative view. First, it does not adequately account for reparative duties when there is no relationship to begin with. Second, it presses the wrong kind of reasons in support of those duties in general. For it seems that, by its lights, one (or even the) reason why Walter is under a duty to Violet to drive carefully in the first place is that, should he fail to do so and crash into her, he would damage his relationship with Violet. But this does not seem right: Walter is under a duty to her to drive carefully by dint of his general duty to road users and pedestrians to give due consideration to their fundamental interests in physical safety. This is so whether or not there is a relationship to salvage.<sup>5</sup>

On so-called corrective approaches to reparations, Walter's reparative duty is not grounded in the damage he did to his relationship with Violet (even if, we may readily suppose, he *did* cause such damage). Rather, it is connected to his primary duty to others to take reasonable care while driving. The task of an account of reparative duties is to explain the nature of this connection. On Gardner's influential view, which he dubs the continuity thesis, the reasons which ground Walter's primary duty to drive carefully are not extinguished by his dereliction: they continue to apply to him.<sup>6</sup> On another view, it is the right and its correlative primary duty which survive, not the reasons which grounds the primary duty: the reparative duty is the next best thing to

<sup>4</sup> See eg J Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (Polity 2002); L Wenar, "Reparations for the Future" (2006) 37(3) *Journal of Social Philosophy* 396; Radzik, *Making Amends* (n 1); Radzik, "Tort Processes and Relational Repair" (n 1).

<sup>5</sup> In response to first objection, Linda Radzik argues that even in those cases, there is a relationship to salvage, albeit a purely moral one (Radzik, "Tort Processes and Relational Repair" (n 1) 238. See also M Walker, *Moral Repair—Reconstructing Moral Relations after Wrongdoing* (CUP 2006) ch 1. My concern with this move is that it relies on such a broad understanding of what constitutes a relationship as to empty it of explanatory content. For the wrong-kind-of-reason objection, see eg R Kumar, "Why Reparations?" in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014). Gardner himself is skeptical of the reconciliatory approach; FPLPL (n 1) 91–98.

<sup>6</sup> See, in particular, J Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30(1) *Law and Philosophy* 1.

respecting the right.<sup>7</sup> On yet another view, Walter's duty is grounded in his breach of his primary duty to Violet to take reasonable care while driving.<sup>8</sup>

On whichever backward-looking account one endorses, the wrongful harm which Violet suffered at Walter's hands is repaired only if she is brought back as close as possible to where she was before the crash. For this to happen, it is not enough that Walter should offer to do that which will put her back in that position—say, for the sake of argument, compensate her for the inconvenience and pay to have the car fixed: Violet must accept Walter's payment and use it to put herself back, as close as possible, to where she was before the crash.<sup>9</sup> Hence our two questions:

1. On what grounds, if any, is Violet under a duty to Walter to accept the payment?
2. On what grounds, if any, is Violet under a duty to Walter to use it conformably?

### 3. Acceptance

When discussing the question of acceptance, Gardner makes two points. First, turning down a reparative payment is tantamount to thwarting the wrongdoer's attempt to fulfil his duty to repair. Victims are under a duty not to do so—or, as he puts it, a duty to help wrongdoers “finish the reparative job”. However, second, a victim may refuse a reparative payment as a way to put the past firmly behind her and to make a fresh start, and if to do so is the next best thing. There is no duty of acceptance if one's refusal is grounded in reparative considerations. But there is a (*pro tanto*) duty not to refuse the payment for non-reparative reasons.<sup>10</sup>

<sup>7</sup> A Ripstein, *Private Wrongs* (Harvard University Press 2016), ch 8; EJ Weinrib, *Corrective Justice* (OUP 2012), ch 3.

<sup>8</sup> Tadros (n 1). Restorative and corrective approaches are not the only games in town. In the philosophy of tort law, they have formidable rivals in the economics approach and the civil recourse approach. Very roughly put, on the economics approach as defended by Richard Posner and Guido Calabresi, the aim of tort law is to assign liabilities following a legal breach in such a way as to maximize economic efficiency. On this view, the fact that Walter *wronged* Violet plays no role in ascertaining what he owes her. On the civil recourse approach as defended by, in particular, John CP Goldberg and Benjamin C Zipursky, that fact is crucial. But whereas the corrective approach grounds Walter's reparative duty in his breach of his primary duty, the civil recourse approach grounds it in Violet's right to *seek recourse* against Walter (JCP Goldberg and BC Zipursky, *Recognizing Wrongs* (Harvard University Press 2020)). Unlike the economics approach, the corrective and the civil recourse approaches conceive of the legal rights and duties of torts, and, by implication, the moral rights and duties of reparative justice, in relational terms; and they thus both open the door to an account of what, if anything, victims (or plaintiffs) owe to wrongdoers (or defendants). I do not examine in detail what the civil recourse approach may have to say about this issue, partly in deference to the fact that this chapter is a contribution to a volume on Gardner's works, partly because I have a (not fully formed) reservation\* about its central claim in so far as it applies to reparative justice as distinct from tort law. (\*To wit, that Walter's reparative obligation to Violet is not grounded in Violet's right to seek redress but, rather, in the mere fact that he wronged her. Whether she has the right to enforce or waive the performance of his duty (which is what the right to seek remedies amounts to) is a separate question.)

<sup>9</sup> I say “for the sake of argument”, for it is possible in principle that some remedial measure other than a payment might sometimes do the job. But in this chapter, I assume that nothing other than payment to fix the car and compensate her for the inconvenience will do.

<sup>10</sup> *FPLPL* (n 1) 217–18 and 228–29. This paragraph reconstructs what I take Gardner's position to be, in the light of the pages just mentioned and in the light of his endorsement of the duty to use conformably in ch 3. More on the latter in section 4.

I disagree with Gardner, on two grounds. For a start, his way of framing the question threatens to render the latter moot. He sometimes describes Violet's refusal in terms of not thwarting Walter's *attempt* to fulfil his duty to repair, sometimes in terms of not thwarting his *performance* of the duty. This is unfortunate, for these are not the same. Walter attempts to fulfil his duty if (for example) he writes a check without realizing that his bank account does not have enough funds: Violet thwarts his attempt if she, for example, surreptitiously steals all of his pens, as a result of which he cannot write the check. Contrastingly, Walter performs his duty if he writes the check with enough funds to cover it and sends the check to Violet. Now, as Gardner has it, she thwarts the performance of his duty by not cashing the check. But it is wholly unclear why that is the case. Walter's duty to pay is simply a duty to write a check with sufficient funds to cover it. So long as he does this precisely, he *has* performed his duty and Violet's refusal to cash the check cannot be aptly described as thwarting his performance.<sup>11</sup> If this is correct, the question of whether Violet is under a duty not to thwart Walter's performance of his reparative duty does not get off the ground. That said, let us take Gardner at his word and assume, with him, that however one construes Walter's duty to pay and Violet's acceptance, the question of whether she is under a duty to accept remains on the table. Even so, as I now argue, Violet is not under the stated duty to Walter. More expansively put, (i) Violet is not under a duty not to pre-empt his offer by indicating that she will not accept it; (ii) she is not under a duty to do what she needs to do in order to have Walter's rights in respect of the requisite amount of money transferred to her; (iii) she is not under a duty not to return the payment to Walter once she receives it.

As far as I can see, Gardner does not provide a defense of the view that Violet is under the relevant duty.<sup>12</sup> Here is one. Generally, we are under duties not to thwart—and, indeed, perhaps even to help—one another in the performance of our duties. Suppose that, at time  $t_1$ , I am under a duty to you to rescue you from the pond in which you are drowning. As I am about to wade in at  $t_2$ , your life-long murderous enemy stands in my way and refuses to budge, thereby making it impossible for me to save you, whereupon you die. Assume that the land on which we both stand is publicly owned, so that prior to your getting into difficulties in the water, I and your enemy are equally entitled to stand where we are. That he wrongs you, grievously so, by refusing to let me go through is beyond dispute. I also think that he wrongs me.

I suspect that not everyone will agree. Some might say that by making it impossible for me to save you, your enemy has extinguished any duty I had to you to rescue you and that I am in exactly the same situation at  $t_2$  as the bystander who is too far away to

<sup>11</sup> See, respectively, *ibid* 106 and 217. For an incisive discussion of this point, see Goldberg (n 1). I am indebted to Adam Slavny and Gopal Sreenivasan for helping me clarify my thoughts on the ambiguity in and consequent exegetical difficulty with the term “duty not to thwart the performance of/attempts to perform the duty to repair.”

<sup>12</sup> It might be thought that the answer, for Gardner, lies in his general account of duties, including reparative duties, as delegable. On this view, Walter delegates to Violet the task of seeing to it that the reparative job is finished. (*FPLPL* (n 1) 107.) However, even if it makes sense so to construe Violet's action, we still need to know on what grounds she is under a duty to Walter to agree to fulfill his delegable duty. (On delegable duties, the continuity thesis, and cases such as Walter and Violet, see AS Gold, “Delegation and the Continuity Thesis” (2021) 40 *Law and Philosophy* 645.)

do anything and watches in impotent despair as you drown.<sup>13</sup> But this does not ring true. For the fact is that, unlike the bystander, I *was* in a position to rescue you. It is not merely understandable but appropriate that I should round on your enemy and ask on *my* behalf as well as on yours what on earth he is doing. I now have a grievance against your enemy, on my own behalf and which the bystander does not have to the same extent, for preventing me from rescuing you.

The point applies, *mutatis mutandis*, to reparative duties. Suppose that I thoughtlessly knocked you over into the pond. Of all the possible rescuers, it behooves me other things being equal to get you out. In this case too, I am owed a duty not to be thwarted in my reparative endeavor. Or—going back to Walter and Violet—suppose that unbeknownst to Violet, Violet's daughter intercepts Walter's check before it gets to her mother, and cashes it for herself. That she wrongs Violet is beyond doubt. I believe that she also wrongs Walter.<sup>14</sup>

Here are two considerations in favor of the view that one is under duties to duty-bearers not to thwart them. First, on plausible conceptions of well-being, a life that goes well is one that is lived in compliance with the demands of morality. This, in fact, is a recurrent theme in Gardner's works, particularly in *From Personal Life to Private Law*. In so far as we owe it to one another not to impair our opportunities for a good life (at least not without warrant), we owe it to one another not to thwart our fulfillment of our duties, reparative or otherwise (at least not without warrant.) Second, irrespective of the impact of one's failure to comply with the demands of morality on one's well-being, to respect another person as a moral agent is to recognize in them the ability to do the right thing in the light of their own judgments, and to support them in their successful exercise of that ability. This partly explains why manipulating, exploiting, or coercing someone into committing a wrongdoing is a wrong done to them, and not merely to the victims of that wrongdoing. The rationale for the duty not to act in such a way as to get someone to do wrong is also a rationale for the duty not to act in such a way as to make her fail to do right. To put the general point in Gardnerian parlance, we do not merely have reasons to try to live by the demands of morality, we have reasons—grounded in well-being and moral agency—to succeed in doing so. Likewise, we (sometimes) are under *duties*, and do not simply have reasons,

<sup>13</sup> Another skeptical point: suppose that your enemy pushes you under the water and kills you before I manage to get to you. In this case too he has made it impossible for me to fulfill my duty of rescue. The intuition I harness here seemingly implies that he wrongs me, which seems wholly implausible. I agree with the judgment of implausibility. But I am not committed to it. There is a salient difference between depriving someone of the means she needs in order to fulfill her duty, and acting in such a way as to change the facts which gave rise to that duty in the first instance. Thanks to Adam Slavny and Sandy Steel for pushing me on this.

<sup>14</sup> One may wonder whether Violet and Walter have a moral claim against Violet's daughter and, if so, whether they both ought to have a legal claim to remedy against her. To the first question: I am inclined to say "yes," though it is not always clear what the nature of the daughter's wrong is. Is it an act of theft against both Walter and Violet? Against Walter only, if she intercepts the check before it reaches Violet? An act of theft against Violet but an exercise in thwarting Walter's performance of his reparative duty if she seizes the check after it reaches her mother? To the second question: this depends on when, legally speaking, Walter is deemed no longer to have a title to the money, and when the money is deemed to belong to Violet. Thanks to Zoë Sinel for drawing my attention to this fascinating and hugely complex issue and to Alexander Georgiou for a helpful discussion.

not merely to try but to succeed, and others owe it to us not to thwart our performance of those duties.<sup>15</sup>

Those considerations strike me as compelling. Indeed, as we shall see later on, they support a duty of acceptance in some more complex cases. However, they do not support the claim that *Violet* is under a duty of acceptance to Walter in the simple case. As I noted at the outset, Violet has a right against Walter that he repair the wrong he did her. On the interest theory of rights (which Gardner and I both endorse), to say that someone has (i) a right, (ii) a permission, and (iii) a power in respect of  $\phi$  is to say that some interest of hers is important enough to, respectively: (a\*) impose on third parties a duty to respect or promote  $\phi$ , (b\*) deny third parties a claim that she not  $\phi$ , (c\*) render third parties liable to her changing her and their jural relationships over  $\phi$ .<sup>16</sup> Generally, agents have two broad categories of interests: first-order interests in the goods necessary to lead a flourishing life on the one hand, and second-order interests in exercising some degree of control over what third parties do to or for them in respect of those first-order interests. Walter wrongfully sets back Violet's first-order interest in the goods of physical security and use of her car, which grounds his reparative duty to her. Violet also has a second-order interest in deciding whether or not she will accept the payment. The question is whether her second-order interest is important enough to be protected by a permission (or no-duty) *vis-à-vis* Walter not to accept the payment.

I believe that it is. To see this, consider non-reparative duties to rescue. In the pond case, you do not owe it to me not to relieve me of my duty to rescue you. Your interest in deciding whether or not to remain alive surely outweighs my interest in seeing to it that you do remain alive; and it is important enough not merely to be protected by a power, *vis-à-vis* me, to waive my duty, but also by a permission, *vis-à-vis* me, to do so. To be sure, your need for rescue will go unmet if you refuse my help, but such is your prerogative.

I see no reason to treat differently reparative duties to pay. Violet's interest in deciding whether or not to accept Walter's payment outweighs his interest in it being the case that she actually gets the payment. The wrongful harm which Violet incurred at Walter's hands will go unrepaired if she turns down the payment, but that too is her prerogative.

The claim that Violet does not owe it to Walter to accept his payment finds support in restitutive justice. Here are some examples, drawn from two nineteenth-century literary masterpieces. First, in George Eliot's *Middlemarch*, Nicholas Bulstrode, the town's banker and one of the main characters, is seen, and wants to be seen, as a devout Christian in words and deeds. Yet he has made his fortune by illicitly depriving his first wife's daughter and grandson of their rightful inheritance, a fact of which Middlemarchers are clearly not aware. Decades later, he offers the impoverished

<sup>15</sup> On the wrong of getting someone to act wrongly, see also JW Howard, "Moral Subversion and Structural Entrapment" (2016) 24(1) *Journal of Political Philosophy* 24. If the second consideration in favor of the duty not to thwart duty-bearers is apt, then it is *pro tanto* worse to stymie someone in the fulfillment of her duty than it is to thwart her in the commission of a supererogatory act.

<sup>16</sup> WN Hohfeld, *Fundamental Conceptions as Applied in Judicial Reasoning* (Yale University Press 1919). The *locus classicus* for the interest theory of rights is J Raz, *The Morality of Freedom* (Clarendon Press 1986) ch 7.

grandson, Will Ladislaw, to return to him the equivalent of what he took from him. Ladislaw refuses the offer, essentially because Bulstrode's original business, on which his current fortune is built, was a pawnshop doubling up as a fence shop. Ladislaw is impetuous and particularly sensitive about his difficult family circumstances. But it is the manner of his refusal, which betokens (paraphrasing Eliot) merciless arrogance towards the older man, that gives us pause—not the refusal itself. By hypothesis, the money is *his* and, precisely for that reason, it is for him to decide whether or not to accept it.

Second, Victor Hugo's *Les Misérables*. The hero, Jean Valjean, steals silverware from the bishop who gave him hospitality. He is caught by police officers who drag him back to the bishop's house to return the goods. The bishop's mendacious assertion to the police that he gave the silverware to Valjean sets the latter on his long and difficult road to redemption—as hoped for by the bishop. Even if Valjean had not understood the bishop's message, it would be odd to say that he would have been wronged by his benefactor's refusal to accept the goods. We do not owe it to thieves to take back the property they have stolen from us.<sup>17</sup>

One final point. My rejection of Violet's duty of acceptance is compatible with the view that victims are under some circumstances under duties of acceptance to wrongdoers in respect of the latter's reparative duties to pay. Suppose that bystander Brenda offers to pay up *in lieu* of Walter. However, Walter is willing to pay, as is his duty. Indeed, he insists—for no reason other than the fact that it matters to him that the wrongs he has occasioned not go unrepaired. I am inclined to think that, *if* she is minded to take a payment, she is under a *pro tanto* duty to him to accept his payment rather than Brenda's in this case.<sup>18</sup>

#### 4. Use

I have argued that Violet does not owe it to Walter to accept his payment. Suppose that she does accept the money. The question is whether she owes it to Walter to use it in conformity with the reparative ends which mandated it in the first instance. Those two

<sup>17</sup> G Eliot, *Middlemarch* (OUP (Oxford World's Classics) 1999) (first published in 1871–1872) VI.lxi; V Hugo, *Les Misérables* (Gallimard—Bibliothèque de la Pléiade 2018) (first published in 1862) I.xii. My point about the bishop applies irrespective of the fact that Valjean did not willingly return the silverware.

<sup>18</sup> Suppose that Walter is destitute and that paying reparations to Violet would cause him severe hardship. It might be thought that, given that Brenda is willing to pay in his place, Violet ought to accept her payment rather than his: far from being under a duty to him to accept, she is under a duty to him to refuse. Whether this is correct depends on, *inter alia*, whether reparative obligations, in the same vein as distributive obligations, are subject to a no undue cost proviso (something like “ought” implies “can”). If they are, and if Walter thus is not under a duty to pay yet insists on doing so, then we may worry that Violet's refusal, in so far as it is grounded in concern for his well-being, is unduly paternalistic. If Walter is under a duty to pay, either because reparative duties are not subject to the no undue cost proviso or because, though they are, his duty does not run afoul of the proviso, then Violet is not under a duty *to him* to take Brenda's payment rather than his, though she may, perhaps, be under an undirected duty of charity to do so. These twists on the initial case raise the difficult question of the relationship between the principle that “ought” implies “can” and the moral foundations of civil law (on which question see eg A Slavny, “Should Tort Law Demand the Impossible?” in PB Miller and J Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (OUP 2020); Frederick Wilmot-Smith, “Law, ‘Ought’ and ‘Can’” (2021, unpublished), on file with author.



questions, of acceptance and use, must be kept separate. Even if Violet is under a duty to Walter to accept his payment, it does not follow that she is under a duty to use that payment conformably. Conversely, even if she is not under a duty to accept the payment, it does not follow that if she does accept it, she has full latitude as to how to use it.

Assume, following Gardner's expository lead, that Violet gives the money to her daughter instead of fixing her car. Assume further that helping her daughter not only does not help Violet fix her car but, moreover, does not make good on the inconvenience Violet incurred as a result of the crash. For example, Violet's daughter decides (with her mother's foreknowledge) to treat herself to a holiday. Walter complains: "you shouldn't have done that! I gave it to you to fix your car." According to Gardner, he has a legitimate grievance.

Gardner's initial example—from *Curb Your Enthusiasm*—is more complex than appears at first. The victim, Heineman, does not inform Larry, who rear-ended his car, that he has given Larry's reparative payment to his daughter; Larry finds out when he notices that Heineman has clearly not fixed his car and confronts him. Larry's sense of grievance is colored by the fact that Heineman acted surreptitiously and against their shared understanding that Heineman would fix the car.<sup>19</sup>

I am not sure that Larry has a grievance under those circumstances. I am tempted to say that short of having promised Larry to use the money conformably, Heineman is allowed to change his mind without informing him. In any event, Gardner's core analysis of the example clearly indicates that there is more to Larry's grievance than his having been deceived: "That Heineman did not spend the money on replacing the smashed taillight means . . . that Larry's attempt to do the right thing by the light of the continuity thesis has been frustrated. Hence Larry's indignation."<sup>20</sup> That being said, Gardner does not tell us *why*, setting aside Heineman's deceit, Larry's indignation is justified and why, more generally, victims owe it to wrongdoers to use the latter's payments conformably. As far as I can tell, the closest he comes to offering an argument is when he claims that a victim who says that her use of the payment is none of the wrongdoer's business "is . . . dropping [him] prematurely from the justification equation."<sup>21</sup> I confess that I am not sure how to parse that statement. One can of course readily concede that Walter would have a grievance if Violet's daughter intercepted the check and, instead of having the car fixed as asked by her mother, spent it on herself. For as I suggested above, third parties are under duties to duty-bearers not to thwart them in the performance of their duties. But we do need an argument in support of *Violet's* duty of conformable use.

It is quite possible that, had Gardner been pressed on this point, he would have said that the duty of conformable use is grounded in the same considerations as ground the duty of acceptance.<sup>22</sup> If so, my rejection of the latter applies to the former. In the

<sup>19</sup> See, especially *FPLPL* (n 1) 226. I am grateful to Andrew Gold for prompting me to disentangle those various dimensions of the case.

<sup>20</sup> *ibid* 103.

<sup>21</sup> *ibid* 106. As an aside, Gardner notes that the claim that a victim owes it to her wrongdoer to use his reparative payment conformably raises the question of whether his claim against her ought to be enforced by the courts, ie by means of supervising how she spends the money. His reasons for rejecting courts' involvement are persuasive (*ibid* 227–28).

<sup>22</sup> Thanks to Alexander Georgiou for the suggestion.

remainder of this section, I scrutinize another argument one might be tempted to deploy in support of that duty. To wit, if Violet spends the money to non-reparative ends without Walter's consent, she is appropriating from him something which he was not under a duty to give her—to wit, £500 to *help her daughter go on holiday*.<sup>23</sup>

I agree that Walter is not under *that* duty. Even so, it does not follow that she wrongs him if she chooses to spend the reparative payment in this particular way. At  $t_1$ , before the crash, Violet has a car. Here are some of her options:

1. Keep the car.
2. Sell the car and give the proceeds of the sale to her daughter.

As she has no spare cash, she cannot give any to her daughter without selling her car. Let us suppose for now that her car is no longer roadworthy as a result of the crash. (I shall relax this assumption presently.) At  $t_2$ , after the crash and before Walter's intervention, she is minus her car and still with no spare cash for her daughter. Walter owes it to her to get her as close as possible to where she was at  $t_1$ . The next best thing is to get the car fixed for her. However, as Gardner rightly argues, she may have good reasons for asking that he give her money instead—not least the fact that she may not want to have any further interaction with him, that she would incur greater inconvenience still if he took charge, etc.<sup>24</sup> Let us stipulate, then, that he owes it to her to give her £500, period, bearing in mind (to repeat) that he does not owe it to her to help her fund her daughter's holiday. At  $t_3$ , having received the payment, here are some of her options:

- 1\*. Pay for the car to be fixed with Walter's money and keep the car.
- 2\*. Pay for the car to be fixed with Walter's money, sell it, and give the proceeds to her daughter.
- 3\*. Let the car go unfixed and give Walter's money to her daughter.

At  $t_1$ , Violet had the option of foregoing fixing her car and helping her daughter. At  $t_3$ , Walter's payment gives her two different ways of reaching this state of affairs: options 2\* and 3\*. I take it that Walter would have no grounds for objecting to her opting (as per 2\*) to have the car fixed, sell it, and help her daughter with the proceeds: she would be left without a car, but she would be able to help her daughter without being £500 out of pocket. If so, it is hard to see on what grounds he could object to her bypassing the sale altogether and using his payment directly to help her daughter (as per 3\*).

My claim turns on the fact that Walter gives her money. If he reimbursed her for the car repairs *ex post*, or gave her a repair voucher to be spent at her garage of choice, she would not have option 3\*. He does not owe it to her to give her that option. Rather, given that she has independent reasons for asking for money *ex ante*, she now has that third option, which is merely another route for her to do what she was able to do before the crash, to wit, foregoing her car and helping her daughter.

I have stipulated so far that Walter's carelessness results in Violet losing a road-worthy car. Suppose now that the car, although damaged, is still roadworthy (as in

<sup>23</sup> Thanks to the audience at the KJuris workshop, where I presented this paper in March 2021, for a good discussion of this point.

<sup>24</sup> *FPLPL* (n 1) 106.

fact is the case in Gardner's original story).<sup>25</sup> In that scenario, at  $t_3$ , she now has the following options:

- 1\*\*. Pay for the car to be fixed with Walter's money and keep the car.
- 2\*\*. Pay for the car to be fixed with Walter's money, sell it, and give the proceeds to her daughter.
- 3\*\*. Drive around with a damaged car and give Walter's money to her daughter.

In this case, her situation at  $t_3$  is better in one respect than it was at  $t_1$ , for she now has an option which she did not have then, namely the use of her car *and* spare cash to help her daughter. Could Walter object to her choosing option 3\*\* on the ground that he did not owe it to her to give her cash to help her daughter and that by using the payment in this way, she is appropriating something that did not belong to her? I doubt it. If it is the case that (as I argued above) Violet does not wrong Walter by fixing and selling the car for her daughter's benefit, it is hard to see why she wrongs him by opting to help her daughter directly. To say that she does implies that she owes it to him *not* to take advantage of the fact that he wronged her in the first instance and did what he was under a moral duty to do anyway, namely offering payment. That seems unduly demanding of her.

I suspect that in this and the previous (kinds of) case, the thought that Violet owes it to Walter to use the payment conformably draws intuitive force from the fact that she gives the money to her daughter. Suppose however that she decides to keep it for herself, not with a view to spending it here and now but in case she might want to spend it on something completely unrelated to the harms she incurred at Walter's ends. For all she knows, she might revise her conception of a good life in ways that may well necessitate spare cash. For example, she might want to leave some money in her will, which she currently does not have, to the Cats' Protection League, or she might rediscover her love for playing an instrument and then decide to buy a new one, and so on. It seems extraordinarily counterintuitive to insist that she owes it to Walter *not* to do that. There is no principled reason for treating differently Violet's decision to delay spending the reparative money until such time as she has a better sense of how to spend it, and her decision to spend it now for the sake of her daughter. Consequently, she does not wrong Walter by helping her daughter.<sup>26</sup>

So far, I have assumed that Violet has preferences in respect of how to spend the payment, which include fixing the car and giving money to her daughter and which she may justifiably weigh as she wishes. Suppose that she is utterly indifferent as between fixing the car and treating her daughter to a nice trip.<sup>27</sup> She can (i) let her daughter decide, (ii) fix the car in conformity with the reparative ends for which the money is meant, or (iii) toss a coin. Must she opt for (ii) in this case? I doubt it. If the rationale for holding Violet under a duty of conformable use is the same as the rationale for holding her under a duty to accept the payment in the first place, then, given that she does not owe Walter a duty of acceptance (as per my argument in section 3), it is hard

<sup>25</sup> I am grateful to Massimo Renzo for pressing me to distinguish more carefully between those two variants.

<sup>26</sup> For similar points, see Goldberg (n 1).

<sup>27</sup> Thanks to Adam Slavny for the suggestion.

to see why she would be under a duty to him to opt for (ii). Pending argument to the contrary, what she does with the money is none of Walter's business.

## 5. Complications

I have argued that, in the kind of case under consideration so far, a victim is not under a duty to her wrongdoer to accept his remedial payment and to use that payment conformably: she may let the reparative job go unfinished. I have relied on three simplifying assumptions: Violet and Walter do not or barely know each other; the crash is relatively minor; they are the only parties involved in the crash. In this section, I relax each assumption in turn.

### 5.1 Special relationships

Suppose that Walter and Violet stand in a special relationship: they are colleagues, parent and child, siblings, partners, or neighbors.

Some wrongdoings are such that, when committed by and against individuals who do stand in a special relationship, payments are not in order: only apologies will do. In many cases, however, payment will be owed. Does the fact of Walter's and Violet's social, familial, professional relationship make a difference to their normative relationship as wrongdoer and victim?

There are two ways in which the presence of a special relationship might be morally salient. First, we might think that other things equal, individuals are under more stringent duties to their associates—be these duties not to harm or duties to help—than to strangers, and, thus, are under more stringent reparative duties to the former than to the latter. On this view, other things equal, it is worse unwarrantedly to harm or fail to help a friend than to impose the same harm on or withhold the same help from on a stranger.<sup>28</sup>

Even if and when that is true, however, such that the fact of their relationship has a bearing on the stringency of Walter's reparative duty to Violet, it is not clear that she is now under a duty to accept his payment and/or use it conformably which she would not have absent that relationship. Granted, it is possible that if she turns down Walter's payment or uses it to help her daughter, she will thereby damage their relationship. It is also possible that she is under a duty to try and maintain that relationship (suppose that they are siblings, for example, or close friends). But this would not ground a duty to help Walter finish the reparative job? For a start, such a relationship seems beyond repair if what it takes to maintain it is the acceptance and/or conformable use of a reparative payment *qua* payment. While Violet might value that relationship enough to have a reason to accept Walter's payment and use it to fix her car, I doubt that she is under a *duty* to him to do so—as distinct from a duty to try and repair the relationship

<sup>28</sup> Note: this does not imply that, contrary to what I said in section 2, reparative duties, in such cases, are best justified by appeal to reconciliatory ends—any more than my duty not to, eg, lie to or assault my friend is grounded in the importance of preserving that friendship.

by some other means. Moreover, the wrong kind of reason objection to restorative defenses of wrongdoers' reparative duties also applies here. If victims are under duties to wrongdoers to accept their reparations, this is so by dint of a general obligation to help wrongdoers fulfil their duties *tout court*, and it is unclear why the fact of a special relationship should change that.

The second way in which the fact of a relationship might and in fact does make a difference is this. Parties in a special relationship can be under duties to do things for one another which they are not under a duty to do for outsiders. Suppose that Walter—a rugby fanatic impatient with the modern game's concern for player safety—previously failed to take seriously the possibility that his teenage son, a reluctant rugby player keen to please his oppressive father, might have suffered a concussion in a particularly rough game, despite the boy complaining of headaches over the following few days. Had Walter taken him to Accident & Emergency, in fulfilment of his parental reparative duty of care, his son would not now suffer from cognitive impairment. Violet, who is a close friend of Walter's, knows all of this; she knows too that Walter is racked with guilt. A few weeks later, he crashes into her, totaling the car but mercifully not injuring her. Yet she knows that if she refuses his payment towards a new car, he will be utterly crushed by what he will see, yet again, as a failure to do right. Now, we might think that he needs professional help. Yet under those circumstances, it seems that she owes it to him, her friend, to take the payment (which, I maintain, she would not do were they strangers to each other). However, I doubt that she owes it to him to use it to get a new car. To say otherwise is to confer on him claims to govern how she leads a life which, surely, he does not have.<sup>29</sup>

## 5.2 The nature of the wrongdoing

It might be thought that the claim that Violet is not under a duty to Walter to accept his payment or to use it conformably unduly trades on the fact that, in the examples under discussion, Walter's wrong is relatively minor: the car is damaged, but it is nothing that a straightforward repair cannot fix, and Violet emerges unscathed from the crash. Suppose instead that she sustains fairly serious injuries. Walter owes her considerably more by way of reparative payment, such as something towards the cost of her rehabilitation, and perhaps even retraining if she has to change career as a result. Might there be something to the thought that, although it seemed an exaggeration to say that, in the minor crash case, she *wronged him* by declining the payment or by using it to help her daughter, it does not seem an exaggeration to say so in the serious crash case?

Perhaps. I conceded in section 3 that Walter might feel very bad at the prospect that his wrong might be left unrepaired. Let me put the concession more strongly: the more serious a wrongdoing, the more appropriate it is for wrongdoers to experience guilt, remorse, shame, and so on. Sometimes, those feelings can blight a life. Now, agents generally are not under a duty never to act in such a way as to adversely affect someone's life. But past the threshold at which the adverse effect constitutes a harm,

<sup>29</sup> Thanks to Sandy Steel for pushing me on this point and furnishing the example in broad form. The rugby twist is mine.

they can be under such a duty. The thought, then, is this. Even if Violet is not under a duty to Walter to accept his payment or to use it conformably, she is under duties of acceptance and conformable use in cases in which Walter's feelings of guilt reach the harmfulness threshold.<sup>30</sup>

I am not entirely sure what to think of this putative move. If Walter's feelings are appropriate, in the sense that they are not shaped by an irrational interpretation of the facts of the case and that they are commensurate to the wrong he has committed, it is not clear that Violet owes it to him to help alleviate them. If his feelings are not inappropriate, whether she owes him anything depends on the magnitude of his wrongdoing and the costs to her of helping him. It seems that for wrongdoings of a certain magnitude, Violet owes him precisely nothing by way of acceptance or use, however debilitating his feelings might be. Suppose, then, that he has not wronged her to such an extent as to extinguish any duty she might have in respect of his offer of payment. Admittedly, it seems implausible for her to aver that it would be costly to her merely to accept a payment (on the assumption that she does not have reparative reasons to refuse it).<sup>31</sup> If so, then she may well be under a duty of acceptance. However, it is hard to believe that she also owes it to him to spend the money conformably. Acceptance should suffice.

### 5.3 Multiple victims

Many (most?) wrongs have multiple victims. Consider the following variants of our initial scenario. In the first variant, suppose that Walter rear-ends both Violet and Vivien in one fell swoop. He is under a duty to each of them to make financial reparations. Let us further suppose, first, that the damage he does to Violet's car is much more serious than the damage he causes to Vivien's, and second, that he does not have the financial resources to make payments to both of them. Violet, let us thus suppose, has a stronger claim than Vivien on his reparative resources.

If Violet decides not to accept the payment, she will make it possible for Walter to fulfil his reparative duty to Vivien. Suppose that she does accept the payment (as is her right) but, instead of fixing her car, gives it to her daughter (who does not have any claim, distributive or otherwise, to it). As a result, not only does the wrong which she suffered goes unrepaired (as is her prerogative), so does Vivien's.

In the one-victim case, I argued that Violet did not owe it to Walter not to give the money to her daughter. The question here is whether the fact that he has a *pro tanto* duty to another party makes a difference to what she owes him. I do not (I confess) have a very firm intuition about this kind of case. But I am inclined to think that it does

<sup>30</sup> These rough and ready points raise a number of difficulties which I cannot address here, such as what the threshold is and whether it is determined solely by the magnitude of the harm (the answer is "no"), and whether and when agents can forfeit their claim not to be adversely affected (the answer is "yes").

<sup>31</sup> The assumption is necessary, otherwise the question under consideration is moot. For if Violet has reparative reasons to refuse the payment altogether, then she is—by Gardner's lights and indeed my own—clearly entitled, at least *vis-à-vis* Walter, to do so. The question is not moot if we assume that she lacks such reasons. For with that assumption in hand, the question then arises as to whether the seriousness of the wrongdoing *alone* makes a difference to her duty to him.

not. If, absent Vivien, Violet does not wrong Walter by not using the money conformably, it is hard to see why Vivien's predicament makes a difference and thus implies that Violet *wrongs Walter*.<sup>32</sup>

In the second variant, Walter causes serious damage to Violet's car which, in turn, occasions serious harm to Violet's young son Victor. For example, Violet can no longer drive Victor to the hospital for a thrice-weekly dialysis. She also cannot afford to pay for taxis. In the parlance of reparative justice, Walter's wrong has a primary victim, Violet, and a secondary victim, Victor. He owes reparation to Violet for the damage he caused to her car and the adverse impact of his recklessness on her ability to discharge her parental duty to Victor. He also owes it to Victor to make it possible for Violet to help Victor overcome the harm which he caused him.

If Violet turns down the payment or uses it to (for example) save up for a holiday, she remains unable to discharge her own duty to Victor and wrongs him. But she also wrongs Walter. For in effect, she is intercepting the reparative payment which Walter owes Victor. While she does not owe it to him to accept or use conformably whatever he owes that does not relate to her parental duties, she does owe it to him, and not just to her son, not to thwart his performance of his reparative duty to Victor. The well-being and moral agency arguments which I sketched out in section 3 in support of the view that your mortal enemy owes it to me not to make it impossible for me to rescue you do apply to this particular case.

Of course, the issue arises because Walter needs Violet's cooperation to repair the wrong he did to Victor. Were Victor old or well enough to take himself to the hospital, matters would differ. I do not think that this stipulation renders the case under scrutiny overly rarefied. On the contrary: the point which it drives home applies to any case in which a wrongdoer depends on another party, with whom he does not have a fiduciary relationship, for the fulfilment of his reparative duties to his victims.<sup>33</sup> There may not be many cases of this kind in interpersonal relationships other than family relationships. But there are many such cases in the political realm. For example, think of reparations owed to victims of colonial oppression or of unjust wars, and which must be paid by wrongdoing states to those victims via the latter's governments. When those governments' officials steal those payments to fill their own private coffers, they wrong their citizens primarily, but also (if less obviously and less damningly) the citizens of wrongdoing states.

## 6. Conclusion

John Gardner has a demanding view of what victims owe to wrongdoers in respect of the latter's reparative payments. I have argued that victims have greater latitude, in that regard, than he gives them. It is not simply that it is up to victims to decide

<sup>32</sup> This is compatible with the view that Violet owes it to *Vivien*, if she accepts the payment, to use it conformably. I find that view somewhat implausible, though.

<sup>33</sup> Suppose that a wrongdoer *W* entrusts *X* with the task of fulfilling his (*W*'s) reparative duty to *Y*. *W* acquires a right against *X* that the latter fulfill his duty. If *X* does not comply, his dereliction is a breach of this particular duty. In the case I have in mind here, Violet wrongs Walter notwithstanding the fact that, by my stipulation, he has not asked her to discharge his reparative duties to Victor on his behalf.

what conformity with reparative ends requires (though I believe that it is, as indeed does Gardner, who says that respect for the autonomy of victims require that they be given some latitude, within reasonable bounds, to make such judgements).<sup>34</sup> Rather, my point is that it is largely up to them, *vis-à-vis* wrongdoers, to decide whether or not to pursue those ends in the first instance.

I do not claim to have provided a full answer to the question at hand. In particular, I am unsure whether and to what extent my arguments in favor of victims' latitude apply to cases in which a service, rather than financial reparations, is owed. I am also unsure about their purchase on victims' duties, or lack thereof, to accept and use conformably financial reparations for breaches of contractual rights. John Gardner is one of very few philosophers to invite us to reflect on what if anything victims owe to wrongdoers in response to the latter's fulfilment of their reparative duties. That there is so much still to ponder, in the light of his work, is a measure of his enormous influence, and of our loss.

<sup>34</sup> *FPLPL* (n 1) ch 6.