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Comment on Gardner: Duty and Right in
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Abstract

John Gardner's *From Personal Life to Private Law* is a striking marriage of cultivated sensibility and analytic prowess. Professor Gardner is both acutely sensitive to the lived experience of our moral relationships and highly skilled at disentangling the threads which those relationships weave together to realize rich and distinctive forms of value. *From Personal Life to Private Law* pursues its thesis that there are multiple and deep connections between the ideas of duty, responsibility and reparation that lie at the center of private law and their counterparts in the relationships that figure centrally in our private lives with both subtlety and rigor. The work stimulates in the way that only the best tort theory does.

My Comment is shaped by two responses to this overarching theme. On the one hand, I share Gardner's doubts that the form of the tort lawsuit should loom as large as it does in the tort theories of Coleman, Ripstein, Weinrib and others. Duties of repair live in the shadow of primary duties of respect, and come into play only when those primary duties have not been discharged. Tort lawsuits and their form are secondary, not primary. On the other hand, private law and personal life diverge in very important ways. Coercion and rights loom large in tort whereas they are conspicuously absent from Gardner's account of the morality of private life. In private life, obligations loom much larger than rights. We have the tort duties that we have primarily because we have interests important enough to justify constraining our conduct towards each other. Many of the duties that we have in personal life, by contrast, are not owed to specific persons and are not coercively enforceable by them. Characteristically, the duties on which Professor Gardner dwells are justified because they enable to realize values which are important to our (private) lives, but which have little if anything to do with respect for important interests of others. We tend to lose sight of this fundamental difference

between private law and private life if we focus too intently on the interconnections between the two domains.

Comment on Gardner: Duty and Right in Personal Life and Private Law

(forthcoming, Jerusalem Journal of Legal Studies)

Gregory C. Keating¹

The chapters that we have from John Gardner's *From Personal Life to Private Law* are a striking marriage of cultivated sensibility and analytic prowess. Professor Gardner is both acutely sensitive to the lived experience of our moral relationships and highly skilled at disentangling the threads which those relationships weave together to realize rich and distinctive forms of value. *From Personal Life to Private Law* pursues its themes with both subtlety and rigor. The chapters that we have in hand trace diverse links between personal life and private law and stimulate thinking in the way that only the best tort theory does. Part of that stimulation stems from the fact that Gardner is challenging one of the most influential schools of contemporary tort theory by pervasively denying one of its core theses.² At the outset of his manuscript, Gardner rejects the particular strand of Kantianism embodied in the work of theorists like Ernest Weinrib and Arthur Ripstein. Wienrib and Ripstein's variants of Kantian tort theory place the form of the private lawsuit at the center of tort law and, indeed, at the center of private law more generally. So conceived, the law of torts is a special moral phenomenon, one fitted to a distinctive institutional form. Professor Gardner, by contrast, places his emphasis on the connections between the ideas of duty, responsibility and reparation that lie at the center of private law and their counterparts in the relationships that figure centrally in our private lives.

My comments here are shaped by two responses to this overarching theme. On the one hand, I share Gardner's doubts that the form of the tort lawsuit should loom as large as it does in the tort theories of Coleman, Ripstein, Weinrib and others. Litigation in tort is concerned with obligations of repair, and duties of repair are secondary, parasitic duties. Duties of repair live in the shadow of primary duties of respect, and come into play only when those primary duties have not been discharged.³ Compliance with tort's primary obligations of respect is preferable to perfect discharge of its secondary duties of repair. When tort law's duties of respect are discharged duties of repair come into play only when they are primary norms of obligation.⁴ Tort law's norms of repair are next-best ways of discharging obligations of respect that can no longer be discharged in the best

¹ William T. Dalessi Professor of Law and Philosophy, USC Gould School of Law. I am grateful to the participants at the Symposium on Professor Gardner's and Ripstein's books held at Hebrew University on June 26 & 27 2016, especially Ori Herstein, Sandy Steele and Arthur Ripstein, for illuminating discussion. And I am indebted to John Gardner for providing very stimulating material. Daniel Gherardi provided valuable research assistance.

² John Gardner, *From Personal Life to Private Law* (forthcoming).

³ Strict liability wrongs are a partial exception to this generalization. For fuller discussion of the points in this paragraph, see Gregory C. Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY, 293 (2012); GREGORY C. KEATING, *Strict Liability Wrongs*, PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 292 (Oxford University Press, 2014).

⁴ See generally, *Id.*

way that they might once have been discharged. Viewing all of tort law from the vantage point of repair puts the cart before the horse by placing secondary duties before primary ones. Moreover, putting the bilateral relation of tortfeasor and victim at the center of the analysis captures the structure of tort law's remedial phase at the cost of obscuring the structure of its primary norms. Those norms are omnilateral, not bilateral. Tort is a law of rights *in rem*. Gardner is, I think, right to remove the form of the tort lawsuit from the center of our understanding of tort law.

On the other hand, it seems to me that private law and personal life diverge in very important ways. Coercion and rights loom large in tort, whereas they tend to fade into the background in private life. Professor Ripstein is right to emphasize this fact in *Private Wrongs*.⁵ The role of tort law is to protect certain rights and interests of persons from harm and infringement at the hands of others. And it discharges this role by articulating obligations whose breach gives rise to liability. Insofar as it is concerned with the limited domain of obligations whose breach gives rise to coercively enforceable rights of repair, tort is discontinuous with private morality. Gardner's Razian supposition that law enables people to comply better with the reasons that already apply to them may not do justice to this divergence. Tort law may both create new reasons and concern itself with only a subset of the reasons that already bear on people's duties.

Relatedly, I worry about Gardner's focus on duty and cognate concepts such as responsibility and wrongs. In placing his emphasis on duties—and not on rights—Gardner is in tune with most of contemporary tort theory. More importantly, his emphasis on duty may well help us to understand the normative structure of personal life. Still, I worry that Professor Gardner may be wrong-footing himself by putting almost all of his weight on concepts that focus our attention on the wrongdoer's side of equation—on “wrong,” “duty” and “responsibility”—and avoiding the concept of right. In private law, rights and wrongs are generally reciprocal, at least formally. Emphasizing rights calls our attention to the interests that duties protect; emphasizing wrongs calls our attention to the constraints that duties impose. Consequently, it may seem surprising that focus on one would eclipse the other. But the choice between leading with duties and leading with rights is a choice about which kinds of reasons have primacy. Tort law may be interested in defendants' wrongs mostly because it cares about plaintiffs' rights. Tracing the connections between wrongs, duties, responsibilities and reparation in personal life and counterpart conceptions in private law may lead to underplaying the role of rights in private law.

I suspect that, in general, we have the tort duties that we have primarily because we have interests important enough to justify constraining each other's conduct. Critically, those interests not only justify constraining each other's conduct; they justify constraining *our conduct towards each other*. Not every interest strong enough to give rise to a duty gives rise to a correlative individual right. Our interests in health, for example, impose duties on all of us not to pollute the environment but those duties do not give rise to correlative rights against each other. Our duties not to pollute are duties to do one's part to sustain a public good which it is in everyone's interest to sustain. Someone who breaches that duty fails to do their part to support an important collective good but they do not wrong anyone else in particular. Tort duties are owed to each other and are rooted in individual interests strong enough to justify constraining the ways in which we may treat each other. Many of the duties that we have in personal life, by contrast, are not owed to specific persons and are justified because they enable to realize values which have little if anything to do with respect for important interests of others.

⁵ ARTHUR RIPSTEIN, *PRIVATE WRONGS* (Harvard University Press 2016).

A. From Rights to Wrongs

A little more than a generation ago, tort theorists of diverse stripes commonly doubted that there was a strong connection between tortious wrongs—particularly negligent ones—and moral wrongs. This doubt had its roots in the stringency and objectivity of the negligence standard. *Vaughan v. Menlove*—the “original” and most famous of reasonable person cases—is constructed around the premise that moral and legal fault may diverge sharply.⁶ Menlove may not have been morally blameworthy for failing to take reasonable precautions against the harm he inflicted on Vaughan, but he was legally at fault for failing to take the precautions that a reasonable person would have taken.⁷ “Ought implies can” and moral fault—moral blameworthiness—therefore requires the capacity to have done otherwise. Menlove may have lacked the cognitive capacity to evaluate correctly both the riskiness of his action and the merits of measures that might reduce that risk, but he was still at fault legally for failing to take the precautions that a reasonable person would have taken. Following *Vaughan v. Menlove*’s lead, tort theorists were inclined to see legal fault as distinctive precisely because, and insofar as, it diverged from moral fault.⁸ In his early paper on negligence liability, for example, Richard Posner objected to all attempts to offer moral justifications for negligence law.⁹ For Posner the argument that legal fault was fundamentally different from moral fault was a prelude to the development of an instrumentalist theory of tort. The belief that legal fault is markedly different from moral fault, however, was not particular to instrumentalists. Richard Epstein similarly stressed the differences between the two in his contemporaneous development of a rights-based, libertarian defense of general strict liability in tort.¹⁰

Non-instrumentalist accounts of tort law were alive and well in this period, but these accounts assigned pride of place to rights, not wrongs.¹¹ There was, to be sure, disagreement as to just which rights or interests grounded liability. Following Hume and Mill, Neil MacCormick emphasized security.¹² Following Kant and Rawls, George Fletcher and Charles Fried emphasized equal liberty.¹³ Richard Epstein and Robert Nozick emphasized a Lockean natural right to individual freedom.¹⁴ These were important differences, but those differences should not be allowed to eclipse a shared fundamental idea. That shared idea is that the claims of potential victims justify imposing obligations running to those potential victims on those whose endanger them by imposing risks of physical harm upon them. Those obligations might take the form either of objective duties of care articulated by negligence law, or strict liability. But in both cases, the obligations are imposed on

⁶ *Vaughn v. Menlove*, (1837) 132 Eng. Rep. 490; 3 Bing (N.C.) 468.

⁷ *Id.* Of course, another reading is possible. It is possible to read Menlove’s actions as exhibiting disregard for plaintiff’s property and safety. Such disregard would certainly be culpable.

⁸ See, e.g., J.J. Gow, *Is Culpa Amoral?* 65 JURIDICAL REV. 17 (1953). Neil MacCormick, *The Obligation of Reparation*, reprinted in LEGAL RIGHT AND SOCIAL DEMOCRACY, 212, 221–22 (1982).

⁹ Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD., 29, 31–32 (1972).

¹⁰ Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

¹¹ See e.g., Epstein, *supra* note 10; MacCormick, *supra* note 8 at 213, 214, 223–26; George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

¹² MacCormick, *supra* note 8.

¹³ Fletcher, *supra* note 11; CHARLES FRIED, AN ANATOMY OF VALUES, 183–87 (1971).

¹⁴ Epstein, *supra* note 10. ROBERT NOZICK, ANARCHY STATE AND UTOPIA, 73–84 (1974).

persons responsible for imposing risks to the liberty and security of others to those whose liberty and security they jeopardize. What negligence and strict liability have in common is that they secure an important measure of protection for urgent interests in liberty and security. The emphasis of the theories was on rights, not wrongs. Formally, duties and rights may have been co-equal counterparts but substantively duties were grounded in rights.¹⁵

“Rights-based” views made a place for corrective justice, but that place was secondary. The corrective justice of tort reparation just tumbled out of breaches of primary obligations to respect the liberty or security of others. That, indeed, is the lesson of the maxim that there is no right without a remedy.¹⁶ If having a right to the physical integrity of one’s person means that others must take care not to violate that integrity, when someone fails to respect that right they must then repair the harm done by their disrespect. And the rest of us must support the legal machinery that effects this repair. Rights without remedies are rights in name only.¹⁷ Or, to put the same point a bit differently, on a “rights-based” view, obligations of respect are primary obligations whereas obligations of repair are secondary. Secondary obligations are parasitic on primary ones. In general, the role of secondary obligations is to support primary ones.¹⁸ In particular, obligations of repair normally arise out of breaches of primary obligations to conduct oneself in a way which respects the rights of others.

For a generation now, tort theorists have been putting less weight on rights and more on the reciprocal concept of wrongs. Whereas an earlier generation of tort theorists saw reparation as the handmaiden of right, more recent theorists have made corrective justice the central concept of tort and, indeed, private law more generally. Influential work by Jules Coleman and Ernest Weinrib has

¹⁵ Jeremy Waldron’s thesis that rights ground waves of duties is apposite here. See JEREMY WALDRON, *Rights in Conflict*, in LIBERAL RIGHTS, 203 (1993).

¹⁶ “But I am not able to understand, how it can be correctly said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right. . . . On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong there is a remedy to redress it; . . . and, if no other damage is established,, the party injured is entitled to a verdict for nominal damages.” *Webb v. Portland Mfg. Co.*, 29 Fed. Cas. 506 (Cir. Ct.D.Me. 1838).

¹⁷ This is clearest in MacCormick, *supra* note 8, at 219, 226. I would align work of my own with this tradition. See especially Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996); and Gregory C. Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY 293 (2012). Of course, this comes very close to Professor Gardner’s “continuity thesis.” The difference seems to be that the continuity thesis starts from duty, not right.

¹⁸ I have in mind the kind of point that Hart & Sacks make in their classic materials. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), at 122 (emphases in original):

Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully. This is the primary purpose of the arrangement, and the provisions which describe what this purpose is are the *primary provisions*.

Every arrangement, however, must contemplate also the possibility that on occasion its directions will not be complied with. . . . The provisions of an arrangement which tell what happens in the event of noncompliance or other deviation may be called the *remedial provisions*.

This is an instance of Waldron’s thesis that rights ground “waves of duty.” See Waldron, *supra* note 15.

been at the heart of this shift.¹⁹ Coleman’s work both emphasized corrective justice as the master concept of tort law, and showed how this emphasis on corrective justice led also to an emphasis on wrongs, not rights.²⁰ More recently, John Goldberg and Ben Zipursky have placed “conduct-based wrongs” at the center of their conception of tort law.²¹ Other theorists have chosen to emphasize responsibility more and rights less. Tony Honore’s development of the concept of “outcome responsibility” (carried on by Gardner in the chapters we have before us) is a case in point.²² There is much to be learned from, and to agree with, in these writings. They have helped to correct an excessive de-moralization of negligence liability. Legal fault *is* a special kind of moral fault, a failure to conduct oneself in an appropriately careful way, and it is a legitimate basis for holding people accountable for harms to others that careful conduct would have avoided. “Outcome responsibility” is an important form of moral responsibility.

Yet, even if we are prepared to acknowledge the insight embodied in corrective justice’s correction of an earlier generation of tort theory, we may still wonder if tort theory can really do with quite as much de-emphasis of rights—and as much moralization of tortious wrongs—as now seems normal. We don’t hold people responsible just because we can, or condemn conduct in court just because it could have been more careful. What is wrong with Menlove’s conduct, fundamentally, is that neither Vaughan nor the rest of us can live with placing our security at the mercy of other people’s incompetence. We each have a right to the integrity of our persons and our property and our rights justify placing certain demands on each other. As tort theory has known since the time of Holmes, a certain level of competence is necessary if we are to live with each other on mutually acceptable terms.²³ The flip side of this coin is that tort duties of care are not plausibly justified by citing the rich forms of value whose realization they enable. This may be true of the duties of spouses to one another, of the duties of parents to children, and of many other duties in personal life about which Gardner writes so sensitively and so well. But duties in tort are worth discharging mostly because others can rightly claim that we are obligated to protect them from harm at our hands.

Strikingly, Professor Gardner’s joining of personal life and private law pushes rights to the side at its outset. Gardner begins by putting the concept of duty at the center of his project, zeroes in on “strictly relational duties” as especially important, and writes warily of rights. “[T]alk of rights seems out of place in connection with some strictly relational duties.”²⁴ This is so for two reasons. First, rights-talk can be adversarial, whereas strict relational duties are usually embodied in

¹⁹ See e.g., JULES COLEMAN, *Part One: Tort Law and Corrective Justice*, in *THE PRACTICE OF PRINCIPLE* (2001); ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

²⁰ See e.g., JULES COLEMAN, *RISKS AND WRONGS* (1993).

²¹ John Goldberg & Ben Zipursky, *Chapter 1: Civil Wrongs, Civil Recourse, and Civil Rights*, paper presented to the University of California at Irvine Colloquium in Law and Philosophy, Spring 2016. (“Tort law is a law of wrongs and redress. It identifies certain ways of interacting with others as wrongful—as not-to-be-done—and it empowers persons who have been wronged to obtain redress from those who have wronged them. Such, at least, is the core claim of this book.”).

²² See, e.g., TONY HONORE, *RESPONSIBILITY AND FAULT* (1999).

²³ “If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 108 (1881).

²⁴ Gardner, *supra* note 2, at 38.

cooperative relationships; indeed, strictly relational duties help to constitute many cooperative relationships. Second, the values served by strictly relational duties are not coextensive with the rights that arise in connection with such duties. Parents, Professor Gardner reminds us, are obligated to be impartial among their children, but that impartiality may serve values that are not grounded in benefits to the children to whom the duty of impartiality is owed. Gardner's observations are acute and accurate. But, as Professor Gardner distances himself from talk of rights and traces out the subtleties of "strictly relational duties" in private life, the progression of his argument may underscore the differences between personal life and private law as much as it illuminates the connections.

B. Relations, Rights and Repair

Duties in personal life are supported by reasons more diverse, and often markedly distinct, from rights of those who might be thought to benefit from those duties. Among other things, these differences have consequences for appropriate modes of reparation. Strictly relational duties in personal life commonly constitute and sustain complex and delicate cooperative relationships. When those relationships are ruptured by wrongs, the task of repair is concerned in the first instance with the restoration of the relationship. Stubbornly standing on one's rights is no way to go about restoring a ruptured relationship. That fact is presumably what prompts Professor Gardner to be wary of rights-talk and to chastise its adversarial tone. Yet, rights are central to reparation in law. The violation of a primary right—to the liberty and integrity of one's person, or to one's privacy, or to one's emotional tranquility—is what gives rise to a right of repair. And the reparation consists not of rebuilding a complex and delicate cooperative relationship but, as Gardner often emphasizes, doing whatever it is that is as nearly equivalent as possible to honoring the right in the first instance. These are, I think, two markedly different conceptions of reparation. Moreover, the conceptions of reparation appropriate to the two domains are markedly different *because* rights are fundamental to private law in general and tort in particular. The values served by many of the duties that populate our private lives are not coextensive with the rights that arise in connection with such duties, but legal reparation is concerned with what the victims of tortious wrongs may coercively compel as a matter of right.²⁵ On the one hand, law is the natural habitat of right and coercion. On the one other hand, right and coercion are very much out of place in personal life.

This gap between legal rights and the duties that populate our private lives haunts Professor Gardner's book. The chapters of *From Personal Life to Private Law* that we have before us implicate two very different conceptions of repair and its role. On one account, the essential role of repair is to mend relationships, which wrongs have ruptured. On the other account, the essential role of repair is to mend harm done, and thereby restore rights. The natural habitat of repair as the restoration of relationships is personal life, whereas the natural habitat of reparation as the restoration of rights is law.²⁶ The personal relationship-restoring conception of repair falls out of Professor Gardner's discussion of strict relationality. Important personal relationships—friendship, marriage, parenthood, to name a few—are constituted in important part by duties owed *only* to those who are parties to the relationship. When one friend seriously wrongs another, the friendship cannot

²⁵ Professor Ripstein's discussion of the matter in Chapter 8 of *PRIVATE WRONGS* makes this point well and powerfully. Ripstein, *supra* note 5.

²⁶ In choosing this topic, I hope that I am not being unfair to Professor Gardner. The chapters that we have indicate that reparation is discussed at some length in chapters that we do not have. My hope, then, is that the questions I raise here will be of some use to the completion of the book.

just carry on as before. If the relationship is to be renewed, apology, forgiveness, reconciliation and the like are now called for. Unless these can be achieved, the friendship will be damaged and the value that it brought into the parties' lives will diminish or disappear.

The rights-restoring conception, by contrast, is implied in Gardner's discussion of Lord Blackburn's "famous dictum" that "awards of reparative damages" are oriented "towards putting the plaintiff 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his . . . reparation.'"²⁷ The impossibility of erasing the wrong and restoring the victim to her original condition gives birth to the "continuity thesis."²⁸ The best thing would have been for the wrongdoer to discharge her obligation and respect the victim's right. Having failed to discharge that obligation, the wrongdoer is now obligated to do what she can to erase the damage and get the victim's life back on course. The unity of practical reason puts us under an obligation to do the next best thing possible to repair the harm we have done. Here, reparation is essentially substitutional, not relational. The repair is of a condition, perhaps of a life, but not of a relationship in anything approaching the "strictly relational" sense of that term. There never was much of a relationship to begin with; there were just rights to respect. Respecting rights is a relation among persons—justice is a relation among persons—but as relations go it is one of the thinnest.²⁹

Let me now blur the sharp dichotomy of the previous two paragraphs at least a bit. Repairing relationships and restoring rights are not *wholly* different in kind. Rights establish a particular kind of relationship among persons. They delineate ways in which persons *must* respect each other on pain of legal coercion. Indeed, a distinctive feature of a legal right—perhaps even *the* distinctive feature of a legal right—is not that its violation gives rise to an obligation of reparation, but *that the obligation of reparation is coercively enforceable by a court of law*. In some cases, it may be correct to say that compelling reparation in response to the commission of a wrong restores a relationship of legal equality. Consider a circumstance where a person of modest means prevails against his wealthy neighbor in a suit for trespass, only to have the wealthy neighbor spit in his face in the most brutal and brazen manner possible. That spitting is a public expression of personal contempt on the part of the wealthy neighbor. It denies the victim's authority to determine who may touch his person and how they may do so.³⁰

In denying the victim's authority over his own physical person the defendant asserts his superiority. In hierarchical societies social superiors do not have to treat their social inferiors as bearers of equal rights with equal authority over their physical persons.³¹ By treating the plaintiff

²⁷ Gardner, Ch. 5, p. 5, fn. 9, quoting *Livingstone v. Rawyards Coal Company* (1880) 5 App. Cas. 25, 39.

²⁸ "The continuity thesis . . . is a thesis about the continuity of primary and secondary obligations in the law of obligations, and more generally about continuity. . . . When I fail to do what I have a reason to do, says the continuity thesis, the reason for me to have done it survives the failure, and calls for such fallback conformity on my part as may still be possible." *Id.*, at 27–28.

²⁹ See JOHN RAWLS, *POLITICAL LIBERALISM*, xlv. 14 (1996).

³⁰ See *Alcorn v. Mitchell*, 63 Ill. 553 (1872). The case is the subject of Scott Hershovitz's original and provocative paper *Tort as a Substitute for Revenge*. Scott Hershovitz, *Tort as a Substitute for Revenge*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* (2014). My interpretation of the case should not be imputed to Professor Hershovitz.

³¹ In a hierarchical society, spitting on the part of a social inferior may be an assertion of social equality. If a commoner spits in the face of a King, perhaps what the commoner is doing is denying the King's superiority and asserting the commoner's equality— not asserting superiority over the king. I owe this point to Ori Herstein.

with such contempt, the wealthy neighbor denies the independence and equal status of his neighbor. Equal status is a kind of relation among persons. When a court of law subsequently awards the less wealthy neighbor substantial damages in his battery suit, it asserts publicly that the prevailing plaintiff may not be treated with such contempt. It asserts that the defendant *is* accountable to the plaintiff and that the parties are legal equals. This, at any rate, is one way to understand what the law does in such a case. So understood the payment of reparation is the restoration of a relationship. Yet even in this unusual case the relationship restored is a relationship of equal right. The lesson of the example is that respecting rights is a relationship of sorts.

The power of private law to enforce this kind of reparation—and so to restore a relationship of equal right—is extraordinary and precious. Respecting rights, however, is a weak and even impersonal kind of relationship. Professor Gardner is more than keenly aware of this fact. He sets out to capture this difference when he distinguishes different kinds of relationality. Duties in private law (well, in modern tort law, anyway) are “loosely relational,” whereas duties in private life are “strictly relational.” Early in the book, Gardner introduces the concept of “strictly relational duties.”

A strictly relational duty is a duty that one has for the reason that one stands in some special relationship with the person to whom the duty is owed. By a ‘special relationship’ I mean, in turn, a relationship other than the relationship that we are all said to have with each other simply as persons or human beings or God’s creatures, etc. A special relationship, we might say, is . . . a relationship with someone in particular, from which others must inevitably be left out.

Special relationships in this sense include those between parents and their children, employers and their employees, host and their guests, doctors and their patients, lawyers and their clients and businesses and their customers.³²

Special relationships give rise to “strictly relational” duties. One may owe a duty to one’s friends not to gossip about them, but one doesn’t owe such a duty to one’s enemies, or to strangers, or even to fellow citizens.

Parenthood, marriage, friendship, and romantic love are all canonical instances of special relationships partially constituted by strictly relational duties. To be sure, strictly relational duties are not exclusively personal. Indeed, some special relationships are distinctively legal in that they are constituted and sanctioned by law. The employer-employee relationship is one case in point; diverse fiduciary duties are another.³³ Other cases in point are hidden from view by the fact that it is the legally constituted role that is salient (e.g., the role of a judge), not the relationship (to the parties). And even intimate relationships among spouses, parents and children are backed by law, and not only when they go awry. “[T]he law is also there to crystallize constitutive norms, to affirm the social significance, and to emphasize solemnity.”³⁴ Indeed, because strictly relational duties constitute relationships among persons, *they are intrinsically social*. Because they are intrinsically social they require social recognition and support. There are therefore two important ways in which strictly relational duties invite law’s presence. First, they depend on social recognition and support, which

³² Gardner, *From Personal Life to Private Law*, *supra* note 2, Ch. 1, *Something Came Between Us*, at 5.

³³ *Id.*, at 25, 29.

³⁴ *Id.*, at 37.

the law can supply in a very powerful form. And second, the values that they instantiate are realized by the imposition of webs of categorically binding obligations. Law can help to create, solidify and sustain such obligations.

This line of thinking is persuasive and illuminating, and it helps to close some of the gap between personal life and private law. Even so, important gaps remain. When strictly relational duties in personal life are involved, the restoration of relationships is the first-best form of repair. When paradigmatically relational duties are involved, wrongs shatter ongoing relationships. Two possibilities now come to the fore. Repairing (or mending) the relationship is one of them; breaking the relationship off, or unwinding it, is the other. Repair is the presumptively better option because if it can be realized, the value that the relationship brings into the lives of the parties will not be confined to memory but will endure and grow. If the relationship is to be renewed, apology, forgiveness, reconciliation and the like are now called for. Amends must be made for the wrong that damaged the relationship, and the making of such amends may itself be the mending of the relationship. To put it a bit differently, repair may just be the activity of making amends for the wrong so that the relationship may be healed and continue forward as a relationship continuous with its past. However one puts it, though, the restoration of the relationship is the first and best aim of repair.

This line of thought seems correct, but it also seems to have transported us to a sphere beyond law's poor powers of repair. Repairing a close personal relationship damaged by the commission of a serious wrong requires a delicate, complex and interlocking set of actions and attitudes.³⁵ For reconciliation to be achieved, the parties to the wrong must come to shared judgments about the significance of the wrongs committed; they must engage in actions which express appropriate attitudes of apology and forgiveness; and they must overcome emotions which are not wholly responsive to reason, imperfectly subject to voluntary control, and entirely beyond coercive command. Someone who has been personally wronged is right to resent both the wrong and the wrongdoer. Overcoming that resentment is a necessary condition for restoring the relationship. And for that to happen in the way that it needs to happen, sincere and convincing apology must be made.

Of course, it may not happen at all. Friends can't be compelled to restore or renew their friendships. As much as anything, what we expect is for the friends to work matters out themselves. They may repair and renew their relationship—or walk away from it, or live with a diminished relationship—as they see fit. Their friendship is their business. Among other things, it would strike us as counterproductive for the law to step in, for reasons Gardner emphasizes.³⁶ Law can neither compel sincere apology, nor dispel justified resentment, at least not in the way that authentic apology and forgiveness can. The Illinois courts could force Alcorn to pay Mitchell a handsome sum of money for spitting in Mitchell's face, but they could not force Alcorn to accept the conclusion that he was profoundly wrong to treat Mitchell with contempt. They could similarly not compel Alcorn to adopt the attitudes of regret and repudiation which sincere apology requires with respect

³⁵ For perceptive discussions of apology, see, *inter alia*, ELIZABETH V. SPELMAN, REPAIR, 82-100 (2002); Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 529 (2001).

³⁶ Indeed it may get in the way, as Gardner notes, because adversarialism is incompatible with the normal case of a flourishing personal relationship. See Gardner, *supra* note 2, Ch. 1, *Something Came Between Us*, at 38.

to his spitting in Mitchell's face. Nor could the court force Mitchell to forgive Alcorn. On the one hand, there are "moral constraints on our attempts to repair others, to 'straighten them out' against their will."³⁷ Coercing apology runs afoul of those constraints. On the other hand, coerced apologies are likely to be counterfeit. Even apologies which are elicited by the imposition of social pressure or the prospect of benefit are suspect. The very presence of pressure or the prospect of gain put the sincerity of the apology in question.

When the restoration of a relationship requires the parties to form judgments, adopt attitudes, and overcome angers and resentments rightly precipitated by the wrong that ruptured the relationship, restoration is beyond both the law's poor powers of repair and the scope of its proper authority. The relationship of Alcorn and Mitchell as civic equals—their relationship as citizens with equal rights—can be coercively restored because Alcorn can be found liable for battery and forced to pay compensation large enough to reassert Mitchell's dignity. Reparation can effect civic equality—or so the law of torts supposes. For our purposes, though, the point is not whether it succeeds in this endeavor. The point is that the enforcement of civic equality may be within both the law's power and its legitimate authority, whereas forcing Alcorn to regret, repent and sincerely count Mitchell as his social equal are not. Reparation and reconciliation are very different phenomena. Reparation in tort and elsewhere extracts money—and *only* money—from defendants who are judged to have committed wrongs. Correspondingly, it awards only money to plaintiffs. It does not ask the defendant to apologize, and it does not demand that the victim forgive. On the defendant's side, you can pay up without repenting. On the plaintiff's side, you can take the money and hold your grudge. The differences between reparation and reconciliation are deep and pervasive. Indeed they are deep enough to implicate two fundamentally different ideals of justice. Reconciliation is the aim of restorative justice; reparation is the tool of corrective justice.³⁸

It is, of course, not only possible, but entirely commonplace for relationship restoration to fail. Friendships and marriages may be shattered by the commission of a wrong, or a series of wrongs, so that there is no way of restoring the relationship and moving forward. Breaches can be irreparable. There may come a point where the "next best thing to do" in the wake of some breach of a strictly relational duty is to end the relationship, not struggle to restore, rebuild and repair. It may be better to carry on without the relationship and build a new life. Professor Gardner is well aware of this possibility and, indeed, it integrates easily into his "continuity thesis."³⁹ But the ease with which this point is integrated into the "continuity thesis" may conceal the sharp line that has now been crossed. It seems to me that when we leave behind the idea of restoring the relationship, but continue to be preoccupied with repair, we are now occupied with a markedly different conception of repair, namely, reparation as the restoration of rights. If legal rights are rights that can be coerced, then the rights and responsibilities of friendship are not fit subjects for law. Friendship, like apology, cannot be coerced. Tort law is more about mending broken bodies than mending broken relationships, more about repairing rights than about reconciling persons.

³⁷ SPELMAN, REPAIR, *supra* note 35, at 35..

³⁸ See SPELMAN, REPAIR, *supra* note , at 51-64. 80-87. Spelman does not use the term "corrective justice" but draws essentially this contrast.

³⁹ See, e.g., Gardner, *supra* note 2, *The Way Things Used to Be*, at 27-28.

To be sure, strictly relational duties often do implicate rights as well as relationships. Marriages, and family relationships more generally, are paradigmatic examples of strictly relational duties, which implicate rights as well as relationships. Legal rights and legal reparation come into play, however, when efforts to repair those relationships fail. When Professor Gardner contemplates this circumstance he writes that legal mechanisms come into play “mainly to provide a fall-back, a framework for *modus vivendi* or orderly exit, in case the . . . relationship begins to break down.”⁴⁰ The role of the law is not to restore the relationship, but to regulate its demise. It’s not clear just how much weight we should put on the phrase “modus vivendi” with its Hobbesian overtones of simmering warfare. One alternative, though, is to invoke the language of justice and rights in lieu of the language of war. Often, when legally sanctioned relationships collapse to the point where restoration is no longer possible, reparation of a sort remains a possibility. The kind of reparation which is now possible, however, is very different from the reparation of relationship-reconstruction. The issue is now what the wronged party can demand as a matter of right from the party who has done them wrong to redress the wrong that has been done. This domain is the natural habitat of the law. Gardner’s contrast between mending relationships and *modus vivendi* eclipses the law’s distinctive space.

Some duties that figure centrally in personal relationships can be enforced and others cannot. Law cannot coerce relationship-restoring reparation because people cannot and should not be forced to apologize sincerely, forgive from the bottom of their hearts, or gladly remain friends with each other. The values that make these actions authentic must be freely embraced by the actors. When it is impossible or undesirable to restore a legally sanctioned relationship like marriage, we enter the diminished social world of goods which can be coerced, and their next-best equivalents. And once we cross the threshold into this world, the law is at home. People cannot be forced to forgive, apologize sincerely, or reconcile, but they can be forced to divide assets equitably; to discharge financial obligations to children; and to pay fair alimony. These actions don’t depend on attitudes, dispositions or emotions which the law has no power to compel. We are settling legal rights, not restoring personal relationships. Vindicating rights is the form of repair for which the law is suited, and for which reparation is the mechanism.

There is some danger that, in saying that law repairs rights violations not relationships, we may underrate the importance of rights to relationships. If private life is rightly prized because it may enable relationships and forms of human flourishing which surpass the formal, arms-length virtue of respecting rights, it is also rightly loathed because it may enable forms of human misery, exploitation, domination and cruelty from which the cool formality of respecting rights is both a relief and a salvation. Respecting people’s rights is an incomplete ideal for human relationships but it is usually a necessary condition for any decent human relationship.

C. Do Duties Have Priority Over Rights?

From Personal Life to Private Law turns away from talk of rights as part of its turn against the emphasis contemporary corrective justice and civil recourse theory place on the bipolarity of right and duty as the key to the morality of tort law.⁴¹ I share Professor Gardner’s belief that it is a mistake to put bipolarity of remedial right and duty as they manifest themselves in tort litigation at the center of our understanding of tort law. But I am skeptical that the cure for this mistake is to

⁴⁰ *Id.*, *Something Came Between Us*, at 28 (emphasis in original).

⁴¹ Gardner, *supra* note 2, *Something Came Between Us*, 1-3.

detach duty from right, and treat duty as the master concept of both personal life and private law. We might, after all, turn in other directions. We may, I think, have moved too far away from the tort theory of an earlier generation and now put too little weight on the importance of *primary* rights to the law of torts. The fundamental reason to have tort law as an institution may not be to correct harm wrongly inflicted, but to protect essential interests of persons from harm. Like retributive justice in criminal law, corrective justice in tort puts the cart before the horse.

In general, primary rights in tort law are rights *in rem*, rights that obligate everyone else.⁴² Primary duties, for their part, are not bipolar but omnilateral—they are owed by everyone to everyone else.⁴³ The bipolarity of remedial rights, for its part, simply falls out of the omnilaterality of primary duties. Personal rights to repair arise when someone's violation of an omnilateral obligation results in the violation of someone else's right *in rem*. On the one hand, focusing on primary rights and duties puts rights and obligations at the center of tort law, where they belong. On the other hand, placing priority on primary rights frees right and duty from both bipolarity and the peculiar tendency of corrective justice theory to put repair of harm wrongly done before respect for persons' rights not to be harmed in the first instance. Retaining rights-talk is important. Tort is about claims that persons have qua persons to have certain central interests in security respected. And reparation in tort (and in private law more generally) is distinctively concerned with the vindication of rights. The domain of duties that matter to private law is correspondingly narrower than the domain of duties that matter in personal life.

Other considerations point in the same direction. For instance, right and responsibility in tort are reciprocal in the way that right and duty are, and here, too, right seems antecedent to responsibility. Saying this does not commit us to denying the claim that tort law raises distinctive and difficult questions of responsibility. When natural persons are involved, responsibility for lapses may well be the central question of negligence law. Just when and why persons may be held responsible for their lapses is a difficult question. Normal parents are capable of watching three-year-old children at the zoo vigilantly enough to prevent such children from slipping into the Gorilla enclosure.⁴⁴ But no one always watches children as closely as they should. Everyone is careless some of the time. Such lapses are both to be expected—they are normal—and relatively blameless. Pointing an accusing finger of blame at the parent whose lapse of attention enables her three-year-old to join the Gorilla in his enclosure has the unattractive odor of hypocrisy.⁴⁵ So too, because there is no liability for attempts in the law of torts, liability in tort puts the question of responsibility for outcomes squarely on the table. Surely, it matters to the defensibility of negligence law as an institution whether we have sound reasons for holding people responsible for lapses, even though all of us are lapse-prone and no one can reasonably be expected to lead a lapse-free life. And surely it

⁴² Rights that attach to special relationships are the principal exception to this generalization.

⁴³ American courts commonly say, for example, that everyone owes everyone else a duty of reasonable care. See e.g., *Miller v. Wal-Mart Stores*, 219 Wis.2d 250, 260 (1998) (“In Wisconsin, everyone has a duty of care to the whole world.”). The California Supreme Court, echoing a 130 year old statute, has remarked “[i]n this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as a result of their conduct.” *Randi W. v. Muroc Joint Unified School Dist.*, 14 Cal. 4th 1066, 1077 (1997).

⁴⁴ See Mike McPhate, *Zoo's Killing of Gorilla Holding a Boy Prompts Outrage*, N.Y. TIMES (May 30, 2016), available at http://www.nytimes.com/2016/05/31/us/zoos-killing-of-gorilla-holding-a-boy-prompts-outrage.html?_r=0 (discussing the unfortunate tragedy of a child falling into a gorilla enclosure and the subsequent decision of the zoo to kill the gorilla).

⁴⁵ *Id.*

matters that our understanding of ourselves as agents and persons cannot be sustained if our responsibility doesn't extend to outcomes. Recent work in tort theory—including Professor Gardner's own work—has wrestled hard with these questions and deepened our understanding of responsibility, in both law and life.

Even so, it is implausible to say that tort law as an institution finds its primary justification in the independent allure of responsibility for lapses and outcome responsibility. Just as it seems wrong to say that criminal law exists to punish the guilty (and right to say that we have criminal law to secure our persons, property and communities against harm), so too it seems wrong to say we have tort law because people need to be held accountable for their lapses. If nothing else, tort law is peculiarly selective in its choice of outcomes for which it holds people accountable. Nothing in the idea of outcome responsibility itself explains why the outcomes which attract special responsibility in tort are those which violate important interests in liberty and security. In the same vein, one can doubt that tort law holds people responsible for outcomes because personhood and agency would go unrealized if people were never held accountable for the outcomes of their actions. One might suspect that tort law is concerned with outcomes because it is concerned with protecting people from certain kinds of harms, or with providing for persons the security that John Stuart Mill described as the “groundwork of our existence.”⁴⁶ Mere lapses don't attract the attention of tort law because mere lapses don't violate the rights (or interests) that tort law is concerned to protect.

Last, one might think that reparation itself is less an extension of duty than tort theorists now commonly suppose, and more an extension of rights. The role of reparation is to repair rights that have been violated; it is an extension of tort law's protective role. Reparation surely is an obligation of correction triggered by breach of a duty of care. But that duty of care may rest not on its own bottom, but on the importance of securing the physical and psychological integrity of our persons (and other essential interests) against harm. Duty, in short, may be the handmaiden of right.

⁴⁶ JOHN STUART MILL, UTILITARIANISM 251 (1863). *From Personal Life to Private Law* is both tempted by this kind of view and resistant to it. See Gardner, *supra* note 2, *The Way Things Used to Be*, at 33-35.