The Nature and Disvalue of Injury

In our everyday pursuit of our interests, we regularly and predictably hurt one another in numerous ways. These vary from the trivial, when a person cuts in front of you too sharply on the highway, causing you a moment of alarm, to the potentially life-changing, as when a lover falls out of love (or into the bed of another). Despite their potential magnitude, only some of these daily setbacks are ordinarily thought to be the concern of principles of justice. Undoubtedly it is bad to be cruel, disloyal, thoughtless and selfish, but only sometimes when we act in these ways do we treat others unjustly. That subset of setbacks can be called injuries; this paper is an inquiry into their nature, and disvalue.

We need to know two things about injuries, so construed: how to distinguish between them and non-injurious setbacks; and what distinctive moral concerns they raise. The requirement of distinction is very important. Some of the setbacks we impose on others in our daily lives are the unnecessary product of cruelty and thoughtlessness, and should probably be minimized whether or not they are a matter of justice. Others, however, can be necessary consequences of our living as independent, autonomous individuals. For example, the freedom to hurt others in non-injurious ways, such as by ending a relationship, is a vitally important part of an autonomous life. A clear conceptual line around injury clarifies how we may pursue our interests within the constraints of justice, by differentiating between morally acceptable and unacceptable cases where my gain is your loss. To that end, this paper defines injuries as right-violations, arguing that setbacks which are not such violations are, other things equal, permissible.

It is not enough, however, simply to be able to parse setbacks into injurious and non-injurious ones. We must also understand the moral concerns that they raise, that is, the reasons that tell against injuring one another, or the disvalue of injury. A clear

understanding of the moral reasons against injuring one another is necessary in at least three ways: first, it helps us decide how much of our individual and collective effort to devote to preventing injuries from occurring, for example through legislation and law enforcement; second, it helps either identify or rule out cases where it is all things considered justified to injure a person—where the reasons against injury are outweighed, such as might occur in wartime, or when a grave threat is faced and individual liberties are placed into question. Finally, an understanding of the disvalue of injury is crucial to the project of rectifying injuries, enabling us both to determine how rectification can be achieved, and how we can argue in its favour.[1] The rectification of right-violations is undoubtedly important in its own right, but is also a precondition of achieving the sort of mutually supportive community without which more positive moral goals cannot be achieved: if injuries go unrectified—or are rectified in the wrong way—resentment and mistrust will inevitably prosper.

How we understand the structure and disvalue of injury will bear directly on the possibility and justification of corrective justice. This paper, for example, proposes that corrective justice should be concerned with injuries *qua* right-violations, which are constituted by independent *pro tanto* elements of harm, and wrong, which have both public and private dimensions.[2] If harm and wrong are independent from one another, then the method of rectification must pay independent attention to these two dimensions: we cannot rectify one by rectifying the other.[3] An injury could not be rectified, therefore, simply be paying compensation to rectify the harm: since the wrong would remain unremedied. Likewise, while an apology might successfully rectify the wrong, it may not, on its own, secure the rectification of the harm—especially if the injurer lacks resources. Moreover, if, as is argued below, injuries contain elements of private as well as public wrong, and if the former cannot be rectified by rectifying the latter, then this poses a problem for the popular view among Tort Law theorists that the

whole wrong can be remedied through punishment, while the payment of compensation takes care of the harm.[4] Finally, if injuries do comprise these mutually irreducible constituents, it becomes likely that there will be not one, but at least two arguments for rectification, each attuned to the specific demands of the dimension of the injury that it aims to rectify.

The paper's goal, then, is to develop a consistent and coherent explication of the nature and disvalue of injury, which can help answer all these questions. It proceeds as follows: the first section explicates the conceptual structure of injury *qua* right-violation, distinguishing it from non-injurious setbacks. The second section argues that the substantive moral components of injury are wrong and harm, neither of which is reducible to the other. The third section distinguishes between the public and private dimensions of injury. The conclusion reflects on the applications of this analysis.

1. The Conceptual Structure of Injury

This section presents the conceptual structure of injury as right-violation, clarifying the difference between injuries and non-injurious setbacks. Injury is defined as follows:

> A injures B if and only if A's conduct breaches a duty, to A's performance of which B has a right.

Obviously this definition presupposes some conception of rights. I propose a hybrid position combining interest-based[5] and status-based[6] theories of rights, according to which:

> 1. B has a right if and only if B can have rights, and her status as a right-bearer, together with an aspect of her well-being, are individually necessary and jointly sufficient reasons for holding some other person(s) to be under a duty.
> 2. An individual can have rights if and only if she is an equal member of the moral community.

The most important feature of the first thesis is that it makes status and interests individually necessary and jointly sufficient reasons for the duty. Because a person has this status, there are certain interests of hers that must be respected. This is what makes this conception of rights hybrid. The second thesis can be fleshed out in different ways depending on the relevant moral community—for example, it might concern the universal moral community of all mankind, or alternatively some particular political community. The idea of equal membership of the moral community is supposed to convey two things: first, that one has the great moral worth required to be a member of the moral community, as contrasted with a wasp, for example, which does not have that worth; and second, that within that community all members are equal.

As a hybrid view, this conception of rights will be attacked on two fronts: by purely status-based theories of rights, and purely interest-based theories. A thoroughgoing defence of this position is evidently not possible here, since the goal of this paper is not to defend a theory of rights, but to explicate a particular conception of injury. Nonetheless it is worth noting how the hybrid conception of rights captures the positive features of both the interest- and the status-based theories, while avoiding their flaws. Status-based theories of rights seem mistaken in their denial that interests play any role in justifying rights, or explicating the disvalue of a right-violation: since rights do in fact protect our interests, and since our interests are clearly morally important in their own right, it seems obtuse to deny this any justificatory relevance. However, shifting to a purely interest-based theory of rights causes still greater problems, because such a theory cannot eliminate the possibility of marginal interpersonal tradeoffs being justified—which has led to the criticism that interest-based theories lead to a form of 'utilitarianism of rights'. To elaborate: on an interest-based theory of rights, the moral reasons against breaching a right reduce exclusively to the damage done to the protected interest. Suppose, then, some aspect of B's well-being, *x*, is a sufficient reason for A to be under a

duty not to damage *x*, by *y*-ing, but suppose further that A can gain $x + 1$ by *y*-ing. The only reason A has against breaching the duty is provided by the value of B's interest *x*, but A can gain $x + 1$ by breaching the duty. A has no reason, then, not to do so, since the net outcome of *y*-ing, in breach of the duty, is a one unit gain in the satisfaction of interests. It might even be true that, in such an example, A does not even have a duty, because B's interest is not a sufficient reason for her to be under that duty. This follows logically from the fact that the sole thing that goes wrong, when the duty is breached, is the damage to the interest. The same also follows if, instead of just A *y*-ing, there are three other people, and each gains only $(x + 1)/4$ from doing so. These marginal interpersonal tradeoffs, however, should be obviously wrong, at least, if we are not utilitarians. It is not in fact permissible for me to harm you to benefit myself, even if the benefit to me is considerably greater than the harm to you. If rights protect interests only against being traded off against interests of lesser value, then they offer them no additional protection at all, since the value of the interest can play this role without the right: the ascription of rights should protect interests against being subsumed within the general overall calculus, otherwise it is not doing its job. This is the great insight of status-based theories of rights: they enable us to posit something that goes wrong when a right is violated, over and above the damage to the interest that the right had protected.[7] The proposed hybrid theory of rights nicely captures the key insights of both the interest- and status-based alternatives, by mobilizing the importance of treating one another as equal members of the moral community, in protection of our most important interests.

Given this conception of a right, we can now refine our understanding of the core elements of injury:

(1) B is an equal member of the moral community.

(2) A's performance of *x* damages B's interest *y*.

(3) 1 and 2 are jointly sufficient reasons for A having a duty not to *x*.

(4) A has done *x*, in breach of her duty, damaging B's interest.

The next stage is to build on this core conception of injury by identifying cases that only appear injurious—where A damages B's interest, but does not violate a right. Because this hybrid conception identifies two individually necessary and jointly sufficient justificatory grounds for rights, it follows that there are two different classes of 'non-injuries', depending on whether the interest-based or the equality-based ground is defeated. Each is considered in turn.

In the first class of non-injuries are those where the relevant interest does not play its proper justificatory role. Within this class there are two subcategories, of which the first is when the damaged interest is not sufficiently valuable. This can be true absolutely, or relatively, and of the interest *qua* interest, or of the amount of damage done. For example, B's interest in having a tasty Christmas roast is, absolutely, insufficiently important to ground corresponding duties in A. Alternatively, it may be the relative evaluation of the interest that matters: an entrepreneur, B, is undercut by rival A, driving B out of business. B's interest in providing for herself and her family is clearly important; however, A has the same interests, as well as a still more important interest in autonomy. While B's interest may ground other duties, it cannot constrain A's freedom to compete. Finally, notice that in both of these cases our judgment is based on the interest as a whole. Sometimes, however, it is the minimal amount of damage that motivates our reluctance to identify an injury. Thus, B's interest in her bodily integrity as such is supremely important, but if A bumps into her while rushing down the street, the damage is so minimal that it would be absurd to hold that A has thereby breached a duty. This is the moral equivalent of the legal maxim, *de minimis non curat lex*.

In the second subcategory within this class, it is the fact that the interest is constitutively unsuited to protection by a right that prevents us identifying damage to it

as injurious. For example, B's interest in being loved is among her most vital, but cannot ground a duty in A to love her; moreover, this is not (or at least, not solely) because A's autonomy outweighs B's interest, rather it derives from what it means to demand something as a right. Specifically, when B has a right, she can demand, as an equal member of the moral community, fulfilment of the corresponding duty, and if necessary she can enforce this demand. Yet, the concept of love is such that, if it is given neither by nature nor by choice, it cannot be given at all. Coerced love is an oxymoron, and damage to an interest such as this cannot, therefore, be counted injurious: it is in the nature of this particular interest that it cannot be protected by rights.

In the above cases, it is clear that the equality-based reason tracks the interest-based reason: if B's interest is not sufficient to justify a duty, then A does not disrespect B's moral equality by damaging that interest. There are other cases, however, where the interest-based reason is satisfied, but the equality-based reason is not, so no injury obtains. In these cases the interest in question is ordinarily weighty enough to ground a right, but damaging that interest does not, because of some specific reason, constitute disrespecting the moral equality of the victim. In the first subcategory of non-injuries, within this class, are those where B waives protection of the right. For example, if A and B are boxers, and A knocks B out in a legal match, what would in other circumstances be a violation of B's rights is not injurious: because B waived the protection of her right, A's punching her in this case does not impute disregard for her status as a moral equal.

The second subcategory involves cases where circumstances render it impossible for A to perform her duty. In such cases, B has an interest which would ordinarily ground duties, and A's conduct is going to damage that interest, but A cannot avoid doing so. Given that she cannot avoid damaging that interest, her conduct cannot impute disregard for B's equal membership of the moral community: it cannot convey any meaning at all, since she was not in control of her action.

Three main circumstances could render it impossible for A to perform her duty to B. First, A could be subject to an external, agency-defeating cause: for example, she is pushed out of a window by C, landing on B, breaking her collarbone. Since she cannot control C's actions, A is subject to an external determination, which defeats her autonomous agency by making it impossible for her to do otherwise than fall on B. In this case, it is C who injures B, as well, presumably, as A. The second way is if A is subject to an alien, internal agency-defeating cause. If, for example, A suffers from senile dementia, and wanders unwittingly onto B's land, then despite the sufficiency of B's interest in sole use of her property to ground duties in most cases, in this case A does not breach a duty because she cannot voluntarily fulfil any duties. Although her dementia is internal, it is alien to her control, and therefore, again, defeats her autonomous agency. Finally, A's duty can be defeated if it is not reasonably foreseeable that her conduct *x* would lead to outcome *y*, i.e. damage to B's protected interest. The concept of the 'reasonable' can be fleshed out in different ways. One approach emphasizes that risks should be distributed around society in a fair and optimal way: to say, on this account, that it was not reasonably foreseeable that $x \rightarrow y$ is to say that we could not, in fairness, expect someone to know that this would occur. For example, while in the Alps, A calls out to her friend C, inadvertently starting an avalanche which harms B. If it was not reasonably foreseeable that the avalanche would ensue, A cannot be held in breach of a duty.[8] Since she could not have been expected to know that $x \rightarrow y$, she could not avoid doing *y*, and it was therefore impossible for her to fulfil her duty. In each of these cases B is undoubtedly harmed, but because it is not possible for A to do otherwise than harm B, there is no grounds for saying that her harming B also manifests disrespect for her status as a moral equal.

We can conclude, then, that A injures B if and only if:

(1) B is an equal member of the moral community.

(2) A's performance of *x* damages B's interest *y*.

(3) 1 and 2 are jointly sufficient reasons for A having a duty not to *x*. For 1 and 2 to be jointly sufficient reasons for a duty:

(3.1) The interest *y* must be:

(3.1.1) absolutely and relatively valuable enough to ground the duty;

(3.1.2) damaged in a non-negligible way;

(3.1.3) constitutively suited to protection by a right.

(3.2) And the moral equality consideration (1) must not be defeated by:

(3.1.1) B waiving the protection of her right;

(3.1.2) circumstances obtaining where A cannot avoid damaging *y*. A cannot avoid damaging *y* when:

(3.1.2.1) she is subject to an external, proximate, agency-defeating cause;

(3.1.2.2) she is subject to an internal, proximate, agency-defeating cause;

(3.1.2.3) it was not reasonably foreseeable that her conduct would damage *y*.

(4) A has done *x*.

2. The Substantive Components of Injury: Harm and Wrong

Having explicated the conceptual structure of injury as right-violation, we can now turn to its substantive components. This section argues that injuries consist of two necessary components, harm and wrong, which are each independently disvaluable: that is, each offers independent reasons against violating rights. While this conclusion follows logically from the conception of rights proposed in section 1, this section aims to show it has more than stipulative authority.

The concept of harm can be quite complex, but it is understood here simply as a setback to person's interests.[9] For present purposes, there is no need to espouse a particular theory of well-being to ground a conception of interests, nor need we go

beyond the ordinary linguistic meaning of setback. A harms B, when A's conduct produces a deficit in some aspect of B's well-being.

When A injures B, she violates B's right. B has a right when her moral status, and an interest of hers, are individually necessary and jointly sufficient reasons to hold A to be under a duty. On this definition of rights, a right-violation must necessarily constitute a setback to the right-bearer's interests, i.e. a harm. The notion that right-violations necessarily involve harm stands or falls, then, with the hybrid conception of rights: if the latter is plausible, that counts as evidence for the former position. More substantive support can be provided by considering two counterexamples that might be proposed: insult and trespass. When A insults B, she might be thought to disrespect B's moral equality without damaging an interest of hers, since words alone cannot harm a person. If it is possible for an insult to itself be an injury, then this could be a case of a harmless injury. This does not, however, seem a plausible analysis. The first response is that we are generally sceptical about the idea that insults can constitute right-violations, perhaps for this very reason. However, if and insofar as we do think insults can be injurious, it is a mistake to suppose that this has nothing to do with the victim's interests. Obviously, much depends here on the conception of well-being you defend, but on each of the standard views—hedonic, preference-satisfaction, and objective list[10]—it is eminently possible to posit an interest in not being insulted by others. Being insulted by a random stranger—not an unusual experience in England, especially for cyclists—can be upsetting, is clearly not something one wants to happen, and undermines any number of objective interests (such as that in inhabiting a good community, for example). Whether these interests are serious enough, or of the right sort, to ground rights and duties, is a separate question, but if we do sometimes have duties not to insult others, their interests in not being insulted can play the required justificatory role.

Another possible counterexample that is sometimes mooted is that of trespass.[11] If A uses B's property without asking, but leaves it exactly as she found it, then has she not breached a duty without causing any harm? Again, this analysis does not seem decisive. If there is a genuine right against this sort of trespass, then it must be grounded in an interest in having exclusive control of one's property, not simply the interest that one's property go undamaged. Of course, we may reasonably dispute whether there is such a proprietary interest (I am not sure that there is). Even if we believe the interest exists, it may still be insufficiently important to generate rights. But if we reject the interest, then we must also reject the claim that there is a right against harmless trespass. If we want to defend this right, we must identify a salient interest that is damaged when the right is violated.

It is important to know how the degree of harm varies in an injury. This tracks two independent variables: the seriousness of the interest, and the extent of the setback. Thus, if A has punched B in the face, the harm is greater if B's nose is broken than if A has only split her lip, while both probably count as more severe harms than, for example, if A repeatedly takes B's parking space. The interest in bodily integrity is evidently much weightier than that in retaining one's allocated parking space, while a broken nose is a greater damage to bodily integrity than a split lip.

The hybrid conception of rights being explored here posits that they have twin justificatory grounds; it is unsurprising, then, that there should be two dimensions to what goes wrong when a right is violated—that is, two independent, substantive components of injury. The second component, alongside harm, is wrong, which we can also call disrespect. The view that wrong plays an independent role in injury can be defended in two ways. First, by following the conceptual analysis of section 1, and showing that on this conception of rights, it is analytically true that right-violations

involve wrong, or disrespect. Second, by criticizing a counterproposal according to which disrespect is just another form of harm.

The first point is simple: on the assumption that A, as a member of the moral community herself, meets certain criteria for rational and moral agency, then if it was reasonably foreseeable that her conduct *x* would damage B's protected interest *y*, if she was subject neither to internal nor external proximate and agency-negating causes, if B has not waived her right, and if *y* is sufficient, in all senses, to ground the duty breached by A, then her decision to do *x*, and damage *y*, clearly imputes her disregard for the first thesis of the analysis above, that B is an equal member of the moral community. Voluntarily to choose to violate another person's rights is to communicate, with one's actions, one's indifference to her status as a right-bearer.

We can provide this conceptual argument with more substantive support by comparing it with the most plausible alternative view of the substantive components of injury. This alternative, which we can call the welfarist conception of injury, agrees with the hybrid conception that rights are more than just moral signposts, which flag up important interests without adding anything to the disvalue of their being damaged. It suggests, however, that the additional reason provided by rights is the right-bearer's interest in being respected. On the welfarist conception, wrong is simply another form of harm. This view is attractive for its simplicity, since, other things equal, it is easier if we recognize only one type of moral reason. It might also make it easier to rectify injuries, since compensation is normally thought adequate for the rectification of harms. Moreover, welfarists sometimes argue that recognizing moral reasons other than those grounded in well-being involves committing oneself to a weird and unfamiliar metaphysical proposition about the nature of value.[12] However, either this simplicity must come at a serious cost for the plausibility of our account of right-violations, or it must be abandoned, and the conception of interests rendered sufficiently more complex

that whatever benefits this view was supposed to have over the hybrid alternative rapidly evanesce, to the point that one begins to suspect that the difference between the two is purely verbal. There are at least three ways in which the conception of well-being underlying the welfarist conception must be complicated before it can offer a plausible account of injurious disrespect: it must be objectivist, radically pluralist, and nonteleological. Taking all these together produces an 'interest' that has so little in common with the interests protected by rights, that the core claim that harms and wrongs are independent components of the injury must be accepted.

One advantage of the welfarist approach to rights, and to morality in general, is that it has scope for subjectivism, and therefore for sensitivity to the great differences between people's conceptions of the good life.[13] The connection between disrespect and moral equality on the hybrid conception, by contrast, is resolutely objectivist. In this respect, however, the hybrid conception definitely seems in the right, so the welfarist will have to reject subjectivist theories of well-being, such as hedonic and preference-satisfaction theories. Suppose A violates B's and C's rights in identical ways, for example by attacking them in the street. Suppose, however, that B has terribly low self-esteem, and believes that she deserves to suffer, so does not perceive the violation of her rights as a derogation from her moral status, because she does not believe that she in fact has moral status. On a subjectivist account, the disrespect done to B is less than that done to C, despite the fact that the right-violations were identical, and that B is wholly wrong about her supposed lesser moral worth. This would be true on either a hedonic or preference-based view. To capture the invariant degree of disrespect manifest in identical right-violations, the additional interests thesis must adopt an objectivist theory of well-being. The welfarist conception of injury must be objectivist, then, just as is the hybrid conception: it has no advantage here.

Objectivist theories of well-being, however, are widely accepted: while this does diminish the simplicity of the welfarist alternative, it is by no means a definitive objection. The next problem is a little more fundamental: the objectivist theory of well-being in question must be radically pluralist, for this account of the substantive components of injury to be plausible. The type of interest that is set back by disrespect must be radically different from the interests protected by our rights. Supposing the underlying theory of well-being posited the commensurability of all interests, this would mean that there are cases where one very important value can be outweighed by a large number of much less important tokens of the latter. If each instance of *x* is notionally worth 100 units of good, while each instance of *y* is worth 0.01, there will come a point where a sufficiently large number of *y* (10,001) will outweigh *x*. This would mean, for example, that we can violate a person's right to bodily integrity if so doing would ensure a small amount of amusement for a large enough number of other people. If the interest harmed in a right-violation, and the interest in not being disrespected, are commensurable in this way with lesser interests such as amusement, then this follows necessarily. This seems obviously wrong, which suggests that there must be some deep discontinuity between the interest in not being disrespected, and our other interests.[14]

It is worth asking, of course, just whether a welfarist theory of injury could adequately accommodate this crucial discontinuity. This is important not only for cases where insignificant benefits weigh up against rights, but also for the justification of some inalienable rights, which it seems there must be. If some rights are to be inalienable then it must be objectively true that there are no other goods that can be worth suffering the disrespect and harm involved in violations of those rights. But how are these radical discontinuities to be accommodated? If the disvalue of disrespect is continuous with itself, and the other interests with which it clashes are continuous with themselves, and if in some instances those other interests can outweigh the disvalue of disrespect, then

logically speaking it seems impossible to sustain the thesis that some rights can be inalienable, and others can be discontinuous with less significant benefits. Suppose that it is the same interest in not being disrespected which is undermined when A violates B's right to privacy as when she violates B's right to life. If the welfarist conception of injury is to be any simpler than the hybrid conception defended here, then this must be the case. It seems fairly clear that the right to privacy can sometimes be overridden by other considerations. Some impositions into people's private lives, for example, might produce economic benefits—this is one justification for the introduction of ID cards in the UK, for example. On the welfarist account, this must be because the harm of disrespect, plus the harm to the interest in privacy, are together outweighed by those economic benefits. Supposing, however, that the disrespect involved in this case is the same interest as the disrespect involved in the murder case, it must be true (a) that some quantity of economic benefit would be sufficiently weighty to justify A murdering B, and it cannot be ruled out (b) that there might be some such quantity that could therefore make it permissible for B to alienate her most serious rights. Neither of these views seems plausible. The welfarist conception of injury is not only required to be as complex as the hybrid conception, it also seems especially ill-equipped to deal with the nuances of the subject. The hybrid conception fares better here because it recognizes the radical difference between wrong and harm at the outset, so is not constrained by the requirement to treat them as quantities of a common substrate. As such, they can relate to one another as our considered judgments suggest that they should.

Perhaps the welfarist would counter that people do in fact weigh disrespect against their other interests, and if they can do this in practice there must be some way of capturing this process in theory. Take prostitutes, for example: those among them who pursue their profession by choice might be construed as believing that disrespect is commensurable with the well-being benefits they can gain with the money that they earn.

This example, however, is instructively flawed: the prostitute cannot in fact weigh the instrumental value of money against the disvalue of disrespect, because for her to accept the money in exchange for sex is to alienate the right that would otherwise be violated, meaning that she is not, in the relevant sense, being disrespected. She cannot compare [no disrespect, no payment] with [disrespect, payment], because the latter set is internally incoherent. The same applies to any comparable case where one is deciding whether gaining a given benefit is worth suffering what would ordinarily be considered a right-violation, therefore these cannot be adduced in support of the commensurability of disrespect and harm.

The welfarist conception of injury, then, has to be radically pluralist, and objectivist, in order to be plausible. And if we are ready to accept such a radically pluralist and objectivist theory of well-being, it is hard to see what is wrong with recognizing that there can be other moral reasons besides those grounded in well-being. The final objection to the welfarist conception of injury is that, to be plausible, it cannot even be teleological. For present purposes, a teleological understanding of right-violations sees them as occurrences which instantiate a certain amount of disvalue, which must be compared against alternative possible states of affairs, with a view to maximizing value and minimizing disvalue. Well-being is ordinarily understood as the quintessentially teleological value: it adds value to any state of affairs that someone's life goes well, there seems to be good reason to maximize well-being, and so on. If, however, we view right-violations as disvaluable occurrences to be minimized, then we are compelled to accept the legitimacy of violating one person's right in order to prevent two identical right-violations from occurring. A nice example of this classic problem occurs in Stephen Spielberg's film *Minority Report* (based on the Philip K. Dick book).[15] In this film, a foolproof system for the prevention of murders is established in New York City: three Cassandras are used to foretell the immediate future, using their special sensitivity to the

disruption in the universe that occurs when a murder is about to take place, and enabling a pre-emptive sci-fi strike against the murderer. Thousands of lives are saved. The twist, however, is that in order to procure the services of the prophets of murder, it is necessary to murder the mother of one of them. Thus one murder is committed to prevent thousands of others from taking place. Setting aside the other nuances of this problem, the key point is that on a teleological understanding of right-violations this sort of conduct is permissible: right-violations are disvaluable occurrences, and however nuanced our understanding of that disvalue, however discontinuous we make the interest in being respected with our other interests, it must still be continuous with itself, so it must be true that two right-violations are worse than one identical right-violation, so we should violate one right to prevent two identical rights being violated. Perhaps this is acceptable to some, but most will find Spielberg's angle considerably more plausible (the tone of the film is clearly nonteleological). This is a fundamental intuitive wedge issue, and each side can do no more than assert the truth of its response.

Now, it is possible to sustain the view that disrespect is just another form of harm, even in the face of these observations. Provided one can defend an objectivist theory of well-being, which is radically pluralist with respect to the distinction between disrespect and other harms, and which rejects teleological considerations to this particular interest in avoiding disrespect, while accepting their plausibility where our other interests are concerned—provided these criteria are met, it may be possible to sustain a welfarist conception of disrespect. One has to wonder, however, just what would be the point? If harm and disrespect are so radically different from one another that we must radically adapt our theory of well-being to accommodate the two, what exactly do we gain in that adaptation? It would not help us when it comes to understanding the method of, or argument for rectification, since even on this welfarist view harm and disrespect are so radically different that one could not be remedied by

resolving the other. It is of little use when working out how important injuries are, and when an injury can be all things considered justified: if the interest in avoiding disrespect is discontinuous with our other interests, and indeed nonteleologically structured, it is not as though we can resolve such quandaries by appealing to an overall principle of maximization. The case for harm and wrong being independent of one another appears watertight, as grounded in our understandings of how injuries relate to one another and other values. Whether or not we then posit that harm and wrong are notionally part of some radically plural supervalue would appear somewhat irrelevant. The present paper continues in its view that harm and wrong are mutually independent, that they ground quite different types of moral reasons. It remains agnostic on the further question of whether, in some way, these reasons can ultimately be understood as deriving from the importance of individual well-being, because whether or not that is the case, they are to all intents and purposes cut from quite different cloths.

It remains to consider how the disrespect manifest in injuries varies. Variations in disrespect track harm in one respect, but diverge in two others. The correlation consists in the fact that to violate a more serious right constitutes both a greater harm, and a worse degradation of the victim's moral status. A person whose right to bodily integrity is violated is more seriously disrespected than one whose violated right is to her own parking space. The first divergence concerns the amount of damage: while this is crucial to establishing the seriousness of the harm, it is irrelevant to the disrespect. If A punches both B and C, breaking B's nose but only bruising C's cheek, she has violated the same right in each case, and her action surely degrades their moral status identically, despite the difference in extent of the damage. The second divergence derives from the agent's intention. Whether or not A intended the injury is irrelevant to the extent of the harm involved, but is crucial to the disrespect. If A deliberately violates B's rights, then she deliberately disregards B's moral claim on her, and the implication in her action that she

rejects B's moral status is undoubtedly exacerbated. Conversely, if her conduct was merely careless, that implication is mitigated. Nonetheless, a careless right-violation still involves some disrespect, however little: although A did not select B, it is nonetheless B whose capacity for rights she disrespected by not taking her duty of care seriously; moreover, though she did not choose to injure B, she chose the conduct which foreseeably led to B's injury.

3. Injury, Public and Private

Insofar as we have thus far focused on the specific setbacks to the victim's particular interests, and on the disrespect she suffers, we have discussed what can be called the private harm, and the private wrong that she suffers. Injuries, however, can also have a public dimension, whereby not only the victim, but society as a whole suffers harm and wrong. This section elaborates on the difference between public and private harm and wrong. It begins by explaining what is meant by public harm and wrong, then compares these with the private dimensions of injury.

When A injures B, we can assess the harm in two ways: we can focus on how B's interests have been set back, or we can look at the effect of the injury on C-Z, other members of society, as well. There are at least three facets to this latter, public dimension of the harm. The first is that, when A injures B, in many cases she also directly harms C-Z, by setting back their interest in living without fear. Second, and less directly, A's conduct undermines C-Z's autonomy, since autonomous action is conditional on making stable plans for the future based on one's legitimate expectations. If these expectations can be crushed without warning by an injury, people are less able to make plans, and therefore less autonomous.[16] The third aspect is still less direct: A's conduct sets an example; when others see A injuring B, they may be motivated to imitate her. This can

exacerbate the first two aspects of public harm; it is particularly serious when society, and its institutions, are already in a precarious state. Public harm, then, can be summarized as the spread of fear and undermining of legitimate expectations, compounded by setting a bad example to others.

There are two key elements to the public dimension of wrong. First, when A injures B, she violates the system of rules that B-Z collectively affirm. In one sense, these rules serve our collective well-being, so this is another public harm. However, as Feinberg influentially argued, there is a distinct public wrong here, because these rules also express our moral code, and are valued for their own sake: the injurer has outraged our commitment to this shared morality.[17] Second, when A injures B, there is a sense in which, in a just society at least, she wrongs everyone as she wrongs B, because she has not just injured an individual, but a member of a moral community, and an injury to one is an injury to all. This is one explanation for the state being the plaintiff in public law,[18] and perhaps captures what J. S. Mill meant when writing about the difference between resentment and justice: resentment derives from wrong done to oneself, but justice focuses on injuries 'which wound us through, or in common with, society at large'.[19] This is, indeed, a familiar notion: victims of serious crimes often seek justice not for revenge, but in the hope that nobody else will be injured as they were. The public component of wrong in an injury, then, can be summarized as the affront to society's shared moral code, and a symbolic injury to all by injuring our equal.

There are three main differences between the public and private harm. The first derives from the obvious fact that, while C-Z suffer in the indirect ways just described, when A injures B, it is B alone whose protected interest is substantially set back. Nobody else shares this experience with her. Second, the extent of the private harm is determined entirely by intrinsic factors: the importance of the interest damaged, and the extent of that damage. The public harm, conversely, is shaped by extrinsic factors: for example, the

publicity achieved by the injury, and the relative stability of society's institutions. An injury about which nobody hears, in a society with strong institutions, would cause less public harm than the same injury, with more publicity, and weaker institutions.[20] Finally, public and private harm require quite different methods of rectification. Private harm may feasibly be rectified through compensation. Rectification of the public harm, conversely, will probably require punishment, rehabilitation, or preventive detention. Moreover, punishment self-evidently could not rectify the private harm, since harm to A does not restore the setback to B's interest. On at least these three counts, then, public and private harm are distinct dimensions of injury.

There are three reasons to believe the public and private wrong are also separate. The first derives from what it would mean if there were no difference between the two. If this were true, then when A injures B, the disrespect B suffers would be identical to that suffered by C-Z: if there is no private wrong, then all members of society are equally wronged by an injury. But this surely does not match our intuitions about disrespect: although anybody else could have been in B's position, as with the harm, they were not, and it was B whose moral status was actually degraded by A's conduct.[21] The second differentiator is that there are some public wrongs that are not also private, and vice versa: for example, treason need not involve injury to any particular individual; meanwhile, though one can carelessly injure, and disrespect, an individual, in some cases the disrespect is insufficiently serious to engage the solidarity of the rest of society. The third reason is that, while punishment may rectify the public wrong, it is poorly suited to rectifying the private wrong. Not only must we ask exactly how harming A remedies the disrespect shown to B, but we must also see that this makes punishment far too similar to retaliation, or revenge, from which most advocates of punishment are keen to distance themselves.[22] Moreover, forgiveness can reduce the burden of rectification on an injurer with respect to the private wrong, but to allow forgiveness to determine rectification of

the public wrong would be to make the criminal justice system unforgivably subjective and arbitrary.

Concluding Remarks

This paper has presented and explicated a specific conception of the nature and disvalue of injury *qua* right-violation. It has attempted to provide an intuitively plausible account of what a right-violation is, and then to expand on that by analyzing the substantive components of injury, focusing specifically on the distinct components of harm and wrong. It has argued that there is a radical difference between these two components, and against the attempt to assimilate disrespect to harm. Finally it has shown that injuries have both a public and a private dimension, and that we can understand their public dimensions in terms of wrongs and harms as well. Armed with this analysis of the nature and disvalue of injury, we are not only better positioned to distinguish between non-injurious and injurious setbacks to others' interests, we are also well-positioned to assess different methods of rectifying the injury. We can conclude by considering how the present analysis helps us better to understand the latter problem.

There are three plausible avenues for the rectification of injuries: distributive, criminal, and corrective justice: when A injures B, a theory of distributive justice considers what A and C-Z, other members of society, owe B: it redistributes the loss she has suffered. A theory of criminal justice, conversely, considers what A owes B-Z by way of punishment, her 'debt to society'. Corrective justice alone considers what A owes B as a consequence of her action. It is this feature, correlativity, that distinguishes corrective justice.

The rectification of the public dimensions of injury is best suited to criminal justice: we cannot redistribute the damage a crime does to social stability, or the fear people suffer as a consequence, or indeed the affront to our collectively affirmed code of

morals. Nor, however, would a correlative remedy be adequate, as, in aiming to fix the harm and wrong done to B, it would ignore that suffered by C-Z. The private wrong, however, does seem to lend itself to correlative rectification: A has disrespected B, and it is plausible to argue that she alone can remedy this disrespect, because she alone can reaffirm B's moral equality.[23] Even if C-Z collectively affirm B's moral status by punishing A, there is still something lacking as long as A remains unrepentant. Nor is there any plausible means of redistributing this disrespect.

The private harm is the only genuinely ambiguous element within the public and private dimensions of the injury. While it cannot be rectified through punishment—unless we think that the suffering of the punished injurer is in the interests of her victim, so compensates the latter directly—it is equally amenable to remedy by correlative, or redistributive means.[24] We need to know more than the nature and disvalue of injury to establish how and why the private harm should be rectified: we must move beyond explicating the concepts that go into a theory of corrective justice, towards the deployment of these concepts in more substantive arguments. Nonetheless, a clear understanding of the concept of injury is a precondition for any further discussion of this topic.

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[1] See Seth Lazar, 'Corrective Justice and the Possibility of Rectification', *Ethical Theory and Moral Practice*, 11(1), 2008.

[2] When discussing the nature and disvalue of a specific injury, the harm and wrong at stake are always *pro tanto*: they are determined exclusively by the nature of that injury, without any reference to other factors that may also be at stake. They are thereby distinguished from all things considered judgments of harm or wrong.

[3] *Contra* Joel Feinberg, *Doing & Deserving: Essays in the Theory of Responsibility*, (Princeton: Princeton University Press, 1970); Ernest Weinrib, *The Idea of Private Law*, (London: Harvard University Press, 1995).

[4] See Jules Coleman, *Risks and Wrongs*, (Cambridge: Cambridge University Press, 1992), p. 325; Stephen Perry, 'The Moral Foundations of Tort Law', *Iowa Law Review*, 77, 1991-1992, p. 487.

[5] See Joseph Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986), p. 166.

[6] See Robert Nozick, *Anarchy, State and Utopia*, (Oxford: Basil Blackwell, 1974), Chapter 3; Thomas Nagel, 'Personal Rights and Public Space', *Philosophy and Public Affairs*, 24(2), 1995.

[7] Although it cannot be discussed in depth in this paper, the issue of how to understand justified rights violations is relevant here (thanks to a reviewer for pointing this out). On the interest-based theory of rights, if the right-bearer's interests are outweighed by conflicting considerations, then no disrespect is shown to her by damaging those interests, because she has been treated as an equal by having her interests counted at their proper value. On the hybrid theory of rights, by contrast, there can be justified rights violations when the reasons given by the right-bearer's status and interests are together overridden by conflicting considerations, but those reasons will remain important—they will be overridden, not eliminated—and may well give grounds for corrective action.

[8] Thanks to David Miller for this example.

[9] See Joel Feinberg, *Harm to Others*, (Oxford: Oxford University Press, 1984).

[10] Derek Parfit, *Reasons and Persons*, (Oxford: Clarendon Press, 1984), Appendix I.

[11] See Weinrib, op. cit., p. 116.

[12] See Andrew Moore and Roger Crisp, 'Welfarism in Moral Theory', *Australasian Journal of Philosophy*, 74(4), 1996.

[13] Richard J. Arneson, 'Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare', *Philosophy and Public Affairs*, 19(2), 1990; R. M. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, (London: Harvard University Press, 2000), Chapter 1.

[14] An anonymous reviewer has suggested that there can be instances of a single good that are incommensurable with one another. I am not sure this is true: for *x* and *y* to be incommensurable, it must be true that we cannot reduce them to a common metric whereby ordinal comparisons can be made between them. If they are instantiations of the same good, then there is necessarily a common metric. However, even if I am wrong that incommensurability presupposes radical pluralism, evidently a monist theory that sought to accommodate incommensurability would have to be still more complicated than a pluralist theory, since it would have to explain not only the great differences between apparently identical values, but also what makes them instantiations of the same good.

[15] *Minority Report* (Twentieth Century Fox, 2002), Stephen Spielberg (dir.); Philip K. Dick, *Minority Report (the Collected Short Stories of Philip K. Dick)*, (London: Gollancz, 2002).

[16] See Robert E. Goodin, 'Compensation and Redistribution', in Chapman (ed.), *Nomos Xxxiii: Compensatory Justice* (London: New York University Press, 1991).

[17] Feinberg, op. cit., pp. 95-118.

[18] See Peter Birks, 'The Concept of a Civil Wrong', in Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), p. 40.

[19] John Stuart Mill, *Utilitarianism*, (London: Longmans, Green, Reader & Dyer, 1871), §5.21.

[20] See G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Wood, trans. Nisbet, (Cambridge: Cambridge University Press, 1991), §218.

[21] See Weinrib, op. cit., p. 143.

[22] See Mill, op. cit., §5.21; Hegel, op. cit., §102A.

[23] Lazar, op. cit.

[24] While researching and writing this paper I benefited from the generous support of St Peter's College, Oxford, and the Arts and Humanities Research Council. Thanks also to David Miller, whose encouragement and criticism were crucial to the development of both this paper, and the research project of which it is a part.