On Being Wronged and Being Wrong

Abstract:
If D commits a wrong against V, D typically incurs a corrective duty to V. But how should we respond if V has false beliefs about whether she is harmed by D's wrong? There are two types of cases we must consider: (1) those in which V is not harmed but she mistakenly believes that she is (2) those in which V is harmed but she mistakenly believes that she is not. I canvass three views: The Objective View, The Subjective View and The Mixed View. The Objective View holds that V's claim depends on the correct account of harm, rather than her false beliefs, and so D has a duty to offer damages to V in (2) but not (1) in order to compensate her. The Subjective View holds that, for broadly Anti-Perfectionist reasons, V's claim depends on her sincere beliefs, even if they are mistaken, and so D has a duty to compensate V in (1) but not (2). The Mixed View holds that we should defer to her beliefs in (1) but not in (2), so D has a duty to compensate her in both cases. In this paper, I argue that we should accept The Mixed View.

Keywords: Compensation, Anti-Perfectionism, Political Liberalism, Corrective Justice, Paternalism

1. Introduction

How should the law cognise harm for the purpose of corrective duties? Should it always adopt an objective conception, in which there is a set list of recognised harms for which claimants can be compensated? On this view, although some victims will suffer more harm depending on their particular vulnerabilities and circumstances, harm is considered objective in the sense that it is compensable because it is bad for the victim irrespective of her attitudes. Alternatively, should the law sometimes give regard to the claimant's sincere subjective beliefs about the harm that she has suffered, even if these beliefs are mistaken?

One problem with always adopting an objective conception of harm is that, though there is a large measure of agreement about what counts as harm in core cases, there is deep disagreement in peripheral cases.[1] But the contested nature of harm is not the only difficulty here. Even if we have established the correct conception of harm, it does not follow that rules regulating compensation should always invoke it. Perhaps respect for the victim's autonomously chosen ends or values sometimes requires deference to her beliefs, even if they are false. On the other hand, if the victim's demand for compensation outstrips the harm that she has *in fact* suffered, can we expect the injurer to bear burdens because of the victim's mistake?

These questions draw together important themes in moral, political and legal philosophy. The relationship between the law and individuals' beliefs about harm is important for the implementation of corrective duties in private law since it has implications for what causes of action and remedies are available to claimants. The tort of negligence, for example, requires not only the existence and breach of a duty of care, but also that this breach cause the claimant a legally recognised form of harm.

A parallel can also be drawn between this issue and debates in political philosophy. In particular, Liberal Anti-Perfectionists may question whether judges or law-makers are permitted to coerce individuals on the basis of true claims about their wellbeing. Anti-

Perfectionists generally hold that the state cannot, in exercising its coercive power, offer as a justificatory reason any consideration grounded in a comprehensive set of moral, philosophical or religious values (or conceptions of the good), which include beliefs about harm in peripheral cases. The Anti-Perfectionist constraint thus disables certain reasons from being legitimately offered as a justification for state action.

Is this parallel between tort law's conception of harm and Anti-Perfectionist justice significant? The conception of harm adopted by the civil law is objective, and many would baulk at the suggestion that a claimant's beliefs should ever affect the compensation to which she is entitled**.** I will argue later that this dismissal is too quick, but for now I will note that Anti-Perfectionists have a *prima facie* objection to the law adopting a purely objective conception of harm and this objection cannot be ignored.

Moreover, this issue is almost non-existent in legal discussions of actionable harm, even though it has direct relevance for cases as well as the theoretical foundations of the law. In *McFarlane v Tayside Health Board* [2000] 2 AC 59, for instance, the House of Lords ruled that where a doctor's negligence in performing a sterilisation procedure resulted in the claimant having a baby that she would not otherwise have had, the claimant could not sue for the cost of bringing up the child. This decision was reached, in part, because the judges believed that the birth of a healthy child was a benefit that offset the financial burden of upbringing.[2] The question whether it is acceptable for the court to impose on parents a value-judgment about wellbeing that they may not endorse was not addressed.

As I mentioned, one criticism of the decision is that the judges' conclusions about the wellbeing of the claimants were wrong (a child is a whinging bundle of demands, one might think. How could *that* make a life go better?). A second criticism, motivated by Anti-Perfectionist reasoning, is that it is wrong for the law to impose judgements based on controversial comprehensive doctrines that those coerced by the law reject, even if those doctrines are correct.[3] The advantage of this objection over the previous one is that discussions of the correct view of harm can be avoided since the objection grants, *arguendo*, that the courts' view is correct. The relevant cases to consider, therefore, are those in which there is a conflict between accurate judgments about harm and mistaken beliefs held by the victim.[4]

There are, then, two types of cases we ought to consider: (1) those in which the victim is not harmed but she mistakenly believes that she is and (2) those in which the victim is harmed but she mistakenly believes that she is not.[5] Here are three views about how we ought to respond to type-(1) and (2) cases. *The Objective View* holds that compensation should always be determined by a single, universally applicable conception of harm. In a type-(1) case, if the victim is benefitted, she has no claim even though she reasonably believes she is harmed. In a type-(2) case, if the victim is harmed, she has a claim even though she reasonably believes she is benefitted. *The Subjective View* holds that compensation should be paid in (1) but not in (2). In (1), even though the victim is mistaken, she is still worse off according to her own values and projects. In (2), however, when she is harmed but believes she is benefitted, she cannot claim in good faith that she considers herself worse off and so is not entitled to compensation. One question is whether the victim is entitled to *any* compensation; a second is the 'quantum' of damages: the amount of compensation owed. *The Objective View* holds that compensation should be calculated according to the actual degree of harm done, whilst *The Subjective View* holds that it should be quantified according to the victim's view.

I argue that both *The Objective View* and *The Subjective View* fail. Instead, we should accept *The Mixed View*, which makes three central claims. First, in type-(1) cases, the wrongdoer has a duty to offer compensation. Where the victim falsely believes she is harmed, compensation should be offered for Anti-Perfectionist reasons. Secondly, in type-(2) cases, the wrongdoer *also* has a duty to offer compensation. Where the victim is harmed but wrongly believes she is not, compensation should be offered to counterbalance her harm. Thirdly, wherever there is real harm done, damages should be calculated according to the correct conception of harm, but where the victim falsely believes that harm is done, damages should be limited to a reasonable threshold. This claim means that respecting the victim's beliefs does not require that we quantify compensation according to those beliefs (perhaps, therefore, such damages cannot be considered compensatory. I will return to this conceptual question below). Even if the reasons we have to respect autonomy are generally decisive when deciding whether a victim has a claim, they need not also govern the value of this claim.

Does accepting the Mixed View, or the Subjective View for that matter, thus imply a general entitlement for victims to set their own compensation, or to defer to their beliefs in every case? Such a policy would not only be almost impossible to implement, but would also undermine the stability and formal equality of the law of damages, which might be reason enough to rule these views out from the start. However, neither has this implication, so it is worth pausing to explain why.

First, the views described above are not general accounts of actionable harm: they apply only to type-(1) and (2) cases. The majority of claims will still be in respect of harm accepted by most views. This is true of damage to instrumentally useful goods such as income, property or physical and mental capacities. A universally applicable conception of harm is therefore acceptable in most cases; the questions addressed in this paper appear only at the periphery. Second, The Mixed View is a philosophical position rather than a legal proposal. It addresses moral duties that are potentially legally enforceable, but whether they should be enforced involves balancing other considerations. For example, claimants would be incentivised to falsify their beliefs in order to categorise their case as type-(1) if they would not otherwise be entitled to damages. To counter this, there must be significant evidence of sincere belief. This burden is met when the claimant engages a professional to help pursue her ends – as in McFarlane – but other claimants will be in a weaker evidential position.

Given these caveats, it is not clear that *The Mixed View* undermines formal equality at all, since all persons are subject to the same rules, and variations in the level of damages between claimants track considerations that, according to *The Mixed View*, are not arbitrary. Nevertheless, there are further reasons to put aside this worry. Any inconsistency is mitigated by the reasonable threshold I defend in section 4. Maximal consistency can be achieved through a conventional award to recognise the interference in type-(1) cases, which is the same for each claimant,[6] although some scope for variation in damages depending on the facts of the case is also possible. Finally, from a defendant's perspective, type-(1) cases are generally less foreseeable than cases in which there is little or no disagreement about whether the potential outcome is harmful. As I will explain further in section 2, this means that the circumstances in which a type-(1) case will arise following *wrongful* conduct will be limited.

Here, then, is a quick map of the argument. In section 2 I defend an assumption on which the argument is based: that it is possible to unintentionally, non-harmfully yet

wrongfully interfere with a person's pursuit of her ends. I will defend *The Subjective View* against *The Objective View* with regard to type-(1) cases in section 3, although I will argue in section 4 that damages should be limited. In sections 5 – 6 I will defend *The Objective View* against *The Subjective View* with regard to type-(2) cases. If these arguments are successful, their combination will justify *The Mixed View*. In the conclusion I will address the criticism that *The Mixed View* is an arbitrary compromise in its attempt to accommodate elements of both other views. I will seek to show that this perception is misleading: *The Mixed View* emerges from a principled assessment of the cases as a defensible, coherent, victim-centred view.

2. Where's the Wrong?

One might object that *The Mixed View* cannot get off the ground because the assumption on which it depends is untenable. It is a condition of unintentional wrongdoing, this objection holds, that the outcome that makes the act wrong is foreseeable to the wrongdoer. If it is not, the notion of wrongfulness is incoherent. But given the wide variation between victims' beliefs, it is not possible to foresee purely subjective harms and therefore it cannot be wrong to cause them.

It is true that foreseeability is closely linked to unintentional wrongdoing and limits the range of actions that can be wrongful. But this does not render wrongdoing in type-(1) cases incoherent. One reason for this is that purely subjective harm is sometimes foreseeable. Consider the following schema: D helps V to achieve some desired end, D does so negligently, but V is not made worse off. This schema applies to failed sterilisation cases, of which there is already a group of inconsistent legal decisions,[7] but may be applicable across a wider range of professional and non-professional circumstances. In these cases, even purely subjective harms will typically be foreseeable because D is aware of the end that his actions are supposed to assist V in pursuing.

These cases are often normatively and legally complex. There may be multiple reasons why wrongdoing is present or absent. If D and V form an agreement, for example, whether actual harm is caused by D's actions may be immaterial. But an argument based on a pre-existing agreement is separable from one based on negligence and it is important to consider the latter in its own right, partly because the outcome of some cases may hinge on this argument alone, but also because any argument offered to support a court's decision should be scrutinised, especially when it is based on nebulous appeals to justice or moral offense.[8]

Even in cases where subjective harm is unforeseeable, we cannot rule out the possibility of wrongdoing. In both law and morality, it is possible for D to act wrongly by virtue of *some* of the foreseeable consequences of his actions but not others. In tort law, the eggshell skull rule provides that, as long as the relevant type of damage is foreseeable, its precise nature and extent need not be. In Page v Smith [1996] AC 155, the House of Lords gave this rule a wide interpretation, holding that an unforeseeable psychiatric injury was compensable because physical injury was foreseeable. Although psychological harm differs from the type of subjective harm under discussion, there are two important points to note here. First, in cases where some consequences of D's action are foreseeable but not others, debate focusses on which consequences should be compensated, not whether D acted wrongly at all. It is generally accepted that a person can act wrongly by virtue of those consequences of his action that *are* foreseeable, even if others are not. Second, it is

then an open question whether any specific unforeseeable consequence should be compensated – this depends on the balance between the eggshell skull rule and limitations on recovery imposed by other elements of the tort, such as remoteness and the scope of the duty of care. Perhaps the arguments of this paper fail for a variety of reasons, but they should not be excluded from consideration on the grounds that type-(1) cases cannot involve wrongdoing.

This means, of course, that D's conduct is much less likely to be wrongful if unforeseeable subjective harm is the *only* consequence. But as mentioned above, this should be viewed as a benefit, since it places a limit on liability that helps to keep one's legal duties roughly within one's control. Having said all this, these caveats should not obscure the significance of *The Mixed View*. Many people believe that victims' sincere beliefs should *never* play a role in the determination of damages. This is the first claim questioned by *The Mixed View,* and it is to this we now turn.

3. Defending *The Subjective View* against *The Objective View*

The Subjective View captures an important insight when applied to type-(1) cases, where the victim is not harmed but she mistakenly believes that she is.[9] In additional failed sterilisation cases, we can also construct cases involving more general disagreements about the nature of wellbeing.[10] Here is a hypothetical example based on a more fundamental debate between philosophers who endorse subjective and objective views:

> *The Reticent Philosopher:* V spends her life writing a series of philosophical works. Although the works are brilliant, advancing knowledge in various ways, she decides not to publish them as she prefers to avoid the attention, instead saving them to a private online account accessible only to her close colleagues. As a result of his reckless mismanagement of the website, D accidentally[11] distributes the works. They become widely reproduced and popular, deepening the understanding of many who read them. V does not believe that the achievement improves her life and instead believes that she has been harmed by having unwanted publicity thrust upon her.

Let us assume that valuable achievements make one's life go better irrespective of one's preferences. V's philosophical accomplishments therefore improve her life, and this outweighs any harm she suffers as a result of publicity.[12] (This example reflects my controversial views about wellbeing. I leave it to the reader's imagination to construct examples that reflect her own, perhaps conflicting, views.) Like *McFarlane*, in *The Reticent Philosopher* D benefits V overall by wronging her.

Having set up the cases, in the rest of this section I argue that V's choices should be respected in *McFarlane, The Reticent Philosopher* and other type-(1) cases, and we should recognise a moral duty, which is potentially legally enforceable, owed by D to offer compensation. Why is this?

A) The Argument from Independence

One argument is that if D fails to compensate V, he will have interfered with her pursuit of an end, E, that she has a right to pursue without wrongful interference. If it is accepted that D cannot permissibly interfere with V in this way *ex ante*, this raises a presumption

that D has a duty to compensate V *ex poste* if he wrongfully interferes with her pursuit of E. To deny this duty would be effectively to empower wrongdoers to coercively interfere with the independence of others (though it would not *literally* empower them to do so, since the initial act is still *ex hypothesi* impermissible). If the benefit to V of interfering with her pursuit of E cannot justify performing the initial act on paternalistic grounds, it is difficult to see how it can vitiate the presumption in favour of remedial action after the wrong. One way to emphasise this is that V should be entitled to an injunction to prevent the wrongful interference *ex ante*. This seems sufficient for the presumption that, if an injunction is no longer possible, D should offer the next best solution to the wrongful interference, which is likely to be a form of compensation. We do not ordinarily think that reasons supporting a duty of non-interference vanish once that duty has been breached.[13]

It may be objected that the mere right to pursue one's ends does not create a presumption in favour of a reparative duty when someone interferes with them. If a corporation's business plan is frustrated by competition, this has no implications for legal reparation. But we must remember that the interference in the cases we are discussing is *ex hypothesi* wrongful. On this assumption, it would be contrary to our usual attitude towards reparative duties to suppose that the reasons that render the interference wrongful disappear. I have conceded that the circumstances in which an agent unintentionally wrongs another without rendering her worse off will be limited. But I also argued that such cases are possible and coherent, and thus the present argument will apply to them.

Another objection is that remedial action after the wrong is often (though not always) more burdensome to the wrongdoer than avoiding the wrong in the first place. It is therefore misleading to say that, because one has a duty not to wrongfully interfere with another's permissible ends, one must also have a duty to compensate if one does so. We have some reason to resist this objection, since if wrongdoers are able to rely on the fact that compensating is very burdensome to escape their corrective duties, this also practically empowers them to interfere with others. Nevertheless, there is some force to this objection and I will return to it in section 3.

The argument from independence is most plausible when applied to intentional interferences. Consider the case of a cosmetic surgeon performing reconstructive surgery on a victim of a car crash, who decides to take the opportunity to improve the shape of the victim's nose.[14] Even if the victim would have consented to the surgery had she been asked, the surgeon's interference is impermissible. Not only this, but he must compensate her – perhaps by undoing the surgery or, if that is not possible, by offering her damages – even if the victim is benefitted overall according to her own beliefs. One way to explain this judgment is by appealing to the importance of our independence from wrongful interferences, including beneficial ones.

The argument retains some of its force in the context of unintentional wrongs. Suppose the surgeon accidentally improves the shape of the victim's nose due to a failure to take adequate care. He makes effort to avoid negligent interference that is likely to cause harm, but makes no effort if he foresees that his negligence is likely to interfere with the victim non-harmfully or beneficially. If he knows that he will not incur any corrective duties in this way, he is effectively empowered to wrongfully interfere with the victim.

Admittedly, this argument has its limitations. The effective power to interfere with the independence of others created by a strict adherence to *The Objective View* may not lead to frequent interferences, especially if this power does not tend to motivate potential wrongdoers. Claims for intentional interference are relatively rare, and although negligence

is a form of wrongdoing, the threshold of culpability is fairly low. The upshot is that some acts of negligence are accidents that are likely to have happened regardless of the potential stringency of the corrective duties incurred. However, as I argue in the next section, respect for the victim's autonomously chosen ends might require more than creating disincentives to wrongfully interfere with others.

B) The Anti-Perfectionist Argument

The independence argument is broad in scope since it can be accepted by non-liberals. But the claim that D has a duty to offer V compensation can be further supported by showing that it can be motivated by Liberal Anti-Perfectionist reasoning. This argument consists in two stages: an appeal to the central tenets of Anti-Perfectionist liberal theories and an extension of these ideas from the realm of political morality to cases of interpersonal harm. But first, a caveat is in order. I appeal to an objection to individuals being coerced on the grounds that some view about their wellbeing, which they reasonably reject, is true.[15] Not all liberals endorse this core idea, and perhaps not all Anti-Perfectionists. Some liberal legal theorists, such as Kantian liberals, would reject the application of this idea to interpersonal obligation and only compensate those whose basic capacities to pursue their ends and property have been damaged.[16] My argument will therefore not be acceptable to all liberals, but I will suggest that it can be motivated given multiple accounts of the normative basis of Anti-Perfectionism.

On Rawls' account of political liberalism, liberalism must eschew appeal to comprehensive conceptions of the good if it is to avoid becoming just "another sectarian doctrine" (Rawls 1985). The constraint against appealing to reasons grounded in comprehensive doctrines applies to the basic structure of society, as the citizen's relationship with this basic structure is characterised by four features. The relationship is involuntary, coercive, lifelong and profoundly impactful on "citizens' character and aims, the kinds of persons they are and aspire to be." (Rawls 1985: 68). Rawls was not clear about whether the private law was part of the basic structure, but despite some comments suggesting that contract law ought to be excluded (Rawls 1993: 267 – 69), others have argued that he gave good reasons for believing that at least those parts of the private law that do not merely specify individual rules of conduct, but operations for the implementation and enforcement of the body of law, form part of the basic structure (Scheffler 2015). Regardless of whether Rawls would include the rules governing legally cognisable harms in tort law within the basic structure, there are other circumstances in which the four features that justify the application of the Anti-Perfectionist constraint are present, and others have argued that liberal legitimacy ought to be extended to domains beyond those specified by Rawls.[17] Many contemporary liberals, for example, extend the constraint from constitutional essentials to coercive laws in general (Larmore 2008: 86) and (Quong 2010: 233 – 250).

It is plausible that the victim's relationship with the civil law falls within the scope of the constraint. Victims are coerced by the civil law, in the sense that they have no control over the rules that determine the outcome of their case. It may seem that they voluntarily submit to the authority of the law, but this voluntariness is compromised since they are barred from attempting to privately extract a remedy from the wrongdoer. The transaction is also impactful on their future prospects, particularly if the harm is, from their perspective, very severe. Given the structure of this relationship, it is hard to believe that the court can justifiably fail to assist them in continuing to pursue the ends that they have

a right to pursue, but have been wrongly prevented from doing so, by forcing upon them conception of harm that they can reasonably reject.

This idea can be supported in a number of different ways. My purpose here is not to adjudicate between different accounts of the normative basis of Anti-Perfectionism, but rather to show that we should take seriously its application to type-(1) cases whatever account we adopt. One way to defend the plausibility of the Anti-Perfectionist constraint is by recognising the fact of reasonable pluralism. This helps to explain the need for institutions that can be endorsed from the perspective of multiple conceptions of the good, or that do not appeal to reasons grounded in comprehensive doctrines that citizens can reasonably reject. The burdens of judgement are part of the *causal* explanation of how citizens come to hold plural and conflicting conceptions of the good, but the reasonableness of the resulting pluralism helps to justify the political component of the reasonable citizen: the commitment to co-operate with others on terms they can accept. The fact of reasonable pluralism explains why the Anti-Perfectionist constraint is a condition of legitimately exercising coercive authority.

Some may find it primitively plausible that coercive authority must be justified to those who are coerced, and that it can only be justified by offering a reasons that the subject could, in some sense, accept. On this view, there is no deeper basis for Anti-Perfectionism, it is simply a requirement of legitimate authority. As long as the authority of the civil court is the kind that invokes this requirement, there is no reason why it should not apply to type-(1) cases.

Jonathan Quong offers an alternative view. He argues that the Anti-Perfectionist constraint is grounded in respecting the status of others as possessing the capacity to plan, revise and rationally pursue their own conceptions of the good (Quong 2010: 100 – 7). Paternalistic acts that violate Anti-Perfectionism are inconsistent with this status, and so respect for a person's autonomously chosen ends or beliefs is a requirement that emerges from seeing her as possessing a certain status. It is not obvious why judging that a person makes a mistake about the value of her ends involves denying that she has the capacity to pursue a conception of the good – denial of a general ability to x is not implied by failure to x in a particular instance. However, coercive interference based on reasons that can be reasonably rejected does, one might argue, demonstrate disrespect for the individual's freedom to form her own comprehensive doctrines.

Another rationale for Anti-Perfectionism is based on respect for autonomy. It might be argued that a person's autonomously formed beliefs generate constraints on the way she may be coerced as long as they are reasonable. If the citizen meets the requirements of reasonableness, judgment of the value of her ends by the coercing authority is withheld.[18] Respecting the autonomous freedom of others involves recognising that affirmation of the coercive rules under which they live from their own perspective matters. This view can be broken down into two elements. First, the value of living an autonomous life depends on the possession of special moral powers that generate an interest in leading such a life.[19] Second, by virtue of possessing these powers, individuals are owed a special form of respect by the coercing authority. Failing to adhere to Anti-Perfectionist constraints is to regard a person's exercise of her sense of justice and rational powers as insufficient to permit her an equal say in determining the rules that govern her.[20]

I will not investigate these views further here. The point is that, regardless of which account of the core idea of Anti-Perfectionism we accept – whether it is primitively plausible as a condition of legitimate coercion or a requirement of respect for either status

or autonomy – Anti-Perfectionists should object to the argument exemplified by *McFarlane* and *The Objective View*. This is because they all converge to support the idea that there is something objectionable about coercing an agent on the basis of truth-claims about her wellbeing that she rejects.

C) Other Perspectives

Hopefully, the independence argument and the Anti-Perfectionist argument are sufficient to mount a positive case for holding wrongdoers liable to compensate their victims in type-(1) cases. We should also briefly address two objections, based on the perspectives of the wrongdoer and the civil court. First, from the court's perspective, deferring to V's beliefs may conflict with paternalistic reasons to reject V's demand for compensation (suppose that, if V is not compensated, she will no longer be able to pursue E and will pursue a more worthwhile end instead). But these reasons are not strong enough to justify leaving D's coercive interference uncompensated. Moderately furthering the interests of others is not important enough to justify acting coercively *ex ante*, so it is doubtful that it could justify leaving the coercive actions of others uncorrected *ex poste*. To think otherwise would require defending a strong form of paternalism that many paternalists explicitly reject.[21]

Second, from the wrongdoer's perspective, D may complain that he should not have to bear burdens as a result of V's mistake.[22] Two points may be made in response. First, this complaint is, to some extent, question-begging. Whether D has a strong complaint will depend on what duties he has in light of his interference with V's autonomously chosen aims. D's complaint is only justified if he can show why the arguments made previously, which establish a presumption in favour of compensation, are ill-motivated. Second, D could have avoided becoming encumbered by this corrective duty by refraining from his reckless conduct (note that the avoidability argument is even stronger if his wrongful act is intentional, as it is easier to avoid intentional wrongs. It is weakest in respect of negligent acts that are difficult to avoid, although even most of these can be avoided if the defendant exercises her capacity for reasonable care). His grounds for complaint are weak given that he was in the best position to avoid bearing burdens as a result of V's mistake.

Much depends on the stringency of the avoidability requirement. If it is too weak, D can object that he had no realistic chance of avoiding the law's coercion, or that it is trivially true that those who cause harm are best placed to avoid it, but if it is too strong then V remains uncompensated in cases where D could have avoided the wrong with relative ease. The requirement, as I envisage it, will be satisfied by many acts of negligence, but is not trivially satisfied because D causes harm, since the claimant's opportunity to avoid the outcome must also be taken into account.[23]

This distinguishes D's subjection to the civil law from his subjection to the state. He has a good opportunity to avoid wronging his victim, thereby becoming subject to the coercive authority of the civil law, but no opportunity to avoid being subject to state authority *per se*. He can legitimately complain to the state that he should not be coerced in order to further a conception of the good that he can reasonably reject, but he lacks a complaint against being forced to compensate V when he wrongfully interferes with her and had a good opportunity to avoid doing so, even if he can reasonably reject V's beliefs about the harm she has suffered. It must be remembered, of course, that if there is a conflict between D and V's conception of the good, one of them will inevitably be coerced

according to a conception that they reasonably reject. In these cases, it is less objectionable to coerce the wrongdoer given that he was in a better position to avoid being subject to this coercion.

4. Quantifying Compensation

The conclusion of section 3 is consistent with both *The Subjective View* and *The Mixed View*. Now, however, a further question arises. If a victim has an actionable claim in type-(1) cases, how much should she be compensated? *The Subjective View* holds that she is entitled to be compensated according to her own beliefs. This is the second claim made by *The Mixed View*.

Perhaps the following argument will be made in favour of *The Subjective View*. When D wrongs V, it is foreseeable *that* V will be harmed, but the *extent* of the harm may not be foreseeable. If V has some condition that makes her harm greater than expected, it seems fair to require D to compensate her for the entire injury, including the unforeseeable portion. This is a well-recognised legal principle, which I discussed in the introduction: the 'thin skull rule'.[24] *The Subjective View* might be seen as an extension of the thin skull rule. Some victims have thin skulls, others have thin beliefs. Either way the wrongdoer must take his victim as he finds her.

However, this argument should be resisted. To illustrate the implications of *The Subjective View*, consider the following case:

> *Lightning Bolt*: Achilles and Narcissus are struck by a lightning bolt recklessly issued from a conjurer. Achilles receives an injury to his heel, which paralyses him, while Narcissus receives a shallow wound. Narcissus' wound leaves a faint scar, but as he is extraordinarily vain, he sincerely believes that he is harmed as much as Achilles and demands equal compensation. The conjurer has enough to pay both victims, but as his coffers are running dry, doing so would leave him very badly off.

The Subjective View implies that Narcissus should receive equal compensation to Achilles. But it is intuitive that although both have some claim to compensation, Narcissus is not entitled to as much as Achilles. This asymmetrical intuition is, it seems, based on the judgment that Narcissus' beliefs about his wellbeing are false. We are not willing to render the conjurer so badly off to respect Narcissus' false beliefs, but we are willing to do so in response the real harm inflicted on Achilles.

This suggests that the truth of the victim's beliefs about the extent of her harm affect what, following Victor Tadros, we can call the *maximum harm threshold* (Tadros 2014). This is a threshold that sets limits on the enforcement of duties. We are often not permitted to enforce compensatory duties if this will place the wrongdoer below a certain threshold of wellbeing. Suppose that D steals a small amount from V, but fully compensating V will cost D his life. It is not permissible to enforce D's duty to V because doing so will inflict too great a harm on D. The burden that D would have to bear to fulfil his duty surpasses the *maximum harm threshold*.

In *Lightning Bolt*, if the conjurer compensates Achilles, he will be very badly off. Nevertheless, it is acceptable to enforce his duty to Achilles: the cost of enforcing his duty

falls below the *maximum harm threshold*. At least, one might think, he is compensating for a real harm. Moreover, if inflicting paralysis or a similar significant harm on the conjurer was the only way to *prevent* him paralysing Achilles, this would also be permissible.[25] But it is less plausible that he can be made to compensate Narcissus, whom he has barely harmed, to the same extent that he would be required to compensate a permanently paralysed person, if doing so will render him very badly off.

What explains this asymmetry between victims of real harm and victims of perceived harm? Perhaps the best explanation is deflationary: we should not be surprised by this intuition or assume it is an anomaly in need of explanation. One's wellbeing and one's autonomous pursuit of ends are normatively distinct interests, and it is not surprising that the duties they generate have different properties, including different maximum harm thresholds. Consider an analogy with harming and promise-breaking. There is a presumptive duty against doing either of these, but typically the interest in not being harmed is greater than the interest in not being the recipient of a broken promise (although there are some act-tokens of promise-breaking that are worse than some act-tokens of harming). Accordingly, the maximum harm thresholds are typically different: I may be required to bear a burden of a certain size in order to avoid harming you but not to avoid breaking a promise to you. Similarly, Achilles' interest in not suffering very serious harm is greater than Narcissus' interest in maintaining his vanity, so the maximum harm thresholds of the conjurer's duties to avoid interfering with these interests are correspondingly different.

An alternative explanation for *Lightning Bolt* it that Narcissus' beliefs should be rejected because they are epistemically unreasonable, and only beliefs meeting a standard of epistemic reasonableness should be accommodated by *The Mixed View*. This epistemic requirement applies both to the victim's judgement about whether she is harmed and to her judgment about the extent of her harm. It is possible that the first judgment is reasonable but the second is not. A rational person operating under the burdens of judgment[26] might come to overvalue his looks, but not to the extent that he believes a faint scratch is as harmful as permanent paralysis. Given this possibility, a liberal who accepts the Anti-Perfectionist argument against *The Objective View* might also accept my judgment about *Lightning Bolt*.

At this point it may be doubted whether damages paid to victims who have not been harmed are truly compensatory. They differ from ordinary compensation in that they do not respond to harm, but they also differ from other remedies, such as vindicatory damages, because they are calculated according to the victim's perceptions about harm (subject to the maximum harm threshold). We should not assume, however, that compensation only responds to harm (Tadros 2014). Alternatively, a different solution would be to opt for vindicatory damages and offer all victims a fixed sum to recognise their beliefs about the harm they have suffered.[27] For now, I am happy to leave these options open and assume that either is consistent with D's corrective duties. My present purpose is only to argue that the maximum harm threshold for duties to compensate for perceived harm is typically lower than that for duties to compensate for actual harm; there may be a range of satisfactory remedial options that are consistent with these constraints.

5. Defending *The Objective View* against *The Subjective View*

So far we have seen that *The Subjective View* has plausible implications in type-(1) cases. What about type-(2) cases where D wrongfully harms V but V does not believe that she is harmed? It must be remembered that the question is whether D owes a potentially enforceable moral duty to offer compensation to V, not whether V must accept, as V cannot be forced to accept compensation. So assuming V seeks damages, the question is this: if D could provide decisive evidence that he has not harmed her by her own standards, can D rely on this to escape paying damages to V?

Let us consider some cases. As before, these will depend on particular views about wellbeing. For example, if you think that Mother Teresa was deeply misguided to believe that physical suffering is a benefit because it brings the victim closer to identifying with Jesus Christ, injuring a devout follower of Mother Teresa will be a type-(2) case. Following on from *The Reticent Philosopher*, here is another case based on a philosophical controversy about wellbeing.

> *The Shallow Philosopher:* V is desperate for fame, but her only talent is in philosophy. She spends her life writing a series of philosophical works that she hopes to publish with a reputable publisher. The works are brilliant, advancing knowledge on a variety of philosophical problems. But V's publisher, seeking wider circulation but negligently ignoring the author's wishes, wrongfully turns the works into a rhetorical and hysterical pamphlet. The pamphlet is successful: it is widely bought and distributed, dumbing down the opinions of readers all over the world. V becomes internationally famous and enjoys her newfound success. As she is a Hedonist about wellbeing she believes that she is made better off by the distribution of the pamphlet than she would have been had the original works been distributed.

Again, we must assume that Hedonism is false and D makes V's life go significantly worse by ruining her achievements, even though this does not negatively affect her mental states. Moreover, we must assume that the transformation of a great work of philosophy into a flamboyant pamphlet considerably diminishes its value. (It is also worth noting that *The Shallow Philosopher* can be transformed into a non-offsetting case by stipulating that V is indifferent about the publisher's intervention. If this were true, V would falsely believe that she is not harmed, but would also not be benefitted by having her preferences satisfied, thus avoiding the additional complications in offsetting cases).

The Subjective View holds that, in type-(2) cases, D does not owe any compensation to V as V cannot make a good faith claim that she is worse off. This, I will argue, is implausible. It is hard to believe that D does not owe V any compensation in *The Shallow Philosopher* and this conclusion is, I suggest, generalisable across all type-(2) cases.

A) The Paternalistic Argument

The primary reason why we should reject these implications of *The Subjective View* is that there are paternalistic reasons to compensate V: V is harmed and D has a duty to provide her with the opportunity to counterbalance that harm. The award may encourage V to recognise real harms in future, and even if her beliefs will not change, it may make her better off in other ways. Since money is instrumentally valuable, V may use her resources to further some other end that will improve her wellbeing.[28]

The obvious criticism at this point is that acting paternalistically is deeply objectionable. Worse still, the claims I have made so far appear inconsistent. Since *The Mixed View* rejects paternalistic reasons to withhold compensation in type-(1) cases, why should we look favourably on them now? This depends on the precise circumstances in which paternalism is objectionable. Although there is good reason to object to many instances of paternalism, there are several fundamental differences that make the paternalistic reasons to which I am appealing less problematic than their application in type-(1) cases.[29]

The most troubling examples of paternalism involve coercing a person in conflict with her choices. In *The Reticent Philosopher* and other type-(1) cases, recognising that D has benefitted V would require violating her choices by refusing her request for compensation, and this would allow D coercively to interfere with V without incurring any corrective duties. But in the present case the victim's choices are not violated by the law. The question is just whether compensation ought to be offered. It is at the victim's discretion whether she seeks to enforce D's duty and so her choices are not thwarted.

Paternalism is also objectionable if one attempts to influence a person's behaviour for her own benefit by making her preferred goals harder to achieve. For example, the state may tax undesirable activities, making them difficult to pursue, even if it does not prohibit them. This charge of paternalism is also inapplicable here. By offering the victim compensation, the wrongdoer does not make it more difficult for her to persist with her false conception of wellbeing; it merely makes it easier to adopt the correct one. It gives her an *opportunity* to improve her wellbeing that she does not have to take.

Jonathan Quong offers a more expansive account of paternalism. He notes that encouraging someone to make the right choice might be paternalistic without limiting liberty (Quong 2010: 80 – 2). He adopts 'the judgmental definition', according to which an act is paternalistic if it seeks to improve someone's position and is motivated by a negative judgement about that person's ability to make a competent decision for herself. This charge of paternalism seems to apply in the present case, as the paternalistic rationale to recognise D's duty to compensate V is grounded in the judgment that V is mistaken about her wellbeing.

However, on closer inspection, the charge does not apply. As I mentioned in the discussion of the normative grounding of Anti-Perfectionism, judging that a person has a false belief does not entail the further judgement that she lacks the *ability* to form true beliefs. In fact, it is consistent with the opposite judgment. To illustrate, suppose that a bright student makes a mistake in an exam. Judging that she makes a mistake in a particular instance is consistent with the judgment that she has a higher than average ability to perform well in exams. Since a judgment about a person's general ability is more reflective of their character than a judgment about a particular mistake, it is not clear why the latter judgment is disrespectful when, in making it, one can refrain from making the former judgment.[30]

Quong offers the example of paying one's daughter to take piano lessons. He argues that this is objectionable, even though it does not limit liberty, because it is motivated by a negative judgment about the daughter's ability to decide what is in her best interests. But the objectionableness of the parent's behaviour in this example seems attributable to the fact that choosing not to play the piano is not sufficiently detrimental to the daughter's interests. There are many valuable things one can do with one's time and playing the piano is only one of them. Suppose instead that the parent pays the daughter

to avoid taking unnecessary risks, believing that she is generally good at making decisions about risk but is liable to make a mistake in this case. This is more akin to *The Shallow Philosopher*, as in this case if V is not compensated her overall wellbeing is seriously affected. If we modify Quong's case in this way, I doubt that the parent's paternalistic act is very objectionable.

As before, we can adopt a different strategy and argue that, even if these paternalistic reasons are weak, D lacks a complaint against the law acting on them. D is, again, coerced by the law once he incurs liability: V is given a power exercisable against him to co-opt the court in enforcing his corrective duties. But D was in the best position to avoid incurring a duty towards V, and therefore to avoid being coerced by the court. As before, the opportunity D had to avoid putting himself in this position substantially reduces the worry about the justification of laws that coerce those to whom they apply.

6. The Bad Faith Objection

There is an important objection to the argument of section 5. If V can claim compensation even if she believes she is better off, then she is claiming in bad faith.[31] In *The Shallow Philosopher*, there is something duplicitous about V's claim. She seeks compensation from D even though she has not been harmed according to her sincere (albeit incorrect) beliefs. Isn't *The Subjective View* right to insist that a claim must be made in good faith? Call this the *bad faith objection*.

First of all, the bad faith objection is not an objection to recognising a moral duty on behalf of the wrongdoer to offer compensation; it is only an objection to the victim's standing to enforce that duty. Even if the objection has force, therefore, a number of other responses to the duty besides enforcement by the victim would be available. The court could make a public declaration that the defendant owes such a duty and ought to fulfil it. There is case law to suggest that civil courts currently have jurisdiction to make similar declarations as a way of vindicating victims' rights, even if the defendant is not liable for any further damages.[32] Alternatively, there would be no *moral* objection (although there may be legal constraints) to the wrongdoer's duty being enforced on behalf of the victim by those who do not lack standing to do so, such as the victim's family members or descendants. Having narrowed the scope of the objection, let us now see whether it has any force.

In some type-(2) cases, it is too strong to insist that victims who pursue their claim must be acting in bad faith. V might recognise the possibility that her beliefs are wrong, and that she is very badly off if they are. She would not be claiming in bad faith if she sought compensation as a form of insurance, to improve her wellbeing in other areas, in case she had the wrong belief. This is not necessarily a duplicitous expression of bad faith; it might express a degree of uncertainty in her convictions about wellbeing. Furthermore, it does not follow from this that she does not *sincerely* believe that she is not harmed. This would mischaracterise the nature of her belief. Absolute certainty, or even substantial certainty, is not a necessary condition of belief. Admittedly, this thesis on the conditions of belief requires more of a defence than I can offer here, although there are plenty of examples in which it is intuitive that one can believe without full confidence. One class of examples is recollection: I can believe something about a past event even if my memory is sufficiently hazy that I lack confidence in this belief.

Moreover, not all legitimate claims to compensation require that the victim has in fact been harmed.[33] For example, in the English law of damages, a claimant's compensation is not always reduced to deduct benefits flowing from the wrong. But this would be illogical if compensation is universally a response to harm. Charitable gifts to victims are causally dependent on the wrong having occurred, but such benefits are not deducted from the claimant's compensation.[34] This may be for a number of reasons. Perhaps it is unfair if the wrongdoer benefits from the charity of others. Also, deducting such benefits may discourage charitable gifts to victims. Either way, the victim receives compensation for aspects of the harm that are already compensated.

Rules like this should encourage us to be clearer about the content of the good faith requirement. The objection assumes that V must claim in good faith that all of her compensation responds to harm that she believes has been inflicted on her. This is not true of charitable gifts, since the victim can accept that she is doubly benefited without the kind of bad faith that would undermine her claim. Given this, we should not be dogmatically opposed to compensation that does not always respond to harms recognised by the victim.

In any case, it is not clear that good faith is generally necessary for valid compensation claims. I have assumed that beneficially interfering with others can be wrongful. Suppose that V is a sado-masochist and enjoys others inflicting pain on him. V wants D to inflict pain and would consent to this if D asked. On the basis of this hypothetical consent, D wounds him. Clearly it was not permissible for D to do this despite the fact that V believes he is benefitted. Equally, it is not permissible for doctors to touch or perform surgery on patients without their consent, even if the patients believe such actions are to their benefit and would give consent if asked. And finally, it is not permissible for D negligently to allow the work to be accessed in *The Shallow Philosopher* even though V does not believe that it makes her worse off. Since good faith is not necessary for the initial duty not to interfere with others, we should question whether it is necessary for the corrective duties that wrongdoers incur as a result of those interferences.

Finally, the wrongdoer in type-(2) cases may not subscribe to an erroneous conception of wellbeing. From his perspective, he will have failed to fulfil his corrective duties if he does not offer compensation to his victim. He also acts in bad faith if he knows he has harmed someone and has been sued by his victim, but refuses to pay damages by appealing to the victim's conception of wellbeing, which he knows to be mistaken. It is hard to see why the victim's bad faith should debar her claim whilst the wrongdoer's bad faith should not hinder him.

7. Conclusion: Arriving at *The Mixed View*

I have made three general claims about the role of the victim's (sincere and reasonable) false beliefs in compensating for the consequences of wrongful action. First, when V is benefitted but believes she is harmed, we should compensate out of respect for her autonomously chosen ends. This may burden the defendant with a victim's mistake, but this can be justified to him, primarily because the defendant was in the best position to avoid being burdened in this way.

Second, although we should grant claims to victims in these cases, these awards must be limited to a reasonable threshold. It is not plausible that defendants should bear

extreme burdens because of the erroneous beliefs of their victims. Nor does respect for autonomy require treating severely harmed victims, such as those who have suffered amputations or paralysis, equivalently to those with false, idiosyncratic beliefs.

Finally, when V is harmed but believes she is benefitted, we have paternalistic reasons to compensate her. Compensation is instrumentally valuable and may be used to improve some other component of her wellbeing, or to benefit others, and there is nothing objectionably paternalistic in this since the award does not make it more difficult for her to pursue her chosen ends. Again, this can be justified to defendants, primarily on the grounds that they could have avoided liability by refraining from wrongdoing.

In making these claims, I defended a compromise between *The Subjective View* and *The Objective View* that I call *The Mixed View*. *The Mixed View* might be accused of arbitrariness in its attempt to strike this balance. Let me conclude by offering a few reasons why I think that any appearance of arbitrariness is purely superficial. One asymmetrical feature of *The Mixed View* is the way in which autonomy-respecting and paternalistic reasons operate. Autonomy-respecting reasons override paternalistic reasons in type-(1) cases but paternalistic reasons override autonomy-respecting reasons in type-(2) cases. This is because the impact of both kinds of reasons depends on the objectionableness of paternalism. But the objectionableness of paternalistic acts, I have argued, is largely conditional on violating a person's choices or making it more difficult for her to pursue her goals.[35] On this plausible view about paternalism, the approach to compensation offered by *The Objective View* is only problematic in type-(1) rather than type-(2) cases. In the former, refusing to compensate V contradicts her choices. In the latter, offering compensation does not contradict her choices because the award is not forced upon her. Instead, she is given discretion over the enforcement of D's moral duty.

The asymmetry also appears less arbitrary when we attend to the role of avoidability in the argument. The wrongdoer's opportunity to avoid breaching his primary duty diminishes his complaint against incurring an obligation to pay compensation. In the first stage of the argument, this creates space for the law to act on autonomy-respecting reasons: the wrongdoer cannot complain that he must bear a burden for the sake of V's autonomy because he could have avoided wronging her. In the second stage, this creates space for the law to act on paternalistic reasons: again, he cannot complain that he must compensate his victim because he could readily have avoided incurring this burden. As long as some positive case can be made in the victim's favour in both scenarios, even if this positive case is made in very different ways, the avoidability of D's wrongdoing reduces his ability to rebut it.

Put simply, there is a conflict of reasons in these cases. We have reasons to respect the autonomous choices of individuals, but we also have reasons to respond to real harm, and these reasons can conflict. *The Mixed View* shows greater sensitivity to the reasons we have, as *The Subjective View* ignores our reasons to respond to harm and *The Objective View* ignores our reasons to respect autonomy.

References

Alexander L and Ferzan K (2009) *Crime and Culpability*. Cambridge: Cambridge University Press.

Arneson R (1980) Mill versus Paternalism. *Ethics,* 90: 470–89.

Chan J (2000) Legitimacy, Unanimity, and Perfectionism. *Philosophy & Public Affairs* 29: 5–42.

Clayton M (2006) *Justice and Legitimacy in Upbringing*. Oxford: Oxford University Press.

Clayton M (2012) The Case Against the Comprehensive enrolment of Children. *Journal of Political Philosophy* 20(3): 353-364.

Clayton M (2000) The Resources of Liberal Equality. *Imprints* 5: 63.

Cohen J (1989) The Economic Basis of Deliberative Democracy. *Social Philosophy and Policy* 6(2): 25 – 50.

Dworkin R (2000) *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, MASS: Harvard University Press.

Dworkin R (1972) Paternalism. *The Monist*, 56: 64–84

Feinberg J (1986) Wrongful Life and the Counterfactual Element in Harming. *Social Philosophy and Policy* 4(1): 145 – 178.

Galston W (1991) *Liberal Purposes*: *Goods, Virtues, and Diversity in the Liberal State*. Cambridge: Cambridge University Press.

Gardner J (2011) What is Tort Law For? *Law and Philosophy* 30: 1 – 50.

Larmore C (2008) *The Autonomy of Morality*. New York: Cambridge University Press.
- (1992) The Limits of Aristotelian Ethics. *Nomos* 34: 193 – 4.

McMahan J (2005) The Basis of Moral Liability to Defensive Killing. *Philosophical Issues* 15: 386.

Nagel T (1991) *Equality and Partiality.* Oxford: Oxford University Press.

Parfit D (1984) *Reasons and Persons*. Oxford: Clarendon Press.

Parr T 'Taking the Envy Test Seriously' (unpublished ms).

Quong J (2010) *Liberalism without Perfection*. New York: Oxford University Press.

Rawls J (2005) *Political Liberalism*. New York: Columbia University Press.

Rawls J (1985) Justice as Fairness: Political not Metaphysical. *Philosophy and Public Affairs* 14: 246.
Rawls J (1971) *A Theory of Justice*. Harvard: Cambridge, MASS.

Raz J (1986) *The Morality of Freedom*. Oxford: Oxford University Press.

Raz J (1989) Facing Up: A Reply. *Southern California Law Review* 62: 1153.

Raz J (1990) Facing Diversity: The Case of Epistemic Abstinence. *Philosophy and Public Affairs*, 19(1): 3 – 46.

Ripstein A (2006) Beyond the Harm Principle. *Philosophy & Public Affairs* 34(3): 216-246.

Ripstein A (2009) *Force and Freedom: Kant's Legal and Political Philosophy* Cambridge, MASS: Harvard University Press.

Scanlon T (2000) *What We Owe to Each Other*. Harvard: Cambridge, MASS.

Scheffler S (2015) Distributive Justice, the Basic Structure and the Place of Private Law. *Oxford Journal of Legal Studies* 35 (2): 213-235.

Slavny A (2014) Nonreciprocity and the moral basis of liability to compensate. *Oxford Journal of Legal Studies* 34(3): 417-442.

Tadros V (2007) *Criminal Responsibility* Oxford: Oxford University Press.

Tadros V (2014) What Might Have Been in Philosophical Foundations of the Law of Torts John Oberdiek (Ed.) Oxford: Oxford University Press, 171 – 92.

Thomson J J (1991) Self-Defense. *Philosophy and Public Affairs* 20: 283.

Todd S (2005) Wrongful Conception, Wrongful Birth and Wrongful Life. *Sydney Law Review* 27: 525.

Tsai G (2014) Rational Persuasion as Paternalism. *Philosophy and Public Affairs* 42(1): 78 – 112.

Wall S (2010) Neutralism for Perfectionists: The Case of Restricted State Neutrality. *Ethics*, 120: 232–256

Cases

Ashley and another v Chief Constable of Sussex Police [2008] UKHL 25

Emeh v Kensington Area Health Authority [1985] QB 1012

Hunt v Severs [1994] 2 AC 350 (HL)

McFarlane v Tayside Health Board [2000] 2 AC 59

Page v Smith [1996] AC 155

Parkinson v St James and Seacroft University Hospital NHS Trust [2002] QB 266

Parry v Cleaver [1970] AC 1 (HL)

Rees v Darlington Memorial NHS Trust [2004] 1 AC 309

Smith v Leech Brain & Co. [1962] 2 QB 405

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[1] For discussion of competing theories, see Derek Parfit (1984: 493 – 502) and Thomas Scanlon (2000: 113 – 126). These are discussions of theories of wellbeing rather than harm, but the same considerations apply to both concepts. Indeed, it is arguable that harm *just is* setback to wellbeing, though I cannot defend this claim here. I assume that this is the correct view about harm and refer to victims' beliefs about harm and wellbeing interchangeably. For a defence of the view that harm is setback to wellbeing, see Victor Tadros (2014: 171 – 92).

[2] See Lord Steyn at p. 82 and Lord Millet at p. 114. Note the decision that the child was beneficial *to* the parents, not merely that children are valuable but one must want and choose a child in order to realise her value. For a discussion of the relationship between desires and reasons, see Scanlon (2000).

[3] In the following discussion, I refer to both beliefs about harm and personal ends, the frustration of which is harmful from the victim's perspective. Most of the cases I discuss involve the wrongful interference with an end, where that end is motivated by a belief or set of beliefs that form part of an individual's conception of the good. But the core idea of Anti-Perfectionism, as I understand it, applies to coercion on the basis of any claim grounded in a conception of the good that an agent can reasonably reject, even if the belief that grounds the rejection does not motivate one of the agent's ends, or does not do so at that time that she is coerced. I restrict the scope of the Anti-Perfectionist argument to beliefs about the *content* of one's conception of the good, rather than beliefs about the most efficient means to achieve it, but the normative force of the Anti-Perfectionist argument does not depend on whether a belief about the good motivates an end. That the core idea applies to both beliefs and ends will become clearer in section 3B when I discuss possible normative bases for Anti-Perfectionism.

[4] On some views about harm, these cases are impossible. For example, if harm is setback to preferences, and the victim's preferences are not frustrated by the wrongdoer's actions, then the victim is not harmed. I reject preference-based accounts of harm, although I lack space here to summarise the arguments against them. For a more detailed critical discussion, see Tadros (2014). Similarly, some cases that appear to involve such a conflict may, on closer inspection, involve a conflict between two incommensurable but valuable conceptions of wellbeing. For a defence of value pluralism, see Joseph Raz (1986). I do not rule out value pluralism or the possibility that preferences play an important role in wellbeing. I do rely on the assumption that not all cases that appear to involve this conflict can be explained away; there are some genuine conflicts between accurate and mistaken judgments about wellbeing.

[5] In this paper I will restrict discussion to mistaken beliefs that are nevertheless reasonable in the Rawlsian sense. The most plausible challenge to the orthodox view exemplified by *McFarlane* that the law ought to ignore subjective beliefs about harm is posed by reasonable, rather than

unreasonable, beliefs. If *any* subjective beliefs ought to be accommodated, reasonable beliefs are the best candidates.

[6] For this possibility, see Rees v Darlington Memorial NHS Trust [2004] 1 AC 309.

[7] For a series of failed sterilisation cases demonstrating an inconsistent approach to the arguments addressed in this paper, see Emeh v Kensington Area Health Authority [1985] QB 1012, McFarlane v Tayside Health Authority [2000] 2 AC 59, Parkinson v St James and Seacroft University Hospital NHS Trust [2002] QB 266 and Rees v Darlington Memorial NHS Trust [2004] 1 AC 309.

[8] For example, Lord Steyn referred to general considerations of distributive justice (83) and Lord Millett held that it is offensive not to consider a child as a blessing (114).

[9] The victim's belief that she is worse should, of course, be sincere. This requirement resembles Ronald Dworkin's envy test. See Dworkin (2000: 67 – 68 and 134 – 62). The central difference is that the envy test is best characterised as a device for interpersonal comparison (see Matthew Clayton (2000: 77 – 8), and the test I appeal to here is intrapersonal.

[10] I exclude from discussion cases in which one's mistaken belief about wellbeing is due to a false empirical belief. I will assume that, in all cases, victims are fully informed about the relevant facts. I think it is less plausible that we have reasons to respect beliefs that are simply misinformed, though I will not explore these cases any further. For a similar claim about Dworkin's envy test, see Tom Parr, 'Taking the Envy Test Seriously' (unpublished ms).

[11] I emphasise negligence in the present case to determine whether V could be compensated even if she is better off. It remains true that she would possess a number of other rights, not grounded in negligence, such as preventing further publication of the work.

[12] Some doubt the possibility of harmless wrongdoing. It is not straightforward to construct cases of genuine harmless wrongdoing, but I argue elsewhere that such cases are possible. See Adam Slavny and Tom Parr (2015: 100-114).

[13] On the continuity of reasons supporting a primary duty to avoid wrongful interference, see John Gardner (2011).

[14] This case is taken from Matthew Clayton (2012).

[15] It might be suggested that the civil court only coerces defendants if it finds them liable. Claimants are never coerced – their requests for remedy are merely rejected. However, I rely on broader notion of coercion. The court coerces claimants in the sense that most law is coercive: it imposes rules on them, which impact significantly on their lives, backed by the threat of legal sanction. Since claimants are prohibited from undermining the judgment of a civil court by extracting a remedy privately, they are coerced by it in this sense.

[16] For example, see Arthur Ripstein (2006). For a fuller development of this view, see Ripstein (2009).

[17] See, for example, Mathew Clayton (2006: 93 – 124) (applied to the upbringing of children) and Joshua Cohen (1989: 25 – 50) (applied the democratic defence of socialism).

[18] On the epistemic shallowness of Liberal Anti-Perfectionism, see Raz (1990).

[19] For Rawls' account of the two moral powers, see Rawls (1971: 442 – 449).

[20] See Matthew Clayton (2006: 15). For an argument that violation Dworkin's envy test, which is the appropriate metric of advantage for Anti-Perfectionism, usurps citizens' autonomous judgments, see Tom Parr, 'Taking the Envy Test Seriously' (unpublished ms).

[21] For example, Raz argues that 'Not all perfectionist action is coercive imposition of a style of life. Much of it could be encouraging or facilitating action of the desired kind, or discouraging undesired modes of behaviour.' See Raz (1986: 161 and 417). See also Joseph Chan (2000).

[22] This line of reasoning is employed in Scanlon's contractualist theory. He states that "an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject." See Scanlon (2000).

[23] For further discussion on the role of avoidability as a ground of corrective duties see Slavny (2014).

[24] For a statement of the thin skull rule in English law, see Smith v Leech Brain & Co. [1962] 2 QB 405.

[25] Since the conjurer is culpable for his recklessness, this conclusion follows from most views about self-defence. See Larry Alexander and Kimberly Ferzan (2009: 112 – 3,) Jeff McMahan (2005) and Judith Jarvis Thomson (1991).

[26] These include differences in education and experience; the vagueness of moral concepts; the complexity of evidence; differences in the way evidence is weighted; and the complexity of competing normative considerations. A reasonable belief in the epistemic sense is one that a citizen, operating under the burdens of judgement, might sincerely come to hold.

[27] For a more detailed discussion of the available options in medical negligence cases involving costs relating to bringing up children, see Stephen Todd (2005).

[28] It will not always be true that compensation makes the victim better off. Imagine that the person in *The Shallow Philosopher* is so irreversibly steeped in her hedonism that she uses the money to buy an experience machine from Robert Nozick, making her life go even worse. In principle, if a wrongdoer knows or has good evidence that this is the case, this will undermine the paternalistic rationale for offering compensation. In practice, it is unlikely that a defendant would have such knowledge, but we can accommodate this possibility by making the duty conditional. The duty is engaged only if there is no good evidence that the victim will use the resources to make herself worse off.

[29] There is disagreement about how best to define paternalism. Violating a person's choices for their own benefit is paternalistic on any almost any definition. Perhaps the most restrictive definition is that a paternalistic act limits a person's liberty. Writers who accept the liberty-limiting definition include Gerald Dworkin and Richard Arneson. See Dworkin (1972: 64–84) and Arneson (1980: 470–89).

[30] Some argue that the state can respect citizens even if it judges that they are mistaken by treating them as rational agents. It can do this by publically appealing to the reasons that make the state's favoured ideal sound. See William Galston (1991: 109).

[31] For Dworkin's discussion of the good faith constraint in his political theory, see Dworkin (2000: 148 – 61).

[32] See *Ashley and another v Chief Constable of Sussex Police* [2008] UKHL 25.

[33] The example of the surgeon who performs cosmetic surgery without the victim's consent has already been discussed. See note 14 supra.

[34] See *Parry v Cleaver* [1970] AC 1 (HL). Although if the claimant is given gratuitous care by family she can sue for normal cost but holds recovery in trust for the carer, see *Hunt v Severs* [1994] 2 AC 350 (HL).

[35] There may be other forms of objectionable paternalism, such as that involving rational persuasion. See George Tsai (2014). I believe that material distinctions can be made between Tsai's examples and the present case, but I lack the space to pursue that argument here.

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Acknowledgements:
I would like to thank Claire Bergum, Chris Mills, Dr T. A. Parr (Oxon), Victor Tadros and two anonymous referees for PPE for their comments on this paper.