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Why Answer?

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Nils Jansen, *The Idea of Legal Responsibility*, **O.J.L.S.** (forthcoming, 2014) available at [SSRN](#).

Prof. Nils Jansen's new article, *The Idea of Legal Responsibility*, is an ambitious work of tort theory. Jansen engages some of the most basic questions of private law. The article's rewards are found on two levels. First, the argument it propounds—that responsibility in tort can be usefully (if not exclusively) framed in terms of restitution—is intriguing and offers another take on corrective justice. Second, the framework around which Jansen builds his argument – the evolution of the law of restitution in scholastic and early modern European private law— is one that may be unfamiliar to many common lawyers. Jansen's article make a persuasive case that contained within this history are lessons that transcend the common and civilian divide.

Professor Jansen's thesis is deceptively simple: He argues that the best justification for tort liability in many modern legal systems on both sides of the Atlantic is a principle of "responsibility" that has its roots in the doctrine of unjust enrichment. Early in the article Jansen asserts that the question that all tort theorists in both the common law and civilian legal cultures must answer is, "why be responsible for another's loss" and that the answer to this question lies in the "moral principle against unjust enrichment" (P. 3). Yet by the end of the article, Jansen restates his position so that it seems that unjust enrichment is useful today because it helps illustrate the "constitutionalisation" of tort law, a modern phenomenon where the priority of basic human rights determines the variety of tort doctrines that dominate today's legal landscape. This tension is interesting and worth considering.

Jansen is quite clear at the outset of the article about what a tort theory needs to do. It must explain responsibility in tort for losses that do not arise from the defendant's wrong-doing. According to Jansen, the chief problem with almost all modern corrective justice theorists (Pufendorf, Grotius and Weinrib, for example) is that "they cannot account for the fact that corrective justice is not only concerned with the correction of the consequences of wrongful behavior (wrongs), but also—and often more importantly—with the correction of losses and gains resulting from actions that are legally permitted" (P. 14, emphasis added).

It is clear that that in this article Jansen deals only with a set of concerns within one side of the modern tort theory debate. Although he mentions some well-known law and economics theorists in footnotes, he frankly chooses not even to address the solutions they offer. His target is broad, nonetheless: as he sees it, tort theory in both the common law and civilian systems took a wrong turn when it (and tort doctrine) became single-mindedly fixed around fault and negligence, leaving trespass and strict liability as either anachronisms or riddles to be resolved through even more clever fault-based explanations.

So Jansen goes back to the beginning: to the sixteenth century (and earlier). In the Christian doctrine of penitence we can see the roots of the solution to our twenty-first century problem. According to Jansen, the scholastic theory of restitution "formulated a comprehensive system of non-contractual obligations" (P. 5). To be a good person meant acknowledging and paying penance for the wrongs one committed before God; including wrongs that harmed other people. The doctrine of *restitutio* developed by Aquinas from Aristotle gave structure to this theological impulse by identifying the form of secular property interests which, if trespassed upon, entailed an obligation of repair.

Jansen provides a fascinating account of how the early doctrine of *restitutio*, which, he persuasively argues, was not fault-based, was marginalized in favor of a system of responsibility conditioned on fault. Rejecting a unified natural law architecture, Grotius divided wrongs into two groups—wrongful gains (unjust enrichment) and wrongful losses (torts)

and insisted that responsibility for the latter could only be justified on the basis of faulty (wrongful) conduct. Pufendorf added to this a political dimension; stripping away natural law, he justified responsibility for wrongful losses by reference to the state; a person is responsible for the losses caused to others when they unreasonably failed to conform to the non-criminal conduct-guiding rules of the state (P. 12). Finally, modern corrective justice theorists like Weinrib took the final step and argued that fault-based corrective justice was required not by God, not by political theory, but by the very conception of tort law itself.

Jansen's main rebuttal to the advocates of fault is that they excise so much of tort law (in both the common law and civilian systems) that their accounts fit neither the law nor our moral intuitions. Jansen's main exhibits in his case against "fault-oriented" corrective justice are cases of necessity, such as *Vincent v. Lake Erie* and strict liability for ultra-hazardous activities. In these cases, liability is imposed even though the defendants acted reasonably. Therefore their liability cannot be based on wrongful conduct unless by "wrongful" all we mean is conditional fault (an act that is wrong only if there is no compensation after the doing), a definition of "wronging" or "wrongfulness" which Jansen rejects as empty (P. 17).

Surprisingly, at this moment in his argument, Jansen turns his back on unjust enrichment. It would have been open to him to have argued that cases like *Vincent* are best explained as restitution, and he notes some well-known theorists who make that very claim.. But Jansen does not want to collapse tort law into unjust enrichment. In fact he rejects their conflation, saying that "wrong categories make bad law" (P. 20) and that to slot *Vincent* into unjust enrichment is to make a category error.

Instead, Jansen argues that restitution illuminates the solution to certain problems in the law of necessity, such as why a defendant is liable in tort if she engages in a privileged invasion of property and gains nothing by it (e.g. a stranded hiker who attempts to enter a cabin in the woods but fails to do anything but break the windows). Jansen argues that responsibility in such a case is not based on the literal gain by the defendant, but on her invasion of one of the plaintiff's "basic" rights (P. 25). An invasion of a basic right that is reasonable and of no benefit to the doer creates an obligation to restore losses even though they are not *wrongful* losses.

In this short review I cannot deal in detail with the argument Jansen adopts to determine when invasions of rights that are not wrongful are nonetheless the responsibility of the defendant to repair. (His argument depends heavily on George Fletcher's distinction between reciprocal and non-reciprocal risk.) What I want to note, however, is just how far Jansen's theory strays from its original roots in the law of unjust enrichment. The idea that there are a certain basic rights that tort rules protect in doctrinal forms that are contingent on various circumstances has recently been propounded by a number of liberal tort theorists such as Arthur Ripstein and Greg Keating (whom Jansen generously acknowledges). What is unclear to me is what work the doctrine of unjust enrichment does once the primacy of rights to certain human goods is asserted.

There is a way in which Jansen's argument makes a full circle. He acknowledges that the scholastic theory of penitence was vulnerable to attack by modern secularizers like Grotius and Pufendorf because it asserted a menu of property rights (*dominium*) whose invasion was absolutely prohibited by reference to divine command. Although the content may be very different, the "constitutionalist" approach to tort—that private law rules are fixed around the protection of basic rights—shares a similar structure with the scholastic approach. If a defendant today impairs a basic right whose invasion is absolutely prohibited, her responsibility is to pay restitution for the invasion—regardless of whether she was at fault, or her invasion was otherwise not wrongful. The great difference is that back in the sixteenth century the law could refer to divine command to identify those interests, whereas now judges have to refer to something far more nebulous.

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