

Summary

“Torts, Markets and Equality”

by Paul Bou-Habib

The nature of individual responsibility in the foundations of tort law is taken up in Paul Bou-Habib's article, which considers tort as part of a wider moral and political theory. Both theories which Bou-Habib considers, the market-based approach of Richard Posner and the “Law and Economics” school, and the equality-based approach of Ronald Dworkin, view tort as contributing to a broader social ideal: wealth-maximization for Posner, equality for Dworkin. Bou-Habib argues against Posner's attempt to defend the ideal of wealth-maximization by appealing to public consent. According to Bou-Habib, such consent must most plausibly be interpreted as hypothetical, but hypothetical contractors (along the lines of those envisaged by John Rawls) would not choose wealth-maximizing institutions for the basic structure of society. Here Bou-Habib's argument against Posner on torts parallels Rawls' own argument against utilitarianism: one would not hypothetically consent to rules which allow others to infringe (even compensably) one's security at will. In contrast, Bou-Habib views the hypothetical device employed by Ronald Dworkin to justify the foundations of tort law as more promising, because it mimics an insurance market in which people can make their own individual choices about their security. Dworkin introduces a “principle of correction” to allow imperfections in the actual market to be corrected through tort law. However, Bou-Habib argues that Dworkin's willingness to allow preferences expressed by a group of people in the market to determine the rights of another (by allowing those rights to be overridden, compensably, through tort law) is problematic. Tort law should, he proposes, arguably be based instead on a notion of objective goods, such as Rawlsian primary goods. This would introduce a notion of public interest into tort law and protect people against having their rights invaded on the basis of others' mere preferences.