

Non-Compensable Harms

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It is more or less uncontroversial that when we harm someone through wrongful conduct we incur an obligation to compensate her.¹ But sometimes compensation is impossible: when the victim is killed, for example. Other times, only partial compensation is possible. There may be little one can do, beyond a certain point, for the person one has made permanently quadriplegic; or that a state can do for a person who has spent most of his life in prison on a wrongful conviction. Call any harm whose victim cannot be fully compensated a ‘non-compensable harm’.

Many authors have discussed the duties offenders have to compensate their victims. But to my knowledge none has explored how these duties change when full compensation is impossible. This article is an attempt to explore this largely ignored question. I shall defend the position that when an agent wrongfully harms another, she incurs an undirected duty to promote the impartial good to the extent that the harm she has done is non-compensable. Apart from its theoretical interest, this thesis bears on a range of practical issues. To give just one example, if the best or most appropriate way for a wrongdoer to promote the good is by contributing to a reduction in criminal activity, it may imply that criminals have an obligation to submit to punishment in order to deter others from crime.²

Let me begin by stating my thesis explicitly:

The Non-Compensable Harms Thesis: When one person wrongfully harms another, she acquires a duty to promote the impartial good in proportion to the amount of harm that is non-compensable.

Several elements of the thesis require some explanation. For the purpose of this article I assume a counterfactual-comparative account of harming, according to which an act harms a person just in case, and to the extent that, it leaves her worse off than she would have been had the act not been performed.

¹In what follows I do not claim that compensation is the *only* duty to which wrongful harming can give rise. A wrongdoer might also be required to apologize, for example, to revise her relationship to the victim, or to make a commitment not to commit the offence again.

²Victor Tadros (2011) has pursued a justification of punishment like this. Because Tadros’s justification rests on the obligations criminals have to benefit their own victims, however, he has difficulty accounting for cases in which it is not possible to benefit the victim of a crime. If I am right that wrongdoers have a duty to promote the impartial good when their victims cannot be compensated, this may help explain why criminals can have a duty to submit to punishment even when doing so will not benefit their own victims.

Correspondingly, I will say that an act compensates someone for a harm to the extent that it leaves her no worse off than she would have been, had that harm not been done. That is not the only conception of harm on the market. My arguments are compatible with alternative conceptions of harm, however, because they will still require a corresponding account of compensation, and any plausible account of harm will allow for harms that are not fully compensable.

By ‘the promotion of the impartial good’ I mean the promotion of that which is of intrinsic value, including the elimination of intrinsic disvalue. For the most part, I will remain neutral on what sorts of thing are intrinsically valuable. It is crucial to stress, however, that by ‘impartial’ I do not mean non-person-affecting. Although it might be that the world is improved when it contains more knowledge or beauty, on any plausible axiology it is improved when its inhabitants enjoy more wellbeing or less suffering. Central to my argument is the assumption that possible worlds or states of affairs can be ordered in terms of better and worse overall, where this notion is conceptually independent of their being better or worse for a particular individual, and where one state of affairs is better than another just in case it contains more intrinsic value on balance. Although widely accepted, this view does have its detractors (e.g. Taurek 1977, Foot 1985), and those who deny that we can make sense of one state of affairs being better or worse *simpliciter* than another will not find my arguments persuasive.

I turn now to a defence of the Non-Compensable Harms Thesis. Suppose Jones wrongfully breaks Smith’s finger. Jones has an obligation to fully compensate Smith for this by, for example, paying his medical bills and offsetting any pain and suffering or lost wages. But suppose Jones had instead chosen to kill Smith. Then there would be no way for Jones to compensate Smith. So by ‘ought’ implies ‘can’, Jones would have no duty to compensate Smith. So, it seems that by committing a far more egregious act, Jones can ensure that he has no obligation to compensate his victim, instead of the costly one of compensating him for a broken finger.³

Of course, by killing Smith, Jones may owe compensation to Smith’s family or loved ones because his action also harmed them. And he may be required to submit to legal punishment on, for instance, grounds of fairness or political obligation. But these duties obtain in virtue of facts that are connected only contingently to the original harm. There is no reason to think they will always obtain, or that when they do their strength will be greater than that of the

³Strictly speaking, it may be possible to compensate victims posthumously by satisfying interests they once had in what happens after their deaths. If so, many killings would turn out to be at least partially compensable. However, I am sceptical that many are *fully* compensable; it is hard to see how anything done posthumously could make up for the loss of, for instance, decades of happy life. Moreover, it is probably true of many people that the vast majority of their interests in what happens in the future require for their satisfaction that they remain alive. There seems to be little one can do posthumously to improve the lives of such people. For these reasons, I suspect that even allowing for the possibility of posthumous compensation it would be relatively easy to find cases in which by killing someone, a perpetrator can ensure that she incurs a weaker compensatory duty than she would have incurred had she inflicted a less harmful, non-lethal injury instead.

compensatory duty that would have arisen had the less harmful act been performed instead, so we cannot appeal to them to avoid the result in question. For those who prefer tidiness, we can add that Smith has no family or friends (or even that Jones killed them, too) and that the offence takes place in the state of nature.

The same phenomenon arises when it is *full* compensation that is impossible. Suppose Wright wrongfully causes Edwards to be moderately disabled for a year. Assume that, while doing so would be onerous and expensive, it is possible for Wright to fully compensate Edwards. But suppose Wright had instead chosen to assault Edwards in a way that made him quadriplegic for life. There is still something we can do to improve the lives of the permanently quadriplegic. But it is unlikely that we can raise their wellbeing to the level it would have been at had they not been injured, and let me stipulate for good measure that in the case of Edwards there is a point (relatively easily reached) at which there is *nothing* more that can be done for him. Here, again, it seems we must accept that by perpetrating a much more serious harm a person can ensure that he incurs a far weaker obligation to his victim.

In ‘A Difficulty Concerning Compensation’ (2013), Saul Smilansky considers several cases like these and concludes that they reveal an intractable ‘paradox of morality’. His reason for thinking these cases paradoxical seems to be that they are incompatible with the following principle:

(A) Other things being equal, the strength of the obligation one incurs in virtue of wrongfully harming another correlates with the degree of harm done.

As he puts it,

if [a perpetrator’s] burden can be lightened (or even dismissed altogether) because of the increased harm to the victims, this situation is manifestly morally unsatisfactory, and indeed absurd. (2013: 333)

Seeing no alternative, Smilansky (2013: 336) reluctantly concludes that we must abandon the intuitively attractive view represented by (A). Rather than rejecting (A), however, we could deny that

(B) The obligations one incurs in virtue of wrongfully harming another are exhausted by the obligations one has to *her*.

Instead, we might maintain that the perpetrator of a wrongful harm incurs obligations that track the degree to which she has harmed the victim, instead of the extent to which it is possible to compensate her. Then the situation would no longer be absurd. In doing so, we might appeal to

The Non-Compensable Harms Thesis: When one person wrongfully harms another, she acquires a duty to promote the impartial good in proportion to the amount of harm that is non-compensable.

Since killing a person is much more harmful than breaking his finger, the Non-Compensable Harms Thesis implies that Jones's obligation in virtue of killing Smith *is* more demanding than his obligation in the world where he merely breaks Smith's finger – it is just that the non-compensable portion must be made up for elsewhere. Similar remarks apply when it is full compensation that is impossible. When Wright causes Edwards permanent full paralysis, the thesis implies that his overall obligation is more demanding than it would have been, had he instead caused him temporary moderate disability.

Below I will consider a number of objections to the Non-Compensable Harms Thesis in general and to the argument just made in favour of it in particular. But it is worth registering that the thesis already enjoys at least some intuitive appeal. Many people, I suspect, would find it hard to accept that agent-neutral morality requires us to engage in highly demanding or risky activities to assist the less fortunate by, say, devoting several years of our lives to volunteering in the Peace Corps. But it is much easier to believe that Jones, who has killed an innocent person, could be morally required to do something of the kind.

To be sure, one can uphold the general claim that the perpetrator of a wrongful non-compensable harm can incur an obligation that is not directed *to* her victim, while denying that the content of that obligation is the promotion of the impartial good. Two alternative ways of filling in that content are that it involves the duty to suffer for one's wrongdoing, and that it involves the duty to repent for it. The view that wrongdoers should suffer for their misdeeds has some pedigree by way of the religious doctrine that wrongdoers should atone for their sins by engaging in penance, but it is not a serious rival to the Non-Compensable Harms Thesis for several reasons. First, imagine Jones ends up enjoying his experience in the Peace Corps and becomes a happier and better person for it. We would not, I think, judge that he has failed to discharge the duty he incurred by killing Smith. Second, although many people believe that wrongdoers deserve to suffer, it is harder to believe that they could have a moral duty to suffer, such that it would be impermissible for them not to inflict suffering upon themselves.

Finally, even if we do maintain that the perpetrator of a non-compensable harm is required to suffer for it, in fact it is not obvious that this view supports the claim that the content of the obligation is suffering rather than the promotion of the good. For, many people also consider the suffering of evildoers to be an intrinsically good state of affairs. Thus, even if perpetrators of non-compensable harms have a duty to suffer, this can be understood as the view that they have a special duty to promote the good. Furthermore, since it is independently plausible that if a person has a duty to bring about some outcome then she ought to bear the costs of bringing it about herself, this argument can avoid the unpalatable conclusion that the perpetrator may discharge her duty by inflicting suffering on other wrongdoers rather than on herself.

A second possibility for filling in the duty acquired by the perpetrator of a non-compensable harm is that wrongdoers have a duty to repent. There are at least two problems with this view. The first is that it is not clear that the remorse one should feel for a wrongful action tracks its harmfulness rather

than other factors like how egregious or callous it was. The second problem is that whether one feels remorse is normally not under one's control. The racist perpetrator of a lethal hate crime may feel no remorse at all; indeed, he may regret not having done more harm. Because one can have a duty to feel or express remorse only if one is able to do so, this view would imply that these wrongdoers do not incur any obligation, while those who are capable of sincere regret do. I think we should conclude that while we may justifiably think less of people who do not feel or express remorse for their misconduct, wrongdoers themselves do not have a duty to do so.

The Non-Compensable Harms Thesis avoids the morally absurd result that by doing more harm a wrongdoer can ensure that she acquires a less demanding obligation, and it does so in a way that is more plausible than rival ways of filling out the content of that duty. It also enjoys some independent intuitive appeal. These considerations provide some reason to accept it. But they are not sufficient to justify the thesis for three reasons:

i) Even if we can explain why the promotion of the impartial good can make up for non-compensable personal harms, we need an explanation for why *compensable* harms cannot be made up for in that way. For I accept that when it *is* possible to compensate a victim for a wrongful harm done to her, no amount of good done elsewhere can count as discharging that duty.

ii) We lack an account of the internal connection between the object of the moral violation (a particular individual) and the object of the duty it supposedly generates (the world in general). When it comes to the duty to benefit a victim, in contrast, that connection is clear. My victim has a claim *against* me, and I have a corresponding duty *to* her. But no analogous link seems forthcoming for the move from harming a person to the obligation to do something that may well have no beneficial effect on her. By implying that one person's loss in wellbeing can be made up for by increasing value elsewhere, the Non-Compensable Harms Thesis may be thought to disregard the separateness of persons.

iii) We lack an account of why the content of the duty is the promotion of the good in particular. Again, in the case of compensation the analogous explanation is more or less plain. Compensating one's victim is the way to rectify the harm one has done to her. But it is not yet clear how making the world better in ways that do not benefit one's victim would go any way toward rectifying a wrongful harm. The answer to all three issues, I shall argue, proceeds from the following premiss:

(C) When a person wrongfully makes the world a worse place, one has an obligation to add value to the world to the extent that one has wrongfully removed it.

The claim is not, I hope, too controversial. The reasoning is straightforward: when one does wrong, one has a duty to reset things as far as possible to the way they would have been if not for one's wrongdoing. Indeed, this seems to be the standard rationale behind the more familiar obligation to compensate victims. Joel Feinberg (1970: 74) writes that the reason a perpetrator has a

duty to compensate his victim for the wrongful harm he has done to her is ‘not only to repair the damage but also to “restore the moral equilibrium”’. According to Feinberg (1970: 76), compensation ‘sets things straight’ and calls for ‘the redressing of the moral balance or the restoring of the *status quo ante culpum*’. It is clear what these metaphors are meant to capture. The point of compensation is to make things as close as possible, normatively speaking, to the way they were (or would have been) in the absence of the wrongful harm. Both reasons Feinberg cites – repairing the damage and restoring the moral equilibrium – apply *mutatis mutandis* to the redress of wrongdoing that makes the world worse impartially. So if, as seems plausible, Feinberg is right about the rationale behind the duty of offenders to compensate their victims, we should also accept that one has a general obligation to restore to the world what impartial value one’s wrongdoing has eliminated from it.

Let me now relate in more detail how (C) rationalizes the Non-Compensable Harms Thesis, and how it resolves problems (i)–(iii) raised earlier. Some ways of making the world worse seem to be non-person-affecting, in that the reason why they make it worse is not any harmful effects on particular individuals. At least on their orthodox interpretation, non-identity cases are paradigmatic examples. But one can also make the world impartially worse by behaving in a way that is person-affecting. A world in which one more wrongful killing occurs is worse for someone, but on any plausible axiology it is also worse *simpliciter*. Therefore, (C) implies that when one person wrongfully harms another she incurs not one but two distinct duties, deriving, respectively, from the personal and impartial aspects of her transgression. When and to the extent that a wrongful harm is compensable, the victim has a claim against the perpetrator for the full amount of that compensation. The perpetrator’s duty to satisfy this claim is independent of her duty to restore impartial value to the world. However, by fully compensating her victim, a perpetrator also makes the world less bad than it would have been had the relevant harm never been done. Accordingly, to the extent that one fulfils the obligation to compensate her victim, the duty to restore impartial value to the world is discharged *incidentally*. To the extent that a harm is non-compensable, the duty to restore impartial value remains, and it is this remainder that gives rise to the perpetrator’s obligation to promote the impartial good.

This explains why, as observed in (i), one cannot rectify a *compensable* harm by promoting the general good. That worry came, I think, from the assumption that the Non-Compensable Harms Thesis implies that when a victim cannot be compensated the duty to compensate her transforms into a duty to promote the impartial good. But, rather, the imperative to restore to the world the value one has wrongfully eliminated from it is independent of whatever obligations one has *to* one’s victims. So it makes sense that when one has an undischarged personal duty, promoting the impartial good does not count toward its fulfilment.

Because it is the impartial aspect that generates the obligation to promote the good, this rationale for the Non-Compensable Harms Thesis avoids the charge posed in (ii) – namely, that by allowing that one person’s loss in wellbeing can be made up for elsewhere, the thesis fails to respect the separateness of

persons. And since the obligation in question is given by the duty to restore impartial value one has wrongfully eliminated, the account explains why the content of the obligation is the promotion of the good, thereby answering (iii). Furthermore, because on this rationale the good that is required is proportional to the impartial disvalue of the non-compensable portion of the harm, it accords with (A), the principle that the obligations a perpetrator incurs in virtue of wrongfully harming another correlate with the amount of harm she has done.

(C) provides a normatively significant underlying rationale for the Non-Compensable Harms Thesis. Before concluding, however, I should address two issues it raises. First, it may be objected that it lets some wrongdoers off the hook too easily. By some estimates, the current cost of saving a life in the more miserable parts of our planet is just several thousand pounds. The argument so far may therefore seem to imply that an affluent murderer can make amends by donating a relatively negligible sum to an effective charity. There are two things to notice about this objection. The first is that it depends on the facts that the perpetrator is well off and that there are many people alive who are very badly off, such that their lives can be greatly improved at little cost to the wealthy. These facts are both contingent and almost certainly reflect pre-existing unfairness. The second is that the same issue arises even for ordinary compensatory duties: how demanding it is for a perpetrator to compensate her victim almost always depends on how well off she is. It seems plausible, therefore, that what is problematic is not the Non-Compensable Harms Thesis, but rather the current distribution of those factors which determine how easy it is to add value to the world.

The second issue concerns cases in which the perpetrator of a wrongful harm can satisfy either her obligation to compensate the victim or her obligation to restore impartial value to the world, but not both. An intuitively compelling view is that the duty to compensate one's victim has some priority, though perhaps not lexical priority, over the duty to restore to the world the value one has removed. This may simply be an instance of a general phenomenon whereby directed duties have some priority over undirected ones, or, more intriguingly, it may suggest that there is a fittingness constraint on the duty to restore impartial value, such that when possible one should promote the good in a manner that addresses the specific way it was wrongfully removed (in the cases in question it was removed by harming a particular individual).

It is worth highlighting, however, that even if the duty to compensate has lexical priority over the corresponding duty to restore value to the world, this need not mean that whenever a perpetrator has the opportunity to compensate her victim this is what she all-things-considered ought morally to do. An offender may well have pre-existing duties of beneficence or justice which themselves outweigh any compensatory obligations she has to her victims. That she should fulfil these other duties instead is more likely still when her own victim is unjustly well off relative to other prospective beneficiaries, for then there is an additional reason of justice to benefit the latter instead. Furthermore, it may well be that one can permissibly fail to discharge a *pro tanto* duty in order to

promote the greater good, even when doing the latter is supererogatory.⁴ How we should balance these various competing considerations when they conflict is a difficult question that any view about the rectification of wrongdoing, whether compensable or not, must eventually address.⁵

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⁴Frances Kamm gives the example of breaking a minor promise in order to donate a kidney one is not required to donate. (1996: 313–14)

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