



## A Difficulty Concerning Compensation\*

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### Abstract

We sometimes harm people legitimately, by standing in front of them in the queue at the cinema and buying the last available ticket, for instance, or by acting in self-defense. If we harm them illegitimately, however, we ostensibly have a moral obligation to compensate them for the harm done. And the more we harm them, the greater the compensation that, *prima facie*, we need to offer. But if the harm increases further, at some point we will need to offer less compensation. Yet more harm, and it is quite likely that no compensation at all will be morally expected. In such situations, the greater the harm, the better off we will be, morally, in one important respect. This is morally absurd but, I claim, true, and it does not appear to have received significant philosophical attention. I explore the issue.

### Keywords

compensation; moral paradox; harm; forgiveness; existential paradox; Teflon immorality

We sometimes harm people legitimately, by standing in front of them in the queue at the cinema and buying the last available ticket, for instance, or by acting in self-defense. If we harm them illegitimately, however, we ostensibly have a moral obligation to compensate them for the harm done. And the more we harm them, the greater the compensation that, *prima facie*, we need to offer. But if the harm increases further, at some point we will need to offer less compensation. Yet more harm, and it is quite likely that no compensation at all will be morally expected. In such situations, the greater the harm, the better off we will be, morally, in one important respect. This is morally absurd but, I claim, true, and it does not appear to have received significant philosophical attention.

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Harm takes many forms, but for my argument the variety does not matter much. Medical negligence is obviously unlike beating up your opponent unconscious in a bar brawl, and both are very dissimilar from genocide, but all three examples may bring up this issue quite forcefully. The problem is simple: all other considerations being equal, the required compensation will be a function not only of the *harm* we have caused, but also of how the recipient of this compensation can *benefit* from it. This statement seems almost a conceptual truth: compensation depends upon the victim's capability to benefit from it because, if unconnected to the victim's capability, compensation will do no good. But—and this is the crux of the matter—harm may render the benefit nonexistent.

Let us assume that the aim of compensation is to help the recipient to maintain as high a level of happiness as subjectively possible. Other views are possible, and we will consider some of them later on. But this seems a plausible moral interpretation if we stay focused on the victim and aim for the high end of the compensatory scale: I compensate someone to the utmost of my ability by making him as well off as he can be, given his condition. Sometimes harm can make the victim dependent in a way that requires considerable resources, but sometimes not. If the harm inflicted on my victim in her childhood through my culpable negligence resulted in serious permanent mental handicap, I ought to carry the burden of the expense required to keep her alive and happy.<sup>1</sup> Had I harmed her *less* severely, however, *greater* resources would probably have been required, since her mental potential would have remained much higher and the professional qualifications of her caregivers, for instance, would have had to be greatly superior, making things far more costly. At present, given that my victim has only limited mental abilities, she can hardly be helped, and extracting more compensation from me would be pointless. Because of her condition, not only will further expenditure be far less useful to her than it is to others but, after a certain stage, any further outlay of money or effort will make no difference at all. She can be “optimally compensated” (based on her current capability) at limited cost. Similarly, harm that causes the victim severe depression may render compensation, beyond a certain level, futile. In both types of example, I benefit from the greater harm inflicted on my victim.

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<sup>1</sup> I intentionally focus here on “normal” instances of harm and avoid the further complications of cases where the harm affects the victim's identity; in “wrongful life” cases thereby even making it questionable whether he is indeed a victim.

But what about compensating the family of the victim for the harm I have caused? That is likely to be morally appropriate under certain circumstances, such as when the victim loses future earning power as a result of my intervention. Yet, if the harm is so great as to prevent him from marrying and having children that he would otherwise have had, my expenses may thereby be considerably reduced. Here is one way in which events might unfold. In scenario A, I harm a person who then marries and has children, but dies several years later as a delayed result of my actions. Scenario B is just like A, except that the harm I caused is more severe, and also prevented him from marrying and having any children. Under B, there is no need for me to support his wife and children (he has none), and my obligations end with his death. Under A, I may well be morally obligated to help provide for his wife and children while he is alive, as well as after his death.

Or I may even kill my victim, in which case I would not have to pay her any compensation; she ceases to be a subject for compensation altogether, because, being dead, she cannot benefit in the way that she could, were she still alive. Even if she died leaving behind no children, I am still likely to be morally obliged to compensate her parents or siblings, except that I might have killed not only her but all her relatives as well, and then there is no one left to compensate. That is the case with large numbers among the millions of Jews exterminated by the Nazis and their helpers during the Holocaust. Whole extended families were expunged from the face of the earth, and their material assets often went to their murderers. There is no one seeking restitution, let alone compensation and, arguably, no one to compensate.

Of course, our moral resources go beyond compensation. It may often be morally and legally possible to extract punitive costs from the negligent; the intentionally harmful, let alone the evil, are of course the focus of moral and criminal attention that goes beyond compensation. This claim, however, does not dismiss the difficulty I am pointing out, since compensation matters even when other types of sanctions are enforced. Whatever these other sanctions might be, this difficulty derails compensation of the victim, which is a central pillar of our moral vocabulary and practice. The worst moral acts, those which cause the most harm and deserve the most blame and the severest punishment, will often be those where compensation will be unable to achieve much, if anything, and hence where the duty and the burden of compensation to the victim will be negligible or nonexistent.

Moreover, the moral and legal (tort) standards for compensation are, as a rule, much laxer than those for criminal blame and conviction. Often, establishing criminal liability with the required certainty proves impossible

or other difficulties prevail and so, in practice, all that is left is the claim for compensation. If that too is avoided, then we have, in radical form, what I have called “Teflon immorality,” immorality that goes on unchecked, where the wrongdoing is not stopped and the perpetrators remain beyond the reach of sanction.<sup>2</sup>

Looking at collectives may help to clarify this problem. To think that Germans as a collective, as distinct from guilty individual Germans, morally ought to have been severely punished after the Holocaust is implausible. But to think that the German collective (through its country, Germany) is morally bound to compensate Holocaust survivors is surely persuasive. Such compensation ought to continue as long as survivors exist and perhaps longer, to their children, even after the time when all the Germans who were alive during the Holocaust have died (and ipso facto cannot be punished in the normal sense). Clearly, then, compensation can be morally salient even when punishment is not. But the amount of compensation is obviously so much lower because the number of survivors is so small relative to the huge number of murdered victims.

In broader terms, if the entire field is in practice limited to compensation and if, as noted, the worse the harm one has inflicted the less compensation one will be morally required to offer, a paradox obtains and one that, morally, clearly matters. Even if some scope for retribution exists, it surely matters that proportionality between the harm inflicted and the victim’s losses, on the one hand, and the level of required compensation, on the other hand, is unsustainable, and the relationship between the two is indeed *reversed*, a situation representing a major breakdown, here, of our moral world.<sup>3</sup>

One counter-argument could be that, if only compensation were at stake, then all that matters is that, if possible, those who suffered be

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<sup>2</sup> S. Smilansky, *Ten Moral Paradoxes*. (Malden, MA: Blackwell Publishing, 2007), p.136; see also S. Smilansky, “Why Moral Paradoxes Matter: ‘Teflon Immorality’ and the Perversity of Life,” *Philosophical Studies*, forthcoming.

<sup>3</sup> Other situations will also exhibit the moral salience of compensation, even where retribution is limited or impossible, as well as the difficulty that I am pointing out with compensation. One example concerns people who have already exacted extreme harm on many others, and have perhaps been fully punished for it, receiving consecutive life sentences. If such people were to go on causing further harm, their “retributive situation” arguably could not worsen. Their obligation to compensate their victims could still be *lowered*, however, if they were to harm their victims *more*, for the reasons already noted. Another example would be that of wrongdoers who have died and cannot be punished, yet their estates may still compensate their victims. The estate can save money if the wrongdoer has caused his victims greater harm. This may then allow the estate to contribute more money to good causes, thereby enhancing the offender’s reputation.

compensated as much as they should be. If this is not possible (because the victims are dead, for instance), then indeed no compensation is in place. Compensation differs from retribution – or from condemnation and so forth. We feel uneasy about compensation only if we read it not only as pure compensation but also as retribution, but this understanding implies mixing terms or categories. If in the situations I have described we think of compensation as retribution, the result indeed does not make sense, but if we think of it solely as compensation, it does seem plausible.

This line of argument, however, works only insofar as we take an unreasonably narrow view of the nature and significance of compensation. Morally, the impossibility of compensating the victims, because they have been so severely harmed that they cannot benefit from the compensation that they otherwise deserve, is deeply problematic. Compensation may have become pointless, but that is part of the problem with the compensatory situation, not something we should be complacent about. There is less of a duty to compensate, or even no duty at all, because of the very actions which have wronged the victims and which, in themselves, would give rise to substantial duties. *The wrongdoing itself has limited or even eliminated the duty to compensate for it.* Moreover, this argument avoids any concern with those who have caused the harm. Because the victims cannot be made whole again, those who caused them to be in this unfortunate state have only reduced – or no – duties towards them. Compensation is not only merited by the victims, but imposes a just potential burden on those who harmed them. If this 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.

It might be said that compensation is in any case only a matter of insurance, hence not a significant moral and legal concern. Insurance will indeed often be called to help with the burden of compensation, though it still needs to be the agent's own insurance. And my argument would often still be relevant. The sum of money that the harmful agent is insured for may cover only the lower expenses resulting from severe harm rather than what those expenses would have been had the victim's circumstances allowed him to enjoy greater benefit from the compensation. As noted (recall the case of the mentally handicapped victim), one would actually benefit by causing greater harm, which allows the diminished compensation one owes to be fully covered by one's insurance.

Several related points may help to understand the significance of the difficulty. Compensation is often personal in what it requires from the harmful agent. Obviously, many things are not covered by insurance, such as the moral need to apologize or to do things for the victim beyond

monetary compensation. Compensation also typically needs to be asked for. It is important that compensation is personally related to the victim, in that it is *her* compensation: she is supposed to be receiving something because she deserves compensation. In the typical pattern of criminal justice, the state prosecutes wrongdoers for violating an impersonal law, and although the victim may be glad that the transgressors are punished (if she is alive and can understand what is happening), this is not done essentially for her sake. By contrast, a typical process of compensation focuses on the victim. The duty of compensation is a duty *to the victim*. Attempts in recent years have sought to move punishment closer to compensation, forcing wrongdoers to deal with their victims and to do something for them. Such gestures seem to support my claim about the importance of compensation, irrespective of whether various forms of punishment are also imposed on offenders.

My point might seem to be limited to the pragmatic sphere, without any significant moral weight. True, one will avoid the need to pay for the lifelong maintenance of the dead or to compensate the relatives of one's victims, if those relatives were never born or have also been killed. But morally, this does not make one's situation in any way better. Inflicting greater harm on people is morally worse for the harmful agent or, at least, can never be morally better. If one cannot properly compensate one's victims, or indeed compensate them at all, then a moral lacuna has formed, and one is necessarily worse off: it is always better to be able to compensate one's victims. Compensation reduces, as it were, the sense of the badness of one's original deeds (insofar as it implies that they are the sort of things that can be compensated for), and redeems one's moral situation.

Yet this conclusion is too hasty. Our moral, compensation-related obligations can be very significant, requiring us, for example, to shoulder a large economic burden of compensation in the form of hospital and care expenses. The disappearance of this burden—the *morally sanctioned* disappearance of this burden—is hardly trivial. Moreover, some moral burdens are directly and inherently connected to the victim, and depend on his or her condition. If the harm is great enough (even if it does not lead to the victim's death), one may not be morally required to seek out the victim and devote time to him or her, nor to seek his or her forgiveness. The physical or emotional injury inflicted on the other person may be so great that no amount of attention will now matter, and no forgiveness can be granted. This might possibly be worse for one if one seeks forgiveness, but might also be a great relief. One can learn to deal emotionally with the harm one has done to the other, without having to deal with the other's

reluctance to forgive, say, or with the continuous need to interact with him or her. The personal nature of the interaction and its potential burdens might have become impossible because the victim has been so badly harmed. The moral duties will have become lighter because the potentially applicable, more demanding set of duties has been precluded as a result of one's wrongdoing.

As is true in many other instances, here as well we may be inclined to avoid the "moral pragmatics," and refrain from looking at the manifold effects of pragmatic considerations on what we are morally required to do.<sup>4</sup> Ideally, compensation would make the victim of the harm whole again, and the duty of the wrongdoer (or perhaps even under certain conditions of society as a whole) is to enable this. The baseline to be restored would be something like enabling the pursuit of the set of ends that the victim would have pursued in the absence of the harm, with similar prospects for success.<sup>5</sup> And further compensation for being harmed itself (e.g. for the shock and pain), and for the intervening time between the harm and the restoration of the baseline, would be required. However, often the nature of the harm is both permanent and such that restoration to the baseline cannot be achieved. Then, as we saw, compensation can, at best, maximize the attainment of the potential for the well-being of the victim in his or her current, much lower state. We might want to say that the "true" duties (of returning the victim to the earlier baseline, and so on) have not disappeared, they only cannot be met. But it seems more honest to confront uncomfortable reality and admit that there are now only limited, less burdensome duties in place, as a result of the harm. *Since there are but meager remedies for the victims, there are only limited duties upon the wrongdoers to provide them.*

This situation poses a potential difficulty with negative incentives: at least in certain ways, it pays to do more harm rather than less. The wrongdoer can hope that, beyond his or her control, the harm that he or she has done will prove greater. And ratcheting up harm so as to limit or avoid

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<sup>4</sup> As I recently argued, pragmatic considerations can be central to establishing the level of moral expectations and duties which make sense, and hence also in establishing our moral worth. See S. Smilansky, "Moral Demands, Moral Pragmatics, and Being Good," *Utilitas* 22 (2010), pp.303-308.

<sup>5</sup> As Robert Goodin shows, even if we raise the victim to a level at which, subjectively, he is as well-off as he would have been without the injury, this may not offer full compensation, if the person cannot pursue his pre-injury ends. Often, however, no compensation is possible, even in reduced form. See, R.E. Goodin, "Theories of Compensation" *Oxford Journal of Legal Studies* 9 (1989), pp.56-75.

the need for compensation altogether becomes tempting. But matters go deeper. The moral difficulty here, as noted, goes beyond the mere practical question of whether we will be able to capture the negligent or malevolent and to extract compensation from them. As shown, *actual moral obligations will be modified and often decrease when one has been more harmful*. There is no duty to care for a woman's children after her death if one made her unable to have children. There is no duty to seek someone's forgiveness if he or she is, due to your actions, incapable of understanding what is asked of him or her. "Compensating" others instead may be a way of dealing with the disturbing advantages gained by the wrongdoers, but this will not help the victims, and is a misuse of the term "compensation." Our issue points out a tragic feature of fairly common moral situations, a corner of our moral universe where things go very wrong. However, we cannot escape the logic of the situation: compensation depends on the capacity of the victim to benefit from it, while increased harm may lower that capacity, and the concomitant morally required compensation. Morally satisfying compensation would track the victim's losses, but in cases such as we are considering this becomes nonsensical, because the harm is so great that the victim cannot benefit from much compensation, and hence the associated duties are drastically reduced, or even eliminated.

Things may thus be morally outrageous and absurd, but this is not a mistake. It is not as though we are missing something, so that if we only understood things better matters could be worked out. Nothing can be worked out, insofar as compensation to the victim is concerned – that, after all, is the very difficulty. This seems to fall into the category of "existential paradoxes," where the conclusion appears absurd even after due reflection, but has to be accepted as true in spite of its absurdity.<sup>6</sup> The problem does not lie in our understanding of the situation, or in our inflated moral expectations, but in reality. We understand all that needs to be understood, and our expectations are morally justified. In situations such as those considered here, it is reality that ceases to make moral sense.<sup>7</sup>

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<sup>6</sup> S. Smilansky, *Ten Moral Paradoxes*, p.4.

<sup>7</sup> For the sake of simplicity, I have focused on cases of straightforward harm. Some more sophisticated or perverse types of harm, such as manipulation or conversion cases where the expectations and desires of the victim are radically modified, will also exhibit the difficulty that I am pointing out. For example, it might be the case that the wrongdoer has harmed the victim in such a way that the latter does not feel any need for compensation, or would even resist it, thereby sparing the wrongdoer the need to compensate the victim.

This situation brings to mind the idea of “moral luck.”<sup>8</sup> The issue of compensation can be a particularly disturbing instance of luck: good moral luck for the culpably negligent or harmful, and even for the malevolently destructive, whose victims lost their compensation-utilizing capability or for other reasons do not need to be so heavily compensated. It might turn out that, for reasons beyond your control, your victim ended up more severely harmed, and this lowers what you owe by way of compensation, thereby making you in one way better off. Even worse, wrongdoers will have frequently brought about their good fortune through their morally unacceptable actions, thereby underscoring the absurdity. In such situations, harmful agents may be better off, in terms of compensation, *because* they have been morally worse and have, perhaps even intentionally, done more harm.

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<sup>8</sup> See D. Statman, ed., *Moral Luck* (Albany, NY: SUNY Press, 1993).

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