Introduction

On February 28–March 1, 2003, the University of San Diego Institute for Law and Philosophy held a conference entitled "Baselines and Counterfactuals in the Theory of Compensatory Damages: What Do Compensatory Damages Compensate?" The articles in this collection emerge from that symposium.

First, Robert Cooter, Herman Selvin Professor of Law at the University of California at Berkeley, discusses in his article, *Hand Rule Damages for Incompensable Losses*, how money cannot compensate for some losses, as when parents suffer the death of a child. For incompensable losses, courts should develop a theory and practice of damages from the way reasonable people respond to the *risk* of incompensable losses. Specifically, Cooter argues, courts should apply the Hand rule to find damages based on the reasonable person's point of indifference between less risk and more expenditure on precaution. Cooter asserts that Hand rule damages are efficient and fair. Implementing Hand rule damages would cause a significant increase in damage awards and insurance costs for some important kinds of accidents.

In *Can We Compensate for Incompensable Harms*, Dr. Adi Ayal, member of the Faculty of Law at Bar Ilan University, further develops some aspects of Cooter's arguments and critiques others. He focuses on methodological issues, including the application of behavioral economics to risk assessment and the difference between lexical preferences and incomplete ordering. The issues addressed in the legal literature of compensatory damages, he argues, are explained better by lexical preferences, a point stressed when he applies the same to Cooter's scheme of compensation for risk rather than harm. Dr. Ayal then questions Cooter's assumption that risk is always compensable, even when the actual harm is not.

Richard Craswell, William F. Baxter-Visa International Professor of Law at Stanford University, surveys various economic or instrumental

theories of remedies, arguing that the concept of "compensation" plays a very different role in these theories than it does in theories of corrective justice. This difference was less apparent during the 1970s, when the earliest economic theories often suggested that compensatory remedies would be efficient. But more recent economic theories have identified a number of reasons why efficient remedies might be either greater or less than compensatory damages.

More fundamentally, Craswell argues that corrective justice theories often begin by taking it as a premise or axiom that remedies should be compensatory. By contrast, he says, economic theories are concerned only with the instrumental *effects* of remedies, without regard to whether a given remedy qualifies as compensatory. As a result, Craswell asserts that economic theories have more to say about many practical or second-order questions, such as the exact quantum of damages that ought to be awarded in any given case. Those questions cannot plausibly be addressed by appealing to some abstract definition of "compensation," but they may be addressable (in principle, at least) by an instrumental analysis of a remedy's effects.

Michael Moore, Professor of Law at the University of Illinois, examines in his article, *For What Must We Pay? Causation and Counterfactual Baselines*, the question of whether we are liable to compensate for harm that we cause only when our acts "make a difference" in the world, meaning the kind of negative difference we think of as harmful to others. In doing so, this article examines a number of legal contexts in which the "make a difference" principle seems critical in either sustaining or denying liability. Because the "make a difference" principle is explicitly counterfactual in nature, and because the dominant theory of factual causation in the law equates causation with counterfactual dependence, this article focuses on the counterfactual theory. In the end, Moore concludes that it is generally causation that is dominant in determining legal liability, not counterfactual dependence.

In *Moore, Causation, Counterfactuals, and Responsibility*, Richard Fumerton, Professor at the University of Iowa, responds to Michael Moore's article. According to Fumerton, the employment of counterfactual tests seems to pervade the law, not only in determining at whose feet to lay a harm but also, perhaps more importantly, in determining whether or not someone was harmed in the first place. For that reason, he agrees completely with Moore that one cannot very well ignore counterfactuals despite the fact that they resist (for the reasons Moore gives) easy analysis. While he also agrees with Moore that one cannot analyze causation employing counterfactuals, he does not agree that causation gives us "cleaner" breaks that are more useful in assigning responsibility than do counterfactuals. He argues that one should view *facts* as the

relata of causal connection, and that if one does, one faces similar problems employing both causal and counterfactuals tests in deciding which among the indefinitely many lawfully relevant antecedent conditions are relevant to the assignment of responsibility in criminal and civil law. On either kind of test, one must inevitably rely heavily on pragmatic considerations to make legally relevant distinctions. Fumerton concludes by arguing that in an ideal world one would employ *neither* causal *nor* counterfactual tests in assigning criminal and civil responsibility. One would focus instead on internal properties of actors. This is not, however, an ideal world, and pragmatic considerations probably argue against revising our current legal practice.

In his article *Harm, History and Counterfactuals*, Stephen Perry, Fiorello La Guardia Professor of Law and Professor of Philosophy at New York University School of Law, examines certain aspects of the concept of harm. He argues that harm must be understood as a setback to an interest, and that the determination of whether or not an interest has been set back requires a comparison between two states of affairs. He defends this view against a general critique of "comparative" models of harm that has been advanced by Seana Shiffrin. Perry further argues that the relevant baseline of comparison for determining whether or not there has been harm is the status quo ante, meaning the state of affairs that existed prior to the causal process that led to the allegedly harmful condition. He defends this "historical worsening" account of harm against the "counterfactual" account of Joel Feinberg, which claims that the appropriate baseline of comparison is the state of affairs that would have obtained had the relevant causal process not occurred. Although all harms are, according to Perry, setbacks to interests, he argues that not all setbacks to interests are properly regarded as harms. In defending this conclusion he distinguishes between "core" or "primary" interests, which represent fundamental aspects of human well-being, and "secondary" interests, which are interests defined in terms of core interests. Thus a person has a core interest in not being physically injured, and a secondary interest in not being subject to the risk of physical injury. A setback to the former interest is harm, but according to Perry, a setback to the latter interest is not. Finally, Perry discusses the issue of compensation for harm in tort law. He argues that although harm itself should be understood in terms of an historical worsening, there is much to be said for the view that compensation for harm should be determined not historically but counterfactually. There is much to be

said, in other words, for the view that the quantum of damages should be determined not by attempting to restore the plaintiff to the status quo ante, but rather by trying to put him in the position that he would have been in had the tort not occurred.

In *Rethinking Injury and Proximate Cause*, Professor John C.P. Goldberg of Vanderbilt Law School offers a constructive commentary on Perry's article, *Harm, Counterfactuals, and Compensation*. In the first part of his commentary, Goldberg offers to refine Perry's account by suggesting that there is an important distinction to be drawn between "harm" and "injury." Using illustrations drawn from tort and contract law, Goldberg argues that harm, as Perry defines it, should be understood as a special instance of injury, to be contrasted with other forms of injury, including rights violations and lost expectancies.

In its second part, Goldberg's article plays off of Perry's analysis to provide a novel interpretation of the proximate cause component of negligence law. Rejecting standard views that proximate cause serves only to prevent "excessive" litigation or liability, Goldberg argues that the doctrine instantiates a general principle of tort law, namely, that a victim can only recover on a tort claim if she herself has been wronged by the alleged tortfeasor. Thus, on Goldberg's reconstruction, by preventing the attribution of responsibility for fortuitously-caused harms, proximate cause limits liability to instances in which there is not merely wrongful conduct by *D* that causes injury to *P*, but in addition a *wronging of P by D*. This understanding of proximate cause, he maintains, fits well within a "civil recourse" theory of tort law, and helps explain away various doctrinal puzzles, such as the thin-skull rule, and the greater willingness of intentional tort doctrine to impose liability notwithstanding fortuitous causation.

In *What to Compensate? Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, Leo Katz, Professor of Law at the University of Pennsylvania, argues that finding the rightful measure of compensation involves first finding the right baseline. But baseline problems, though common throughout law, are remarkably ill-understood. Rather than solve these problems outright, Katz seeks to get to the bottom of their multiple roots. The four kinds of cases being considered are typified by (1) the plaintiff whose leg the defendant tortiously broke—thus preventing him from getting on the plane that crashed (i.e., the "failure to worsen" cases); (2) the plaintiff whose loss of legs due to the defendant's tortious conduct caused her to give up her career as a professional athlete—with the result that she is now much happier and has no regrets about losing her former career (i.e., the "subjective improvement" cases); (3) the promisee of an enforceable contractual promise asking to be put in the position he would have been in had the

promise been kept rather than had the promise never been made (i.e, the contract damage question); (4) the plaintiff who but for defendant's tortious conduct would not exist, with particular emphasis on the descendants of slaves who but for slavery would not have existed, and surely not in the United States.

In *Baselines and Compensation*, a response to Leo Katz, F.M. Kamm, Professor at New York University, argues that Katz's approach to the failure-to-worsen cases illustrates the conflict between "objective" and "state-of-mind" theories of liability. While noting that the objective theory underlies any defense of a counterfactual baseline for damages, Professor Kamm advances a "cause dependence principle," which evaluates a defendant's state of mind as a causal factor when determining liability. In response to Katz's discussion of the raw utility problem, Kamm argues that differing legal obligations in the "interpersonal" and "intrapersonal" contexts prevents the type of cycling of legal obligations discussed by Katz.

In discussing Katz's analysis of contract expectancy damages, Kamm argues that problems arise due to the fact that contractual obligations create rights in future performance as opposed to property rights in the product of future performance. Finally, in discussing Katz's view of the "future generations conundrum," she presents her own view that creators owe their creations a certain set of conditions, the "minima," which may be used to determine liability to future generations.

Emily Sherwin, Professor of Law at the Cornell Law School, argues in her article, *Compensation and Revenge*, that damages described as compensatory in fact provide not only compensation but also an element of retaliation for legal wrongs. She then examines the moral status of civil remedies as an vehicle for revenge.

Kenneth W. Simons, M.L. Sykes Scholar and Professor of Law at Boston University School of Law, responds to Emily Sherwin's conception of tort damages as containing a component of judicially-sanctioned revenge. In *Compensation: Justice or Revenge?*, Simons both challenges Sherwin's retributivist model and uses some of its propositions to explore his preferred, nonconsequentialist account of tort doctrine.

According to Simons, a significant impetus for Sherwin's revenge-based theory is what she perceives as the failure of the nonconsequentialist account to explain the way actual compensation practice works. Simons counters by arguing that the nonconsequentialist model, in fact, has more positive strength than Sherwin allows. For instance, contrary to Sherwin's

restatement of the doctrine, the corrective justice model of tort liability *does* require linkage between the victim's right and the injurer's duty. This linkage can explain why tort law entitles victims to compensation not just from some source or other, but specifically from the wrongful injurer who caused their losses. It can also explain why a vengeance rationale is not needed in order to make sense of compensation practice.

After rejecting Sherwin's revenge theory as the global justification of tort compensation, Simons next considers whether and how the retributive impulse informs some discrete areas of the law. In the areas of pain and suffering, and punitive and hedonic damages, Simons assesses Sherwin's arguments and, in some cases, finds them compelling if incomplete. Finally, Simons follows Sherwin into the phenomenology of tort litigation and concludes that, while the relevance of revenge to some aspects of the litigation mechanism is unclear, there is good reason to believe that the revenge "story" played out in lawsuits is a significant part of how the legal system understands itself.

In *The Grounds and Extent of Legal Responsibility*, Richard Wright, Professor of Law at the Chicago-Kent College of Law, Illinois Institute of Technology, puts forth the following argument. The usual academic solution to the so-called "proximate cause" (extent of legal responsibility) issue is a single, harm-matches-the-foreseeable-risk (harm-risked) limitation. This limitation, which has been championed by successive editions of the *Restatement*, supposedly implements the morally attractive proposition that the reasons for creating liability should limit the extent of that liability.

According to Wright, the harm-risked limitation, however, is based on a misunderstanding of the grounds of legal responsibility. It thus must be qualified by numerous exceptions to be even minimally plausible, and even then it is seriously underinclusive and overinclusive. Moreover, it has not been accepted by the courts. Instead, courts apply a number of limitations that are explained and justified by a proper understanding of the grounds of legal responsibility. The three principal limitations prevent liability for a tortiously caused harm when (1) the harm almost certainly would have occurred anyway in the absence of any tortious conduct or condition, (2) there was a superseding cause of the harm (an intervening, highly unexpected, but-for cause of the harm), or (3) the harm did not occur as part of the realization and playing out of one of the foreseeable risks that made the person's conduct tortious, before the hazards created by the realization of that risk had dissipated.

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