

Baselines and Compensation

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I. MENTAL STATES, CAUSATION, AND LIABILITY

The first problem that we shall examine is raised by the cases in which by our tortious *wrong* act someone is either (1) made no worse off than he would have been because the injury is one he would have suffered anyway by another means or (2) made better off because, though the act produces an injury, it benefits him by interfering with an upcoming greater injury. Should we assign liability based on the fact that an injury was caused relative to how the person was in his prior uninjured state (namely, the causal approach)? Or, should we take account of the fact that the person either was made no worse off or received a benefit relative to how he would have been in the future had there been no tortious act (namely, the counterfactual approach)?

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Leo Katz offers one way to answer this question, though he does not commit himself to it, which is as follows:¹ (a) Determine whether, if you *knew* that (1) or (2) above would hold, either your act would be permissible with no liability for damages, or no great effort would have to be made to avoid the act;² (b) if the answers to these questions are yes, then even if you do not know that (1) or (2) holds when you act, you are not liable for damages. This is a defense of the counterfactual approach. It proceeds by showing that the counterfactual approach would be used to evaluate someone's act if he acted knowing (1) and (2) and then claiming that knowledge is not a necessary condition for use of the counterfactual approach. In other words, if you do an act whose objective welfare consequences—a bad combined with a greater good—could either provide a justification for the act over any alternative acts in the case of (2), or present no reason against doing the act over any alternative acts in the case of (1), then even if you did not act because of the objective welfare consequences, you are not liable for any injury you cause. Having done the act without justification, you are liable at most for an act that might have been, but fails to be, bad overall.

I would say that what underlies this view is an objective versus state of mind theory of liability. It can be part of an objective versus state of mind theory of permissible acts in general. The latter says that properties of acts and their consequences make an act permissible or not, regardless of whether people know of these properties or act because of them.³ Your act can be justified even if you do not act for the sake of what justifies it, and liability is (mostly) a function of the former, not the latter.

Katz does not put the view he describes in terms of the importance of objectively justifying or defending properties as opposed to states of mind. He thinks the deeper point underlying the view he describes is that if an appropriate means (form of conduct) could have led to an outcome, one can use inappropriate means to bring about the same outcome without being held liable for the bad part of the outcome, but

1. See Leo Katz, *What to Compensate? Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, 40 SAN DIEGO L. REV. 1345, 1347–53 (2003).

2. Katz considers what would be true if you “knew” of the consequences of your act. *Id.* at 1348–50. This is weaker than considering what would be true if you also (1) intended to bring about the consequences, or (2) acted merely *because* (on condition) that the consequences would occur but not intending their occurrence. Furthermore, your knowing that a certain outcome will occur is weaker than your knowing that the consequences could provide you with a defense for an act. This is because you may not know that the outcome provides a defense and yet act anyway.

3. Judith Thomson has defended such a view. See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 123–48 (1990).

only perhaps for the use of inappropriate means.⁴ Let us call this the “interchangeable means thesis.”

I shall begin my critical remarks by commenting on this last point. The interchangeable means thesis is mistakenly broader than an objective theory of justification or defense such as I have suggested above. As Katz recognizes, it implies that simply because one *might* have brought about an outcome in an appropriate way, one is not liable for the bad part of the outcome when the outcome is brought about inappropriately.⁵ This is different from the claim that because one *will* bring about the same outcome if one acts in a permissible way, one has no great liability if one brings the outcome about by means ordinarily inappropriate in order, for example, to avoid a big cost to oneself. For example, if I drive down route *A*, Joe on route *B* will be left to drown in a raging sea, and I will crash into a tree and be severely injured. If I drive down route *B*, my car will push Joe into the water where he drowns, but I will not be injured. Joe drowns either way, but I can avoid killing him by suffering the injury on route *A*. I suggest that I need not go down route *A*. The latter claim depends on the fact that the alternative permissible act I would perform if I do not go down route *B* also has Joe’s death as an outcome. By contrast, the interchangeable means thesis does not require that in these very circumstances the permissible act would otherwise be done and would result in the same outcome for a victim. It only makes reference to a permissible act or omission that *might* have been done leading to the same outcome. Hence, one cannot defend the interchangeable means thesis, as Katz tries to do, by presenting a case in which the outcome for a victim *will* be the same no matter what one does.

However, Katz may hold the additional thesis that even if there is not a permissible means that I would have undertaken, and that leads to the same outcome in these very circumstances, there always *could have* been such a means had one, in the past, been willing to expend sufficient resources to bring such a means about.⁶ I doubt that this thesis is true. But even if it were true, it would not make morally equivalent (a) a situation in which there is a permissible means whose costs we seek to avoid and (b) a situation in which, but for our having avoided certain costs, there would have been a permissible means. This is because, I

4. See Katz, *supra* note 1, at 1349–51.

5. *Id.* at 1350–51.

6. I gather that he does hold this additional thesis, based on a conversation I had with him on April 25, 2003.

believe, there is a moral difference between (i) refusing to pay costs *to use* an available permissible means rather than an ordinarily impermissible one when the outcome is the same, and (ii) refusing to pay costs *to make it the case* that there is a permissible means to an outcome. If there is actually no permissible means, one cannot behave as though it existed just because it might have existed. I conclude that it is the objective theory of justification, not the interchangeable means thesis, that underlies a defense of the counterfactual baseline test for compensation.

Given this as background, let me now raise some concerns about using the counterfactual baseline to determine liability and permissibility. First, suppose John knows that he will soon die of a disease. Does this imply that if the only way to stop Sam from negligently running over and killing John is for John to kill Sam, John may not do so, though a person not dying of a disease may do so? After all, on the counterfactual view, the value of what John defends is minimal, as he would otherwise live only a short time anyway. This also suggests that Sam need not impose a big cost on himself—correcting his negligent conduct—to avoid running over John. And if Sam need not impose the cost on himself, why should John be permitted to impose a big cost on Sam? Katz's thesis about the irrelevance of knowledge also implies that even if John did not know that he would soon die, his killing Sam is also without defense, objectively speaking, if John will in fact soon die.

Second, suppose that if *A* does not run into *C*, breaking his leg and thereby preventing him from dying in a plane crash, *B* would do the same thing. In this scenario, *A* only makes *C* no worse off than he would have been, not better off. Suppose *A* rather than *B* does actually break *C*'s leg and prevents his death in a plane crash, and he does so because he intends to save *C*. Suppose further that *C* would like to express his gratitude. Should he be stopped by the thought that *A* did not provide him with any benefit relative to the position he would have been in if *A* had not acted? Or, should he rather be interested in the *actual causal chain* in which *A*, not *B*, saved him from the crash. The latter, I think. So even when we use the counterfactual baseline of the plane crash to evaluate *A*'s conduct, we also recognize the importance of the actual *causal*, noncounterfactual element. To clarify the relevance of this for our original problem, let *X* stand for what *A* does that *B* would otherwise have done. If *X* is good (saved *C* from the crash), the fact that *A* actually did it matters even if *B* would have done it too. Then, if *X* is bad, why doesn't *A*'s actually breaking *C*'s leg also matter even if a plane crash would have done it had *A* not produced the same result?

Third, suppose the plane crash would result from negligence and the airline company would be liable for damages. If *A* crashes into *C* and breaks his leg in order to save him from the crash, there is a way in

which the negligent airplane crash still *caused* the harm to *C*, for *A*'s awareness of the upcoming crash prompted the effort to help. And, while *C* is better off than if he had crashed in the plane, he might have been perfectly alright (a) if the upcoming crash had not given *A* the reason to act, and (b) if the upcoming crash did not present the alternative of death. Arguably, the negligent company should be liable for the damage to *C* caused by *A*. By contrast, now suppose that *B* crashes into *C* due to negligence, not to save him. Then, there is no causal relation between his act and the upcoming negligent air crash, no way in which knowledge of that upcoming crash caused or was causally connected to the car crash that broke *C*'s leg. The company can say that its negligence was in no way causally involved in the harm to *C*, and it is saved from liability for his broken leg. The state of mind of *A* or *B* is important because it determines whether the actual cause of the injury is causally connected to what would, counterfactually, have caused the same or worse injury. Suppose we would consider the negligent airline liable for harm that intentional rescuers do even before the airline's negligence occurred. My claim is that this helps us understand why we should sometimes, as in *A*'s case, use a counterfactual baseline to determine the liability of the person who actually causes the injury and sometimes, as in *B*'s case, not use a counterfactual baseline.

Put more precisely, in my analysis the factors pointed to in these last hypothetical cases can be used to support the following general claims: (I) The causal account, as opposed to the counterfactual account, of assigning liability for an actual tortious act should be used when whatever (for example, the plane crash) would be responsible for setting the counterfactual baseline (namely, at death) does *not* have a causal role in explaining the actual harm. (II) When whatever is responsible for setting the counterfactual baseline also has a causal role in explaining the actual harm, the counterfactual baseline should be used for determining the liability of the person who actually causes harm. (This is true independent of whether there is liability in any party (for example, the airline) for the event (namely, the plane crash) that sets the baseline.) Let us call these two claims the "cause dependence principle."

I have presented this principle in an attempt to explain why the use of the counterfactual baseline might be correct when speaking of those who crash in order to save, but not of those who tortiously crash. This is so even though factors that could be used to justify a saving are as much objectively present in one case as in another. But I am aware that this

principle would have to be further modified to be anything more than a necessary condition for the use of the counterfactual baseline, for suppose a driver's knowledge of the impending airplane crash makes him very jittery and causes him to negligently crash his car into C, thereby killing him. This satisfies condition (II) of the principle, but in this case do we want to say that the company is liable for damages or that this driver's liability should be determined by the counterfactual baseline (namely, differently from any other negligent driver)? I think not. It seems that it is only if an *appropriate* response to what would be responsible (namely, the plane crash) for the counterfactual baseline is caused by it that the counterfactual baseline should be used to determine whether compensation is owed by the person who actually causes harm.

The appropriate response by the person who actually causes harm, perhaps involving a particular mental state, is important because it helps keep the actual cause of the harm causally connected to what would have been the cause of the counterfactual harm. This does not mean that the goodness of the mental state (for example, the intent to rescue) is intrinsically important to determine liability for injury; rather, the mental state may be only instrumentally important, for it keeps the counterfactual baseline-setting cause of harm involved in causing the actual harm. Here is a possible example where there is no good intention to rescue the person who is injured, and yet the counterfactual baseline is appropriate: I save two people who will die in a plane crash merely in order to be sure that they can repay their debts to me. In doing all I must do to save them, I unavoidably but unintentionally crash into a third person who would also have died in the crash, injuring his leg. His injury was caused by an appropriate response to the upcoming crash—saving the two even for an ignoble end. The negligent airline should, I believe, be held liable for the damage to the third person, and the counterfactual baseline should be used to determine my liability to him.⁷

7. I argue that an agent cannot always be free of all moral responsibility for an injury that he causes *A* in order to diminish the badness for *A* and others of someone else's act. F.M. Kamm, *Responsibility and Collaboration*, 28 PHIL. & PUB. AFF. 169, 179–81 (1999). Only sometimes, when an agent acts at the directive of the person who would otherwise do the greater evil, does all moral responsibility for the injury shift away from the agent. *Id.* However, in this article I did not argue that when the agent who tries to diminish harm retains moral responsibility for the injury, he is also liable to compensate at great cost to himself for the damage he causes. In addition, the cases discussed in *Responsibility and Collaboration* differ from the ones discussed in this Part. Those cases involved an agent, on his own or at a villain's request, killing *A* in order to stop *A* through *F* from being killed by a villain. *A*'s situation is improved only in that ex ante, his probability of being killed is reduced because only one of *A* through *F*, rather than each of them, will be killed. This is very different from *A* also benefiting ex post by suffering less of an injury. It is also different, I believe, from a case in which an agent kills *A*, who will be killed anyway, rather than make a big sacrifice to avoid killing him.

II. LEGAL UTILITY AND INTERPERSONAL PREFERENCES

A second problem can be understood to follow on the first discussed in Part I, with a modification: Would everything said about the first problem remain the same if mere utility, understood as preference satisfaction or happiness, were substituted for a good outcome understood in nonsubjective terms (for example, having one's life saved)? For example, can making someone happier overall play the same role as saving his life when weighed against causing him an injury? Consider a case where we crash into someone, causing his leg to be lost, but leave him happier overall than he would have been had he caught his plane for the trip that would have made his life completely miserable but would not have damaged him in any physical way. Leo Katz argues that, in general, the law tends to ignore utility, but common sense takes it into account, and we have to choose one option or the other. He calls this the "raw utility problem."⁸

I have several questions about his conclusion and the particulars of his argument. But first, notice that one reason the law might ignore utility is that it refuses to believe the utility could not have been brought about in any way but by damaging the person. For example, if someone is miserable having to fulfill a contract to engage in sports, ought he not work hard to pay off the contract rather than have to wait for his leg to be cut off so that he is unable to play sports? To avoid this issue, let us suppose that the person will be coerced into sports and truly cannot achieve happiness unless he loses his leg.

On this assumption, my first question is whether common sense sides with raw utility. For suppose we think that someone who is devoted to pursuing a career in music should even cut off his leg in order to avoid being coerced away from that career. We might think this not because we take bare preference satisfaction or happiness to be so important, for if someone has a bare preference to be legless, we might not think that he should cut off his leg to satisfy his preference. We think it appropriate to focus on the character of the object of the person's preference (namely, his career versus leglessness per se).

Even if this is so, would common sense agree that if *A* knew that the

Harming someone who will be thereby no worse off than he would have been in order to save other nonagents seems to raise special problems, and this is the case I discussed in *Responsibility and Collaboration*.

8. Katz, *supra* note 1, at 1353–57.

only way for *C* to have a career that will make *C* happy is for *C* to miss his plane, then *A* (without even consulting *C*) would have a defense if he crashed into *C*, causing his leg to be lost? I think not. Some may want to distinguish *C*'s achieving happiness from *C*'s avoiding misery, but I think that even the latter goal would not justify crashing into *C* without his consent. This is in contrast to the permissibility of crashing into him without permission in order to save his life.

Katz presents a very different case to support the view that common sense gives a strong role to (some sort of) preference satisfaction. It is one where *C*'s leg will be lost if it is not treated, but he prefers that the slight damage to his pinky be treated instead. This is because damage to the pinky, but not the leg, would interfere with the career he values above his leg.⁹ This is a case in which (a) we consult with *C* about how he should be treated given his preferences concerning his own life; (b) it is a question of interfering with *C*'s body in order to help one or another part of it, something we should not do without his consent but may do with his consent, given that he is competent: That is, it is not a case of *damaging* one part of his body (his leg) to help another part (his pinky) where his consent may not be sufficient; and (c) possibly, a judgment is being made about the reasonableness of the grounds for his preference; that is, it can make sense to take one's career more seriously than preventing serious damage to one's body.

In what I shall call an *intrapersonal* case, where a person weighs his preferences for career against his preference for less bodily damage, I think a doctor is sometimes permitted to follow the patient's preference, though it may result in more bodily damage. But Katz's case also involves another person *B*, who will lose an arm if he is not treated instead of *C*. (Katz never mentions whether *B* cares about his arm.) Katz argues that cycling in our judgments results if we combine respect for a person's preference with a more objective weighting of damage independent of personal preferences. For, he says, the care of *C*'s leg should take precedence over the care of *B*'s arm according to the law, which uses the objective weighting. But once the doctor turns to *C*'s leg, he will be right to follow *C*'s preference for the care of his pinky. However, the law will then tell him to treat *B*'s arm rather than *C*'s pinky, for objectively the arm counts for more. Next, the law will also tell him to return to *C*'s leg rather than fix *B*'s arm, at which point the cycle starts over.¹⁰

I disagree with Katz's analysis. I do not think cycling will occur as a result of taking preferences seriously in the intrapersonal context while

9. *Id.* at 1355–57.

10. *Id.* at 1356.

simultaneously giving weight to more objective rankings in the interpersonal context. Cycling stops because once *C* agrees to have his pinky rather than his leg treated, the leg gets eliminated as a possible choice by the doctor and the law relative to *B*'s arm. Hence, there is no need to move from *B*'s arm to treating *C*'s leg; the cycling is stopped. Of course, once *C* realizes that not even his pinky will be treated in these circumstances, he may prefer treating his leg to getting nothing. Then the cycle stops with the treatment of *C*'s leg if we take the more objective view in the interpersonal context, as I think we should. Hence, contrary to Katz, I do not think that cycling requires giving up one of two plausible positions—giving weight to preferences or ignoring them. It only requires restricting the scope of preferences to the intrapersonal context and recognizing the effects of doing that on the interpersonal context.¹¹

Finally, in connection with this point, Katz discusses what he calls the Cooter-Porat paradox.¹² First, he describes these authors as claiming that a cost to someone consists of a negative (drawback) component and positive (benefit) component.¹³ Hence, a cost is less as the benefit increases. Notice that this claim could be made whether the benefit is the satisfaction of preferences or is more objectively determined. I find this claim of Cooter and Porat bizarre, for it includes within the idea of “cost” the idea of a benefit, which is supposed to be distinct from “cost.” Just because a benefit gets larger, that does not mean that the cost (which, on my view, is *just* the drawback) becomes smaller, though it may become more worth paying. Katz further describes Cooter and Porat as taking the view that the objective benefit should be used in the calculation of their conception of the “cost.”¹⁴ This would imply that when one's act presents a risk of injury to others and to oneself as well, a determination of negligence in failing to pay the cost of precautions should be based on the fact that the cost to oneself would have been *low*.

11. In a conversation I had with him on April 28, 2003, Katz suggested that special deals might be made between *C* and *B* that will result in different stopping points. For example, because *B* will get nothing if *C*'s leg is treated, and *C* would prefer that his pinky be treated, *B* might waive his right to have his arm treated instead of *B*'s pinky for some money. Then *B* can have his pinky treated. I am not interested in disputing that point here, as it also leads to the conclusion that the cycling can be stopped.

12. Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others?* *Law and Economics in Conflict*, 29 *J. LEGAL STUD.* 19, 19–20 (2000).

13. Katz, *supra* note 1, at 1356–57 n.8.

14. *Id.*

This is because an objective benefit to the tortfeasor—his also avoiding injury—would have occurred had he taken precautions. My grounds for objecting to doing the calculation in this way are as follows: If someone in the intrapersonal context has personal grounds for refusing to value the objective benefit over the costs of precautions, it is wrong to do a calculation in the interpersonal context that depends on requiring him to accept this benefit, even if doing so is in the interest of someone else who would have benefited from his paying the cost of precautions.

III. THE EXPECTANCY PROBLEM

Katz calls the third problem that we shall examine the mere “expectancy problem.”¹⁵ It can be connected to the problem with which we began in Part I in the following way: Should we compare how a person will be if a promise is not fulfilled with (a) the counterfactual baseline of how a person would have been if the promise had been fulfilled, or (b) a baseline of how the person would have been if the promise had not been made? Notice that (b) is also a counterfactual baseline, since it does not merely refer to how the person *was* before the promise, but takes account of opportunities foregone due to reliance on the promise. Connecting this problem with the main problem in Part II would involve deciding whether happiness and preference satisfaction should be relied on to determine the person’s condition as it would have been and as it is. A case analogous to the one focused on in Part I would arise if someone would be as well or better off if his promise went *un*fulfilled than if it were fulfilled.

Those who say we should use baseline (b) say that a person should be compensated for the reliance costs of a failed promise, that is, the way in which he is worse off than he would have been because of his reliance on the promise. This will include other opportunities he passed up and would have taken but for the promise. Strictly speaking, I think these opportunities should be ones a person would have had independently of the promise being made. For if a promise by *A* to *B* results in other people offering *B* new opportunities that he passes up due to reliance on *A*, it is not true that *B* is worse off than he would have been if the promise had not been made. On the other hand, if foregoing such new opportunities due to reliance on *A* was relevant to compensation, then (b) would not be correctly phrased. Of course, someone may be better off than he would have been if the promise had not been made just in virtue of having gotten a promise, even if there is reliance and the promise is not kept. For example, if people know that a famous person promised you

15. *Id.* at 1357–62.

something (even unimportant), your credit rating may go up enormously.

Some who say we should use baseline (a) seem to equate the state the person would have been in if the promise had been kept with the one he expected to be in—hence the name “expectancy problem.” According to Katz, some who support (a) further think that the promise to be given *X* gives one a right to *X*, and so not giving the promised *X* is tantamount to wrongfully taking away from someone an *X* that he already has and to which he has a right.¹⁶

We have seen in Part I that many may often be attracted to a counterfactual baseline for compensation, considering what *would actually* have happened if not for some wrong. But while Katz understands this, he thinks that even supporters of such a counterfactual baseline might object to setting the baseline at what *should* have happened, that is, at what was promised to happen.¹⁷ Hence, when what would have happened depends on the fulfillment of a promise, there are additional reasons to think that wrongs, such as failing to fulfill the promise, that interfere with what would have happened are not to be dealt with by using the counterfactual baseline (a) for compensation.

Before considering the grounds that Katz raises for objecting to the use of (a), let me raise some questions of my own about both (a) and (b). First, it seems wrong to equate (a) with a view that considers someone’s actual expectations and call it the “expectancy view,” for suppose *A* promises *B* to deliver groceries, but *B* does not trust *A* and fully expects him to fail in his promise. *A* expects nothing and it may even be reasonable of him to expect nothing, but because of the promise, he has a *right* to expect and a *right* to the delivery. He may want to get a promise that he does not expect to be fulfilled because he wants it as proof of *A*’s lack of dependability or because the law might enforce it. It is what he has a right to, not what he expects, that should be the basis of (a).¹⁸

My second question bears on both (a) and (b): Why should someone

16. *Id.* at 1359.

17. *Id.* at 1357–60.

18. Thomas Scanlon’s theory of promising and of the wrong of not keeping promises seems to be based on the importance of not defeating expectations we have intentionally engendered. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 295–327 (1998). This theory must be mistaken, I believe, as an account of the wrong of breaking a promise because it can be wrong to break a promise even when it reasonably gives rise to no expectations. It can be wrong because promising gives someone a right to expect fulfillment and a right to be given something, whether he expects its fulfillment or not, whether he knows he has the right or not.

be compensated for all resulting damages or be in the state he would have been in if either the promise had been kept (on (a)) or if it had never been made (on (b))? Suppose I promise you a car and do not deliver. At the time of the promise, you were interested in having the car just to drive on your own. But you are a commercial genius and afterwards see a way to make a deal to sell the car for a hundred times its market value. Am I really responsible when I promise the car for all the not-reasonable-to-expect consequences that you would actually bring forth if you had received the car (on (a)), especially when they had nothing to do with what made you value the promise in the first place? Am I really responsible for all the not-reasonable-to-expect consequences that you would have brought forth if you had not relied on my promise and done other things instead (on (b))? This seems much too demanding a theory of promising, affecting both (a) and (b). If it were true, people should be *very* wary about making promises they are not absolutely sure they can fulfill.¹⁹

Further, I believe that similar constraints on counting all actual consequences should exist when a right based on actual possession, not based on promising, is wrongfully breached. For example, suppose I steal your old car that you (a commercial genius) would have sold for a billion dollars. I ought not to be liable for compensating you for the billion. Hence, I do not think it is the “flimsiness” of the protected interest in the case of a promised possession, as Katz puts it, by contrast to the interest in an actual possession that is necessary to support such constraints.²⁰ So let us henceforth assume that the law is only concerned with liability for reasonably foreseeable consequences of committing a wrong such as breaking a promise. The question remains: Is (a) or (b) the baseline for measuring the comparative badness of the consequences?

The way I would put Katz’s complaint against (a), based on the cases that he presents, is that having a right to something by way of a promise is not morally the same thing as *having* that to which one has a right. When someone interferes with what you have and to which you have a right, he will violate a negative right of yours. But when he violates your right to have something be given to you by not fulfilling his promise to give it to you, or by interfering with the fulfillment of someone else’s promise to you, he interferes with the fulfillment of a positive

19. This was recognized by the famous decision in *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. D. 1854).

20. Does such a constraint on considering consequences account for Katz’s case in which someone’s violation of a rule against cheating results in his getting a higher grade on his record, and this results in his depriving someone else of a valuable job? Is being deprived of the job an unforeseeable consequence of the wrong and, for this reason, noncompensatable? Katz thinks not. See Katz, *supra* note 1, at 1360.

right. A sign of the relative strength of these negative and positive rights is shown by how much you could permissibly do to prevent the wrongful interference with their fulfillment, holding constant welfare consequences of the interference. The negative constraint is very strong by this test. Katz thinks the positive is relatively weak, as you could not do much to stop the interference with the positive right.²¹ For example, if someone will take your drug that you need to save your life, it is permissible to kill him to prevent his act. If *A* will not give you the drug that you need to save your life that he promised, or if *B* interferes with *A*'s keeping his promise, you may not kill either to get the drug.

I am inclined to agree with this test. However, I would add the following explanation of the difference it registers: *A*'s promise to give you *X* is unlike an agreement that, at a certain time, *X* will be your property (even if you do not have it in your possession). Once the agreement is made, nothing else except the passage of time needs to occur for *X* to be yours, and the interference with *X* and with your having it after that time violates a negative right. By contrast, a promise to be given *X* gives you a right to come to have rights over *X* by way of your having a *right to some further performance by the promisor*. And, if the promisor fails to give you this performance: (1) your positive right to the performance is violated, and (2) its violation interferes with your having rights over *X*. Hence, since you never had rights over *X* per se, only over the performance that gives both *X* and the rights over *X*, the counterfactual baseline of how you would have been with *X* seems inappropriate for determining liability.

Suppose that someone who commits the wrong of breaking a promise is not liable to compensate for all the foreseeable consequences of the wrong. Then, in cases not involving violation of promises, does committing a wrong make one liable for all the reasonably foreseeable bad consequences of the wrong? My sense is that if I do a wrong, even a wrong to you, as a way of doing something else that I have a right to do, and that foreseeably negatively affects you, I should not necessarily be liable for the negative effects. For example, to use a case based on one suggested by Katz,²² suppose that I illegitimately take your parking spot in order to rush to a store to buy the last respirator. I do this knowing that you too need to park in your space in order to go buy this last

21. *Id.* at 1360–62.

22. Katz suggested this example in a conversation I had with him on April 28, 2003.

respirator. Because of the wrong I do to you, you will die through lack of the respirator, while I will survive by using it. I agree with Katz's sense that I should not be liable to compensate your estate for the loss of your life simply because a wrong to you was committed. This is because committing the wrong enabled me to make a legitimate purchase, and it was this legitimate purchase that had the very bad effect on you. What if the purchase itself had been illegitimate—for example, I was banned from buying medical supplies in this country? Perhaps I should then be liable for compensating for the loss of your life.

IV. WRONGFUL EXISTENCE AND TORT LIABILITY

The fourth problem with which we shall deal concerns cases in which without a tortious action someone would not have come into existence. Katz chooses to focus on a case of this sort that involves a triangle: *A*'s tortious conduct to *B* causes *C*'s existence, as well as some problem that *C* has (for example, ill health).²³ We should understand this as follows: *C* could not have existed without the health problem. This case differs from one in which *C* would be created without this necessitating a health problem and then *A*, by his tortious conduct, would also make *C* sick. Is *A* liable to compensate *C* for his problem? Katz notes that if we are tempted by the counterfactual approach, we cannot say that if *A* had not acted, *C* would have been better off. This is because *C* would not have existed, and being better off at least seems to require that a person would have been in a better state than he is in.²⁴ Let us assume that if *A* had acted nontortiously, either no one would have existed or *D* would have existed in a better state than *C* is in. The latter possibility gives rise to the “nonidentity problem,” which involves someone like *C* being worse off, not than *he* would have been, but than someone else like *D* would have been.²⁵ Should the fact that someone else would or even could have existed in a better state give *C* grounds for holding *A* liable for *C*'s health problem? In an impersonal morality, such as utilitarianism, *A* might be held accountable for producing a worse state of affairs, but that does not mean he owes *C*, in particular, anything. To what Katz says, I would add that, strictly speaking, we also cannot say—unlike what was said of the person whose leg was damaged but whose life was saved from a plane crash—that if *A* had not acted, *C* would have been worse off. This is because *C* would never have existed, and being worse off also, at least, seems to require that a

23. Katz, *supra* note 1, at 1362–66.

24. *Id.* at 1363–64. We shall cast doubt on this claim below.

25. Derek Parfit discovered the nonidentity problem. See DEREK PARFIT, REASONS AND PERSONS 351–79 (1984).

person would have been in a worse state than he is in.²⁶

If we are tempted by the causal approach, we can say that *A* caused *C*'s health problem. But since *C* did not already exist without the problem and *A* also caused him to exist, can this not be thought of, according to Katz, as giving *C* half of a loaf instead of a whole rather than taking away half of a loaf already belonging to *C*?²⁷ And then if *A*, in addition to this, gives *C* a large inheritance, to which any of *A*'s offspring are entitled, why is *C* entitled to any compensation from *A* for his health problem? Hence, on either the causal or counterfactual approach, we have trouble accounting for a duty to compensate *C* for his problem.

In dealing with this issue and some of the things Katz says about it, I think it is necessary to get clearer about some related matters. Is being in existence a benefit to someone to be weighed against a problem he has? It is not strictly a benefit, in part because there was no one in existence prior to creation whose state would be improved by existing and who would be worse off not existing. This is one reason to think that if a health problem will exist if someone is created, then even if his life will overall be worth living, it might be wrong to create him. After all, no one was in need of existing and so no one would be forgoing a benefit of life in order to avoid a health problem. A person who is created is not strictly benefited if he is not better off than he otherwise would be. This includes being better off than if he were not in existence at all *and* being better off than he would have been if created in a different condition. On the other hand, though a perfectly glorious life is not strictly a benefit to the person created, because it is the person who is created who will have all the goods of the life, I think it is appropriate in many ways to think of being created to a good life *like* a benefit. Certainly, we can benefit a person whom we save from death, even if he would not otherwise have been in a worse state but rather nonexistent. Hence, it is not true that being benefited requires that one be in a better state than one would otherwise have been in. Of course, when we save a life, but not when we create one, there can be someone who needs to continue to exist.

If we are willing to stretch the notion of benefit to include creation to

26. We shall cast doubt on this claim below.

27. Katz, *supra* note 1, at 1364–65. Note that if an entity (e.g., a fetus) that has a whole loaf is not yet the sort that is entitled to keep it, taking away part of the loaf may also be permissible. This can be true even if the entity grows into a person who will live with only the half loaf, so long as this half meets some threshold. For more information, see generally F.M. Kamm, *Genes, Justice, and Obligations to Future People*, 19 SOC. PHIL. & POL'Y 360 (2002).

a new good life, does this imply that the good parts of a life are to be weighed against an unavoidable problem in the life, and if the problem is outweighed, no compensation is owed? Not always, I believe, as will be argued below.

Might we also stretch the notion of harm to include creation to a life that is worth not living, for example, a life full of meaningless pain and misery? It can still be true of this person that in being created to such a life, he is not worse off than he would otherwise have been since he would not otherwise have been in a better state (namely, he would have been either nonexistent or created to no better state). But we can recognize that nonexistence is better than such a bad existence and stretch the notion of being harmed to being created to such a state. Derek Parfit recognizes this by only discussing the nonidentity problem in connection with people who have lives at least minimally worth living or better; they are worse off than someone else might have been, but they are not worse off than if they were nonexistent.²⁸ This is one reason why he would not agree with Katz's view that the nonidentity problem implies that future generations could never have a complaint against you when, had you acted differently, they would not have existed. Those future generations living lives worth not living would still have a complaint not dependent on resolution of the nonidentity problem. Also, if we save someone from death when his life is worth not living, we harm him even though he is not worse off than he would have been, assuming death involves nonexistence. Hence, it is not true that being harmed requires that one be in a worse state than one would otherwise have been in.

Suppose that *C* is living a life worth not living when the alternative is not having been in existence, and his existence is due to *A*'s tortious conduct to *B*. Then is *A* not liable for harm to *C*? I think he is. Further, we can conclude in a two-person scenario that *A*'s creating *C* to such a life when he could easily have avoided it is what can constitute *A*'s *tortious conduct*, and hence *A* not only harms *C*, but wrongs him even in the absence of treating *B* tortiously. In this case, it seems right to conclude that *A* owes *C* compensation.

Next, notice that in previous cases we have considered, such as where a person is saved from a plane crash, the benefit that someone gets when we do something that also injures him consists not only in his not being worse off, but in his avoiding a very bad fate. Seana Shiffrin has argued that causing a lesser harm can be acceptable as a way of preventing someone declining to or being in such a very bad state, but it is not acceptable as a way of providing someone with, or even of seeing that he

28. PARFIT, *supra* note 25, at 359, 362–63.

retains, a very positive condition when being without it does not involve having a very bad fate.²⁹ After all, someone can be in danger of becoming worse off, and yet this involves only his losing a great good and falling into a merely adequate life. Hence, she distinguishes between the permissibility of putting people at risk or harming them to save their lives and the impermissibility of doing this in order to give them a billion dollars by dropping gold bullion bricks on them when they already have adequate lives. It is impermissible to throw the bullion bricks, she says, even if the people would be overall better off with a broken leg caused by the brick plus the billion than they were or would have been otherwise. Hence, she is willing to net out harm we cause to another in the case where they avoid a very bad fate, but not where they get a very good fate.³⁰

Now people hit with bullion bricks are, in having broken legs, worse off than they were or would have been in that way, though they are better off overall because of the billion dollars. Someone created with a disease, however, is not, with regard to the diseased state, *strictly* worse off than he was or would have been. Still, Shiffrin thinks he is in a bad way (she calls it a “harmed state”), not merely lacking some further good added to an adequate condition.

Putting this together with the generous view that coming into existence to a very good life is like a benefit, she concludes that doing what causes the benefit of life to *C* when one must also cause a problem for *C* (such as his having a disease), can itself consist in tortious conduct. The problem is not merely outweighed by the good. Hence, compensation could be required even when someone is “benefited” overall by being in existence.³¹ Shiffrin’s analysis implies that compensation is

29. Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 119–35 (1999).

30. Shiffrin refers to such very bad fates, regardless of how one came to be in them, as harmed states. She does not say whether she thinks that allowing someone to be in a harmed state rather than relieving his problem is wrong. However, she suggests this by writing, “[W]e often consider failing to be benefited as morally and significantly less serious than both being harmed *and* not being saved from harm.” *Id.* at 121. She also does not consider whether making someone worse off by taking away a pure benefit is permissible in order to provide him with a large benefit. For example, suppose the bullion bricks are always thrown over people’s gardens and can never do more than damage their trees and flowers. If such property infringements and setbacks were also impermissible, this would show that harmed states are not uniquely prohibitive. But she writes, “[T]he asymmetry remains even if one compares active harming to the active removal of a benefit” *Id.* at 121 n.14.

31. *Id.* at 148.

owed to the child in Katz's case where the created child has a health problem. This would be so, whether or not the child's existence is due to tortious conduct toward someone else.

Shiffrin extends these conclusions, for she says that even an average, unexceptional life has problems. Among these problems, she thinks, are the burdens of moral choice, pain, and having to cope with death. Hence, she concludes, even an average parent, in creating a life overall well worth living is involved in tortious conduct and may owe compensation to his or her child. The compensation takes the form of giving the child assistance in life that parents typically give.³²

I disagree with Shiffrin's analysis of ordinary creation as tortious and calling for compensation. First, it seems odd to me to treat as problems or being in a harmed state some of the very things that give value to human life, such as moral consciousness. It is possible that some of the things that give value and meaningfulness to human life are not best thought of as benefits to the person (namely, as improving his well-being). Hence, deciding if creating a human person is right or wrong requires more than weighing what are goods and evils to the person created.

Second, I think that the example of the person who may not throw bullion bricks on people risking damage to them for the sake of enriching them is an inadequate analogy to creating people. For a natural way to resolve the dilemma in the bullion case is for the donor, if it is possible, to reduce the size of what he is throwing, thus eliminating risk, even if it also reduces the additional riches he can give. But the analogous course in the case of creating life would be to reduce the goods one creates to the point that is necessary to eliminate the problems. Hence, Shiffrin's argument would lead one to conclude that creating creatures incapable of moral choice, never in pain, and unaware of truths such as the prospect of death, like extremely happy, long-lived rabbits who have no other problems, would be preferable to creating human persons as they are now. But I think this is the wrong conclusion. It would be wrong, and would have been wrong at the beginning of creation, to substitute such creatures for continuing humanity. Shiffrin emphasizes that she has constructed the bullion case so that it is not possible to bestow a benefit in a nonrisky way, and still either it is wrong to drop the bullion or one must compensate those hit.³³ My point is that this does not show that creating people with certain common problems is either wrong or requiring of compensation when it is not possible to avoid the problem, for, I have argued, reducing benefits to avoid problems *is* what should be done in the bullion case, if it were possible,

32. *Id.* at 144–45.

33. *Id.* at 135 n.33.

but reducing benefits to avoid certain problems is *not* what should be done in the creation case, if it were possible. Arguably, if it would be wrong to eliminate problems at the cost of either reducing the benefits to the person or reducing values in the human condition, one should not be liable for compensation for certain unavoidable problems if one produces the benefits and values that outweigh them on balance.³⁴ (It is also true, I believe, that dropping the bullion in the absence of an ability to compensate for a problem caused would be wrong. But creating a child in the absence of the ability to compensate for ordinary problems of life is not wrong.) All this suggests that parents' duties to the children they create are not to be grounded in a duty to compensate, but in something else. This would make it harder to argue for compensation in Katz's case of creating someone with a health problem.³⁵

My own view³⁶ is that creators owe their creations, at reasonable cost, certain things that I call the "minima." These involve *more* than just things that make lives barely worth living. Hence, I do not think that giving half a loaf, as distinct from giving a whole loaf and then taking half away, is permissible if the half a loaf falls below the minima. A rapist who created a child without the minima, even if the life was worth living, would wrong the child. What are the minima? What if one could have easily given more than the minima to the same individual but instead gave only the minima? What if one could have easily created a

34. I say only "arguably" because it is possible that an unconventional view of compensation might be correct. This is the view that says that (roughly) one has a duty to see to it that there not be a problem of which one is the cause. It contrasts with the view that says (roughly) one has a duty not to cause a problem. The first view (unlike the second) implies that if one should not have avoided producing a problem at the expense of not producing a good (even when no compensation afterwards would be possible), one may still be liable for compensation when compensating is possible. This is because one can make it the case that there not be a problem of which one is the cause after one causes it without eliminating the great good. For more on these two views, see Frances Myrna Kamm, *The Insanity Defense, Innocent Threats, and Limited Alternatives*, CRIM. JUST. ETHICS, Winter/Spring 1987, at 61.

35. Shiffrin seems willing to equate actively bringing about bad states and allowing bad states to come about because her focus is on the state one is in (harmed or not) rather than on whether one was caused to be in it or merely left to be in it. Combine this with her emphasis on avoiding bad states relative to achieving benefits for people already in passable states. The result is that Shiffrin would seem to have to condemn a parent who allows a child to travel on buses, thereby increasing his risk of damage, for the sake of going to piano lessons—at least insofar as bus riding is not a means to warding off other harms. I think this is the wrong conclusion.

36. See F.M. KAMM, CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY 132–33 (1992).

different person with more than the minima? These are difficult questions—the last one reintroducing the nonidentity problem—and I shall not address them here.³⁷

What about Katz's additional case in which all children of the rapist are entitled to a sizable inheritance, X , from him or a distant relative? Should their receipt of this be netted against the things in the minima that were not provided by the rapist? One reason to think it should not is that all the rapist's children are entitled to both X and to the minima. Why should one's inheritance be reduced just so that it can make up for something else that should have been provided independently?

V. CONCLUSION

I have argued that in various ways and for various reasons, how things would have been but for a tortious act is often irrelevant to our responsibilities to the victim(s) of the act. Whether compensation is owed and how much can depend on whether what would have happened is in some way causally responsible for what did happen, whether one already has a claim to what one would have gotten, and whether one must not do something without meeting a certain standard.³⁸

37. For a more complete discussion of these issues, see *id.*

38. For comments on this Article, I am grateful to Leo Katz, Derek Parfit, and Seana Shiffirin.