

Defending a Benefit-Based Approach to Compensation for Necessary Losses

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Abstract: This paper examines cases when compensation follows from necessary actions that cause harm. I posit that we can determine when compensation is due in instances of necessity by referring to the distribution of benefits and losses that result from the action.

Jerry Garcia once said, “Constantly choosing the lesser of two evils is still choosing evil.”¹ I am inclined to disagree. Although the choice will ultimately end up with evil or harm in some form, we often praise individuals who take the path that leads to fewer negative consequences. All things being equal, we would much rather save one hundred lives at the expense of one than save one life at the expense of one hundred. In instances where harm is unavoidable, we strive for the least amount of damage possible. This is one of the rationales behind the necessity defense in the civil and criminal law. When one finds oneself in a scenario where harm is unavoidable and the only option is to break the law or suffer greater harm, the law privileges deviations so long as a person is acting as a reasonable person. Such disutility avoiding actions are referred to as “necessary” actions. When we must take them we often also strive to undo any unfair losses or gains, to “make the victim whole.” We turn towards a principle of restitution: going from preserving utility to promoting equity and fairness by annulling unfair benefits and burdens. In this paper, I defend a benefit-based approach to compensation in instances of necessity. I will propose my conditions for compensation, argue against a rights-based approach to compensation, and then defend my thesis against four objections: (1) cases where the greater good is not achieved, (2) cases where the greater good is achieved, yet the person who achieves it acts impermissibly, (3) cases where someone does the wrong thing for the right reasons, and (4) cases where a person does the right thing for the wrong reasons.

¹ “Jerry Garcia Quote,” BrainyQuote, accessed March 11, 2015, <http://www.brainyquote.com/quotes/quotes/j/jerrygarci158230.html>.



Rights-Based Approach vs. Benefit-Based Approach

I believe that one is liable to compensate for causing harm in necessity scenarios. The fulfillments of the following two conditions are necessary and sufficient for liability to compensate: (1) one retains an unfair benefit at the expense of another and (2) but for an unavoidable set of circumstances the beneficiary would not have been part of the causal chain of events that produced the unfair gain and loss. For example, had my friend Dave not been in insulin shock, I would not have needed to steal your insulin pen.

I posit three conditions that are necessary and jointly sufficient for one to deserve compensation for a harm one has suffered: (1) the victim suffered a loss, (2) the loss was unfair or unjust for the victim, and (3) the victim is not responsible for the circumstances that generated the need for the loss. In (2), it is not that the victim *believes* that he or she has lost unfairly or unjustly to satisfy this condition; rather, it is the fact that he or she has suffered the loss unfairly or unjustly. In virtue of the loss that the victim suffered (once the above criteria are met), the victim can be said to be *wronged* by the action and thereby is deserving of compensation.

In contrast to the above benefit-based approach, Judith Thomson adopts a rights-based approach to compensation. She looks for when rights have been infringed or violated as indicators of when a victim is wronged and compensation is due. She offers the following example: You are rich and own a lot of steak.² You keep this steak in a locked freezer on your back porch. Proximate is a child with a protein deficiency who will die if I do not get the child some protein fast. I have no protein at the moment, but you do. You are out of town, and I am unable to contact you. The only way to get the steak is to break into your freezer and take one. Thomson then proposes that you have been wronged by my infringing on your right not to have your steak stolen. Since you have been wronged, you qualify for a claim to compensation for your loss.

From whom should you receive compensation? This is where Thomson's theory runs thin. She proposes that I am the one who ought to compensate you for the loss because I am the one who stole the steak. This is problematic, however. In necessity cases such as the one that Thomson proposes, the action that I take is *justified*. It is justified in virtue of promoting the greater good and preventing a

² Judith Jarvis Thomson, *Rights, Restitution, and Risk: Essays in Moral Theory*, ed. William Pareni, (Cambridge, MA: Harvard UP, 1986).

greater harm. Since the action is justified, it is no longer *wrongful*. In fact, my actions may even be applauded—I saved a life at the mere expense of a steak. Since my actions are justified and thereby not wrongful, I cannot be said to have *wronged* anyone. The issue here is that, even though I did not act wrongfully, you have still been *wronged* by my action.

This issue can be resolved by appealing to the notion that you are wronged by the circumstance and therefore not by me. Because you are wronged by the circumstance, you can claim compensation from neither the starving child nor me because we were not the ones to wrong you. Yet, we want to compensate you for your loss; it is easy to say that you are *owed* something for your loss, and surely we *want* you to have that loss annulled. This incoherence—a compensation owed but no one owing it—is what makes the rights-based approach problematic. A benefit-based approach is better.

If we take a benefit-based approach to compensation, you can recover for the loss of your steak. What we need to do first is look for an unfair gain. We find the unfair gain being retained by the starving child: the child received your steak where you unfairly lost it. I did not benefit from this transaction. In fact, I am acting as a Good Samaritan by saving the child’s life. We want to promote my kind of actions for social benefit and cohesion. If we had the Good Samaritan compensate you for your loss, we would end up with a deterring effect and a decline in Good Samaritan actions because of the looming fear of needing to compensate for my otherwise illicit actions.

In this scenario, the child is the one who ought to be held liable to compensate for the loss of your steak. The child meets all the requirements for being liable to compensate for harm. The child meets (1) in that the child retained an unfair benefit at the expense of another, namely the steak. The child also meets (2) in that the child stands in relation to the causal chain of events that led to the harm. This condition is satisfied in virtue of having the protein deficiency and requiring the steak, facilitating the actions that then followed by me.

Worries and Hard Cases

Let us test my theory further against potential worries. First, what happens when a greater good is not achieved? Consider the case



of *Vincent v. Lake Erie*.³ In this case, a large and valuable ship, owned by Lake Erie Transport Co., was about to be caught in an imminent storm that would have destroyed it. The personnel on the ship decided to dock it at a private dock in order to save it. As the storm passed, the boat remained unscathed, but the dock suffered damage. The dock owner then sued the shipping company for damages to the dock. The courts found that the action taken by the boating company was justified, but the boating company had to compensate because their motivations were not to produce the greater good altruistically but were self-serving.⁴ Suppose, hypothetically, that there were a third-party bystander who saw the boat stranded in the middle of the lake, towed the boat to the dock, secured it to the dock, and left it there. In this fact pattern, concurring with my proposed theory, the boat owner (the beneficiary) would be liable to pay compensation for the damage to the dock, which would be consistent with the original ruling that the boat owner had retained a benefit, justifying that the boat owner pay the cost of compensation.

If we change the fact pattern slightly and say that the boat was not saved but rather that it sank, even though it was secured to the dock, would that change the outcome of who is liable to compensate the dock owner? My answer is no: it does not change the outcome. My proposal for liability to compensation has two conditions: there must be (1) a retention of an unfair benefit at the expense of another, and (2) the beneficiary must stand in relation to the causal chain of events that led to the unfair gain and loss. Condition (2) means that the beneficiary must have been in a position where the unfair loss needed to occur in order for the beneficiary to benefit and promote the greater good. It is neither necessary nor sufficient that the production of the good actually obtains. As long as the motivations behind the action that caused the harm were directed towards producing a good (benefitting the beneficiary), the beneficiary is liable for the action. Whether the Lake Erie Transport Co. actually retains the benefit as a matter of fact is not important. What are important are the motivations and beliefs of the actor.

Second, what about cases where the greater good is achieved, yet the person who achieves it acts impermissibly? Consider Trolley scenarios.⁵ In these scenarios, there is a trolley on a track that is rolling

³ *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (Minn. 1910).

⁴ *Ibid.*, 460.

⁵ Judith Jarvis Thomson and Sherwood J. B. Sugden. "Killing, Letting Die, and the Trolley Problem," *Monist* 59, no. 2 (1976): 204-17.

down a hill out of control. In the direct path of the track, there are five innocent individuals. You are watching these events unfold. Next to you there is a lever that will divert the trolley to an alternate track. However, on this alternate track there is one innocent individual who will most certainly be killed if you divert the trolley onto the alternate track. All things being equal, the permissible action would be to pull the lever and save the five lives of the individuals.

When all things are not equal, however, the scales may tip. What if the one person on the alternative track has the cure for all biological diseases and illnesses that afflict humanity? In this case, we may reconsider and decide that the life of the one individual is more valuable than those of the five innocent people because saving the one produces the greater good. Those who are stern about saving the five people regardless of the credentials or qualifications of the one find it impermissible to pull the lever. If this stern view is granted, we have a scenario where the action is impermissible yet produces a greater good. I believe that it is actually impossible to have scenarios where a greater good is achieved and the person who achieved it acted impermissibly. What justifies the permissibility of the action to pull the lever is that it will produce the greater good. If I have an action that is impermissible, then it *cannot* be producing a greater good. Producing a greater good entails the action being permissible under these necessary circumstances.

Third, what about cases where someone does the wrong thing for the right reasons (or does more than is necessary for the right reasons)? If one acts impermissibly but was motivated to produce a greater good, one's actions would be permissible as long as the motivation for action conformed to the intention to produce a greater good. For example, if there were a raging fire that was coming to burn down the town and the only thing that I could do to stop the fire would be to burn down your crops, my actions would be permissible because they conformed to the motivation to produce a greater good. Furthermore, if I only needed to burn down two of your twenty acres of land to prevent the fire, yet I chose to burn down all twenty, the action would still be permissible. Producing the greater good is what is at stake, and, to be better safe than sorry, burning the rest of your field *to be certain* that the fire would cease is the *reasonable* action to take. However, under a different set of facts where the action was deemed to be *unreasonable*, I would be liable to compensate you for whatever unreasonable excess of loss you suffered. Actions are justified and permissible as long as they can pass a test of reasonableness. As long as



a reasonable person in the actor's situation would have done the same, the action is reasonable and thereby justified and permissible.

A potential objection to my account of this third worry is illustrated in cases where preventative actions are taken. For example, suppose I murdered someone to prevent him from blowing up the United States. It might seem that my theory commits me to applauding this action because it produces the greater good, making the murder permissible. That is far from true. The action would only be permissible if it were *necessary*. The action is only permissible if there are no ways to leave the scenario unscathed. If the facts were such that the man whom I killed had his hand on the button that would blow up the White House and he did in fact plan to do so, then surely my actions to kill him would be permissible. But, if he merely had the *potential* to blow up the White House and did not pose an immediate threat to others, the action of killing him would not be justified. I am not, here, discussing preventative measures that have the potential to produce a greater good. I am only concerned with matters of necessity.

Fourth, what about cases where a person does the right thing for the wrong reasons? These are cases where my motivations are not for the greater good, but the greater good is still brought about by my actions. Suppose that I want to stab Brina. I reach for something long and sharp in order to stab her, and what I grab is an epinephrine pen that I stole from your purse. Suppose, also, that at the same time that I went to stab Brina with the epinephrine, she had a severe and adverse allergic reaction to something in the air which required the rescue and service of an epinephrine pen. I then proceed to stab Brina in the chest, hoping to harm and kill her. Lo and behold, I save her life at the expense of the epinephrine pen.

In this scenario, I am liable to compensate you for the loss of your pen. One must act *for the right reasons* in order to be granted the preclusion from liability to compensate. One of the prongs of my theory involves one's motivations being for the greater good, not just acting and coincidentally happening to produce a greater good. The reason behind this rationale is that one's motivations to produce the greater good are what distinguish the actor as a Good Samaritan: one worthy of one's own actions being considered justified and permissible.

This consideration is in stark contrast to what Paul Robinson believes.⁶ He finds that, as long as the greater good is brought about, the motivations behind the action are irrelevant. He posits that any justified act should never be punished, even if the actor produced the conditions requiring the otherwise illicit act.⁷ His rationale for this conclusion is that we want to promote strivings for the greater good. Suppose Eric sees Tim get hit by a car and the only way for Eric to save Tim's life is for Eric to steal a nearby car and drive Tim to the hospital. Additionally, Eric knows and despises the owner of the car and has been itching to tamper with his belongings. According to Robinson, since Eric produced the greater good and saved Tim's life, Tim ought not to be held liable to compensate the owner of the car for the blood stains, which appears to be consistent with my conclusion. However, Robinson's conclusion is actually problematic because it allows for Eric to get away unscathed with a maliciously motivated action. Eric got away with what he wanted: he managed to harm the owner of the car. If we took Robinson's position, Eric would get away without owing *any* compensation, which is sneaky because Eric's motivations did not coincide with producing the greater good. Robinson's view is unacceptable because it promotes sneaky actions; it allows people to cause the harm they desire to cause and not have to worry about consequences for their actions.

Conclusion

In this paper, I have proposed a theory of liability and compensation based on an analysis of the distribution of benefits and burdens across actions that cause harm. When an unfair loss is sustained, the beneficiary of that loss ought to compensate whomever was harmed in order to make the victim whole again. I have also argued that Thomson's rights-based approach to compensation is incoherent because it generates people who are wronged even though no one has wronged them. By responding to criticisms I have also shown that (1) there is no actual requirement for the greater good to come to fruition for my theory to hold, (2) it is impossible to produce the greater good and act impermissibly, (3) actions that meet the reasonable person standard are not wrong, and (4) those who act with ill intentions are liable to provide compensation.

⁶ Paul H. Robinson, "A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability," *UCLA Law Review*, no. 23 (1975): 266-92.

⁷ Robinson, "A Theory of Justification," 267-68.

