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ON COMPENSATION AND DISTRIBUTION

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My comments on and objections to Goodin’s “Compensation and Redistribution” grow in large part out of a perspective that insists that the roles of compensation and deterrence, or even of incentive effects in general, cannot easily be separated from one another. This is true in the law of torts, in eminent domain, and perhaps elsewhere as well. And if liability rules are meant to serve a deterrence purpose, or even a combined deterrence and compensation function, then the question of the “compatibility” of efforts to preserve the status quo, and attempts to change it, largely dissolves because liability rules and redistribution rules serve not opposite but different functions. Liability rules deter certain activities, and the law must use other tools to redistribute, or its deterrence aim will not be accomplished.

Two examples of the importance of including incentive effects in any positive theory of liability rules, or of the availability of compensation, will make this point within the framework adopted by Goodin. Consider first the popularity of negligence rules, or fault-based liability, in tort law. The law-and-economics literature suggests that strict liability rules and negligence rules have much the same effect on minimizing the costs of acci-
One might, however, choose between these rules on the basis of their “activity level” effects, administrative costs (under one rule negligence must be established while under the other a large number of losses must be measured), or fairly subtle influences on risk taking. With some notable subject-matter exceptions, most legal systems have chosen the negligence, rather than the strict liability, principle as their mainstay. But the key features of compensation employed in Goodin’s argument for “compatibility,” that reasonably relied upon expectations ought to be and are protected and that “bolts from the blue,” as Goodin calls them, are undesirable, suggest strongly that the system not stop with negligently caused losses but that all bolts inflicted on some parties by others be compensated. Without belaboring the matter, my point is that the choice of negligence rather than strict liability indicates that it will not do for a positive theory to focus on the unfairness or on the impact of sudden and unexpected losses that burden the innocent. That many victims of “bolts” were able to purchase insurance to protect their “reasonable expectations,” and that most legal systems do not rush to use tax monies to compensate victims of crimes reinforces this point: one would be at a loss to explain the contours of our legal system with Goodin’s central theme, that unexpectedly inflicted losses should be compensated. Moreover, given the harsh redistributive effects of strict liability rules, which raise prices for all consumers, it will not do to retreat to normative theorizing and suggest that, indeed, we ought to compensate for all bolts. There are, of course, respectable arguments to be made for using a strict liability rather than a negligence rule, but these arguments cannot, I think, simply be based on sympathy for those who are hit by “bolts from the blue.”

I think it useful to examine some concrete details of our liability rules to see, from another angle, the pitfalls of highlighting compensation features to the exclusion of the incentive aspects of these rules. Goodin’s conviction, that recovery by surprised, innocent victims must be complete, swift, and certain, as opposed to the view that recovery serves a complex combination of deterrence and intuitively defined moral goals—is at odds with much in the law’s treatment of losses caused by minors, economic losses caused by tortfeasors, changes in tax law,
and governmental takings of services and other expectations, to name just a few items on a long list of sources of surprise to the average citizen. I turn now to explore two of these subjects.

The observer who focuses exclusively on compensation must find puzzling the long-standing and, I might add, cross-cultural rule that, when a wartime government takes a farmer’s corn or an entrepreneur’s factory, it must pay fair compensation, but when it drafts soldiers and “takes” away their opportunity to earn civilian salaries it need not compensate. None of the circumstances thought appropriate for compensation in “Compensation and Redistribution” or in other writings distinguishes services from property. In contrast, the observer who concentrates on incentive effects will note quite readily that powerful activity-level effects encourage governments to precommit to compensating victims in some settings more than others. A government that does not pay for the food it takes will soon find itself without food because private citizens will cease planting and harvesting. On the other hand, a government that does not pay the fair market value of the human services it inducts is unlikely to find itself without these services because citizens are unlikely to leave the jurisdiction or underinvest in education unless the government is engaged in a remarkably long and harsh war effort.

Somewhat similarly, and more unfortunately, an area of law that is only weakly understood through incentive effects is often even less explicable when viewed through the lens of compensatory considerations. Consider the fact that typical tortfeasors pay for the property they destroy, the medical expenses they generate, and even the earning streams they disrupt, but not for the “pure economic losses,” or once-removed burdens they inflict. Thus, if a stranger negligently runs me over with his motor vehicle, he will not be made to reimburse my employer for the cost of hiring a substitute lecturer while I recuperate. Satisfactory normative and positive theories regarding this question are scarce. My own view is that recovery is available under the law only when there is a substantial net social loss or when no other damages are readily available with which to deter an obvious wrong. But whether or not this modification of an existing theory works as a predictive matter, or is defensible as
a normative enterprise, it is surely the case that thoughts of compensation, rather than deterrence, lead one astray. There is, after all, nothing more compelling and deserving about the property or economic losses of the directly injured party than the losses of an indirectly injured person. Moreover, there are numerous exceptional situations in which indirect economic losses are recoverable, and these cases can be explained more readily with deterrence than with compensation considerations. In the well-known case of *Union Oil v. Oppen*, for instance, fishermen successfully sued for their lost profits after a negligent oil spill polluted the waters they normally fished. There is nothing more or less compelling about the compensatory arguments in this setting than in most where lost profits are not recoverable. If, for example, one fisherman is disabled by a negligent stranger, the fisherman’s partner, who may be unable to handle a boat alone, is not able to collect for lost profits caused by the tort, even though his losses are as real and as sudden as are those caused by an oil spill. The more useful way to think about the matter, from a positive and perhaps even from a normative perspective, is to note that in the latter case the driver who runs over one fisherman is deterred by the suit for medical expenses and lost earnings that will be brought by the victim or his family. In the *Union Oil* situation, however, if the fishermen do not recover for their economic losses there will be no deterrence working against oil spillage because no other obvious plaintiff exists. The legal system thus appears to allow suits for economic losses, even where it is apparent that it is not a great net loss because other fishermen gain and so forth, when to fail to do so would be to allow a tortfeasor to go substantially undeterred.

In short, in numerous areas, both broad and specific, the legal system appears chaotic when viewed through the lens of compensation, but relatively sensible when approached from a perspective that is dominated by or at least includes deterrence considerations. That this is true not only in Anglo-American law, but also in a wide range of legal systems, as I have discussed elsewhere, emphasizes, I think, the grave error of ever focusing on compensation alone.

Turning briefly to a somewhat different aspect of “Compensation and Redistribution,” Goodin’s work encourages us to think
of compensation and redistribution as compatible because to deny compensation and to allow torts, takings, and the like to visit the few unlucky victims who happen in their paths is to redistribute from a few victims to a few tortfeasors or other causal agents. This sort of redistribution among a few lucky and unlucky persons is just the opposite of what a good redistribution policy is said to do, namely broadly redistributing to less fortunate persons. I quite agree with this observation and I think it a fair launching point for a small argument of my own about the relation between compensation, deterrence, and redistribution. Consider the all-too-familiar situation in which fifty thousand factories or five million drivers contribute to the acid rain or to the smog that envelopes twelve million citizens in Los Angeles. We might use private law to allow examination of how many of these polluters could cut back on their activities at reasonable cost. We could, in other words, allow the reality of mass tort suits to extend to everyday but complex and large-scale interactions.

But we do not normally allow tort law to migrate in this manner. And, once again, other legal systems also do not control behavior on this scale with tort, injunctive, and similar tools. The obstacle even rises or sinks to the explicit, doctrinal level, as it is often said that individuals can seek injunctive relief from “private” but not “public nuisances.” A factory emitting noise or particles that interfere with residential life on my block is the sort of polluter I can challenge in court; in contrast, all the factories in the Ohio Valley represent the sort of defendants no one can challenge in a private way.

A fair explanation of this distinction builds on the idea that the law operates in the shadow of, and as a catalyst for, bargains. If several homeowners are successful in convincing a court to block the construction of a factory on nearby land, the losing defendant can always try to buy out the homeowners and then build the factory as he or she pleases. It is therefore said that the parties can “bargain around” an “incorrect” judicial decision. But it is clear that if there are very many homeowners, such bargaining is far more imaginary than practical. In such circumstances, to assemble the various parties and to reach a result that is not sabotaged by free riders and holdouts will be
impossible. After all, the factory owner will need to bargain successfully with every homeowner, and unanimity is difficult to achieve. This difficulty of bargaining fairly explains the underlying disinclination to allow private parties to proceed prospectively against “public” nuisances. It goes without saying that the legal system does not then ignore all such nuisances but rather uses administrative agencies, fines, licensing requirements, and other tools to deal with these problems.

Goodin draws attention to another aspect of this institutional switch from private to public avenues of relief. One might say that we do not use tort suits to handle smog problems because with so many involved parties in mass lawsuits, there would “only” be mass compensation—and mass compensation may as well be done with truly mass redistribution policy tools. Private law, in this view, links together deterrence of some behavior, compensation for some unexpected losses, and inevitable wealth transfers among the parties who are affected by the very rules that take aim at deterrence and compensation goals. In contrast, public, or mass, problems are better resolved with administrative orders and other nontort rules, in part because to do otherwise would create so much of the by-product of wealth transfers as to threaten whatever good might be accomplished by the incentive effects of tort suits. With so much wealth redistribution at stake, one must take wealth effects seriously. Put differently, a combination of (a) careful income tax and welfare policy and (b) separate regulatory attention to, and fines and licenses regarding, pollution and other large-scale problems may be preferable to tort suits that deter wrongdoing but deliver compensation and, therefore, wealth transfers as part of the same package.

In sum, the choice between traditional, common law, essentially private regulation and public, bureaucratic mechanisms as alternative forms of social control can be seen not only as a decision about the relative efficiency and administrability of different systems, each of which almost surely has spheres of superiority, but also as a decision about wealth distribution. That a large component of tort damages, such as lost earnings and lost property values, is a function of wealth emphasizes this point that the actual and the ideal size of the regulatory state is
a question about wealth distribution as much as it is a question about the relative advantages of different incentive systems.

NOTES


7. See note 3 above.


10. For some discussion of the free rider and holdout problem when there is one tortfeasor and many victims, see ibid., 1106–7, 1115–24.