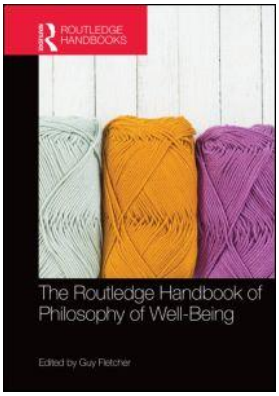

The Routledge Handbook Of Philosophy Of Well-Being

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Well-being and the law

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PART VI

Well-being and other disciplines

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WELL-BEING AND THE LAW

Alex Sarch

Well-being is at least one of the things it is legitimate for the law to aim at. If a law would lead to a substantial improvement in well-being, and would not be overly detrimental to other things we value like equality or justice, then most would agree that passing the law would be permissible—even desirable. But what relationship, more precisely, does law bear to well-being? How does law aim at advancing well-being? And how should it? These questions are the focus of this chapter.

Distinguish two ways in which well-being might be an aim of the law. First, we might think law should aim to *promote* well-being. To say that law should promote well-being in the present sense is to claim that a law is more choiceworthy, all else equal, the more well-being it produces (the higher it causes people's level of well-being to be). This familiar idea figures centrally in the utilitarian tradition in moral philosophy, as well as welfare economics and the economic analysis of law.

Second, we might think that, rather than just aiming to promote well-being, the law should (to coin a technical term) *protect* well-being—*i.e.*, defend against setbacks to well-being by imposing sanctions or liability[1] for actions that are detrimental to well-being. Note that a law can promote well-being at the same time as protecting it. After all, to protect a value like well-being might serve as a means to promoting it. But law can also promote well-being without protecting it outright (e.g., if the government were to set a minimum wage requirement to increase general well-being).[2]

Let me be more precise about what's involved in protecting a value. A law can protect a value, *V*, either (1) *directly*, by expressly stating that liability is to be imposed on the basis of setbacks to *V*, or (2) *indirectly*, by stating that liability attaches to actions that damage something distinct from *V* that nonetheless is closely connected to *V*. More specifically:[3]

> A law, *L*, *protects* a value, *V*, iff *L* states that civil or criminal liability (or some other relevant legal consequence) is to be imposed on the basis of either
>
> 1. infringements or setbacks to *V* itself or a constituent of *V* [*direct* protection], or
> 2. infringements or setbacks to something else, *V'*, that is sufficiently closely connected to *V*—as would be the case if *V'* were necessary for *V*, or typically useful as a means to *V* (even if not necessary therefor) [*indirect* protection].

Thus, for example, a law would protect well-being directly if it imposes liability in response to actions that lower the well-being of another (though there would be obvious practical challenges in applying such a law). A law might also directly protect well-being by imposing liability in response to actions that harm only a constituent of well-being (e.g., mental well-being)—though, in that case, well-being would be protected only *partially*, not as such or in general. By contrast, the law would *indirectly* protect well-being if it provided, for example, that the defendant is civilly liable for actions that harm interests of the plaintiff's that normally are *instrumentally linked* to well-being, such as freedom from assault or injury. Despite not expressly mentioning well-being, such a law would still indirectly protect it by defending against harms to things to which it is closely connected.

In the remainder of this chapter, I consider views about how the law might aim to promote or protect well-being. My goal is primarily one of arbitrage: I hope to point philosophers of well-being towards legal issues that might be of particular interest, in the hopes that this will lead to more contact between the two fields. In the first section, I discuss the law and economics movement, which supposes that law should promote well-being (perhaps exclusively). Then, I consider whether the law in general is concerned to protect well-being, and I suggest that, while the law plausibly aims to promote well-being, it only protects it in limited respects. In the final section, I take a closer look at tort law in particular, since one might think its practice of imposing liability for the harms we cause one another make tort law particularly concerned to protect well-being. Nonetheless, I argue that tort law for the most part only indirectly protects well-being, and even if it does offer some direct protection of well-being, this would still only be partial protection.[4]

Well-being and policy evaluation

The idea that law should promote well-being figures into many views about the question of policy evaluation, which legislators and regulators often confront. This question asks: of the different laws or policies we might impose on a given occasion, which one *should* we choose? Much has been written on how policy evaluation should be conducted, and I will not canvass the possible views here. Instead, I focus on one dominant approach to this question in the law: namely, the economic analysis of law. This approach takes it that laws or policies are to be evaluated chiefly by their effects on well-being. In this section, I sketch the economic approach and then discuss some common criticisms of it.

Starting in the 1960s, economic analysis of law grew into one of the most prominent approaches to the study of law in the USA.[5] It has also had a substantial impact on the reasoning in judicial opinions (Cohen 1985).[6] The movement was ushered in by the seminal work of Guido Calabresi and Ronald Coase (Calabresi 1961; Coase 1961), and was catapulted to prominence by an influential book by Richard Posner arguing that common law rules *are* economically efficient[7] (at least approximately) (Posner 1973). Posner subsequently argued that legal rules also *ought* to be economically efficient (Posner 1980).[8]

The economic analysis of law thus comprises two sorts of project, one descriptive and one normative. Arguably the most familiar of the descriptive projects is *predictive*. The aim is to use economic tools to predict how various legal policies will affect people's incentives, and thus their behavior (on the assumption that people are motivationally responsive to their incentives).[9]

For example, suppose a legislature is trying to decide whether some activity (say, hauling nuclear waste or operating a railroad) should be governed by a negligence rule or a strict liability rule. Negligence rules impose liability on those who cause injuries to others by failing to take adequate precautions (i.e., not acting with "due care"). Strict liability rules impose liability on those who cause injury regardless of the level of precaution they took (even if great care was

taken). Law and economics provide the sort of predictive information the legislature will need to decide which sort of rule to adopt. Economic tools can be used to analyze the incentives that these two competing rules would create for participants in the relevant activity. After all, the question of when participants will face liability for injuries they cause, as well as how much liability, directly affects the level of precaution it is economically rational for participants to take. It also helps determine whether it makes economic sense to engage in the activity in the first place. Thus, by analyzing the incentive effects of legal rules, economic analysis can help predict how these rules will affect behavior.

The *normative* prong of economic analysis of law uses such predictive tools (or others) to evaluate policy alternatives. This amounts to applying the principles of welfare economics to law. The basic idea is to begin by determining how the policies on offer will affect incentives, behavior, and ultimately the satisfaction of individuals' preferences. Since preference satisfaction is taken to be either constitutive of or at least evidence of welfare, descriptive results about how various policies impact preference satisfaction are supposed to have normative implications about which policies are most choiceworthy.

To see how the normative project plays out, consider the most prominent recent defense of the normative prong of law and economics—offered in Kaplow and Shavell (2002) (hereinafter "K&S 2002"). K&S's main thesis is that "social decisions should be based *exclusively* on their effects on the welfare of individuals—and, accordingly, should not depend on notions of fairness, justice, or cognate concepts" (K&S 2002: xvii). Their preferred framework for evaluating policy involves several steps: "[t]he first is to determine the effects of the policy, [while] [t]he second step is to evaluate the effects of the policy in order to determine its social desirability" (K&S 2002: 15). The second, evaluative step itself proceeds in several stages.

The evaluative step begins by asking how the policy choice will impact the affected individuals' well-being, or equivalently, for K&S, their *utility*. As K&S note, "the primitive element for analysis of an individual's well-being is that individual's ordering of possible outcomes" (K&S 2002: 18, footnote 6). Thus, consider a policy proposal, *P*. It could lead to a range of outcomes if implemented: O_1, $O_2 \ldots O_n$. For each affected individual, *S*, we need to determine how she would rank these outcomes—i.e., what her preferences between them are. One common technique for generating these orderings (by no means the only one) is to read off the strengths of people's preferences from their market behavior—i.e., their willingness to pay for various goods (K&S 2002: 409–413).[10] Numbers are then assigned to the outcomes to reflect *S*'s preferences between them, with higher numbers representing a higher position in *S*'s preference ordering.[11] The utility number for each outcome is then multiplied by an estimate of the probability that this outcome has of occurring conditional on *P*'s being implemented. These products are then summed in order to get the expected utility of *P* for individual *S*. K&S emphasize that their notion of utility or well-being "is comprehensive in nature": "[i]t incorporates in a positive way everything that an individual might value" (K&S 2002: 18). They also take on board "the possibility that individuals have a taste for a notion of fairness, just as they may have a taste for art, nature, or fine wine" (K&S 2002: 21).

Once this procedure has been carried out for all affected individuals to find the expected utility of *P* for each one, the next step is to aggregate these individual utilities to reach a conclusion about the overall desirability of *P*—i.e., its *social welfare*. As K&S explain,

> [a] method of aggregation is of necessity an element of welfare economics, and value judgments are involved in aggregating different individuals' well-being into a single measure of social welfare. [Moreover, it] involves the adoption of a view concerning matters of distribution.
>
> *(K&S 2002: 26–27)*

Aggregating the individual utilities is the job of the *social welfare function* (SWF). A simple utilitarian SWF would merely take the social welfare of *P* to be the sum of the expected utilities of *P* for all affected individuals.[12] However, the SWF might also be constructed to be sensitive to distributive equality. For example, K&S note that "the well-being of worse-off individuals might be given additional weight, as under the approach associated with John Rawls, wherein social welfare corresponds to the utility of the worst off individuals" (K&S 2002: 27). There are many other equality-sensitive SWFs as well.[13] K&S "do not defend any specific way of aggregating individuals' well-being [or] endorse any particular view about the proper distribution of well-being" (K&S 2002: 27). Rather, they argue only "that legal policy analysis should be guided by reference to some coherent way of aggregating individuals' well-being" (K&S 2002: 27).

Once an appropriate SWF has been selected, an overall ranking of the policy alternatives can be generated. For each policy *P*, the SWF would take as input the expected utility of *P* for each affected individual and then return as output a social welfare value for *P* (which may or may not be sensitive to distributive considerations). In this way, the policies can be ranked in terms of social welfare value and an overall policy recommendation can be reached.

K&S's defense of this framework for policy evaluation has received substantial criticism—especially their claim that policy evaluation should *only* be sensitive to how policies affect welfare, not what they call "notions of fairness" (K&S 2002: xvii). An initial worry is that K&S's distinction between exclusively welfare-based policy evaluation and evaluation based on notions of fairness is incoherent. On K&S's view, a notion of fairness is an evaluative principle "that accord[s] weight to factors that are independent of individuals' well-being" (K&S 2002: 44). As examples, they mention (i) corrective justice (the principle that one who wrongfully injures another must compensate or redress the wrong), (ii) the principle that promises must be kept, and (iii) retributive justice (the idea that one ought to be punished if, but only to the extent that, one deserves it) (K&S 2002: 39). However, if these principles are to be ruled out from the policy analysis framework as notions of fairness, one wonders why K&S are comfortable allowing considerations of equality or distributive justice to play a part in policy analysis—in particular, by incorporating such notions into the SWF.[14]

K&S are aware of this tension, and they respond that in fact,

> there is no tension because . . . [o]ur definition of notions of fairness includes all principles—but only those principles—that give weight to factors that are independent of individuals' well-being. [Thus,] distribution can play an important role even under a system of evaluation that is concerned exclusively with individuals' well-being.
>
> *(K&S 2002: 28)*

Their idea is to attempt to distinguish "factors that are independent of well-being" (like corrective justice) from distributive considerations on the ground that the latter, but not the former, are still "concerned" with well-being. Nonetheless, this does not fully resolve the problem. Suppose everyone has a right to a certain minimum amount of well-being. Such a right would be "concerned" with well-being at least as much as distributive considerations are, even though K&S see rights as a paradigmatic notion of fairness (K&S 2002: 5 and footnote 7).

A second, deeper worry concerns K&S's argument that justice and rights have no place in policy evaluation. A more moderate view would be that, while well-being and its distribution matter greatly to policy evaluation, avoiding injustice and preventing the violation of rights are also important. K&S reject such moderate views, however (K&S 2002: xvii). Their "argument for basing the evaluation of legal rules entirely on welfare economics, giving no weight to notions of fairness" is that "satisfying notions of fairness can make individuals worse off, that

is reduce social welfare" (K&S 2002: 52). They continue that this point has "special force" because "fairness-based analysis [can lead] to the choice of legal rules that reduce the well-being of *every* individual" (K&S 2002: 52).[15] However, critics object that this argument cuts no ice, as it is trivially true that a concern for justice can conflict with promoting well-being (Coleman 2003: 1524).

Surprisingly, K&S themselves admit "it is virtually a tautology to assert that fairness-based evaluation entails some sort of reduction in individuals' well-being" (K&S 2002: 58). However, they respond that they "do not believe the full [cost] of fairness-based analysis for human welfare is appreciated" (K&S 2002: 58). Accordingly, K&S develop numerous examples designed to show how great the sacrifice to well-being might be if policy evaluation affords independent weight to notions of fairness (K&S 2002: chapters III–VI). Nonetheless, the worry persists. Even if there are some cases where preventing large losses in well-being might give reason to tolerate some degree of injustice, this is not sufficient to establish the *general* claim K&S want—namely, that justice should *never* be given any independent weight in evaluating policy.

One last set of concerns has to do with the notion of well-being used in K&S's framework. To start, one might question K&S's "comprehensive" notion of well-being, which incorporates "everything that an individual might value [like] social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth" (K&S 2002: 18). One might object that the satisfaction of preferences that do not concern one's own life intuitively cannot affect one's well-being. For instance, it seems doubtful that one's well-being can be enhanced merely by the satisfaction of, say, a preference that things go well for the stranger on the train in Parfit's famous case (Parfit 1984: 494), or the satisfaction of a preference for sacrificing one's own well-being to benefit those one loves or to harm those one hates (Hausman and McPherson 2009: 6). Thus, we might want to restrict the preferences that can figure into policy evaluation so that only those concerning one's own life count.

More generally, one might challenge the apparent commitment of K&S's framework to a preferentist theory of well-being. After all, there are well-known objections even to restricted versions of preferentism on which welfare consists in the satisfaction of preferences about one's own life. For instance, when our preferences are manipulated or not autonomous, their satisfaction might not seem to enhance well-being (Sumner 1996, chapter 6). Moreover, it seems possible to strongly prefer things that intuitively make little or no positive contribution to well-being—as in certain cases of masochistic, antisocial, pointless, or otherwise defective preferences (Brink 1989: 227; Kraut 1994; Heathwood 2005; Bradley 2007).

One promising line of response for economic analysis to such problems for preferentism is the strategy defended in Hausman and McPherson (2009). They argue that welfare economics should reject preferentism about well-being, and instead insist only that revealed preferences are a *reliable source of information* about well-being—at least provided these preferences are well informed and self-interested. This would permit us to keep doing policy evaluation in the way economists recommend, without falling prey to the familiar objections to the theory that well-being consists in preference satisfaction.

Nonetheless, there are other sources of information about well-being besides preferences as revealed in the market (e.g., surveys, psychological information, happiness studies). Therefore, before Hausman and McPherson's strategy succeeds in vindicating economic analysis as currently practiced, more needs to be said to establish that revealed preferences are by themselves our *most reliable* source of information about well-being—or in some other sense our best (e.g., most practical) source of such information.[16] Only then can the evaluative project of economic analysis be placed on a more secure normative foundation.

The protection of well-being by law

Although more might be said about how policy evaluation might incorporate the idea that law should promote well-being,[17] let us press on. The other sort of question we might ask about the normative relationship between law and well-being concerns the role of well-being *within* the law. That is, we might ask whether law generally, or perhaps specific laws or legal doctrines, should *protect* well-being in the sense described earlier. Here I will mostly sidestep the normative question of whether law should protect well-being. Whether it should or not depends heavily on empirical questions about whether such protection is an effective and implementable strategy. Instead, my focus is the descriptive issue of whether and how existing law *does* protect well-being—whether directly or indirectly. I begin with some general observations, before considering tort law more closely in the next section.

In general, the concept of well-being does not seem to expressly figure into the content of US law very often. This, in turn, might suggest that US law typically does not protect well-being *directly*. Still, there may be exceptions. Here are some of the more notable references to well-being, welfare, or the like that appear in US law. (1) Art. I § 8 of the US Constitution states that "Congress shall have Power to lay and collect Taxes . . . to . . . provide for the . . . general Welfare of the United States."[18] (2) Decisions about child custody are generally made on the basis of what would be in the "best interest of the child."[19] This test plausibly involves a conception of the child's welfare. (3) To win a sexual harassment lawsuit under Title VII,[20] it is sufficient for the plaintiff to prove that the defendant's conduct "seriously affected" the plaintiff's psychological well-being (if there are no relevant defenses).[21] (4) The Supreme Court has held in the First Amendment context that there is a "compelling state interest" in protecting the physical and psychological well-being of minors, which can be sufficient grounds for curtailing the general right to free speech.[22]

Not all of these more or less overt references to welfare or well-being are examples of law directly protecting well-being in the technical sense introduced above. While (2) and (3) seem like plausible candidates, since they impose liability or other legal consequences in a subset of cases in which well-being is detrimentally affected, the same is not true for (1) and (4). (1) merely authorizes Congress to tax, and by implication to spend, in order to promote the general welfare, while (4) suggests that free-speech protections can sometimes be limited by a concern for child welfare.

Accordingly, US law only rarely makes reference to well-being in a way that suggests it is being directly protected. Indeed, there seem to be good practical reasons for this. There are many conflicting conceptions of the good life, as well as much intractable debate about what the correct theory of well-being is. Therefore, it might be prudent for legislators to formulate the law using concepts that are less hotly contested, not to mention easier to apply. Moreover, legislators might justifiably prefer laws for which there is an "overlapping consensus," i.e., which citizens can endorse despite having differing political ideologies or conceptions of the good life (Rawls 1987).

While the law thus does not often seem to protect well-being directly (probably sensibly), there is reason to think it frequently protects well-being *indirectly*. For example, the criminal law punishes (among other things) intentional or reckless attacks on bodily integrity. Since freedom from such attacks is at least normally of significant instrumental value for achieving high levels of well-being, the criminal law would seem to indirectly protect well-being.

Similarly, tort law often makes damages available to plaintiffs who can prove the defendant injured them at least negligently. Usually the relevant sort of injury here is physical harm, which is tightly connected to well-being. In some limited cases, tort law also makes damages available

to plaintiffs who can prove the defendant's conduct caused emotional suffering (Kircher 2007). We see this most importantly in lawsuits for intentional infliction of emotional distress, negligent infliction of emotional distress, and assault (i.e., causing someone to reasonably fear for her safety) (Kircher 2007).

Finally, the law is frequently concerned to protect various property rights, contractual rights, and financial interests that collectively might seem to be necessary, or at least useful, for obtaining a high degree of well-being. The thought is that living in a society where property is secure, people perform their contracts and one's financial interests are protected will for most people be necessary for, or at least conducive to, achieving high levels of well-being. Accordingly, it's plausible that law often *indirectly* protects well-being.

Tort law

In closing, let's consider tort law more closely to get a clearer sense of the manner in which it protects well-being, as well as the scope of this protection.

Direct or indirect protection?

Tort law deserves special consideration because it might seem to be one of the few areas of law to *directly* protect well-being. The basic argument is this. On one prominent view, tort law aims to "redress the harms we inflict on one another" (Hershovitz 2006: 1149).[23] Harm, in turn, is often understood in terms of reductions to well-being. As a result, we might think tort law directly protects well-being. That is, it would seem to directly impose liability in response to reductions in well-being. (One might make a similar argument concerning criminal law. But since much of what I say here carries over to criminal law, I focus on torts for reasons of space.[24])

There are, however, reasons to doubt that tort law directly protects well-being. Start by noting that tort law does not allow just *any* harm to be the basis of a successful lawsuit. Instead, tort law takes only certain kinds of tangible injuries that are relatively easy to prove—e.g., bodily injury, physical or psychological illness, and sometimes emotional pain and suffering—to be actionable. "Historically, tort law compensated only direct and tangible injuries to persons or property," although over the past century it has started to provide limited "compensation of emotional . . . interests" (Levit 1992: 139–140).[25] Accordingly, tort law does not impose liability for reductions to well-being *as such*. Instead, it would count as directly protecting well-being only if the categories of harm it regards as actionable are reductions to things that qualify as *constituents* of well-being.

However, it's not clear that freedom from the kinds of harms that tort law regards as actionable would qualify as a constituent of well-being. Although it's not easy to say precisely what makes something a constituent of well-being, at least the following sufficient condition seems plausible:

(i) X is a constituent of well-being according to theory T if X is identical to the instantiation of what T regards as a fundamental good-making property.[26]

But freedom from the injuries tort law protects against cannot plausibly be seen as an instantiation of fundamental *good*-making properties; rather, it at best involves the absence of fundamental *bad*-making properties. Thus, freedom from the harms tort law protects against can be a constituent of well-being only if (something like) the following condition is true:

(ii) *X* is a constituent of well-being according to theory *T* if *X* is identical to the absence of what *T* regards as a fundamental bad-making property.

If nothing like condition ii) is defensible, then freedom from the injuries tort law protects against would not be a constituent of well-being. In that case, tort law would not directly protect well-being at all. Thus, for the sake of argument (i.e., to charitably treat the claim that tort law directly protects well-being), I assume that something like condition ii) is correct. If it is, then the absence of pain, say, would count as a constituent of well-being on hedonism. By contrast, a painless surgery would not. Even though such a surgery would lack the fundamental bad-making property of being painful, it is not itself *identical* to the absence of that property. Constituents of well-being thus are to be distinguished from states of affairs that merely cause, *pro tanto* contribute to, or partially realize the presence or absence of a fundamental good-making or bad-making property. After all, merely causing something that in itself enhances well-being is not enough to count as a constituent of well-being, since that would allow an unbounded range of items (i.e., anything that causes an improvement in well-being) to count as a constituent of well-being. For the same reason, states of affairs that merely exemplify a fundamental good-making property (e.g., a pleasant massage), or lack a fundamental bad-making property (e.g., a painless surgery), cannot themselves be constituents of well-being. This would stretch the notion of a constituent of well-being too far.

If this two-pronged understanding of constituents of well-being is roughly right,[27] then it's doubtful that the absence of physical or mental injuries or illnesses would qualify as constituents of well-being.[28] According to most prominent theories of well-being, freedom from such injuries would not in itself constitute the absence of a fundamental bad-making property. On hedonism, for example, only *not being in pain* would qualify under prong ii) as a constituent of well-being. Freedom from physical or mental injury might help causally explain why someone is not experiencing pain right now, but it would not itself be *identical* to the lack of pain. A similar point holds for desire satisfactionism. On that theory, possessing desires that are unfrustrated is what would qualify under prong ii) as a constituent of well-being. While freedom from physical or mental injury might cause some of one's desires not to be frustrated, it would not itself be identical to avoiding the frustration of one's desires.

By contrast, freedom from emotional pain and suffering might well qualify as a constituent of well-being on some theories. This would most obviously be true on hedonism, and perhaps also versions of perfectionism that take human flourishing to involve freedom from suffering. However, desire satisfactionism would not regard freedom from emotional pain and suffering as something that itself constitutes the absence of a fundamental bad-making property. Granted, avoiding pain and suffering would satisfy the desire not to have such experiences. But this still would not make it a constituent of well-being on desire satisfactionism. After all, that theory only recognizes possessing desires that are satisfied, or at least remain unfrustrated, as constituents of well-being. Thus, theories will differ about whether freedom from emotional pain and suffering is itself a constituent of well-being.

Accordingly, the less controversial claim is that avoiding the sorts of injuries that are actionable in tort (perhaps except for emotional pain and suffering) is only instrumentally valuable for preventing the fundamental bad-making properties from obtaining in one's life. Avoiding physical injuries, mental ailments, and traumatic experiences is crucial as a *means* to avoiding that which in itself diminishes well-being. Thus, tort law would mainly protect well-being only indirectly.

If tort law directly protects any constituent of well-being, this would chiefly be freedom from emotional pain and suffering. Nonetheless, it is rare for suits to recover damages for emotional

pain and suffering to succeed (Levit 1992: 143–144). Courts often "exhibit significant concern over whether claims for emotional or mental distress are legitimate" (in part due to the ease with which they can be exaggerated) (Levit 1992: 172). Thus, tort law's protection of this constituent of well-being appears tenuous.

Only partial protection

Even if tort law might directly protect what some theories of well-being regard as a constituent of well-being, it's clear that, no matter what one's theory of well-being, tort law at best protects well-being only *partially*. That is, it protects well-being (whether directly or indirectly) only in limited circumstances. In this subsection, I aim to clarify what these circumstances are in order to further elucidate the scope of tort law's protection of well-being.

One reason tort law protects well-being only *partially* stems from the harm–benefit asymmetry it embodies. While tort liability may be imposed in response to harms, it is rarely imposed for failures to benefit. First-year law students often are surprised to learn that there generally is no duty to rescue, such that tort liability is not imposed for failing to do so.[29] (There are some exceptions, the most notable being when one caused the danger from which the victim now requires rescuing.[30]) Thus, tort law is concerned with just one side of the well-being equation: it protects well-being if harmed, but not when merely unbenefitted. Since liability is not imposed for just any impediment to well-being, tort law clearly does not protect well-being as such—only partially.

A second way tort law protects well-being only partially has to do with the notion of harm it employs. There is a wide sense in which one is harmed by anything that detrimentally impacts one's well-being. Call this the *unrestricted view* of harm. It can be spelled out either comparatively or non-comparatively. The comparative version takes it that event *E* harms person *P* iff *E* lowers *P*'s well-being relative to some baseline—whether this is the well-being *P* had before *E* (a historical baseline), or the well-being *P* would have absent *E* (a counterfactual baseline) (Hershovitz 2006: 1161–1163; Bradley 2012: 396–398; Klocksiem 2012). By contrast, the non-comparative version takes it that *E* harms *P* iff *E* causes *P* to be in an intrinsically bad state, where such states include "pain, mental or physical discomfort, disease, deformity, disability, or death" (Harman 2009: 139).[31] However the unrestricted view of harm is understood, it does not capture the conditions under which tort liability is imposed. To adequately capture these conditions, we must limit ourselves to harms that arose through a *rights violation*.

To see this, consider an example from Hershovitz (2006: 1165). Suppose I steal your TV and enjoy watching it for a time. Now suppose I'm hauled before the court and am sentenced to a term of one year in prison. In the unrestricted sense, the court's action harms me. My well-being is lowered, both relative to what it was before (when I was enjoying your TV) and relative to what it would have been were I not sanctioned by the court. Thus, I am comparatively harmed. Furthermore, supposing I experience mental and physical discomfort while imprisoned—the court's action places me in an intrinsically bad state. So I am non-comparatively harmed too. Nonetheless, the court's action (assuming it is procedurally valid) does not provide the basis for imposing tort liability on the court or any other government institution, even though I was harmed by its actions. Since I deserved (legally and morally) the punishment I received, the court's action did not violate any *right* of mine. Hence tort liability is inappropriate.

Accordingly, tort liability is not imposed in response to just any action that harms the plaintiff in the unrestricted sense. Rather, it is at best imposed only if the defendant's action (1) harms the plaintiff in the unrestricted sense (i.e., causes injury or damage) and (2) violates a legally recognized right of the plaintiff's.[32]

Not only is harm to well-being insufficient for tort liability, it is also unnecessary. One can prevail in some tort suits even if one suffered no perceptible injury, as long as one can show that one's rights were violated. In such cases, the plaintiff will simply be awarded nominal damages (e.g., $1).[33] If mere injury to well-being is neither necessary nor sufficient for tort liability, it seems the main factor on which tort liability depends is the violation of rights. One might question whether tort law should be this way. Perhaps it is an inefficient or otherwise objectionable system. Perhaps we should make compensation available for some injuries not caused by a rights violation. But this nonetheless is the institution we face.

Concluding remarks

This section has aimed to establish two things. First, it's controversial to claim that tort law directly protects well-being. After all, only some theories of well-being imply that tort law directly protects a constituent of well-being. Instead, tort law seems mostly to protect well-being indirectly. Second, even if tort law does directly protect some constituent of well-being, this would still only be partial protection. Tort law typically imposes liability only for harms (not failures to benefit), and moreover only when the harm involved the violation of the plaintiff's rights. Accordingly, the scope of tort law's protection of well-being (whether direct or indirect) appears limited.

One last question: is there work left for the concept of well-being to do in theorizing about tort law as it currently exists? The answer is "yes," at least when it comes to evaluating and reforming tort doctrine. As seen above, to understand the conditions under which tort liability is imposed, we need some notion of injury or damage that is deemed to be actionable, provided it occurred through a rights violation. And well-being can play a central role in determining what the relevant injuries should be. That is, we might appeal to our best theory of well-being to identify the kinds of injury or damage that should be actionable.

Currently, only limited kinds of injuries can be the basis for damage awards in tort—most commonly, medically diagnosable physical or psychological ailments. But perhaps existing tort law is too narrow, and a greater variety of injuries should be compensable.[34] Of course, practical difficulties will arise when it comes to proving in court the extent to which one suffered the more intangible injuries that a plausible theory of well-being might recognize, but which tort law currently does not. Nonetheless, in at least this way, well-being remains relevant to tort law: it matters in unpacking the best notion of injury or damage that tort law should take to be actionable, at least if that injury or damage came about through a rights violation.

Notes

1 Two forms of legal liability should be distinguished: civil and criminal. The former typically involves the payment of money damages, while the latter paradigmatically involves a term of imprisonment and/or fines. Other forms of legal relief include injunctions (court orders to perform or refrain from performing certain actions) or declaratory relief (a binding pronouncement of the parties' rights).
2 A law also might protect well-being without promoting it, as would be the case with an ill-conceived law that seeks to protect well-being but has the general effect of making people worse off.
3 There might be other natural ways to talk about protecting a value. For example, we might say the state should "protect" well-being by ensuring that all its citizens can lead lives with a certain minimum level of well-being (e.g., through social welfare programs). However, this would fall outside the technical sense of "protecting well-being" I employ here.
4 Throughout, I'll be focusing on US law, since that is where my training lies.
5 The influence of law and economics has been more muted in Europe (Dau-Schmidt and Brun 2006: 604).

6 See, e.g., *Wassell* v. *Adams*, 865 F.2d 849, 855–56 (7th Cir. 1989) (Posner, *J.*) (taking an economic approach to the issue of negligence). For an early precursor to this approach, see *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, *J.*) (formulating the famous "Hand rule" for determining if a defendant acted negligently).
7 Economic efficiency is typically understood in terms of Pareto efficiency. A state of affairs, S, is efficient, or *Pareto optimal*, iff no available state of affairs is Pareto superior to S. S1 is *Pareto superior* to S2 iff at least one person is better off in S1 than S2 and no one is better off in S2 than S1 (Coleman 1992: 19). (Sometimes the principle is formulated in terms of preferences between states (Coleman 2003: 1516)). However, because most real-life policies create both "winners" and "losers," "very little efficiency analysis in the law actually invokes the Pareto criteria" (Coleman 2003: 1517). Instead, "[m]ost efficiency analysis relies . . . on the Kaldor-Hicks criterion. One state of affairs, S, is Kaldor-Hicks efficient to another, A, [iff] the winners under S could compensate the losers such that, after compensation, no one would prefer A to S and at least one person would prefer S to A" (Coleman 2003: 1517). For criticism of Kaldor-Hicks efficiency, see Hausman and McPherson (2006: Chapter 6).
8 For critical discussion of this normative claim, see Coleman (1980), Dworkin (1985), and Posner (1995).
9 Another project on the descriptive side argues that the *content* of the law is determined by efficiency. See Kraus (2007) for analysis of this sort of explanatory project.
10 For other options, see Adler (2012: 270–275, 297–302).
11 K&S emphasize that "utility numbers need not be interpreted as objective, measurable quantities, but rather should be understood as constructed, auxiliary numbers selected by the analyst to represent the underlying rank ordering of the individual" (K&S 2002: 18, footnote 6).
12 Another non-equality-sensitive SWF would involve ranking the outcomes according to Pareto superiority (or more likely Kaldor-Hicks efficiency). See *supra*, note 7.
13 For one particularly attractive equality-sensitive SWF, see Adler (2008: 27, 44–45). See also Adler (2012: Chapter 2); Hausman and McPherson (2006: Chapter 13).
14 This objection has been pressed by Dorff (2002: 849–850) and Farber (2003: 1793).
15 Perhaps letting preferences include a taste for fairness mitigates the tension between fairness and promoting well-being. However, this reply is insufficient. First, economic analysis could still recommend highly unjust outcomes—especially if the taste for fairness is not strong enough (Dolinko 2002: 359). Second, while K&S think fairness can have moral significance only in virtue of people having a preference for it, this is not how fairness is generally thought to get its moral significance.
16 I press this objection to Hauseman and McPherson in more detail elsewhere (Sarch 2015).
17 For example, Joseph Raz's perfectionist liberalism would take well-being to matter to policy evaluation, but would not understand well-being in terms of preference satisfaction.
18 The Preamble to the US Constitution also states that one aim of "establish[ing] this Constitution for the United States of America" is to "promote the general Welfare." But the Preamble is not "regarded as the source of any substantive power conferred on the Government of the United States." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905).
19 See, e.g., *Schult* v. *Schult*, 241 Conn. 767, 777, 699 A.2d 134, 139 (1997) ("'In making or modifying any order with respect to custody or visitation, the court shall . . . be guided by the best interests of the child . . . .' [which] include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment.") (internal citations omitted).
20 42 U.S.C. § 2000e, *et seq*.
21 *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) ("Title VII bars conduct that would seriously affect a reasonable person's psychological well-being"). *Harris* also held that harm to psychological well-being is not *necessary* for such a lawsuit to succeed. *Id*.
22 *Sable Commc'ns of California, Inc.* v. *F.C.C.*, 492 U.S. 115, 126 (1989).
23 Hershovitz calls this "the model of harms," in contrast to "the model of costs" on which tort law aims to promote efficiency (Hershovitz 2006: 1147).
24 As Joel Feinberg observed, while "criminal law is not the state's primary tool for the reduction of harms," it still "is the primary instrumentality for preventing people from intentionally or recklessly harming one another" (Feinberg 1984: 31). Feinberg goes on to restrict the notion of harm relevant to criminal law in the same way as we'll see is needed in the torts context. Criminal law, he suggests, is largely concerned with *wrongfully* imposed harms (Feinberg 1984: 105).
25 Levit notes that "[t]hose incurring physical harms are readily compensated," while "[t]hose incurring psychic harms face skepticism" (Levit 1992: 175).

26 Fundamental good-making and bad-making properties are the ones that welfare ultimately depends on—i.e., whose instantiations completely and fundamentally determine how well one's life goes. See Bradley (2009: 19); Sarch (2011: 180–181).
27 Adopting a different conception of constituents of well-being may lead to different conclusions about whether tort law directly protects well-being.
28 The same holds for other kinds of interests that tort law protects, which may not be as tightly connected to well-being—e.g., privacy or property interests (Levit 1992: 139, 140–141).
29 Restatement (2d) of Torts § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action"); see also *Osterlind* v. *Hill*, 263 Mass. 73, 76, 160 N.E. 301, 302 (1928).
30 Restatement (2d) of Torts § 321 (1965).
31 For more on the relation between harm and well-being, see Chapter 35 of this volume.
32 As Hershovitz notes, tort liability is conditioned on proof that "1) the defendant had a duty to the plaintiff, 2) the defendant breached the duty, and 3) the breach of the duty caused the plaintiff damage. Duties are the correlates of rights. Thus, to recover in tort, a plaintiff must show that the defendant invaded a right of hers, causing her damage" (Hershovitz 2006: 1168).
33 Nominal damages are available in suits for battery, libel, and the violation of one's constitutional rights, though notably not negligence, nuisance, or slander.
34 For example, Levit (1992) argues that tort law should be more willing to impose liability on the basis of emotional and other "intangible" injuries.

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