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EXPLAINING COMPENSATORY DUTIES

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In some cases, harming another gives rise to a duty to compensate for harm done. This paper argues that the influential explanations of such duties of compensation—that they are somehow derived from rights intrusions, or breaches of duties not to harm—fail. I offer and defend an alternative explanation for why certain harms and not others give rise to compensatory duties, an explanation that seeks to derive them from wide-scope duties not to harm or to compensate for harm done.

If I were to punch you in the nose, I would thereby incur a duty to compensate you for harm done. And we would expect a court of law, which is partly in the business of enforcing such duties, to hold me liable. So much is familiar. But, we might ask, what explains my duty to compensate you for this harm done?[1] Here is a compelling thought: when I owe you compensation, it is because I have intruded upon your rights, thereby breaching a correlative duty owed to you, and this triggers a duty to compensate. In this paper I critically examine this way of explaining compensatory duties. After considering and rejecting a couple of proposals that make compensatory duties parasitic on the intrusion of rights (or the breach of correlative duties), I present and defend an alternative account.

In Section I, I discuss what I call the *simple explanation* of compensatory duties. As shall be seen, the simple explanation is too simple, for it cannot explain duties to compensate for permissible harms. So in Section II, I discuss what I call the *refined explanation*, which allows for rights intrusions/duty breaches for permissible harms. Unfortunately, the refined view will run afoul of an ought-implies-can principle—or more precisely a duty-implies-can principle—that limits the reach of duties. In Section III, I abandon

1. Abstracting from this particular example, when harm done gives rise to a duty of reparation (of which the duty to compensate is a species), "harm" need not mean physical damage but can include things such as offensive remarks, the taking of or damage of property, etc. And "reparation" need not mean recompense that repairs the harm. For sometimes harm cannot be repaired and, even if it can, there are occasions when something less than or other than full repair is called for. Depending on the nature of the harm, reparation can partly comprise a sincere apology, monetary damages, restitution of property, an expression of respect, etc.

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the project of grounding compensatory duties in rights intrusions/duty breaches. I there present what I call the *wide-scope explanation*, demonstrate its advantages over the alternatives, and defend it against objections. I conclude in Section IV.

An initial clarificatory remark is in order. Though I am primarily concerned with ethical duties to compensate and ethical duties not to harm, in the process of doing so I consider some legal duties in tort. Though these are conceptually distinct types of duty, I assume that tort duties and liabilities can be fairly good (albeit imperfect) indicators of where any corresponding ethical duties lie and I use them for those purposes.

I. THE SIMPLE EXPLANATION

The simple explanation takes rights against being harmed to entail *decisive* duties not to harm on the part of others. A decisive duty is a duty that cannot be outweighed by any competing duties or other normatively relevant considerations in any context. To put things the other way around, if in any given context there are no decisive duties not to harm others, then there are no rights against harm at stake.

Under the simple explanation, then, *A* has a duty to compensate *B* for harm done *if and because A* has intruded upon one of *B*'s rights against harm. In terms of duties, we may say that *A* has duty of compensation to *B* for harm done if and because *A* has breached a decisive duty not to harm *B*.

Though it seems rather intuitive, this is not the best explanation of compensatory duties. To see why, consider the backpacker case presented by Joel Feinberg:

> Suppose you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period, you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm.[2]

Here the backpacker would have a duty to compensate for harm done.[3] Indeed, on this fact pattern courts generally find duties to compensate,

2. J. Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93–123 (1978), at 102.

3. John Oberdiek has recently denied that one would have a duty to compensate in this case because he has "found no convincing rationale for that requirement"; *see* J. Oberdiek, *What's Wrong with Infringements (Insofar as Infringements Are Not Wrong): A Reply*, 27 LAW & PHIL. 293–307 (2008), at 304; *see also* J. Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights*, 23 LAW & PHIL. 325–346 (2004), at 343. I aim to accommodate fairly settled, considered views on the matter and to allay Oberdiek's concerns by providing a rationale for a duty to compensate in such cases.

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as we see in the classic case of *Vincent v. Lake Erie*,[4] where the defendant moored his boat to the plaintiff's dock, without the plaintiff's permission, to weather a dangerous storm. As might have been expected, the storm smashed the defendant's boat against the plaintiff's dock. The court found that although the defendant had acted "prudently and advisedly," he was nonetheless liable for damages to the dock.

The problem with the simple explanation is that it cannot account for duties to compensate for harm done in such cases. It is clear that the backpacker and the *Vincent* defendant acted permissibly, and this entails that these actors did not breach any decisive duty in so acting. If not, there is no simple explanation for their subsequent duty to compensate. In short, the simple explanation is unable to explain cases of permissible action that give rise to compensatory duties.

Proponents of the simple explanation have a reply. They can maintain that the backpacker and the *Vincent* defendant did not intrude upon any rights and on those grounds deny that these individuals have compensatory duties (contra settled case law). Though this position should not be dismissed out of hand, it does require some further account of the nature of our rights and correlative duties. After all, many find it quite plausible that these defendants *did* intrude upon the plaintiffs' rights. The simple explanation should not beg any questions here. Further, even proponents of the simple explanation must admit that if the backpacker had not been in a dire situation, he would have intruded upon the cabin owner's rights by breaking in. So one needs to explain why the presence of the right would be sensitive to the direness of the backpacker's predicament.

The obvious strategy for discharging these further burdens borne by a proponent of the simple explanation is to appeal to a specificationist conception of rights, according to which the contours of a right—what and how much it protects—vary with context in such a way as to guarantee that one cannot permissibly intrude on another's rights. In the backpacker case, a specificationist would claim that the cabin owner's right does not protect him from breaking-and-entering backpackers *simpliciter*; instead, it protects him from breaking-and-entering backpackers not in dire straits. When rigorously applied, specificationism retains the result that wherever a right is found its correlative duty is decisive—one simply specifies the right so that it and the permissible actions of others can never come into conflict.

Let me raise two problems with this reply on behalf of the simple explanation. First, there is something objectionably ad hoc about specificationism. One gets the sense that it works backward; from a conclusion that permissible actions cannot intrude upon rights, it works toward views about the contours of a particular right in context. But it is precisely the claim that permissible actions cannot intrude upon rights that needs to be questioned rather than taken for granted. Second, the main problem with the simple

4. Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

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explanation remains. If correct, the backpacker, the *Vincent* defendant, and many other would-be defendants in relevantly similar cases lack compensatory duties. It is telling that tort law is committed to the opposite position, for this indicates that a commitment to compensatory duties in such cases is widely shared not only by the folk but also by those who have engaged in moderate rational reflection on these matters. Further, if we were to deny these liabilities, we would lose sight of the weighty interests of the plaintiffs in these cases. In the end, the simple explanation is acceptable only if there is no better explanation of compensatory duties that respects the above considerations.

II. THE REFINED EXPLANATION

We might get farther if we abandon the idea that rights against harm entail decisive duties and consider the idea that rights against harm entail *pro tanto,* defeasible duties. In effect, J. J. Thomson suggests this move.[5] Whereas I have been careful to speak in terms of rights intrusions, Thomson would draw a distinction here between rights violations and rights infringements. For her, if *B* has a claim right against *A*'s Φing, and *A* Φs, two outcomes can result. One possibility is that *A*'s Φing is permissible despite the fact that it intrudes on *B*'s claim right, in which case *A*'s Φing merely *infringes B*'s claim right. The other possibility is that *A*'s Φing is not permissible, in which case *A* not only infringes *B*'s claim right, but also *violates* that claim right.[6] In terms of duties, it would seem that *A*'s merely infringing *B*'s claim right not to be harmed is equivalent to *A*'s permissibly breaching his *pro tanto* duty not to harm *B*, and *A*'s violating *B*'s claim right not to be harmed is equivalent to *A*'s impermissibly breaching his *pro tanto* duty not to harm *B*.[7]

With rights-based *pro tanto* duties in hand, we can formulate what I am calling the *refined explanation* of compensatory duties: *A* must compensate *B* for harm done if and because *A* has infringed *B*'s claim right that *A* not harm him and has thereby breached a correlative *pro tanto* duty not to harm. Henceforth, let us just stipulate that "duty" refers to the *pro tanto* variety unless otherwise indicated.

5. J. Thomson, *Some Ruminations on Rights, in* RIGHTS, RESTITUTION & RISK 49–65 (William Parent ed., 1986); J. Thomson, *Rights and Compensation, in* RIGHTS, RESTITUTION & RISK, 66–77 (William Parent ed., 1986).

6. Thomson, *Some Ruminations, supra* note 5, at 51.

7. Oberdiek, *What's Wrong with Infringements*, and *Lost in Moral Space, supra* note 3, criticizes the conception of rights needed to underwrite the infringing-violating distinction, what he calls a *moral-space conception of rights*. His main complaint is that the moral-space conception of rights rests on a defunct conception of causation. Though this is not the place to address the matter, it seems to me that a moral-space conception of rights is not committed to any particular conception of causation, let alone a defunct one. In any event, I do not defend the moral-space conception of rights here, nor do I follow Oberdiek in embracing a specificationist view of rights. In Section III, I offer a third explanatory framework for compensatory duties that does not appeal to rights against harm.

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Plausibly, the backpacker and the *Vincent* defendant are in situations where it is permissible to breach their duties not to harm others because considerations of life and limb outweigh the harm done. Although these duties against harm are defeasible, they can still have a special normative status that distinguishes them from duties of other sorts. For it might be that breach of these duties uniquely triggers compensatory duties, or it might be that these duties are particularly stringent trumps, outweighed or undercut only by the weightiest counterconsiderations or in the most unusual circumstances.

The refined explanation overcomes the shortcomings of the simple explanation. However, it cannot provide a general explanatory framework for all compensatory duties. In brief, there are cases where the refined explanation would run afoul of (a *pro tanto* version of) an ought-implies-can principle. That is, there are cases where some defendant is subject to a compensatory duty but where any explanation of that duty under the refined view would have to appeal to first-order duties not to harm that the defendant cannot respect. Such duties would be morally unintelligible. Since there are no (normatively authoritative) morally unintelligible duties, the refined explanation cannot explain all compensatory duties. That is the short version of the argument. Let me elaborate.

First, let me try to identify a case where a defendant is under a duty to compensate for harm done but where that defendant could not have avoided the harm. Honoré gives us the classic discussion of "shortcomers," people who are too foolish or clumsy to live up to the reasonable-person standard in tort law, at least on particular occasions.[8] To get a little more concrete, we might imagine an unskilled surgeon who is unable to live up to the reasonable-surgeon standard on a particular occasion. A skilled surgeon would have the steady hand and judgment to avoid certain costly mistakes during surgery, but our surgeon does not. Alas, his lack of skill leads to an accident, and he must compensate his patient for the harm done.

Let us work with this example for a moment. As it makes clear, shortcomers are not so lacking in skills, abilities, and capacities that they are no longer agents. Rather, shortcomers are like our surgeon. They are agents that at least on occasion lack the skills, abilities, and capacities to live up to duties not to harm—duties that are insensitive to the relevant defects of body and mind.

Further, as applied our unskilled surgeon, a duty not to harm during surgery would be a duty to do something that such a shortcomer cannot do—he cannot cut the patient in the less risky manner of a reasonable surgeon. What do we mean when we say he cannot do so? We are not saying that there is a logical contradiction in avoiding the harm, nor does avoiding the harm require breaking metaphysical laws. But we are also not saying that the surgeon is experiencing weakness of will or psychological resistance.

8. T. HONORÉ, *Responsibility and Luck, in* RESPONSIBILITY AND FAULT 24 (1999).

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Avoiding harm, the thought is, would require him to do something that it is beyond his physical or mental constitution to do. This surgeon lacks relevant capacities of mind and body that a reasonable surgeon has.

So understood, a duty not to harm here would run afoul of an ought-implies-can principle or, more precisely, it would run afoul of a related (*pro tanto*) duty-implies-can principle—one has a duty to Φ only if one can Φ.[9] To be clear, we should grant that the relevant sense of "can" in the duty-implies-can principle is a matter of some dispute.[10] The important point is that interpreting "duty implies can" as duty-implies-being-within-one's-physical-and-mental-capacities is one of the most plausible ways of cashing out the principle. Surely morality would not ask of a person something that is simply beyond him in this sense.[11] So a duty not to harm, as applied to our surgeon on this occasion of harm-doing, would be morally unintelligible.[12] Hence there is no such duty. And if there is no such duty, the refined explanation has nothing to appeal to in order to explain the compensatory duty. It would seem that we need an alternative explanation.

Stepping back, the surgeon case is just one case where a shortcomer owes compensation despite the fact that he could not avoid the harm in the relevant sense. More generally, the foolish and clumsy are held to the reasonable-person standard in tort law regardless of their capacities to live up to that standard, so we should expect there to be many cases where the

9. Here I am claiming that, if *A* is unable to Φ, it cannot be the case that he has some duty to Φ. Perhaps more strongly, if *A* is unable to Φ, he cannot even have a reason to Φ. Indeed, it would seem that the restriction at the level of reasons explains why it holds for duties and oughts. *See* P. Vranas, *I Ought, Therefore I Can*, 136 PHIL. STUD. 167–216 (2007), at 173.

10. Usually, the "can" in duty- and ought-implies-can principles is interpreted in terms of having the ability and opportunity to Φ. Merely lacking the motivation to Φ does not entail that one cannot Φ. For more on "can", *see id.* Note that J. Gardner, *Obligations and Outcomes in the Law of Torts*, *in* RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ (P. Cane & J. Gardner eds., 2001), has a different interpretation of the burden of showing that duties not to harm are intelligible. He thinks the question reduces to the more general one: Are duties *to succeed* (rather than merely to try or intend) morally intelligible? I take it that duties to succeed are typically intelligible, but it is more difficult to show that they are intelligible as applied to individuals who are unable to succeed in the relevant way. It is this second form of the worry that I focus on.

11. It would be nice to have a more precise definition of what it is to have the capacity to Φ or, more generally, what it is to be able to Φ, but that is beyond the scope of this paper. It suffices for present purposes to generate intuitive verdicts on cases where it seems that one cannot have the duty to avoid harm for lack of capacity. Any theory of capacity or ability will have to respect these intuitive verdicts or explain them away.

12. Some readers might prefer to think of the intelligibility concern in terms of luck rather than duty-implies-can. (On luck in law, *see, e.g.*, Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS (1979); Bernard Williams, *Moral Luck*, *in* MORAL LUCK (1981); Tony Honoré (1999a); Gardner, *supra* note 11; and Stephen Perry, *Responsibility for Outcomes, Risk and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72–130 (Gerald Postema, ed., 2001)). I prefer to couch things in terms of duty-implies-can because there are many different sources of luck in law, and not all of them generate unintelligibility objections. Nevertheless, the duty-implies-can principle might be thought to involve what John Goldberg & Benjamin Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123–1175 (2007), call *compliance luck*, which is bad [good] luck one has in lacking [having] certain capacities, skills, and opportunities needed to comply with a standard of conduct. This kind of luck does seem to raise intelligibility concerns.

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refined explanation breaks down. Regarding strict liability, we might expect many cases where defendants cannot avoid the harm done and yet are liable. So the refined explanation likely breaks down there, too. Before we jettison the refined explanation, however, we need to consider some replies to this line of argument.

There are three ways to salvage the refined explanation. First, one could take issue with what I identify as settled views in and out of tort law. That is, one could deny that shortcomers owe duties of compensation for harm done on occasions when their inabilities get in the way of first-order duties not to harm. Second, one could tweak the interpretation of the duty-implies-can principle so that even shortcomers have the requisite abilities on all occasions when they incur compensatory duties. Third, one could leave duty-implies-can alone and argue that there are complex duties not to harm as yet unidentified, duties that shortcomers can respect on all occasions when they incur compensatory duties. Let me consider these in reverse order.

A. First Reply: Appeal to Complex Duties Not to Harm

Have we failed to consider certain duties of nonharm, duties that even shortcomers can discharge? Consider, for example, a difficult case of runaway mules discussed by the Roman jurist Gaius and Honoré.[13] In this case a muleteer loses control of his mules, which proceed to crush a slave. The muleteer was so constituted that he could not have kept his mules under his control, and so he could not have prevented his mules from crushing the slave. Applying duty-implies-can, the muleteer could not have been under an unqualified duty to prevent the harm to the slave. But Gaius suggests that the muleteer might have had a complex duty not to harm by engaging in an activity that the muleteer knew or should have known to be dangerous.[14] Though the muleteer could not control his mules at the time of the accident, perhaps he knew or should have known of the activity's risks and could have avoided (i.e., had the capacity to avoid) the harm on that basis.

Does this move vindicate the refined explanation, at least for this case and perhaps for similar cases (e.g., cases involving our surgeon and cases of strict liability in modern tort law)? On the one hand, it does look as though the muleteer had the capacity to avoid taking his mules out, so there is no violation of duty-implies-can as far as that goes. On the other hand, the duty we are singling out refers to activities that the muleteer knew *or should have known* to be dangerous. This clause will also be subject to an ought-implies-can principle—the muleteer should have known that engaging in the activity was dangerous only if he *could* have known it was dangerous. Will this be satisfied in every case where a compensatory duty arises for harm done? That is what I want to question.

13. Honoré, *supra* note 8, at 21.

14. A simple duty not to engage in risky activities would not do, for the muleteer is under no compensatory duty for merely engaging in the risky activity. Some harm must result.

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We can imagine a muleteer who actually has some (misleading) evidence that he is a fairly good muleteer. Indeed, let us imagine a moderately conscientious muleteer who has taken some muleteering lessons before riding out on public pathways. His lessons happened to be conducted by trainers who did not give him particularly good feedback (unbeknownst to him and due to no fault of his). The trainers, however, had some justification for being uncritical, for our muleteer performed adequately when completing his lessons, albeit in no small measure due to luck. In any event, to all appearances he handled the mules well enough and looked robust enough to handle them in public. Still, he is simply weaker than your typical muleteer, and his forays into public are significantly more dangerous than those of the typical muleteer. He goes out into public, and sure enough, he is unable to handle his mules.

What shall we say about this more detailed case? Is it the case that the muleteer knew or should have known that his activities were dangerous? I think not. Though there is some extended sense in which the muleteer could have known of his shortcomings—for instance, if he had taken Herculean efforts to discover his skills and shortcomings—he is under no obligation to go to such great lengths. Given the information he acquired after reasonable efforts, he could not have known that he had shortcomings that made his muleteering particularly dangerous. Applying ought-implies-can, it is not the case that he knew or should have known his activities were dangerous, and so it is not the case that he breached a duty not to harm by engaging in an activity he knew or should have known to be dangerous. The same thing can be said of our surgeon. Perhaps he previously got lucky or had misleading feedback during his surgical training. If so, it is not the case that he should have known that he could not live up to the reasonable-surgeon standard.

It is important to note that this particular complex duty applies most naturally to cases of strict liability, for it identifies an activity that one should know to be dangerous. Aside from other difficult cases in this class (e.g., explaining the liabilities of children that engage in adult activities), let me note that this complex duty will not apply to many ordinary cases of negligence in which what matters is that the defendant failed to act as a reasonable person would, regardless of the general dangerousness or harmlessness of his activity (if any such activity can be identified). In those cases, what is the complex duty not to harm that will help to explain the compensatory duties that follow? Most naturally, one wants to say that there is a duty not to (cause foreseeable) harm by failure to live up to the reasonable-person standard. But the reasonable-person standard is "objective," as is the test of foreseeable harm, so it is entirely possible for someone to lack the ability to live up to the standard on some given occasion.

Let me consider a rejoinder parallel to the one given for the above activities. You could say that one has a duty not to (cause foreseeable) harm by failure to live up to the reasonable-person standard when one

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knows or should know that one generally lacks the ability to live up to the reasonable-person standard. There are two problems with such a proposal. First, it is questionable whether such knowledge of your deficiency makes you able to avoid harming others. You might land in the unenviable position of knowing of your defects and yet be powerless to avoid harming others. Second, this duty would entail that compensatory duties result only when one knows or should know that one cannot meet the reasonable-person standard. But as already suggested, there can be cases of liability where one does not know that one cannot live up to the reasonable-person standard and where it is not the case that one should know. People can get lucky or have misinformation about their own abilities.

B. Second Reply: Loosen Duty-Implies-Can

The second reply on behalf of the refined explanation is to loosen the duty-implies-can principle so that whatever the duty of nonharm happens to be, shortcomers can respect it. Along these lines, Stephen Perry suggests that one is outcome responsible if one had the general capacity to foresee the harmful outcome and, on that basis, had the capacity to take steps to avoid the harmful outcome.[15] Similarly, Honoré suggests that one is outcome responsible—responsible for a harmful outcome—if one has the general ability to avoid similar outcomes on similar occasions, an ability that need not be exercisable in a particular case of harm-doing.[16] Let us set aside the curious notion of outcome responsibility[17] and focus on the following idea: One can avoid harm in some particular case *C* if one has i) the general ability to foresee that *actions like the one in C* result in harm and ii) the *general ability to avoid harms in cases like C* (on the basis of one's general ability to foresee such harms). An advocate of the refined explanation can then hope that defendants generally can avoid harms in this relaxed sense.

In reply, one issue is whether all cases of compensatory duties also feature defendants with the general capacities this explanatory framework requires. I doubt it, but let me pass over the question. The deeper problem for the view concerns the italicized phrases, which loosen the duty-implies-can principle by assessing the ability to Φ for some concrete act-token Φ in concrete circumstance *C* in terms of the ability to perform a relevantly similar act-type in relevantly similar circumstances. This would surely defang the duty-implies-can principle, but it is not at all plausible that the principle

15. Perry, *supra* note 12, at 81.

16. Honoré, *supra* note 8, at 37; *see also* T. Honoré, *Can and Can't*, *in* Responsibility and Fault.

17. "Outcome responsibility" is nicely ambiguous between (1) "responsibility" in the sense of being liable, or having a second-order duty to compensate; (2) "responsibility" in the sense of having a first-order duty not to harm; and (3) "responsibility" in a sense that is fully focused on agent evaluation and so is more tenuously related to substantive duties the agent might have.

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is so weak. Straightforwardly, if you cannot perform some token of Φing, then you cannot have a duty to perform *that* token of Φing. It is no help to note that there are other tokens of the same act-type, occurring in slightly different circumstances, that you can perform.

All this is to suggest that, in some cases that trigger duties to compensate, there are no plausible duties not to harm that satisfy the most straightforward reading of duty-implies-can. Some tort theorists are up front about this, for example, J. Goldberg and B. Zipursky.[18] The significance in the present context is that proponents of the refined explanation lack the resources needed for a general explanatory framework for all compensatory duties. For some cases in need of explanation, there is no morally unintelligible duty not to harm that has been breached. Though one could salvage the refined explanation by reconstruing duty-implies-can, if some other explanation can avoid the tinkering so much the better for that alternative.

C. Third Reply: Deny Compensatory Duties

Before offering such an alternative, we need briefly to consider a revisionary proposal. Why not deny liability in all those cases where the refined explanation would have to appeal to a morally unintelligible duty not to harm?

This suggestion faces several problems. First, such reform would fail to capture some fairly settled judgments about when one is required to compensate another for harm done. It does seem appropriate that shortcomers like our surgeon and our muleteer compensate for harm done, for instance, and we would rather not change that aspect of tort law. Second, limiting duties of compensation along the lines suggested would fail adequately to respect the interests of the party harmed, so we have independent grounds for preserving the settled judgments. Third and last, explaining away judgments might be a fine thing to do for the right reasons, but the suggested order of reform gets things backwards. We do not normally select a favored explanation first and then massage the data points (here, settled judgments about when compensation is owed) to fit the explanation. Rather, if a given explanation fails to explain all the data, we try to find an alternative explanation that does a better job. Perhaps different explanations have to explain away different parts of the apparent data set, but to choose among them we must consider the explanations, what they explain, and what they explain away. So, before settling on the refined explanation, we should give the wide-scope explanation a full hearing. Let me turn to it now.[19]

18. Goldberg & Zipursky, *supra* note 12.

19. You might despair that some unified explanation will hold for all compensatory duties and might settle for piecemeal explanations. I proceed on the following methodological

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III. THE WIDE-SCOPE EXPLANATION

I claim that compensatory duties can be explained with the following wide-scope derivation:

1. For all persons *A* and *B*, *A* has a duty [to compensate *B* for harm done as best *A* can if *A* causes *B* harm in manner *M*].
2. *A* causes *B* harm in manner *M*.
3. Therefore *A* has a duty to compensate *B* for harm done as best *A* can.

Premise 1 asserts a wide-scope duty, or a duty to see to it that the conditional within the brackets obtains. If we read that conditional as a material conditional, then the wide-scope duty can be thought of as a duty [either not to cause harm or to compensate for harm done]. According to the wide-scope explanation, then, when *A* has a duty to compensate for harm done to *B*, it is not because *A* has breached a separate duty not to harm but because he would breach a duty not-to-harm-or-to-compensate-for-harm-done if he were to fail to compensate for harm done.

The wide-scope explanation explains why shortcomers have duties of compensation even though they lack duties to avoid harm on particular occasions. Unlike the refined explanation, the wide-scope explanation does not seek to explain compensatory duties in terms of the breach of some other duty, so, a fortiori, the issue of intelligibility for those other duties does not arise. Instead, shortcomers have duties to compensate because failure to compensate would be a breach of their wide-scope duty. To be sure, one could question the intelligibility of the duty posited by the wide-scope explanation, but since this is a duty not-to-harm-or-to-compensate-as-best-one-can (i.e., within the financial resources an individual has and the capacities he or she has to acquire more resources), it is difficult to see how this duty can be beyond the ken of anyone, even shortcomers. In this respect, the wide-scope explanation has a comparative advantage over the refined explanation.

Notice that the explanation does not deny the existence of narrow-scope duties not to harm. It only asserts the existence of wide-scope duties and the derivability of compensatory duties from those. This leaves open the possibility of numerous cases where an agent *A* is under both a narrow-scope duty not to harm *B* and a wide-scope duty not-to-harm-*B*-or-to-compensate-*B*-for-harm-done. Indeed, I think that both duties often hold, but in cases where both duties hold it is the wide-scope duty that explains *A*'s compensatory duties to *B*. This affords us a unified explanation of all compensatory duties.

Of course, the kinds of examples I give against the refined explanation arise mainly in the personal-harm arena. So we should remain alert

grounds: if there is a unified explanatory story that covers all compensatory duties, it is to be preferred to nonunified, piecemeal explanations.

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to the possibility that the wide-scope explanation does not extend to property-rule-based liabilities, where narrow-scope rights and duties might do all the explanatory work. However, it would be nice to get theoretical unity if we can get it. Fortunately, the kind of interest that wide-scope duties protect, discussed below in Section IV, are likely the kind of interests protected by certain property rights, so we might expect the wide-scope explanation to apply to property-based liabilities. In the end, then, I think that what we have here is a uniform explanation of compensatory duties across both personal and property law, for we can see duties to compensate for harm to property as flowing from the very same wide-scope duties as duties to compensate for harm to persons.

Having mentioned some of the advantages of the wide-scope explanation, I now turn to defend it against objections. First, let me comment on the validity of the derivation set out above, then say something about the truth of the crucial premise, premise 1.

A. The Validity of the Derivation

The wide-scope derivation instantiates the following deontic principle:

> Wide-Scope Detachment (duty formulation): "($D_{A,B}$ [not to Φ, or to Ψ]) and A Φ_s" entails "$D_{A,B}$ [to Ψ]."

This can be read "If A has a duty to B not-to-Φ-or-to-Ψ and A Φs, then A has a duty to B to Ψ." And given the correlativity of duties and claim rights, here is a logically equivalent formulation:

> Wide-Scope Detachment (claim formulation): "($C_{B,A}$ [not p, or q]) and p" entails "$C_{B,A}$ q."

This can be read "If B has a claim against A that it-not-be-the-case-that-p-or-it-be-the-case-that-q, and it is the case that p, then B has a claim against A that it be the case that q."[20]

The derivation is valid only if these entailments are valid. I think they are. Consider the duty formulation of wide-scope detachment. There the thought is this: if there is but one way to fulfill one's duty, one must fulfill that duty the only way one can or be in breach. So when A has a duty [either not to harm B or to compensate B for harm done], and A harms B, the only way for A to satisfy his or her duty is to compensate B, for there is no longer the option of not harming B. Similar things can be said for the claim formulation of wide-scope detachment. For if B has a claim against A and

20. I place variables that range over actions inside the duty operator and variables that range over propositions inside the claim operator. This seems rather intuitive. You have a duty to act, whereas another's claim against you is a claim *that* you act.

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there is but one way for that claim to be satisfied, then *B* has a claim against *A* that it be satisfied in that one way. The derivation looks to be in good shape.

The real challenge comes when we ask what other consequences the deontic principle of wide-scope detachment has. Thomson argues that wide-scope detachment combines with another plausible deontic principle—what she calls *P1*—to yield absurd results.[21] So, according to her, we should reject wide-scope detachment and with it the derivation that forms the basis of the wide-scope explanation. Here is P1:

(P1) "$C_{B,A}p$" entails "$C_{B,A}q$" if "p" entails "q."[22]

This principle can be illustrated with the following case. I promise you that I will marry a bachelor. You now have a claim against me that I marry a bachelor. My marrying a bachelor entails that I marry a man. Therefore, by P1, you have a claim against me that I marry a man. Because rights are correlative to duties, P1 entails a *pro tanto* version of a standard principle (PTSP) in deontic logic:

PTSP: "*A* has a duty to Φ" entails "*A* has a duty to Ψ" if "*A* Φs" entails "*A* Ψs."

Applied to the marriage case, my duty to marry a bachelor entails a duty to marry a man.

Let us see why P1 plus wide-scope detachment yields absurd results. Suppose that you do have a claim against me that I marry a bachelor tomorrow. "I marry a bachelor tomorrow" entails "I marry a bachelor tomorrow or I kill my firstborn." So, by P1, it follows that you have a claim against me that I marry a bachelor tomorrow or I kill my firstborn. Suppose now that I infringe your original claim—I fail to marry a bachelor tomorrow. By wide-scope detachment, it follows that you now have a claim against me that I kill my firstborn! Indeed, "I marry a bachelor tomorrow" entails "I marry a bachelor tomorrow or p" for any p, so it follows from P1, wide-scope detachment, and my infringement of your original right that you have a right against me for anything at all!

The corresponding syllogism looks like this:

1. $C_{B,A}p$
2. $p \supset (p \vee q)$
3. $C_{B,A}(p \vee q)$ (from 1, 2, and P1)

21. Thomson, *Some Ruminations*, *supra* note 5.

22. *See id.* at 72. In Thomson's original formulas, the roles of "*A*" and "*B*" are reversed because she speaks in the first instance of *A*'s rights against *B*.

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4. $\sim p$[23]
5. $C_{B,A}q$ (from 3, 4, and wide-scope detachment)

It is indeed absurd that the infringement of any right generates a right to just anything. Either P1 or wide-scope detachment has to go. Thomson would reject wide-scope detachment simply because it has objectionable results when combined with P1. I reject P1 because it has the following objectionable results of its own.

1. First Objection: Necessary Truths

First, consider the fact that for any *p*, *p* entails that $2 + 2 = 4$. By P1, then, if *B* has a claim against *A* for anything, *B* has a claim against *A* that $2 + 2 = 4$. Similarly, by PTSP, if *A* has a duty to do anything, *A* has a duty to see to it that $2 + 2 = 4$. But it sounds very odd to say such things. Can *A* really owe it to *B* that $2 + 2 = 4$? Perhaps if *A* directly promised to *B* that $2 + 2 = 4$ it would be a bit more understandable. Promises and the like aside, however, the thought that *any* claim against *A* entails a claim against him that $2 + 2 = 4$ is hard to understand.

It is not just that these consequences of P1 and PTSP sound odd. It is that there is nothing to be said for seeing to it that $2 + 2 = 4$. That is, being under a duty is meant to have some normative significance—duties are action-guiding, their fulfillment or breach grounds our attitudes toward those who are subject to them, and so on. The duties posited here play no such roles. The only reason one would think that such duties exist, it would seem, is if one were in the grip of a deontic logic that forced one to acknowledge such things.

This first objection aside, while there is a sense in which duties to see to necessary truths would be harmless—one can do nothing to breach the duties—they would have potentially harmful knock-on effects in other areas of normative theory. As emphasized above, we think that one cannot have a duty to do that which one is not able to do. That is, duties govern actions that one can perform. This raises two questions regarding necessary truths, which I express by emphasizing key terms in the following phrases. First, is one able to *do* something so that $2 + 2 = 4$? Second, is one *able* to do something so that $2 + 2 = 4$? If P1 and PTSP are correct, we either have to accept certain results about what counts as an action—whatever I am now doing vis-à-vis $2 + 2$ equaling 4—and what I can do—see to necessary truths (something one would have thought only God could do, if anyone)—or reject the view that duties govern actions that one can perform. These results would not be harmless. They would be far-reaching and

23. As the example above suggests, we need to understand the disjuncts as indexed to a time. If I promised to marry a bachelor tomorrow, I cannot derive a duty to do anything from the fact that I have not married a bachelor yet. For I can still marry one tomorrow. Indexing actions to times is a way to make sure the actions are unavailable if they are not done when the time comes.

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controversial conclusions either in action theory and ability theory or in deontic theory.

To avoid all this, one could amend P1 (and PTSP) so that *B*'s claim that *q* only follows if *q* is not entailed by anything. This seems like a reasonable move, if not a little ad hoc. But there are counterexamples to P1 and PTSP that remain in the face of this move. I turn to them now.

2. Second Objection: Logically Weaker Truths

Let me henceforth focus on PTSP, for P1 will inherit the sins of this corollary. PTSP licenses the inference from "*A* has a duty to Φ" to "*A* has a duty to Φ or Ψ" for any Ψ, for "*A* Φs or *A* Ψs" is logically weaker than "*A* Φs." The classic example of this is Ross's paradox (or a *pro tanto* version of it).[24] In this paradox, we assume that one has a duty to mail a letter, which would then entail a duty to [mail the letter or burn it]. Presumably, one would discharge this duty by burning the letter. But is it really the case that if one were to burn the letter, one would fulfill a duty? I should hope not. Again, fulfilling such a duty would not have the normative significance that duty fulfillment is supposed to have.

There is some confusion about what the paradoxical result is supposed to be, so let me be clear. I do not think the paradox hinges on any entailment between duties and so-called free-choice permission.[25] That is, I am not assuming that one who has a duty to [mail the letter or burn it] is both permitted to mail it and permitted to burn it. Also, I would not say that one discharges the *original duty* to mail the letter by burning the letter. The counterintuitive results are simply (1) there is a wide-scope duty to [mail the letter or burn it], and (2) one fulfills some duty by burning the letter.

In response to such paradoxes, one common reply is that the paradoxical conclusion is only pragmatically odd, but true nonetheless.[26] In this vein, Ralph Wedgwood (who is addressing "ought," not "duty") suggests that Gricean norms would be violated if one asserted the logically weaker duty when one could assert the logically stronger one instead.[27] But there is nothing pragmatically odd in spelling everything out: you have a duty to mail the letter; you have a duty to mail the letter or burn it; and by burning the letter you fulfill the latter duty but not the former. The oddity here is due to the fact that one does not really have a duty to mail the letter or burn it, and one does not really fulfill a duty by burning the letter. In response,

24. A. Ross, Imperatives and Logic, *Theoria*, 7: 53–71 (1941).

25. *Compare* G.H. von Wright, An Essay in Deontic Logic and the General Theory of Action (1968).

26. H.N. Castaneda, *The Paradoxes of Deontic Logic: The Simplest Solution to All of Them in One Fell Swoop*, *in* New Studies in Deontic Logic 37–85 (R. Hilpinen ed., 1981); R. Wedgwood, The Nature of Normativity (2007), at 115. I try to set aside paradoxical implications that can be solved by indexing "oughts" to agents and times or to other contextually variable parameters, as Wedgwood suggests. Thus I do not talk about Prior's Paradox of the Good Samaritan nor Forrester's Paradox of the Gentle Murder.

27. Wedgwood, *supra* note 26.

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Wedgwood claims that "on reflection," it is very easy to do *something* you ought to do; what is hard is doing *everything* you ought to do.[28] But let us stick to the case. Is it so easy to do something I ought to do that I can do so by burning the letter? Again, there is nothing to be said for burning the letter. I have no reason to do it, and if I have no reason to do it, there cannot be a duty I discharge by doing it.

3. Third Objection: Other Weaker Truths

Suppose that I promise to give you a cat. "I give you a cat" entails "I give you a mammal." So, by PTSP, if I have a duty to give you a cat, I have a duty to give you a mammal. Suppose, now, that I hand over a rabid dog. I thereby give you a mammal. Have I done something I was under a duty to do? Of course not.

Here again the proponent of PTSP might claim that the derived duty is harmless. But is it? Deontic theorists have to say something about the normative weight of these derived duties. Presumably, my duty to give you a mammal, for instance, would be less weighty than my duty to give you a cat. And presumably the weight of my derived duty to give you a mammal is transmitted from my duty to give you a cat—other things equal, I am under no duty to give you a mammal if I am under no duty to give you a cat. If so, the advocate of P1 and PTSP will have to deny the following principle of transmission: "*A* has a duty to Φ of weight *w*" entails "*A* has a duty to Ψ of weight *w*" if "*A* Φs" entails "*A* Ψs." That is, advocates of P1 and PTSP cannot say something analogous to a plausible transmission principle in the case of means-ends normativity: "*A* has reason to Φ of weight *w*" entails "*A* has a reason to Ψ of weight *w*" if *A*'s Ψing is a necessary means to *A*'s Φing.

This is an indication of how wide-ranging the effects of deontic principles are. I have no idea how to proceed with a principle of transmission for P1 and PTSP, and it seems to me a theoretical cost that plausible principles in the means-ends literature are unavailable.[29] Taken together, the above considerations place significant pressure on P1 and PTSP. Of course, these considerations must be weighed against the positive case for P1 and PTSP. But if we can also explain why the principles would seem plausible despite being false, we would have a very persuasive case against them.

28. *Id.* at 115 n. 8.

29. The independent plausibility of wide-scope detachment can be seen to put pressure on P1 as well, for in tandem they entail absurd results. Elsewhere (M. Bedke, *The Iffiest Oughts*, 119 ETHICS 672–698 (2009)), I defend the following principle (call it P2): if one has some reason to [Φ or Ψ], then one has some reason to Φ (and some reason to Ψ). If we read our duty claims as essentially certain kinds of reason claims, we get the result that a duty to [Φ or Ψ] would entail a reason to Φ and a reason to Ψ. When we combine P1 and its corollaries with P2, we get the absurd result that for all duties *D* and all actions Φ, *D* entails reason to Φ. P2 is admittedly controversial, and this is not the place to rehearse the case for it. Suffice it to say that there other plausible deontic principles besides wide-scope detachment that when combined with P1, would entail absurd results.

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4. Explaining the Illusory Appeal of P1

Indeed, it is entirely understandable to find P1 plausible despite its being false. With any abstract, formal deontic principle there is the worry of overgeneralization, or the worry of finding the abstract principle true because all relevant examples that easily come to mind comport with it. In my view, what we have in the case of P1 and PTSP are cases of overgeneralization. When considering whether P1 is true one is apt to think of typical cases that satisfy the principle. One large class of such cases feature means-ends relations. These are cases in which *A* owes it to *B* to achieve some end *E*, and *M* is a necessary *means* to *E*. In such cases it is very plausible that *A* owes it to *B*—that is, *A* has a duty correlative to *B*'s claim right—to *M*. For instance, if *A* promises *B* to get a philosophy degree, and taking logic is a necessary means to getting the degree, then *A* has a duty to take logic.

P1 and PTSP will generate these results, and because there are so many familiar cases that fit the means-ends pattern it can seem that the principles must be true. But the principles have much broader implications beyond these familiar cases. Crucially, neither P1 nor PTSP is restricted to actions that enjoy some means-end relation. Grant that the notion of being a means is a difficult one. Still, in ordinary language, we are not likely to speak of, say, logical truths as means to anything, or weaker logical propositions as means to stronger ones, or giving someone a mammal as a means to giving someone a cat. Once we focus on cases not involving means-ends relations, I think P1 loses its initial appeal. It can be seen for what it really is—an overgeneralization of familiar inferences.

That is why, as a methodological matter, it is best to put logic last. Rather than construct a deontic logic from familiar cases and then let the logic constrain further substantive deontic theory *ex ante*, it is better to do the substantive theory first and construct a deontic logic at the end of the day or only when it helps us clarify our thoughts within a limited domain of application.

Given the foregoing arguments, we have good reason to reject P1. This takes the pressure off wide-scope detachment. I am not aware of any further absurd results that wide-scope detachment has of its own, so it looks as though it can support the wide-scope derivation of compensatory duties.

B. Why Should We Think There Are Wide-Scope Duties?

Now we can address the crucial premise of the derivation, the premise that asserts the existence of wide-scope duties. Why should we think that we have these wide-scope duties in addition to whatever narrow-scope duties we have? Or why should we think that others have correlative wide-scope rights in addition to whatever narrow-scope rights they have? While a full hearing of this issue must await another occasion, I can indicate a promising line of argument for wide-scope duties and rights that is independent of the role they play in explaining compensatory duties.

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To that end, consider what it is that rights protect. Plausibly, they protect the weighty interests of individuals. If so, we can ask: Do wide-scope duties do a better job protecting certain interests than do narrow-scope duties? It is pretty clear that certain interests are best protected by narrow-scope duties. I have an interest in bodily integrity, for instance, that grounds a right against others removing my fourth finger without my consent. They have a correlative duty not to do so. And my interest would not be as well protected by a duty [not to remove my finger or to compensate me for removing it].

But it also seems clear that one interest in having my fourth finger consists in what we can call the *economic value* of having that finger. By "economic value" I mean a value that is commensurate with some monetary amount. This is not to say that my only interest in having my fourth finger is an interest in some economic value that can be represented by a dollar amount. As already indicated, some of my interest will be in values that are not commensurable or fungible in this way. Also, what I am calling "economic value" should not be identified with some value or range of values that I would arrive at after negotiating with another at arm's length. In such an arm's-length transaction, it would be difficult for me to put a dollar amount on some of the interests I have in my fourth finger—those that are not commensurable with whatever the currency of compensation happens to be—and any attempt to do so would force me to act as though incommensurable values are really commensurable. As I am using the term "economic value," it is one small part of the value I have in my fourth finger not adequately measured by my willingness to receive money or the loss of all the value in having my finger.

If I am right that there are interests in values that are fungible in this way, wide-scope duties and correlative wide-scope rights seem perfectly suited to protecting them. A wide-scope duty [not to remove your finger or to compensate you for removing it] would protect the fungible economic value of the finger, whereas a narrow-scope right would risk overprotecting this value. What cannot be emphasized enough is that all of this is consistent with other interests in having that fourth finger attached that are not commensurate with monetary interests and that are best protected by narrow-scope duties and rights, which would go alongside the wide-scope ones.

The point here is that it is quite plausible that rights whose purpose is to protect weighty interests would come in a wide-scope flavor, so it is not at all ad hoc to suppose that there are such rights and duties when explaining compensatory duties. As mentioned above, it looks as though certain interests in property are interests in values commensurate with monetary values, so we might expect these interests to be protected by wide-scope rights and duties. Consequently, we might expect property-rule-based liabilities to receive the same explanation as personal-rule-based liabilities.

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IV. CONCLUSION

We cannot explain all compensatory duties by appealing to the breach of some first-order duty not to harm. If we tried, we would run into duty-implies-can restrictions. I argue that certain wide-scope duties offer a better, unified explanation of compensatory duties. Though the derivation needed to get from wide-scope duties to narrow-scope duties to compensate would generate absurd results when combined with other deontic derivations, those other deontic derivations have an illusory appeal that dissolves on further inspection. So I think we are well advised to embrace the wide-scope explanation.

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