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DOES COMPENSATION RESTORE EQUALITY?

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1. INTRODUCTORY

What does compensatory justice seek to accomplish? * A formal answer, of course, is that, like all justice, it seeks to assure each his due. Aristotle's analysis of "corrective" or "rectificatory" justice, however, proffers a more specific answer:

What the judge aims at doing is to make the parts equal by the penalty he imposes, whereby he takes from the aggressor any gain he may have secured. The equal, then is a mean between the more and the less. But gain and loss are each of them more or less in opposite ways, more good and less evil being gains, the more evil and the less good being loss. The equal, which we hold to be just, is now seen to be intermediate between them. Hence we conclude that corrective justice must be the mean between loss and gain. This explains why the disputants have recourse to a judge; for to go to a judge is to go to justice. . . . What the judge does is to restore equality.¹

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In this chapter I consider whether compensatory justice can be understood in this Aristotelian fashion, as somehow restoring equality between parties. In contemporary ethics and political philosophy this notion of compensation as a return to equality has had two very different manifestations. The first is “the principle of redress,” according to which the fundamental aim of social justice is to redress undeserved inequalities. Section 2 argues that this principle is based on a strongly egalitarian ethic hostile to the fundamental claim of liberalism. I then turn in sections 3 and 4 to a more modest understanding of the “return to equality.” It is sometimes argued that a rights violator who fully compensates a victim for her losses thereby restores his condition of moral equality with the victim. Here also, I shall argue, the Aristotelian account fails. However, I contend in section 5 that in one case compensatory justice does restore equality: justified rights violations.

2. RESTORING EQUALITY (I): THE PRINCIPLE OF REDRESS

2.1. *Social Justice and Moral Balance*

Compensatory justice seems necessarily a second-level principle of justice insofar as it operates on other, more basic principles. Compensatory justice apparently tells us what to do when people do not live up to their first-level duties or when they fail to respect first-level rights. So understood, it is a part of what Rawls calls “nonideal” theory, that is, “principles for meeting injustice.”² But Rawls seeks to assign an altogether more basic role to compensatory justice: he seems attracted to the view that it forms the foundation for much of ideal theory. Rawls explains the egalitarian character of the difference principle by saying that it achieves “some of the intent” of the principle of redress. “This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somewhat to be compensated for.”³ My point here is not simply that Rawls’s theory of social justice is built upon a commitment to compensatory justice. As John Passmore points out, “From a certain point of view, facilitatory social justice can be thought of as reparative.”⁴

But to conceive of social justice as reparative is typically still to view it as a response to past injustices: social justice as compensatory justice would still be a nonideal, second-level principle. But if we take the principle of redress as the foundation of social justice—or as one of the foundational principles⁵—the very notion of ideal social justice becomes essentially compensatory.

Rawls is more than a little reluctant fully to commit himself to the principle of redress; the “difference principle,” we are told, is “not the same as that of redress,” although “it does achieve some of the intent of the latter principle.”⁶ However, Rawls’s discussion draws on an essay by Herbert Spiegelberg that provides an unabashed defense of the principle of redress. Writes Spiegelberg:

The argument for the demand of universal equality . . . rests on two premises: (1) *undeserved discriminations call for redress*, (2) *all inequalities of birth constitute undeserved discriminations*. I shall conclude that (3) *all inequalities of birth call for redress*. Such redress implies, at least in principle, the cancellation of all inequalities of birth by equalization. In this sense it follows, that (4) *equality is a fundamental ethical demand*.⁷

In defense of (1) Spiegelberg refers to the legal notion of “unjust enrichment”; any special benefit that cannot be justified, it seems, constitutes an unjust enrichment. And in accord with Aristotle’s analysis, Spiegelberg holds that this enrichment brings about a “moral disequilibrium”; compensatory justice calls for reestablishing the moral balance by equalization.⁸ And since natural talents are undeserved discriminations, redress is called for.

David Gauthier has pointed out a fatal flaw in the case for the principle of redress. If we take seriously Spiegelberg’s reference to unjust enrichment, the argument is that since the discriminations are undeserved, that is, they are contrary to desert, being enriched by them is unjust. But this does not provide the foundation for step (2). For “it is surely mistaken to hold that natural inequalities are undeserved. They are not deserved, they do not accord with desert, but equally they are not undeserved, they are not contrary to desert.”⁹ If (1) means

that all discriminations contrary to desert require redress, it seems that nothing follows regarding discriminations based on natural talents. As Gauthier points out, though these inequalities are not sanctioned by desert, neither are they contrary to it. Indeed, as Rawls himself acknowledges, the upshot is that “[t]he notion of desert does not apply to such cases.”¹⁰ At this point it seems that the argument for the principle of redress depends on an equivocation between “not deserved” (not sanctioned by desert) and “undeserved” (violating the principle of desert).¹¹

2.2 A Reformulated Argument for Redress

We can reformulate the argument for the principle of redress in a way that saves it from equivocation by substituting for step (1), principle *E*:

E: Any discriminatory act—any action that provides differential advantages or burdens—stands in need of justification; any unjustified discriminatory act calls for redress.

Spiegelberg actually seems to have something akin to principle *E* in mind. “The premise that undeserved discriminations call for redress,” he affirms, “thus implies that only morally deserved inequalities justify unequal lots: *without such special justification all persons, whether equal or unequal, ought to have equal shares.*”¹² The crucial claim here is not that these advantages are undeserved, but that they are unjustified (say, by the claim that they are deserved), and in the absence of such a justification they are unjust. For *E* it is enough that natural talents are not deserved (that is, not sanctioned by desert); there is no need to make the (false) claim that they are undeserved (that is, contrary to desert).

Building upon *E*, one could argue:

1. Any discriminatory act—any action that provides differential advantages or burdens—stands in need of justification; any unjustified discriminatory act calls for redress.
2. All social and economic inequalities are based on discriminatory acts—differential benefits and burdens are generated by social systems and institutions.

3. These inequalities thus demand justification.
4. They cannot be justified on the grounds that people deserve their differential talents and, so, deserve the differential benefits or burdens that flow from them.
5. Consequently, in lieu of some other justification for these social and economic inequalities, redress is called for.

Two comments are required here. First, I have framed the revised argument for redress not in terms of the unjustness of nature—for example, what natural endowments a person has received in the lottery of birth—but rather in terms of actions that are based on these. As Rawls says, “The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts.”¹³ Secondly, the revised argument provides only a presumption in favor of redress. As step 5 explicitly allows, there may be some other justification for these inequalities. All the revised argument maintains is that unjustified discriminations call for redress, and that desert is not available as a justification.

2.3 The Principle of Redress as Antiliberal

E is an egalitarian principle. It asserts a blanket moral presumption in favor of equality; it is incumbent on he who is talented to show that his talents are justified or, I suppose, to show that any advantages that accrue to him (say, the admiration of his fellows) can be justified. If he cannot provide a justification, his advantages have upset the moral balance and require redress. And, presumably, because Spiegelberg does not think one can justify such talents and advantages, we are led to a notion of social justice that seeks to restore the moral balance by somehow compensating for their unequalizing effects.

Principles that place the onus of justification on one party rather than another are substantive moral principles: they state that some condition is the moral status quo in the sense that it requires no further justification whereas departures from it do.¹⁴ They present us with a moral asymmetry. Now liberal

political philosophy typically offers a competing presumptive principle:

L: Interference with another's activity requires justification; unjustified interference is unjust.

Certainly this is fundamental to liberal political and legal theory. As Joel Feinberg says, "most writers . . . have endorsed a kind of 'presumption in favor of liberty' requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always requires some special justification."¹⁵ Extending this presumption from liberal legal theory to liberal ethics seems straightforward.¹⁶

Now *L* and *E* are competing principles. If *L* holds, then Alf is free to praise Betty for her wonderful talents, and to shower gifts upon her, unless Charlie can justify interfering with Alf. Perhaps Charlie can provide some justification: all that the Liberal Principle says is that Alf is free to do as he wishes until Charlie can produce a justification for interfering with Alf by making him refrain from rewarding Betty as he sees fit, with his praise or his goods. But *E* holds that Alf or Betty must justify Alf's actions. According to the Egalitarian Principle Charlie need not say anything: unless Alf and/or Betty can justify their actions, they have upset the moral balance and so redress is in order.

Let me put my point in a less formal way. It is often argued that liberals suppose that each person is free to do as he wishes until some justification is presented for limiting his liberty. As Locke said, all men are naturally in "a *State of perfect Freedom* to order their actions . . . as they see fit . . . without asking leave, or depending upon the Will of any other Man."¹⁷ To these liberals, the right to natural liberty determines the point of departure for all subsequent ethical and political justifications: all henceforth are concerned with liberty-limiting principles. Now the Egalitarian Principle postulates a very different starting point for normative theory: all successful justificatory argument establishes permissible inequalities. And in the absence of successful arguments, the fallback position is always a moral

demand for equality. The formulated case for the principle of redress supposes precisely this: in the absence of some good reason, morality demands equality. And when we have departed from equality without justification, restoring equality is morally required. Hence the fundamental role of the principle of redress.

2.4. Liberalism and Formal Equality

Principle *E*, I have argued, is illiberally egalitarian. It may seem that this must be wrong. Many philosophers—indeed liberal philosophers—see *E*'s presumption in favor of equality as a demand of reason itself. Benn and Peters, for instance, defend the principle that "*none shall be held to have a claim to better treatment than another, in advance of good grounds being produced.*"¹⁸ They continue:

Understood in this way, the principle of equality does not prescribe positively that all humans be treated alike; it is a presumption against treating them differently, in any respect, until grounds for distinction have been shewn. It does not assume, therefore, a quality which all men have to the same degree, which is the ground of the presumption, for to say that there is a presumption means that no grounds need be shewn. The onus of justification rests on whoever would make distinctions.

. . . Presume equality until there is a reason to presume otherwise.¹⁹

This is an immensely popular position; Richard Flatham, Isaiah Berlin and William Frankena, to name just a few, endorse it.²⁰ The consensus is that so understood the presumption in favor of equality is (1) a demand of reason or logic and (2) only weakly egalitarian in its implications. Both, I think, are wrong.

Consider first the claim that the presumption in favor of equality is a demand of rationality or nonarbitrariness. According to J. R. Lucas—certainly no radical egalitarian—"formal equality" is simply a statement of the universality of reason. "It requires that if two people are being treated, or are treated, differently, there should be some relevant difference between them."²¹ So if Alf gives a present to Betty but not to Doris then

nonarbitrariness demands that Alf have some reason that differentiates Betty from Doris. If he does not, if, as far as he is concerned, Betty and Doris are equally deserving of his attention and affections, then he is being arbitrary, illogical or irrational to shower gifts on Betty. This example already shows that the principle is not as intuitively obvious as some of its exponents would have us believe. Some philosophers insist that in this sort of case Alf's action simply resists any universalization: even if Betty and Doris are *exactly alike*, it has been argued, it is perfectly understandable, and not at all crazy, for Alf to love Betty and not Doris.²² But suppose (as I think is correct)²³ we take a more traditional view, and hold that even here Alf is committed to some conception of universalizable reasons. If he is rational, something about Betty attracts him to her rather than to Doris (perhaps simply their shared history—Alf saw Betty first). If Betty and Doris were really exactly alike in every way, Alf's preference really would be irrational. But surely, even granting this, Alf need not *justify* his preference to Doris or anyone else. It is one thing to acknowledge that a rational Alf will have his reasons (though he may not be cognizant of them); it is quite another to say that he must justify his preference. Yet advocates of presumptions of equality typically assert, as do Benn and Peters, an "onus of justification." As Benn claims in a later essay, "discrimination in treatment between persons requires *moral* justification: it is not enough simply to *prefer* one to another since that involves regarding another person from the point of view of one's own satisfaction; respect for a person involves a right to be considered from his *own* standpoint."²⁴

As Benn recognizes, a justification must provide others with what are reasons from their perspectives.²⁵ Principle *E*, Benn and Peters's egalitarianism, as well as Benn's later principle, places on each of us a moral requirement to provide reasons to others—justifications—whenever our actions lead to differential treatment. So far from being a simple and uncontroversial demand of reason, this principle would wreak havoc on our lives. One would need to justify to potential spouses whom one did not choose—provide reasons from their perspectives—why one didn't choose them. If one chose to buy a house in one neighborhood rather than another, and both need new resi-

dents, one would have to justify one's choice to those disadvantaged by it. But why must I justify to others my choice to live in East rather than West Duluth? It hardly is a demand of rationality itself that I do so. Indeed, such a pervasive requirement to justify oneself is terribly intrusive, and quite at odds with the liberal presumption in favor of noninterference.²⁶

To be sure, in political, legal and administrative contexts the presumption in favor of equal treatment is explicable and important.²⁷ In these contexts officials are properly required to justify their differential treatment of citizens. In the absence of justification we certainly are apt to conclude that an injustice has been committed. But two features of these settings render them unhelpful in showing that *E* is a basic principle of morality.²⁸ First, citizens come before judges and administrators with rights and duties. The egalitarian principle is thereby transformed into the requirement that those with equal legal rights and duties be treated alike. This is clearly neither foundational, because it supposes an independently defined set of rights and duties, nor is it strongly egalitarian. Second, public officials differ from private citizens in a crucial respect. Whereas we suppose that private individuals are free to act as they see fit until, as it were, they run into the rights of others or some duty, *this* presumption does not hold for public officials. We presume that what one does in an official capacity always stands in need of justification, say, to a superior. If Alf is acting in his private capacity, it is entirely reasonable for him to respond to a request to justify his discriminatory actions with the retort that it is his own business why he acts as he does. Admittedly, if Alf has violated the rights of another we will insist on justification, but he is under no standing obligation to justify his actions to others. Public officials are. They must be able to provide publicly accessible reasons justifying what they do in their official capacity.²⁹ But we ask much less of private agents. And that is why the principle of formal equality before the law—so central to liberal political and legal theory—becomes illiberal when transplanted into ethical theory.

3. RESTORING EQUALITY (II): THE DEBT MODEL

3.1. *What Is a Return to Equality?*

So far I have argued that compensatory justice *qua* the principle of redress cannot provide the foundation for social justice in liberal theory. The principle of redress is most plausibly interpreted as relying on the presumption in favor of equality (*E*); and this presumption is inconsistent with the liberal presumption of noninterference (*L*). Now if we reject principle *E*, if equality is not the moral baseline, it follows that not every de-equalizing act must be either justified or redressed. We have now two types of actions that produce inequalities: those that call for either justification or redress and those that do not. What distinguishes them? The most obvious answer is that the former are *wrongful*, or *rights-violating*, deequalizing acts while the latter are not. It thus might seem that we are led to something like the following principle:

Any discriminatory action that provides differential benefits to Betty, or burdens on Alf, when Alf has a right to equality, must be either justified or compensated.

But now that we have rejected the strongly egalitarian notion of compensatory justice articulated in the principle of redress, this revision of the egalitarian conception looks manifestly strange. It cannot be only rights to equality that ground compensation. Consider the following possibility: Alf has lots of property, Betty very little. Betty violates Alf's property rights by stealing. Would the above principle require compensation be paid to Alf? Not obviously. Perhaps it could be argued that although Alf and Betty have unequal *property*, they have equal property *rights*, and that is the condition of equality, to which we seek a return. But that will not do. Say Betty promises to buy Alf lunch: he has a right against her, but she has no corresponding right against him. Now suppose she breaks her promise. If Alf is entitled to some form of compensation the aim cannot be to restore an equality of rights.

What, then, is meant when it is said that compensatory justice

restores equality? William Blackstone provides the following interpretation of Aristotelian corrective justice:

Corrective justice . . . involves a rectifying or reparatory transaction between one person or party and another. Here there is an attempt to restore the equality which existed prior to the injury of one party by the other. The penalty imposed on the party who inflicted the injury and the corresponding benefit bestowed on the injured party should be proportional to the difference created by the injury.³⁰

Unfortunately, this explication is not pellucid. But the account seems to involve two elements: (1) redistribution that allows for (2) a return to moral equality.

3.2. The Redistributive Claim

A claim of an unjust distribution of resources is fundamental to compensatory justice. Some wrongful action by Betty against Alf leads to an unjust distribution of resources between them.³¹ The most obvious case is where Betty steals some of Alf's property, and quite literally transfers resources. Unlike penal sanctions, which follow from the mere act of wrongdoing, compensatory justice focuses on wrongdoing with redistributive consequences.³² Compensatory justice, then, is premised on some just distribution, and seeks to return to that distribution after unjustified departures from it.³³ Compensation thus aims at the "elimination of unjustifiable *gains and losses* owing to human action."³⁴ To be sure, sometimes questions of compensatory justice do not appear to involve distributive issues. If Betty attacks Alf, he may reasonably claim compensation for his pain. But, of course, here too we confront a distributive issue: Betty's unjust action inflicts costs on Alf, and he seeks to recover these costs.

Compensation is usefully seen as a repayment.³⁵ This is the basis for the familiar notion that compensation is a sort of *debt*. Judith Thomson, for instance, says that the notion of a debt of compensation is familiar: "if we have wronged A, we owe him something; we should make amends, we should compensate

him for the wrong done.”³⁶ A special moral relation exists, then, between victim and aggressor: the aggressor is indebted to the victim, she owes him something because of what she has done.³⁷ The idea of a debt points to a distribution of resources to which we have a moral reason to return: until a transfer is made from aggressor to victim, the victim does not have that to which he is entitled while the aggressor has more than she is entitled to.

The notion of debt indicates that some amount, or some particular thing, is owed by the aggressor to the victim.³⁸ Let us, then, say that the debt has been completely repaid if the victim receives *full compensation*. According to Robert Nozick, “[s]omething fully compensates a person for a loss if and only if it makes him no worse off than he would otherwise have been; it compensates person X for person Y’s action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had not done A.”³⁹ So we can say that by one’s wrongful act one inflicts costs on another. Fully to compensate a person is to redistribute resources to him so that all these costs are, in a sense, repaid.

Blackstone points to a more modest notion of compensation. To determine the amount of compensation to repay a wronged party fully, Blackstone says, would require something like omniscience. His Aristotelian conception calls only for “proportional” compensation: “equal claims be given equal compensation.”⁴⁰ However, for now let us pursue the demands of compensation as full repayment. Let us say, following Nozick and Gauthier, that full compensation demands that a victim receives the same utility from the two sets of actions: {being wronged, being compensated}, {not being wronged, not being compensated}.⁴¹

3.3. *A Challenge to the Debt Model*

The debt repayment model suggests a transaction between the victim and aggressor. And it does seem intuitively right that the aggressor owes the victim compensation. That is, the debt model suggests that if Betty has wronged Alf in a way that causes him loss, then (1) Alf has a claim to be compensated and (2) Betty

has an obligation to repay. Jules Coleman, however, has repeatedly argued against this fairly standard view. He writes:

If there is wrongful loss, it ought to be annulled; the same goes for wrongful or unwarranted gains. Nevertheless, the principle of corrective justice which enables us to identify compensable losses and unjust enrichments does not commit us to adopting any particular mode of rectification. The principle that determines which gains and losses are to be eliminated does not by itself specify a means for doing so. Presumably there is more than one way of rectifying undeserved gains and losses.⁴²

At this point two aspects of compensatory justice to which I have pointed diverge. If compensatory justice is taken as concerned with protecting a certain distribution of resources, then what is essential is that wrongful losses and wrongful gains are eliminated, and the just pattern restored. It does not greatly matter who compensates the victim and how wrongful gains are annulled: what matters is that somehow this is done in a way that restores the just pattern.⁴³ But this proposal undermines the debt model. For the debt model *adds* to the redistributive requirement a moral relation between aggressor and victim: the aggressor *owes* the victim. And until compensation occurs the victim has a complaint *against the aggressor*. Not against others, or society at large, but against the aggressor.

Coleman's proposal can be interpreted in both a radical and a moderate sense. The radical interpretation is that the question (1) "who has aggressed against Alf?" is entirely independent of (2) "who has an obligation to compensate Alf?" Now on the face of it, Coleman misses a crucial moral fact: the victim's complaint is against the aggressor, and not against society at large. If he is not compensated, it is the aggressor who has not repaid her debt. It is hard to believe that our two questions are really independent. Coleman, however, would insist that they are—at least in the case where, although the victim has incurred wrongful losses, the aggressor has not accrued wrongful gains. He writes:

So when I claim that if an injurer who through his fault imposes a wrongful loss on another but who does not thereby gain has an obligation to repair, his obligation cannot derive directly from

the principle of corrective justice, I mean only to be emphasizing the obvious fact that he has secured no gain which would be the concern of corrective justice to rectify. His victim's claim to recompense is on the other hand a matter of corrective justice. And if we feel that the injurer should rectify his victim's loss, it must be for reasons other than the fact that so doing is required to annul his gain.⁴⁴

This is not quite so obvious. The victim, as Coleman says, has incurred a wrongful loss—the aggressor has brought about a maldistribution of holdings. Resources, then, must be redistributed to return to a just pattern. Coleman's claim, then, is that compensatory justice does not tell us where these resources are to come from. But this seems mistaken. From the perspective of distributive justice, it can hardly be irrelevant who pays. Unless the transfer of resources to victims comes from aggressors, new injustices will have replaced the old. This is a real enough problem. Consider, for example, Judith Thomson's justification of preferential hiring:

Lastly, it should be stressed that to opt for such a policy is not to make the young white male applicants themselves make amends for any wrongs done to blacks and women. Under such a policy, no one is asked to give up a job which is already his; the job for which the white male competes isn't his, *but is the community's*, and it is the hiring officer who gives it to the black or woman in the community's name. Of course the white male is asked to give up his equal chance at the job. But that is not something he pays to the black or women by way of making amends; it is something that the community takes away from him in order that *it* may make amends.

Still, the community does impose a burden on him: it is able to make amends for its wrongs only by taking away from him, something which, after all, we are supposing he has a right to. And why should *he* pay the costs of the community's making amends?⁴⁵

Thomson clearly wants to avoid arguing that white males owe blacks and women some of their ill-gained opportunities. Instead of telling us that opportunities are to be transferred from the aggressors, that is, white males, to women and blacks, she argues the community is giving some of its opportunities to

those who have been the victims of injustice. This is the crux of Coleman's simple redistributive theory: the important thing is that wrongful losses are annulled, and "the community" does this. So the aim is to annul wrongful losses. But eventually Thomson is forced to confront the fact that these opportunities will come from somewhere; and they will, in effect, be transferred from the white males, who (in the first quoted paragraph) did not seem to owe women and blacks anything. In the end, despite all she says here, Thomson is forced back into the position that many of the opportunities and advantages of white males have been the result of prior wrongs, and therefore constitute a sort of wrongful gain.⁴⁶

My point, then, is that the aim of returning to a just distribution cannot totally separate the questions (1) who is the aggressor? and (2) who is going to pay? Resources to pay victims have to come from somewhere, and simply to transfer them from the innocent is not, *prima facie*, just.⁴⁷

This, however, brings us to the moderate interpretation of Coleman's proposal. Admit that the aggressors owe victims something; but let us also acknowledge that discovering who is an aggressor against what victim may be costly, perhaps impossible. Consider the case of compensation for road injury. Many aggressors, that is, those who drive dangerously, do not cause actual physical harm. They expose others to risk of injury, a cost on others, and the aggressor gets where she wants to go faster. But only sometimes does this aggression result in an accident. And, as Coleman points out, although the accident imposes additional costs on the victim, the aggressor does not accrue additional wrongful gains.⁴⁸ Now who is to pay? Just those who have caused the accident? But if so, the aim cannot be to transfer wrongful gains to compensate for wrongful losses. For the accident-causing aggressor has accrued no more benefits than the lucky aggressor, who has exposed others to risk without causing an accident.

Certainly we can see here good reasons for treating all aggressors as collectively owing all victims compensation. If some aggressors are simply lucky they did not cause accidents, it is reasonable enough to say that they should not be able to gain from their dangerous activity. So a policy that creates a pool

contributed to by all aggressors—and perhaps all drivers are aggressors sometimes—to compensate victims of accidents would be justified. No doubt better proposals can be formulated. But for now, I wish only to stress that insofar as we are concerned with compensatory justice (as opposed to some utilitarian scheme to maximize total happiness by paying accident victims) we cannot totally separate the issue of who is an aggressor from who is to pay. But that does not mean that we must adopt a simplistic model of aggressor and victim—say, the layman's model of tort law. The debt model of compensatory justice has room for cost and risk-spreading schemes.

3.4. The Return to Moral Equality

Up to this point I have been concerned with explicating, and defending, the first element of Blackstone's proposal: the idea that compensatory justice is essentially redistributive. The debt model, I have argued, captures a good deal of our thinking about compensatory justice.

Blackstone's second claim is fundamental to his neo-Aristotelianism: once the debt has been paid, victim and aggressor have returned to a sort of moral equality. Compensatory justice, he says, "is an attempt to restore the equality which existed prior to the injury of one party by the other." Once the debt is paid, moral parity between debtor and creditor is restored. The moral slate, as it were, is wiped clean. This is the sense in which, according to the debt model, compensatory justice restores equality.

Here, I think, the debt model fails as an account of compensation for wrongful violation of rights. No redistribution of *resources* can by itself restore moral parity between victim and aggressor.⁴⁹ Full compensation, in the sense I define it above, does not achieve so grand a result.

4. TWO MODELS OF RIGHTS AND WRONGS

4.1. The Purely Instrumental Theory of Rights

To see why this is so, compare two models of rights. I shall call the first the purely instrumental theory of rights. The best

examples of this instrumental theory are neo-Hobbesian accounts of rights. According to neo-Hobbesians, it is in the self-interest of everyone alike to accept a system of morality that restrains pursuit of self-interest. As Kurt Baier concludes, the “Hobbesian argument is sound. Moralities are systems of principles whose acceptance by everyone as overruling the dictates of self-interest is in the interest of everyone alike.”⁵⁰ In this sort of theory, to justify some claim right *R* to *X* is just to show that each gains more through having her claim right to *X* respected than it costs her in having to acknowledge and respect others’ claim rights to *X*.⁵¹ To call such rights “instrumental” is just to emphasize that they are purely instruments for advancing one’s interests. Rational utility maximizers would see that each can best achieve his goals if everyone acknowledges certain claims of others to act and to control resources. These rights have no point other than as instruments that further the goals of individuals. The system of rights is a *modus vivendi* among individuals devoted to their own ends: for each best to promote his ends, each agrees to honor limits on what may be done.

I take it that nothing is mysterious about an instrumental conception of rights—in one form or another it is probably the most popular understanding of rights. Now violation of instrumental rights can be compensated in a way that *does* return victim and aggressor to a condition of moral equality. Say that Betty wrongfully appropriates Alf’s property, *X*. In order to remedy the resulting unjust distribution, Betty must, according to the debt model, compensate Alf. And I have said that full compensation would be paid if Alf received the same utility from, or his interests were equally well served by, the two sets of actions: {not have *X* stolen, not have compensation paid}, {have *X* stolen, have compensation paid}. Full compensation, of course, is apt to require much more than just the market value of *X*.⁵² Betty will need to make a payment that takes into account Alf’s pain at having his property taken, his fear that the social order is breaking down, and so forth. But let us say that, whatever the necessary payment is, Betty has made it. Alf now is just as well off as before Betty invaded his rights. He has no further complaint against her. His rights are tools to advance his interests, and Betty has acted so that his interests are not in

any way harmed by her violations. So on what basis could Alf still feel aggrieved? To keep complaining seems peevish.

But something seems amiss with this analysis (and so, I shall argue, with the instrumental conception of rights). We do, I think, have reason to doubt that full compensation returns Alf and Betty to moral equality. If this account of rights and compensation holds, Betty can always convert any property right of Alf's into a liability right by paying full compensation. A property right, let us say, gives Alf a claim to *X* that excludes Betty from using it without his consent, unless she buys it from him; in contrast, a liability rule precludes Betty from using Alf's *X* unless she renders him compensation, after the fact, for using it. The crucial difference is that under property rules Betty must secure Alf's consent prior to her use of his *X* but she does not under liability rules.⁵³ Now the account I have given of Betty's compensating Alf shows that his property right was transformed into a liability right. Given adequate compensation made *after the fact*, Betty wipes clean the moral slate, and has rightful possession of *X*.

However, it might be said that even if Betty fully compensates Alf, she still has not restored her moral status with the community:

The thief not only harms the victim, he undermines rules and distinctions beyond the specific case. . . . [W]e must add to each case an undefinable kicker which represents society's need to keep all property rules from being changed at will into liability rules.⁵⁴

I shall not deal with the debate between proponents of the economic theory of the law and their critics as to whether this "kicker" explains why Betty, despite her compensation to Alf, remains open to criticism.⁵⁵ I wish to focus on a different question: putting aside the social kicker, is it true that Alf no longer has any complaint against Betty? If he does not have any remaining complaint, it follows that a sufficiently rich Betty can declare to anyone: "I can take whatever I want of yours—for a high enough price. Admittedly, I will have to pay you for your aggravation, perhaps rather extravagantly. But if I offer you enough, I can take it. And you will have no reason to complain."

Betty may have trouble with the rest of society—she may have to pay out mountains in compensation to the rest—but at least she is squared away with the victim. Is she? It seems quite clear to me that she is not, and that the instrumental account of rights is unable to explain why she is not.

4.2. Lomasky's Instrumentalism

Loren Lomasky, an advocate of the instrumental view of rights, seeks to explain why Betty is not squared away with Alf. In reference to Nozick's compensation argument, Lomasky writes:

It assumes that an infringement of a right can be made good through compensation, the moral balance restored to what it was *ex ante*. No such general assumption is justifiable. Compensation is inevitably a second-best response that comes into play when full rectification is impossible.⁵⁶

Lomasky depends here on a distinction between rectification and compensation. “‘Compensation’ carries with it the connotation of providing something *equivalent* in value to that which has been lost, while ‘rectification’ has the sense of *restoring precisely* that which has been removed.”⁵⁷ This distinction is important for Lomasky because he advances a strong *incommensurability* thesis that makes five claims.⁵⁸

1. First, Lomasky affirms that any individual has certain ends or projects. Commitment to these projects or ends is the source of their value for an agent. Value is thus *personal* in the sense that what a person values depends on his ends; someone with different ends may quite properly value very different things.⁵⁹

2. On this basis, Lomasky says that “individuals assign personal value to their own projects and not to a welfare measure consequent upon their acting in pursuit of particular projects. What A[If] wishes to realize is specifically E1, not the attainment of whatever level of utility is associated with the realization of E1.”

3. “A[If] will therefore not be rationally indifferent between the necessary means to go about the pursuit of his project E1 and having the necessary means to pursue E2, even if it were somehow demonstrable that the attainment of E2 by A[If] would

have the same welfare measure as does the attainment of E1 by A[lf].”

4. And this is so, according to Lomasky, because Alf is not obligated to accept some impersonal standard of value that renders E1 and E2 commensurable. E1 and E2 need not be commensurable; indeed, it seems typically they will not be.

5. Lomasky concludes compensation is a second-best response to rights violations. Compensation depends upon providing the victim with something of equivalent value. But if values are not commensurable, this is not possible. In contrast, rectification aims to give back the specific thing that was lost and so is not undermined by the incommensurability of values.⁶⁰

Lomasky, then, sides with philosophers such as Isaiah Berlin, Stuart Hampshire and Bernard Williams in holding that values are often incommensurable. Claims about incommensurability are often puzzling. But one thing is certain: it cannot generally be the case that Alf sees his own values as incommensurable. To see why, suppose that Alf really has no way to trade off his values against each other. When confronted with a choice between, say, advancing his project of securing Betty's love and working to compete for tenure, Alf is unable to choose. Fundamental to our conception of a rational valuer-agent is that one can decide which values to promote in particular choice situations. Alf may rationally forgo an opportunity to secure Betty's affections in order to work on his book; if so he has selected between his values. They are commensurable. If they were not, Alf would be at a loss when, as is always the case, he is confronted with decisions about which to promote.

So Lomasky certainly would not want to claim that, as a matter of course, Alf is unable to tell us whether advancing his end E1 to a certain degree is to be preferred to advancing E2 to some extent.⁶¹ It cannot be the case that in Alf's valuational economy there are no trade-off rates between ends. That would lead to practical paralysis. What, then, do proponents of incommensurability such as Lomasky have in mind? They seem to have at least two worries.

The first is real enough, but it is a special case rather than the general rule. Sometimes one's values have been harmed in such a way that one simply cannot be fully compensated. “No satisfac-

tory rectification or compensation can be made to the athlete who becomes a paraplegic as the result of an automobile accident.”⁶² This is true and important. In this person’s valuational economy he has no end he would ever choose to promote at such a cost.⁶³ So we must admit that sometimes a person suffers a loss for which full compensation is impossible. But that is a long way from saying that as a rule full compensation is not possible. Say we put the following proposal to Alf the athlete: agree to laboratory tests that will leave his athletic ability impaired for one month (but he will recover thereafter) and we will pay one hundred thousand dollars. Alf may find it easy to weigh the two conflicting goals. And of course we don’t need fantastic stories to make the point. Real athletes do it all the time: some even decide to pursue academic courses at some cost to their training. Only a monomaniac would never trade off any opportunity to pursue some end for opportunities greatly to advance other ends.

What, then, is the other worry? Here I think Lomasky’s concerns are much like those of Bernard Williams and Stuart Hampshire: commensurability, they believe, supposes the existence of some third value in terms of which the two competing values are appraised.⁶⁴ In this vein Bernard Williams proffers three incommensurability claims:

- (1). No currency exists in terms of which each conflict of values can be resolved.
- (2). It is not true that for each conflict of values some value, independent of any of the conflicting values, can be appealed to in order to resolve that conflict.
- (3). It is not true that for each conflict of values some value can be appealed to (independent or not) in order to resolve that conflict rationally.⁶⁵

Claims (2) and (3) are very much akin to Lomasky’s assertion that what Alf “wishes to realize is specifically E1, not the attainment of whatever level of utility is associated with the realization of E1.” It is, I think, quite right to deny that some third value is always employed to adjudicate the competing claims of E1 and E2. Lomasky, Williams and Hampshire are right to reject claims (2) and (3). Should we reject claim (1) too? Much depends here

on just what we mean by “a common currency.” Writes Stanley Benn:

To trade one value against another one must see them as in a sense substitutable—more of one *compensating* for less of another. The options open to us meet our competing commitments in varying degrees, and to reach a rational decision—to do the best we can in difficult circumstances—we have to be able to set a rate of substitution between them over the relevant range. Unlike a market price, which is also a rate of substitution, this is, in one sense, a subjective rate, the rate at which I am prepared to trade off commitments of one kind against commitments of another. That can be done without having to express the force of each in some common currency, such as utility or money; there can be a foreign exchange market without a gold standard.⁶⁶

We need an exchange rate between ends and commitments; without it, action is impossible. It must be the case that Alf is able to decide whether advancing E1 to degree x compensates him for the loss of an opportunity to advance E2 to degree y . But if Alf can make that judgment, Betty can learn about Alf's character and conclude that he has a stable disposition to make this choice.⁶⁷ So she can compensate him according to his own subjective exchange rate. But, perhaps, Alf does not simply value that E1 be advanced to degree x , but that *he advances* it to that degree. But this would only seem to increase the costs of compensation to Betty: now she must compensate him for two losses: (i) that E1 was not advanced and (ii) that he was not able to act to advance his ends, but rather someone did it for him. Lomasky sometimes suggests that it is (ii) that is beyond compensation. So perhaps the problem isn't simply that one's ends are set back: perhaps the problem with a rights violation, as Lomasky suggests, is that one's ability to pursue projects is undermined.⁶⁸ But if, like Lomasky, we see this in terms of what a person values, compensation will still usually be possible. People certainly are willing to impair their ability to pursue projects—say, by endangering their health or even their lives—to attain some important goals. So even if, for example, when Betty steals Alf's car she impairs his ability to pursue projects, she probably will be able to compensate him. Suppose Betty says: “How about a hundred thousand dollars, that will allow you to achieve your

dream of going to college? Will that compensate you for what I did yesterday, that is, stole your 1978 Pinto?" It probably will. To be sure, if Alf was interfered with so regularly that he never got a chance to act for himself, the loss would become so grave that compensation would become impossible (we are thus back to the first worry discussed above). But, putting aside this sort of massive interference, I see no reason why the loss of (ii) cannot also be compensated for.

4.3. Respect-Based Theories of Rights

I have examined Lomasky's instrumentalism in some detail as he is alive to the challenge full compensation poses to a theory of rights. If rights are simply a means to secure our values, and if (as we must) we have a trade-off rate between values,⁶⁹ then full compensation for rights violations restores moral equality between victim and aggressor—it wipes the moral slate clean. As long as they are willing to pay the appropriate "fee" (that is, compensation) instrumentalism gives a license to aggressors to override the rights of victims. But the instrumentalist must be wrong about this: it permits aggressors to turn our property rights into liability rights when they so choose (at least to the extent that they are squared away with the victim). And, of course, the problem does not simply concern property rights in the narrow sense of "property" as control over external things. All rights—except perhaps the right to life and some rights to bodily integrity—are subject to being bought out in this way. The instrumental theory of rights is unable to explain just why the aggressor wrongs the victim when he overrides rights but compensates afterwards (remember, I am leaving aside here the "social kicker"). The problem, I want to suggest, is that the aggressor not only causes the victim a loss of *value*; in addition, he has acted in a way that is *unjustifiable* and so shows a lack of respect.

It may help to focus on a case in which violation of your rights is a boon to your values. Suppose that a colleague is known for not respecting your privacy. You have let it be known that you do not welcome visitors at night to your house. Indeed, you have made something of a point of it. Unfortunately, your

colleague walks by your house on her way home from work, and often—all too often—she knocks on the door, looks through the window, you answer the door (it is hard to leave her outside knocking, especially tonight as it is twenty-five degrees below zero and she is obviously getting frostbite). When that happens it is almost impossible to keep her out; she stays for ten minutes, like clockwork. As usual, this all occurs one night; but tonight you have an appointment to tutor a really bad student. You promised his father (an old friend of yours) to tutor him in philosophy, so you are obligated to help. This, I should stress, really is a pretty awful student: he is the sort who, after two hours of discussing Kant, asks whether Kant was the same person as Hegel. It is all very trying. Now your colleague makes her nightly appearance at your window, and she barges in once again. Not even this student can withstand her, and this burdensome discussion ends. You feel a distinct relief; no, it is more than that—you are happy.

Does your colleague owe you compensation for violating your privacy?⁷⁰ It seems hard to see why: she has advanced your values. (Maybe you should pay her?) But, one may say, because of her you have failed to fulfill your obligation. Well, you have tried your best, and she is, after all, the one who ended the torture session, so you are blameless. So, then, should you thank her? Hardly. Indeed, you still have a complaint against her: she violated your rights (and so benefited you) by wrongfully interfering with your activity. Is, then, the complaint that she has set back your interest by undermining your ability to pursue projects? Surely not: you are now much freer than ten minutes ago to pursue projects (your colleague, after all, only stays for ten minutes or so.)

A defender of the instrumental interpretation may try to account for this by appealing to an act/rule distinction.⁷¹ The *rules* that justify rights are instrumentally justified as a way for an agent to advance his values; but not every action that accords with rights advances interests, and not all rights violations set back interests. True enough. But the question remains: do you still have a complaint against your colleague who violated the rule and so benefited you? Aren't you lucky she didn't let the rule guide her? As Mill said, it is the pedant "who goes by rules

rather than their reasons.”⁷² If in this case your rights are respected “we should employ the means and the end will not follow.”⁷³ Consequently, Mill cautions against relying on “even the most plausible . . . absolute maxims of right and wrong” in such a way that one loses sight of the “paramount good they are intended to promote.”⁷⁴ For you now to complain because your rights were violated (and, so, your interests were advanced) seems to be just the sort of rule worship Mill criticized.⁷⁵

Perhaps *society* has an interest that the rule be kept; but we are now back to the social kicker. One might say: your colleague has shown once again that she does not respect your rights, and that is what you are complaining about. Your complaint is directed at her continuing disposition to violate your rights. But, surely, if she is moving to Australia tomorrow, wouldn’t that make it all better? In that case (i) she has benefited you and (ii) you don’t have to worry that her disposition will ever lead to her violating your rights again.

I want to suggest that your complaint has nothing whatsoever to do with your values being set back, your projects being thwarted or your ends being hurt. Rather, the complaint is that whatever good consequences that came from the intervention, your colleague acted in a way that could not be justified to you. According to the Liberal Principle (*L*), interference with another’s action requires justification; unjustified interference is unjust. Your colleague violated this principle: as always, she interfered with your activity in a way that could not be justified to you. And I take it that her violation was indeed unjustified. Despite its irksome character, you would have carried on with your tutorial duties—not because you wanted to, or because your interests were advanced, but because you understood it to be your duty. The fact that you were relieved that you were unable to fulfill that duty does not show you would have agreed to her interference. This does not seem mere rule worship. By interfering with your liberty in a way that was not justified, your colleague supplanted *you* as the source of decisions about what *you* should do. To an agent who conceives himself as self-directing, any attempt to subvert the natural tie between *his* practical decisions and *his* activity will be seen as a threat to his status as a person.

That is why one has a residue complaint even when one has not been harmed, or even when the harm has been undone. In our example you have not been harmed, but you have been wronged. Consequently, you can still properly *resent*, or be indignant about, your colleague's interference; the moral emotions of resentment and indignation,⁷⁶ as distinguished from simple anger, are responses to wrongs. As J. R. Lucas writes:

We are angry when we are hurt, but indignant when we are treated unjustly. . . . Indignation, which is the conceptually appropriate response to injustice, expresses, as its etymology shows, a sense of not being regarded as worthy of consideration. Injustice betokens a lack of respect, and manifests a lack of concern.⁷⁷

You can quite properly be resentful and indignant at your colleague's interventions; but, because you have not been in any way harmed, no compensation is owed. Nevertheless, you and your colleague are by no means on a moral par.

4.4. Property Rights and Respect

This account—I shall not say more here in defense of it⁷⁸—provides the basis for a noninstrumental conception of the right to liberty, that is, the right that flows from Principle *L*. The claim, then, is that the Liberal Principle of noninterference is more than just valuable for promoting our aims. Often it is—although sometimes paternalist interference will promote our aims even better.⁷⁹ Rather, the idea is that the Liberal Principle articulates a basic demand of a self-directing person; by ignoring that demand your colleague did not respect your status as a self-directing agent. Wrongful violation of the Liberal Principle is always a sign of disrespect.

Charles Fried argues that this respect-based analysis carries over to property rights. The right to be free from violent intervention, he says, “is firmly rooted in moral notions of respect for persons and the physical basis of personality.” This respect, according to Fried, extends also to a person's right to control the disposal of his labor and talents. “To deny him the right to dispose of his labor and talent is to assert that . . . [others] have

rights to them also. . . . But a person's right to his own person is a fundamental tenet of liberal individualism."⁸⁰ Property rights, Fried maintains, extend this relation. "By casting the relation between a person and a thing in this form of a right, we withdraw it *pro tanto* from the domain of collective imposition. To say that the collector's 'penny Black' is *his* assimilates that relation to the relation between a man and what is quintessentially his, namely, his person, his effort, his talents."⁸¹ The core idea is that property extends one's person: and so one who ignores property rights shows disrespect for personality.⁸²

We need not, however, embrace Fried's extension thesis. The crucial point is that property rights are not rights simply to some flow of benefits; they give the owner control.⁸³ Like other liberal rights, property rights provide a morally protected sphere in which a person may act according to his own values and aims as he understands them.⁸⁴ Consequently the agent must have discretion over how these rights are to be employed. Now if these are the sorts of rights that are justified in a community of self-directing agents, aggressors act unjustifiably when they seek to convert property rights to liability rights. The aggressor endeavors to supplant Betty as the source of decisions about the disposition of her resources: this usurpation betokens a lack of respect. In this manner, violation of any of one's rights constitutes an unwarranted interference with one's activity, and so runs afoul of the Liberal Principle.

A word of caution, however, is in order. Although, like all rights property rights give scope to the agency of the right holder, it must also be kept in mind that much of our practical interest in property is precisely in the benefits—especially the income—that flow to us from property rights. We readily trade property if doing so increases our benefits. Consequently, we should expect that a justified system of holdings will have a place for "takings" or liability rights—cases in which property can be taken without prior consent provided compensation is paid.⁸⁵

We all might benefit in some cases from decreasing certain transaction costs, from public goods, or from the liberty to use another's property in cases of dire need (see section 5). Given

these practical interests, we all may concur full compensation for taking one's property will, in some sorts of cases, wipe clean the moral slate.

4.5. What Can and What Cannot Be Compensated

Say Alf steals a "penny Black" from Betty. Lomasky is right that the best remedy would be rectification: for Alf to return it. If it has been lost, however, compensation in some other form is due. So let us suppose that in some way, Alf redistributes: he transfers resources to Betty such that, all things considered, her values and projects are at least as well off as before. But even if he returned the stolen property he has not wiped clean the moral slate: it remains the case that he acted without justification. Can he, then, increase the payment to make up for that too? Well, he can make up for the pain of being affronted. But repayment can only give back what was lost, the value the victim lost through the aggression. But I have tried to show that wronging is not simply harming; consequently, undoing the harm does not undo the wrong. One cannot undo wrongs in the way one can repay debts.⁸⁶

Is poor Alf doomed forever, and can he never return to moral equality with Betty? At this point we come to questions of penal justice, and the place for mercy and forgiveness. All I wish to insist upon is that redistribution of resources does not allow Alf to recover his moral equality.⁸⁷ For in addition to the maldistribution he has brought about (which does require compensation), Alf has also wronged Betty by unjustifiably interfering with her. If Betty has a property right to X, Alf is not justified in expropriating it subject to compensation: if that was justified, Betty would have only a liability right. So when Alf unilaterally seeks to transform Betty's rights in this way, he is interfering without justification, and so, according to Principle L, wrongs Betty.

The Aristotelian model does not capture this continuing inequality. But some argue that this is misleading, because compensatory justice, properly understood, includes penal justice: a transfer of resources to the victim *and* the punishment of the aggressor would then both be parts of compensatory justice.⁸⁸

Understood in this sense we can say that compensatory justice entails a return to equality (although we may want to say in some cases that even after punishment the aggressor is not fully squared away with the victim). But if so, compensatory justice only restores equality because we include in it penal justice. I think it doubtful that punishment is usefully understood as annulling wrongful gains, and in this way part of compensatory justice.⁸⁹ The important point, however, is not how we use the term “compensatory justice.” What is crucial is that no mere redistribution of resources, no matter how generous, can restore moral equality between victim and aggressor.

5. JUSTIFIED RIGHTS VIOLATIONS AND PAYING DEBTS

The debt model misdescribes the aim of compensation for unjustified violations of rights. In contrast to Coleman I do not reject the debt model because it links the questions of who has aggressed and who is obligated to pay; rather, I object to the claim that payment of compensation restores moral equality between victim and aggressor. Once a debtor transfers the resources back to the owner, the debt is paid. Not so with unjustified rights violations. But the debt model does seem to capture at least some *justified rights violations*. Consider an example introduced by Joel Feinberg, and since the subject of extensive discussion:

Suppose that 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 someone's private property. You smash the 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.⁹⁰

Feinberg holds that you would surely be justified to infringe the person's property rights in this way. However, “almost everyone would agree that you owe *compensation* to the homeowner for the depletion of his larder, the breaking of his window, and the

destruction of his furniture.”⁹¹ Most philosophers have indeed agreed that what you did was justified, but you still owe compensation.⁹² Yet some have questioned this: if you were actually justified in burning the furniture, Philip Montague holds, then you owe no compensation. If, says Montague, you were a vandal, simply destroying a person’s property for the fun of it, you certainly would owe compensation. To say that the backpacker owes compensation too is to treat the backpacker as morally on par with the vandal and that, maintains Montague, is “extremely implausible.”⁹³

A respect-based account of rights provides a rationale for Feinberg’s position and a reply to Montague. Here, the debt model really does apply. The backpacker owes the owner for what has been destroyed and used: until resources are redistributed back to the owner the backpacker is, quite literally, in the owner’s debt. But once the debt has been paid, moral equality has been restored. Why? Presumably because this infringement of one’s property rights can be *justified* to the owner. A justified system of property rights will presumably allow for others in dire and unexpected need sometimes to treat your property right as a liability right. Even the owner can see the point of allowing such action in special cases. So when the backpacker breaks the windows, she displays no disrespect. But the vandal does: his violation of the property right cannot be justified to the owner. Consequently, even if the vandal should compensate the owner, the moral slate is not wiped clean, equality is not restored. Hence, *pace* Montague, to follow Feinberg does not require treating the backpacker and the vandal as moral equals.

6. CONCLUSION: A LIBERAL THEORY OF COMPENSATORY JUSTICE

In this chapter I have sketched some of the main elements of a liberal theory of compensatory justice. First, we have seen that such a theory will not include the principle of redress, which is based upon an egalitarian presumption that conflicts with the Liberal Principle of noninterference. If we understand the Liberal Principle as the fundamental requirement of respect among

self-directing moral agents, we reach a somewhat surprising conclusion: compensatory justice, understood as transfer of resources, cannot fully compensate for wrongdoing in the sense of returning aggressor and victim to moral equality. In cases of wrongful violations of rights, compensatory justice has a more modest, albeit important, task: to rectify the maldistribution of resources that results from wrongdoing. Although this may be a surprising conclusion, it nevertheless is attractive, for it shows why our rights so stubbornly resist being bought out, regardless of the size of the payment. Purely instrumental accounts of rights permit a complete return to equality after wrongful violation. And for that reason they are objectionable.

A "return to equality" is possible only when rights have been justifiably infringed. Although aggressors can repay victims for the harm done, transfer of resources cannot right a wrong.

NOTES

1. Aristotle, *The Ethics*, trans. J. A. K. Thomson (Harmondsworth, Middlesex: Penguin, 1955), 148–149.

2. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 246.

3. *Ibid.*, 100.

4. John Passmore, "Civil Justice and its Rivals," in Eugene Kamenka and Alice Ehr-Soon Tay, eds., *Justice* (London: Edward Arnold, 1979): 25–49 at p. 42.

5. "Now the principle of redress has not to my knowledge been proposed as the sole criterion of justice, as the single aim of the social order. . . . It is thought to represent one of the elements in our conception of justice." Rawls, *A Theory of Justice*, 101.

6. *Ibid.* Nevertheless, I think William T. Blackstone is right to interpret Rawls as essentially endorsing the principle of redress. "Reverse Discrimination and Compensatory Justice," *Social Theory and Practice* 3 (Spring 1975): 253–88 at p. 281.

7. Herbert Spiegelberg, "A Defense of Human Equality," *Philosophical Review* 53 (March 1944): 101–24 at p. 111. Emphasis in original.

8. *Ibid.*, 114. Cf. Blackstone, "Compensatory Justice," 281.

9. David Gauthier, "Justice and Natural Endowment: Toward a Critique of Rawls' Ideological Framework," *Social Theory and Practice* 3 (Spring 1974): 3–26 at pp. 15–16.

10. Rawls, *A Theory of Justice*, 104.
11. I am leaving aside here Rawls's controversial claim that we do not deserve the fruits of our talents because we do not deserve those talents. *A Theory of Justice*, 103–4.
12. Spiegelberg, "Human Equality," 114. Emphasis added.
13. Rawls, *A Theory of Justice*, 102.
14. For a criticism of presumptive principles, see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 8–12.
15. Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), 14–16. See also his *Social Philosophy* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), 21.
16. I have tried to do so elsewhere. See my *Value and Justification: The Foundations of Liberal Theory* (Cambridge: Cambridge University Press, 1990), sec. 24; see also my "Contractual Justification of Redistributive Capitalism," in John W. Chapman and J. Roland Pennock, eds., *NOMOS XXXI: Markets and Justice*, (New York: New York University Press, 1989), 89–121 at pp. 97–101.
17. John Locke, *Second Treatise of Government*, in *Two Treatises of Government*, ed. Laslett Peter (Cambridge University Press 1960), 287 (sec. 4). Emphasis in original.
18. S. I. Benn and R. S. Peters, *Social Principles and the Democratic State* (London: George Allen & Unwin, 1959), 110. Emphasis in original.
19. *Ibid.*, 111.
20. See Richard E. Flathman, "Equality and Generalization: A Formal Analysis," in J. Roland Pennock and John W. Chapman, eds., *NOMOS IX: Equality*, (New York: Atherton Press, 1967), 38–60; Isaiah Berlin, "Equality as an Ideal," in Frederick A. Olafson, ed., *Justice and Social Policy*, (Englewood Cliffs, N.J.: Prentice-Hall, 1962), 128–50; and William K. Frankena, "The Concept of Social Justice," in R. B. Brandt, ed., *Social Justice*, (Englewood Cliffs, N.J.: Prentice-Hall, 1962), 1–29. For a dissenting view see Richard Norman, *Free and Equal* (Oxford: Oxford University Press, 1987), 57–58.
21. J. R. Lucas, "Against Equality," in Hugo A. Bedau, ed., *Justice and Equality*, (Englewood Cliffs, N.J.: Prentice-Hall, 1971), 138–51 at p. 139. See also Raz, *The Morality of Freedom*, chap. 9.
22. See Robert Brown, *Analyzing Love* (Cambridge: Cambridge University Press, 1987).
23. See my *Value and Justification*, sec. 14.
24. Stanley I. Benn, "Human Rights—for whom and for what?" in Eugene Kamenka and Alice Erh-Soon Tay, eds., *Human Rights* (New York: St. Martin's Press, 1978, 57–73 at p. 67. Emphasis in original.

See also Flathman, "Equality and Generalization," 39; Berlin, "Equality as an Ideal," 131, 133.

25. See my "Subjective Value and Justificatory Political Theory," in J. Roland Pennock and John W. Chapman, eds., *NOMOS XXVIII: Justification* (New York: New York University Press, 1986), 241–69 at pp. 255–58.

26. For such a criticism of Benn's egalitarianism, see Les Holborow, "Benn, Mackie, and Basic Rights," *Australasian Journal of Philosophy* 63 (March 1985): 11–25. In his final work, Benn weakens his Egalitarian Principle so as not to undermine the Liberal Principle. See *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), 117–21.

27. See Albert Weale, *Equality and Social Policy* (London: Routledge & Kegan Paul, 1978), 19; and Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), 223.

28. It seems, then, that both *E* and *L* migrated from legal and political to moral contexts. I argue here that in the case of *E* this migration took a distinctly illiberal turn.

29. Stanley Benn and I have considered these issues more thoroughly in our "Public and Private: Concepts and Action," in S. I. Benn and G. F. Gaus, eds., *Public and Private in Social Life*, (New York: St. Martin's Press, 1983), 3–27, esp. pp. 9–10.

30. Blackstone, "Compensatory Justice," 255.

31. Compensatory justice thus presupposes a theory of distributive justice. Blackstone, I think, rather suggests this. *Ibid.*

32. See here Jules Coleman, "Justice and the Argument for No-Fault," *Social Theory and Practice* 3 (Fall 1974): 161–80, esp. pp. 174ff. I consider penal sanctions briefly in section 4.5.

33. See Jules Coleman, "The Morality of Strict Tort Liability," in his *Markets, Morals and the Law* (Cambridge: Cambridge University Press, 1988), 169.

34. Coleman, "Justice and No-Fault," 175. Emphasis in original.

35. *Ibid.*, 176.

36. Judith Jarvis Thomson, "Preferential Hiring," in William Parrent, ed., *Rights, Restitution and Risk*, (Cambridge: Harvard University Press, 1986), 149.

37. See here Robert K. Fullinwider, "Preferential Hiring and Compensation," *Social Theory and Practice* (Spring 1975): 307–20, esp. pp. 310–11.

38. I return to this problem below, section 4.2.

39. Nozick, *Anarchy, State and Utopia*, 57.

40. Blackstone, "Compensatory Justice," 268. For an analysis of some practical implications of the "proportionality principle," see Rob-

ert Simon, "Preferential Hiring," *Philosophy & Public Affairs* 3 (Spring 1974): 312–20.

41. Nozick, *Anarchy, State and Utopia*, 57; and David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), 211.

42. Jules Coleman, "Corrective Justice and Wrongful Gain," in his *Markets, Morals and the Law*, 187–88.

43. In this connection notice that Nozick's account of compensation does identify who is to do the compensating.

44. Coleman, "Corrective Justice and Wrongful Gain," 188.

45. Thomson, "Preferential Hiring," 151.

46. *Ibid.*, 152. See also Bernard R. Boxill, "The Morality of Preferential Hiring," *Philosophy & Public Affairs* 7 (Spring 1978): 246–68.

47. It could be maintained that we all have a duty to rectify all injustices, perhaps individually or *qua* members of the polity. I shall not pursue here the implications of this strong principle.

48. Jules Coleman, "Corrective Justice and Wrongful Gain," 187–88.

49. Note that I focus here on the redistribution of resources, and so exclude penal sanctions; see section 4.5.

50. Kurt Baier, *The Moral Point of View*, abridged ed. (New York: Random House, 1965), 154. For other neo-Hobbesian justifications of morality, see Gregory S. Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986); and James M. Buchanan, *The Limits of Liberty* (Chicago: University of Chicago Press, 1975).

51. I shall not defend characterization of rights in terms of claim rights. For a standard account, see Feinberg, *Social Philosophy*, chap. 4. For sustained criticism of this view, see Alan R. White, *Rights* (Oxford: Clarendon Press, 1984).

52. See Gauthier, *Morals by Agreement*, 211.

53. On this distinction, see Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (April 1972): 1089–1128.

54. *Ibid.*, 1126.

55. For criticism of the economic analysis, see Alvin K. Klevorick, "On the Economic Theory of Crime," in J. Roland Pennock and John W. Chapman, eds., *NOMOS XXVII: Criminal Justice*, (New York: New York University Press, 1985), 289–309. See also the commentaries that follow by Richard Posner and Jules Coleman.

56. Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), 143.

57. *Ibid.*, 142. Emphasis in original.

58. The following discussion, and all quotations, draw on Lomasky, *Persons, Rights*, 142–46.

59. From this, it would seem that Lomasky presents an agent-relative account of value and value-based reasons to act. His position, however, is somewhat more complicated. See *ibid.*, 159. For a discussion, see Eric Mack, “Against Agent-Neutral Value,” *Reason Papers* (Spring 1989): 82–92.

60. Lomasky puts great emphasis on this incommensurability thesis, providing the basis for criticism of the use of indifference curves in moral theory. Although he does not say that they are useless, he thinks that indifference curves imply a commensurability Lomasky seeks to deny. *Persons, Rights*, 143–44.

61. Although it adds complications, it is important to stress that the choice is not simply between whether end E1 is to be preferred to E2 or *vice versa*. Rather, in any given situation Alf will be able to do more or less to advance an end; in one case it may be rational for Alf to forgo an opportunity to advance E1 to a low degree in order to advance E2 to a high degree, even though generally Alf cares more for the former than the latter. Stanley Benn examines the implications of this point. In *A Theory of Freedom*, chap. 3.

62. Lomasky, *Persons, Rights*, 144.

63. In terms of indifference analysis, we can say that such a person has a preference threshold: no trade-offs that take him below a certain level of physical fitness are acceptable. For an extensive analysis of thresholds, see Benn, *A Theory of Freedom*, 56ff.

64. Bernard Williams, “Conflicts of Values,” in his *Moral Luck* (Cambridge: Cambridge University Press, 1988), chap. 5 and Stuart Hampshire, “Public and Private Morality,” in his *Morality and Conflict* (Oxford: Basil Blackwell, 1983), chap. 5.

65. Williams, “Conflicts of Values,” 77.

66. Benn, *A Theory of Freedom*, 48–49. Emphasis added.

67. On knowing the evaluative comparisons of others, see David Milligan, *Reasoning and the Explanation of Action* (Brighton, Sussex: Harvester Press, 1980), chap. 6.

68. Lomasky, *Person, Rights*, 144.

69. As I said above, in some cases we may have no trade-off rates for grave harms to a central value.

70. It has been put to me that she did not violate your privacy since, after all, you *let* her in; you could have just let her freeze. But this seems to me too simple a view of our rights to privacy. Someone who puts you in a position in which you can enjoy your privacy only by allowing her to incur injury is making the option of enjoying your right

too costly; it seems tantamount to a threat. And it seems the same holds true on less bitterly cold nights, when your colleague is seeking to increase the costs of your enjoyment of privacy in other, somewhat more subtle, ways. If you refuse to let her in, you know you are apt to have an unpleasant day at work tomorrow.

71. See Kavka's discussion of "rule egoism" in *Hobbesian Moral and Political Theory*, chap. 9.

72. J. S. Mill, *A System of Logic*, (London: Longman's Green, 1947), bk. VI, chap. xii, sec. 2. I consider Mill's view in more depth in "Mill's Theory of Moral Rules," *Australasian Journal of Philosophy* 58 (September 1980): 265–79.

73. Mill, *Logic*, bk. VI, ch. xii, sec. 3.

74. J. S. Mill, "Thornton on Labour and its Claims," in *The Collected Works of John Stuart Mill*, ed. J. M. Robson, (Toronto: University of Toronto Press, 1963), 5: 659.

75. Gregory Kavka tries to reply to a rather different charge of rule worship in *Hobbesian Moral and Political Theory*, 378–84.

76. According to David A. J. Richards, resentment is appropriate if you have been wronged, while indignation is the appropriate response to a wrong to others. See his *Theory of Reasons for Action* (Oxford: Clarendon Press, 1971), 253.

77. J. R. Lucas, *On Justice* (Oxford: Clarendon Press, 1980), 7. For further consideration of the moral emotions, see my "Commitment to the Common Good," in Paul Harris, ed., *On Political Obligation*, (London: Routledge, 1990), 26–64, esp. pp. 36–46.

78. I develop this argument more fully elsewhere. See my *Value and Justification*, section 24.

79. See Dan Brock, "Paternalism and Promoting the Good" in Rolf Sartorius, ed., *Paternalism* (Minneapolis: University of Minnesota Press, 1983): 237–60.

80. Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981), 99.

81. *Ibid.*, 101. This again points to the illiberal nature of the principle of redress, which seems to give others rights to our talents and what we make of them.

82. This relates to the claim by natural law thinkers that one's *summ* can be extended. See Stephen Buckle, *Natural Law and the Theory of Property* (Oxford: Clarendon Press, 1991).

83. I have argued for this notion of ownership in my "Contractual Justification of Redistributive Capitalism," 106–8. Cf. C. B. Macpherson, "Human Rights as Property Rights," in his *Rise and Fall of Economic Justice* (Oxford: Oxford University Press, 1987), 82.

84. See further Gerald F. Gaus and Loren E. Lomasky, "Are Property Rights Problematic?" in *The Monist* 3, 4.

85. Cf. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985).

86. A temptation here is to assume that if a person is wronged, then somewhere there *must* be a sort of harm that can be compensated. We would do well to follow Wittgenstein's advice. "Don't say: 'There *must* be . . . ' . . . look and see. . . ." *Philosophical Investigations*, trans. G. E. M. Anscombe, (London: Macmillan, 1953), section 66.

87. Hence the inadequacy with proposals to base criminal justice simply on the provision of restitution. See Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87 (July 1977): 279–301. For a more adequate view, see Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" *Ethics* 88 (July 1978): 348–57. Barnett replies in the "The Justice of Restitution," in Jan Narveson, ed., *Moral Issues* (New York: Oxford University Press, 1983), 140–53.

88. It is unclear whether this is Blackstone's view. See "Compensatory Justice," 254.

89. C. L. Ten criticizes this view of punishment in his *Crime, Guilt and Punishment* (Oxford: Clarendon Press, 1987), 38–42.

90. Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7 (Winter 1978): 93–123 at p. 102.

91. *Ibid.*

92. Most famously, Judith Jarvis Thomson in "Rights and Compensation," in William Parent, ed., *Rights, Restitution and Risk*, chap. 5. See also Coleman, "Corrective Justice and Wrongful Gain," 186.

93. Philip Montague, "Rights and Duties of Compensation," *Philosophy & Public Affairs* 13 (Winter 1984): 79–88 at p. 84. See also the comments by Nancy Davis and Peter Westin, and Montague's reply in *Philosophy & Public Affairs* 14 (Fall 1985).

