

RESPONSIBILITY AND COMPENSATION RIGHTS

Peter Vallentyne

I address an issue that arises for rights theories that recognize rights to compensation for rights-intrusions. Do individuals who never pose any risk of harm to others have a right, against a rights-intruder, to full compensation for any resulting intrusion-harm, or is the right limited in some way by the extent to which the intruder was agent-responsible for the intrusion-harm (e.g., the extent to which the harm was a foreseeable result of her autonomous choices)? Although this general issue of strict liability vs. fault liability has been much analyzed and debated, there is a promising position that, to the best of my knowledge, has not been much discussed. This is the view that (1) when the intruder is agent-responsible for violating the rights (e.g., does so knowingly), she owes the intrudee compensation for the entire intrusion-harm, but (2) when the intruder is not agent-responsible for wrongly intruding upon the rights (because the intrusion was not wrong or because the intruder could not reasonably have known it was wrong), then she owes the intrudee compensation only for the intrusion-harm for which she is agent-responsible (and not, for example, harm that she could not have reasonably foreseen). I shall develop and motivate this position without attempting a full defense. Throughout, I focus on the rights of the intrudee, against the intruder, to compensation and the correlative duty of the intruder to the intrudee.

I'm pleased and honored to have this paper included in this collection in honor of Hillel Steiner. Much of what I know about rights and libertarianism I learned from him – both from his written works and from his very helpful correspondence over the years. Moreover, his intellectual rigor, honesty, and modesty have been a source of inspiration. Although Hillel has

not written extensively on compensation for intrusion-harms, it is a topic central to his view of justice, as it is to mine.¹

1. Background

We shall focus on theories that recognize certain basic rights (such as the right not to be killed or assaulted), where these include rights to compensation (and associated enforcement rights) for a rights-intrusion. Such theories hold that, at least under certain conditions, agents owe compensation for the *intrusion-harm* (i.e., harm from a rights-intrusion) that they impose on others.

A person's rights define certain boundaries, which, if crossed, raise the question of whether the right has been intruded upon (as opposed to merely crossed). If rights are understood as protecting *choices*, then crossing the boundary of a right does *not* intrude upon the right, if the crossing is with the valid *permission* of the right-holder.² Rights can, however, be understood as

¹ See, for example, his article "Choice and Circumstance" (Steiner 1997), in which he argues that compensation for intrusion-harms is an important, if neglected, issue for luck-egalitarians.

² Throughout, I understand rights as durable rights, as opposed to effective rights in a context. Thus, when I grant revocable permission for you to use my car, I maintain the durable right, against you, not to use my car (without my consent)—even though in that context, I have no effective right, against you, that you not use it. The fact that I can revoke my permission shows that I still have the durable right. By contrast, if I sell you my car, then I transfer my rights over the car to you and no longer have the durable right.

protecting *interests*—with boundary crossings being intrusions, for example, when they are against the interests of the right-holder.³ There is also the possibility (which I favor) that rights that protect *both* choices and interests, with the protection of choices taking priority. In general, however, I here remain neutral on this issue. For simplicity of presentation, I shall focus on the choice-protecting account.

We shall be asking what compensation rights individuals have in virtue of their rights being intruded upon, where intrusion is understood as follows (assuming a choice-protecting conception of rights for simplicity). If the boundary is crossed with the permission of the holder, then the right is *not intruded upon*. If the boundary is crossed without the right-holder's permission, then her right is *intruded upon*. A rights intrusion does not, however, establish that the intrusion was impermissible. If the intrusion was not the result of an autonomous choice of the intruder (e.g., the wind unexpectedly blew her against you or she attacked you while insane), then the right is *not infringed* and the intrusion is neither permissible nor impermissible (because not the result of an autonomous choice).⁴ If, however, the intrusion is the result of an

³ For superb discussion of the debate between choice-protecting and interest-protecting conceptions of rights, see Kramer, Simmons, and Steiner 1998.

⁴ This terminology departs from that used by Thomson (1990, 366-69; 1991, 300-302), who lumps non-autonomous intrusions along with infringements and allows that they can be violations. Otsuka (1994), however, successfully argues that such non-autonomous intrusions cannot be violations (e.g., because rocks and bears can intrude upon rights but cannot act wrongly). It follows, I believe, that they cannot even be infringements, since such intrusions are not wrong even in the absence of special justificatory conditions. Hence, we need the more

autonomous choice of the intruder, then the right is *infringed*.⁵ Because rights need not be absolute, the infringement of a right need not be impermissible.⁶ Sometimes, there may be special justifying conditions that specify that the right may be permissibly overridden under certain conditions (e.g., avoiding social catastrophe).⁷ If, however, the infringement is not justified by such considerations, then the right is *violated* and the intrusion is impermissible.

We shall be addressing what compensation is owed for each of the following ways of intruding upon a right:

Intrusion: Borders defined by rights were crossed by the intruder without permission of the right-holder.

Non-autonomous intrusion: The intrusion is not the result of an autonomous choice of the intruder and thus neither permissible nor impermissible.

Infringement: The intrusion is the result of an autonomous choice of the intruder and is thus either permissible or impermissible.

general notion of intrusion to cover non-autonomous intrusions.

⁵ I use “infringe” in the sense given by Thomson (e.g., 1990, 122) according to which violations are an impermissible kind of infringement. Others reserve “infringe” for cases of permissible infringement. See, for example, McMahan (2005, 388) and Coleman (1994, 129).

⁶ Actually, I believe that, fully specified (in perhaps highly conditional ways), all rights are absolute, but I here waive that concern.

⁷ The justifying conditions can (and typically do) appeal to the objective facts about the situation, and not merely to the evidence that the agent has, or should have had.

Mere infringement: Justificatory conditions hold for the infringement of the right.

The action is not wrong in virtue of the infringement (but may be for other reasons; see below).

Violation: Justificatory conditions do not hold for the infringement of the right.

The action is wrong in virtue of the infringement.

It's worth noting that, although a rights-violation entails that an infringement is impermissible, the reverse entailment does not hold. An infringement of a given right can be impermissible without being a violation. Justificatory conditions for the infringement of the given right might hold (and thus the right is not violated), but the infringement might be wrong for some other reason. It might violate an impersonal constraint or might violate some other right (perhaps of someone else). Thus, an infringement of a right can be wrong (impermissible) without violating that right.⁸ We shall return to this below.

Throughout, I shall focus on the case where the intruder is strictly harmless in the sense of not having ever imposed an intrusion-harm on anyone and with no chance of doing so in the

⁸ In places, Thomson (e.g., 1976, 40; 1977, 51) seems to define violations as any impermissible infringement. In Thomson 1990, however, she more cautiously states that an infringement is a violation only if it is impermissible (leaving open when further conditions are necessary for an infringement to be a violation). My definition of a violation requires that the infringement of the right be impermissible *because* there are no justificatory conditions for the infringement of that right—and not for other reasons (impersonal wrongs, violations of other people's rights). I suspect that this is what Thomson had in mind all along.

future. Although few, if any, people are strictly harmless in this sense, this is the core case. Intrudees who are not strictly harmless may be owed significantly less than full compensation (e.g., compensation only for the harm from excess force used to stop them from imposing intrusion-harm). That, however, is a topic for another time. Here I focus exclusively on intrudees who are strictly harmless.

I shall focus on the question of what an intruder owes an intrudee. I shall not address the question of what happens if the intrudee dies before fully compensated—either because the intruder killed her or because she died for unrelated reasons. It’s clear that the debt-claim cannot simply disappear, and merely transferring the debt to the intrudee’s heirs fails to reflect the fact that compensation was never fully provided to the intrudee. This is a difficult and important question that I will set aside in this paper.

There are two main views about the duty to compensate for one’s intrusion-harms. On the *strict-liability* view, intruding agents have a duty to compensate for the intrusion-harm for which they are *causally* responsible.⁹ By contrast, on the less demanding *agent-responsibility* (or fault) view, intruding agents have a duty to compensate for the intrusion-harm for which they are *agent-responsible* (“outcome-responsible”, “morally responsible”).¹⁰ To be agent-responsible for an outcome, the agent must be causally responsible for the outcome and the outcome must be

⁹ See, for example, Epstein 1973.

¹⁰ See, for example, Coleman 1992, chs. 16-18; 1994, and Perry 1992. For discussion and criticism of these views, see Zipursky 1998. The view that I propose is a kind of responsibility account, but the role played by agent-responsibility *for violating rights* (i.e., culpability) is, I believe, not present in the work of Coleman or Perry.

“suitably reflective” of the agent’s autonomous agency. There is much debate about what exactly determines when an individual is agent-responsible for something,¹¹ but it’s clear that one can be causally responsible for harm without being agent-responsible for it. This is arguably so when: (1) the intruder’s *agency* was not involved at all (e.g., because an unforeseeable gust of wind blew her against the right-holder), (2) the intruder’s agency was involved but her *autonomy* was radically impaired (e.g., the actions of psychotics or of someone in an extreme panic), or (3) the intruder’s autonomous agency was involved but the intruder *could not have reasonably known* that her choice would have the specified result (e.g., she could not have known that the terrorist had rigged the light switch to set off the bomb).

Agent-responsibility, it should be stressed, is relative to a specified outcome. One can be agent-responsible for some outcomes (e.g., the foreseeable results within one’s control) but not for others (e.g., those results that could not have been foreseen). Suppose, for example, that an agent intentionally shoots another in the leg because she reasonably but falsely believes that the other is a terrorist about to set off a bomb. She is agent-responsible for the foreseeable harm but not for violating the innocent person’s rights (even though she does violate his rights). It should also be noted that agent-responsibility for harming a person entails nothing about whether the

¹¹ See, for example, Fischer and Ravizza 1999, Vallentyne 2008, and the many references in each. For simplicity in the present paper, I assume that agents are fully agent-responsible for the foreseen or reasonably foreseeable results of their autonomous choices. In Vallentyne 2008, however, I defend the view that agents are agent-responsible only for the (foreseeable) *probability shift* that their autonomous choices induce. This is a more limited conception of agent-responsibility.

harming was morally permissible. One can be agent-responsible for morally permissible harms (e.g., against a terrorist to stop her attack) and for morally impermissible harms (e.g., against innocents with no valid justification). Agent-responsibility for an outcome merely establishes that the outcome is suitably attributable to one's autonomous agency.

I shall suggest below that the duty to compensate depends in part on issues of agent-responsibility, and hence on what the agent knew or reasonably should have known. It's important to note that the appeal to agent-responsibility is for determining the extent of the *duty to compensate*. I do not claim—indeed, I would deny—that whether an intrusion, infringement, or violation takes place depends on agent-responsibility or what the agent knew or should have known.¹² The only claim is that the duty to compensate for damages from an intrusion so depends. Whether an intrusion took place is one question; the extent to which the intruder is liable for the resulting harm is another.

When an intruder owes compensation for an intrusion-harm, what is the currency of the debt? It is often assumed that some kind of cash-value payment (in cash or resources) is owed, and this may make sense for legal duties to compensate. For morality, however, it seems mistaken. The relevant harm imposed was a loss in life prospects for wellbeing and it seems more plausible that an offsetting increase in such prospects is what is owed. Obviously, there are

¹² For a defense of the irrelevance of fault to rights-infringement, see Thomson 1990, 229-234. For a defense of the irrelevance of intention or fault to permissibility, see Thomson 1991, 294-96. I agree with these arguments, except that I would argue that autonomous agency is a necessary condition for both rights-infringements and impermissible actions (a claim that she denies elsewhere).

many possible conceptions of wellbeing and of prospects that might be invoked here, but I shall leave this aspect of the position open. The important point is that, although a cash payment (or equivalent) may often discharge a duty to compensate, when it does, it is the means and not the end. Suppose, for example, that I owe you compensation for a 10-unit loss of wellbeing and, before I discharge this debt, the cost of providing this increase in wellbeing increases from \$100 to \$1000 (e.g., because you have an accident that limits your ability for gains in wellbeing). I still owe you 10-units of wellbeing, no matter what the cost (as opposed to only owing you only \$100 plus interest). The currency of compensation is life prospects (for wellbeing), not cash value.¹³

Although I believe that the only reparation duties agents have in virtue of a rights-intrusion are duties to compensate, I do not assume that here. I leave open, for example, whether there are duties to apologize or submit to punishment. My only claim is that the duty to compensate is a duty to provide an offsetting increase in life prospects. Thus, if an intrusion *benefits* the right-holder (e.g., accidentally or because done paternalistically), no compensation is

¹³ Goodin (1989) distinguishes between two kinds of compensation: *Means-replacing* compensation requires providing equivalent means for pursuing the same ends (e.g., a prosthetic leg for a lost leg), whereas *ends-displacing* compensation merely requires providing the means for offsetting the lost wellbeing whether or not it permits the equivalent pursuit of ends (e.g., a sum of money sufficient for achieving the same level of wellbeing, even if not sufficient to buy a prosthetic leg). Goodin defends the stronger, means-replacing, form of compensation, whereas I would argue in favor of the weak, ends-displacing form of compensation. What matters, I would argue, is offsetting the lost prospects for wellbeing, not necessarily restoring any particular capability (in the sense of Sen). For related argument, see Vallentyne 2005.

owed.

I shall now suggest that the duty to compensate for an intrusion-harm depends on whether the intruder was agent-responsible for violating the right (e.g., knew that she was violating the right). Strict liability, I suggest, holds if she is so agent-responsible but not if she is not agent-responsible for acting wrongly (e.g., was not acting wrongly at all or could not have known that she was acting wrongly). As far as I know, the idea of making the duty to compensate depend on agent-responsibility for a rights violation (or perhaps, more generally, acting wrongly) has not been systematically developed. Below, I shall take a first step in articulating and motivating such a position. I will not, however, attempt a full defense.

2. Where the Intruder Is Not Agent-Responsible for Wrongly Intruding upon the Right

To start, we shall consider the case where an intruder is not agent-responsible for wrongly intruding upon the right (“non-culpable” intrusion). This is compatible with the intruder being agent-responsible for some intrusion-harm, since the agent may have intended the harm reasonably believing that she was acting permissibly. (Keep in mind that agent-responsibility is relative to some specified outcome.) In such cases, the intruder’s duty of compensation is limited, I suggest, to compensating for the intrusion-harm, if any, for which she is agent-responsible (and not for intrusion-harms that were not the result of her autonomous choices or that were reasonably unforeseeable).

There are three relevant kinds of case where the intruder is not agent-responsible for wrongly intruding upon the right. In one, the agent intruded upon the right, but did not do so as the result of an autonomous choice (e.g., the wind blew her against the intrudee, or she struck at

him while insane or in an extreme panic). In such cases, the intruder does not act wrongly (since her autonomous agency was not involved; it was a mere bodily movement), and hence she is not agent-responsible for wrongly intruding upon the right. My general claim is that intruders who are not agent-responsible for wrongly intruding owe compensation only for any intrusion-harm for which they are agent-responsible. In the case where there is no autonomous agency involved, the intruder is not agent-responsible for anything and hence owes *no compensation* for the intrusion-harm imposed. This seems correct. Although the agent's body is causally connected with the intrusion-harm, her agency is not. There is therefore little reason for her, rather than someone else, to have a duty to compensate for that harm.¹⁴

This does not mean that the intruder has no right to compensation for the intrusion-harm. It merely means that he has no *special right against the intruder*. If, as I believe, individuals have a (perhaps limited) right, *against others in general*, to be compensated for below-average brute-luck wellbeing (i.e., wellbeing for which they are not agent-responsible), then the intruder may well be eligible for at least partial compensation for the intrusion-harm. There is, however, little reason to hold the non-autonomous intruder accountable for such compensation.

A second case where the intruder is not agent-responsible for wrongly intruding upon the

¹⁴ One argument for strict liability is based on the idea that (1) individuals fully own their bodies and various other things, and (2) full ownership includes the right to full compensation from the intruder. Although I agree that individuals fully own their bodies, I claim that full ownership is indeterminate with respect to compensation and enforcement rights (roughly, because they conflict with a full immunity to loss of rights). For elaboration, see Vallentyne, Steiner, and Otsuka 2005.

right is one where she autonomously intruded upon (i.e., infringed) the right but *did not violate* the right because the right was not absolute and was justifiably overridden (e.g., to avoid social catastrophe). Here, we further suppose that she did not violate anyone else's rights or any impersonal constraint. (We'll return to those issues below.) Thus, the intrusion was permissible. Perhaps pushing a harmless innocent person on top of a terrorist to prevent the latter from setting off a bomb is such a case. What compensation is owed for such permissible intrusions? Some might argue that compensation is owed only for *violations* of rights and not for permissible infringements. It seems more plausible, however, to hold that compensation of some sort is owed even in the latter cases. Although it may be permissible to infringe rights in special cases, there is little reason to hold that the right to compensation would be eliminated in such cases.¹⁵ In any case, my main claim here is that, if compensation is owed to the intruder in such cases, it is limited—given that the intruder was acting permissibly—to the intrusion-harm for which the intruder was agent-responsible. She owes the intruder no compensation for intrusion-harms that she did not foresee and could not have foreseen.

Suppose, for example, that an agent takes the initiative to gently push a harmless innocent to stop a terrorist from bombing. Suppose that the agent could not have foreseen the result that the innocent person suffers a freak devastating injury from the gentle push. Nor could she have foreseen that several bystanders would also be injured by the act. It seems unreasonable to hold that the agent must fully compensate these innocents for the harm imposed, as opposed to the reasonably foreseeable harm (for which she is agent-responsible). As noted above, this does not entail that the innocents are not owed compensation by others in general.

¹⁵ See for example, Thomson 1976; 1977; 1980; 1990, 91-98, for a defense of this view.

It might be objected that, where an agent permissibly infringes someone's rights to prevent harm to others, others have a duty to share in the compensation owed to the infringer. The duty to compensate for infringement-harms for which the infringer is agent-responsible does not, it is suggested, fall entirely on the infringer in such a case. I do not here rule out the possibility that, in such cases, others *owe the infringer* their fair share of the compensation cost that she incurs towards the infringer. I merely claim that the infringer owes full compensation to the infringer for the intrusion-harms for which she is agent-responsible. She is agent-responsible for the infringement-harm in question, and she owes a duty to the infringer to provide such compensation. She may also have a right to collect from others, but that is a separate issue. The failure of others, for example, to provide their fair share of the owed compensation does not affect the duty the infringer owes the infringer.

A third and final case where the intruder is not agent-responsible for wrongly intruding upon the right is one where she (wrongly) *violates* the right but could not have reasonably known that she was doing so (e.g., all the evidence strongly supported the mistaken view that the intruder was a terrorist about to set off a bomb).¹⁶ My claim is that the duty to compensate in this case is no different from that of the previous case where the intruder permissibly infringed the right. Admittedly, in this case, the action is wrong and in the above case, it is not. In neither case, however, does the agent bear any responsibility for acting wrongly, since she could not

¹⁶ It's important to keep in mind that the justifying conditions for a right are based on the objective facts about the situation and not merely the evidence that the agent has. Thus, an agent can violate a right even though all her evidence suggests that it is permissible to infringe the right.

reasonably have known that she was acting wrongly in this third case. It thus seems plausible that, in this third case (like the second), the intruder must compensate the intrudee only for the intrusion-harm for which she is agent-responsible.¹⁷

3. Where the Intruder Is Agent-Responsible for Violating the Right

Where an intruder is not agent-responsible for wrongly intruding upon the right, she owes the intrudee, I have claimed, compensation only for the intrusion-harm for which she is agent-responsible. In such cases, strict liability for all intrusion-harm is excessive, given that the intruder had no reason to believe that she was acting wrongly. Things are different, I suggest, where the agent is agent-responsible for (wrongly) violating the right. In such cases, the agent

¹⁷ The main objection to the claim that agents who are not agent-responsible for wrongly intruding have a duty to compensate only for intrusion-harms for which they are agent-responsible is that it is *insufficiently demanding*. I here mention, but do not pursue, an objection that this view is *too demanding*. Suppose that the agent does not foresee how expensive it will be to compensate for the intrusion-harms for which she is agent-responsible. Perhaps she correctly foresaw a small intrusion-harm but did not foresee that it would be very expensive to increase the intrudee's wellbeing by that small amount (e.g., because the intrudee has some very unusual condition). For example, the intruder believed that the 10-unit loss of wellbeing would cost the usual \$100 but in fact it will cost one million dollars. This raises the question of whether the duty to compensate should also be limited, on a responsibility view, by the cost of compensation that the intruder could have reasonably foreseen. I doubt it, but I don't see clearly.

has, or should have, “a guilty mind”. She knows, or should reasonably know, that she is violating the right, and it seems reasonable that she should be morally accountable for the full intrusion-harm even if greater than she reasonably believed it to be (strict liability).

A weak version of my claim is simply that the duties of compensation are *more* onerous when one is responsible for violating the right (e.g., when one does so knowingly) than when one is not responsible for wrongly intruding (e.g., when one does not act wrongly or when one does so but could not have known that one was doing so). The key claim here is that the culpability of the intruder (in the sense of being agent-responsible for the violation) is relevant to the duty of compensation, just as many think it is for liability to punishment. I have no argument here. I just can't see why this wouldn't be so. Those who knowingly violate a right are subject to higher standards of compensation than those who are not responsible for wrongly intruding.

My key claim, of course, is the much stronger claim that the intruder in such cases is liable for the entire intrusion-harm and not merely the portion for which she is agent-responsible. The main objection to this position is that it is too severe. Suppose that I knowingly violate your rights by flicking your ear, and I reasonably expect that this will cause you only minor harm. Suppose further that I could not have foreseen the fact that you have a special condition (physiological or psychological) that ensures that you suffer great harm from my intrusion. Do I really owe you a large increase in life prospects, given that I could not have known that you would suffer such great harm? My claim is that I do. One can avoid the risk of being so liable by avoiding being agent-responsible for acting wrongly. One can do that simply by not acting in ways that one knows, or should reasonably know, are wrong. Although severe, this is much weaker than the general strict liability view (which holds agents strictly liable even if they are not agent-responsible for acting wrongly).

This is not to say that intruders held strictly liable must bear the full cost of providing the required compensation. Often, they could not have reasonably expected that they would have to bear these costs (as in the above example). Perhaps they reasonably believed that the intrusion-harm would be less. To the extent that they are forced to bear costs that they could not have reasonably anticipated, they suffer bad brute luck (prudentially undesirable outcomes for which they are not agent-responsible). To the extent that everyone has a duty to pay her fair share of perhaps partial compensation to the victims of bad brute luck (a controversial view that I accept), such intruders may be eligible for compensation. The point here is that, intruders who are agent-responsible for violating rights owe full compensation to those who suffer intrusion-harm, but they, in turn, *may* be eligible (depending on brute luck equalization issues that I here leave open) for compensation from others, if the compensation costs are a matter of bad brute luck for them.¹⁸ If the compensation from others is not full, then the intruders, rather than the victims, must bear the shortfall.

Before turning to our final category (agent-responsible for acting wrongly but not for violating the right), I shall briefly comment on an aspect of compensation that has not yet been addressed. We have been focusing on compensation owed to the intruder. Often, of course, an intrusion harms non-intruders as well. For example, if someone beats me up, my wife will suffer as well. Is she owed compensation by the intruder? A common view is that one has rights to compensation only for intrusion-harms suffered from intrusions upon one's own rights. On this

¹⁸ My own view is that even intentional criminals suffer bad brute luck, and are eligible for compensation, when they have a reasonable but false belief that the chances of their being punished are low. This, however, is a controversial view.

view, my wife has no right to compensation, since her rights were not intruded upon.¹⁹ This seems correct when the intruder is not agent-responsible for acting wrongly (e.g., acted permissibly, or reasonably believed she was so acting). When she is agent-responsible for violating someone's rights (e.g., does so knowingly), however, it seems very plausible to me that the intruder should be liable for *all* the intrusion-harm for which she is responsible—both the direct intrusion-harm to the intrudee and the indirect intrusion-harm to third parties. In such cases, the intruder knew (or should have known) that she was violating someone's rights. If she also knew that this would harm others, it seems entirely appropriate for her to owe them a duty of compensation for their harm that she foresaw from the intrusion. (Yes, as Ian Carter objected, this means that you owe compensation to a lot of people, if you beat up a beloved national figure, knowing that you were violating her rights and also causing others to thereby suffer. This seems right to me. Why should anyone else have to bear the cost?) Indeed, one might even argue that intruders who are agent-responsible for violating someone's rights owe *full* compensation—not only to the intrudee, but also—to third parties harmed by the intrusion (even if the intruder could not reasonably foresee that harm). Obviously, that is a big issue, and I raise it here merely to flag it for further consideration.²⁰

¹⁹ For insightful analysis of the tendency in American tort law to restrict duties of compensation to those whose legal rights were violated, see Zipursky 1998.

²⁰ Coleman (1992, ch. 17; 1994) argues that one owes compensation for wrongful harms for which one is responsible. He understands a harm to be wrongful when it is either wrong *or* the result of an infringement of the harmed individual's rights. Thus, he agrees that one can owe third parties compensation for losses to their legitimate interests when one acts wrongly but

4. Where the Intruder is Agent-Responsible for Wrongly Intruding upon But Not for Violating the Right

I shall now briefly address a case of which I am less sure. It is where the intruder is not agent-responsible for *violating* the right but is agent-responsible for *wrongly intruding upon* the right. This can arise because not all impermissible intrusions of a person's right are violations of that right. There may be no violation of that right because justificatory conditions hold for that intrusion (e.g., the intrusion is necessary to avoid social catastrophe), but the intrusion may still be impermissible (wrong) for other reasons. It may violate an impersonal constraint²¹ or it may violate *someone else's* rights. (The justificatory condition for the given right may not justify violating the impersonal constraint or someone else's right.) Thus, an agent may know that she is wrongly intruding upon a person's right without believing that she is violating that right.

Above I claimed that one is strictly liable for intrusion-harm when one is agent-responsible for *violating* the right. Is this also true when one is agent-responsible for *wrongly intruding upon* the right but not for violating it? I am not sure, but I shall briefly comment on this issue.

There are four possible cases based on the following two dimensions: (1) Is the intruder

without infringing their rights.

²¹ I would argue that there are no impersonal constraints. All impermissible acts wrong some being with moral standing. Here, however, I leave open the possibility of impersonal constraints, since I believe that they are conceptually possible.

not agent-responsible for violating the right because she does not violate the right at all, or because she violates the right but could not have reasonably known that she was? (2) Is the intruder agent-responsible for acting wrongly because she violates an impersonal (non-rights-based) constraint or because she violates someone else's rights? Here is an example of the easiest case to justify strict liability: where the intruder *violates* (as opposed to merely infringes) the intruder's rights but could not have known that she was doing so (and thus is not agent-responsible for doing so) and she is *agent-responsible for violating someone else's rights*.

Suppose that I knowingly push A onto B in order to knock over B. I do this because I reasonably, but falsely, believe that B is a terrorist and that knocking him over is the only way to stop the bomb from going off. In fact, B is perfectly innocent. Thus, I violate the rights of both A and B. I am not, however, agent-responsible for violating B's rights, because I could not have reasonably known that I was doing so (since I reasonably believed that justificatory conditions held).

Suppose further that I knew that it was not necessary to push A in order to knock over B. I knew that I could just as easily and effectively have pushed B directly. Out of negligence or malice, I nonetheless pushed A. I thus am agent-responsible for violating A's rights. The suggestion of the previous section entails that I am strictly liable for the intrusion-harm that I imposed on A (since I am agent-responsible for violating his rights). Here, our question concerns what I owe B. I am agent-responsible for wrongly intruding against him (because I knowingly intrude upon B's rights in pushing A onto to him and I know that this is wrong because I know it violates A's rights). I am not, however, responsible for violating B's rights. What do I owe B?

My inclination is to think that I owe full compensation for the intrusion-harm that I impose on here. More generally, the intruder is strictly liable to all intrudees in all four cases above. This is because it seems to me (very tentatively!) that what matters is that the intruder is

agent-responsible for wrongly intruding. She knows, or should reasonably know, that she is acting wrongly. It doesn't matter whether she is agent-responsible for violating an impersonal constraint, someone else's rights, or the rights of the intruder in question.²² In all cases, she has, or should have, a "guilty mind".²³ That, it seems to me, is enough to put her on the hook for strict liability, at least where she is violating the intruder's rights (without knowing she is). Moreover, it seems to me that the strict liability does not depend on whether she is permissibly infringing the right or violating it, since in both cases she could not reasonably have known that she was wrongly intruding.

These are, however, mere speculations. My purpose here is to draw attention to the case, not to resolve it.

²² In the previous section, I raised the possibility that those agent-responsible for violating rights are strictly liable to all victims—even if their rights are not intruded upon. If this is so, then it follows that they are strictly liable to those whose rights they intrude upon in such cases. I tentatively suggested, however, that this was too draconian. It seemed more plausible that they would be liable to all victims, but only for the intrusion-harm for which they were agent-responsible. If this is so, then our question about our main case remains.

²³ Unlike theories of retributive punishment, however, the point is not to impose a harm on the violator but rather to hold that the violator, rather than someone else, has a duty to bear the cost of the rights-violation. My proposal is thus, I believe, in the same spirit as the "justice-based" (McMahan 2002, 402) or "responsibility-based" (McMahan 2005, 394) accounts of liability to the use of force. I here focus on the duty to compensate, whereas McMahan focuses on liability to the use of force, but the general issues are, I believe, roughly the same.

5. Conclusion

I have suggested, without compelling argument, that those who are agent-responsible for violating rights—and perhaps also those who are agent-responsible for wrongly intruding upon rights—owe the intrudee compensation for the entire intrusion-harm whereas those who are *not* agent-responsible for wrongly intruding upon rights are only liable for compensating the intrusion-harm for which they are responsible (e.g., could reasonably have foreseen). If this is right, then strict liability is correct for those who are agent-responsible for violating rights and fault liability is correct for those who are not agent responsible for wrongly intruding upon rights. Culpability (agent-responsibility for acting wrongly) thus seems relevant not only for liability to punishment but also for duties to compensate. My goal has been to articulate a promising position and provide enough motivation for it to be taken seriously. Further work is needed to refine the position and to see whether it is genuinely promising.²⁴

²⁴ For helpful comments, I thank Dani Attas, Ian Carter, Helen Frowe, Matt Kramer, Mike Otsuka, Hillel Steiner, and Jonathan Vertanen.

REFERENCES

- Coleman, Jules. 1992. *Risks and Wrongs*. Cambridge: Cambridge University Press.
- Coleman, Jules. 1994. "Corrective Justice and Property Rights." In Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul (eds.), *Property Rights*. Cambridge: Cambridge University Press.
- Epstein, Richard. 1973. "A Theory of Strict Liability in Tort." 2 *Journal of Legal Studies* 151-204.
- Fischer, John Martin and Ravizza, Mark. 1999. *Responsibility and Control: A Theory of Moral Responsibility*. Cambridge: Cambridge University Press.
- Goodin, Robert. 1989. "Theories of Compensation." In R.G. Frey and Christopher Morris (eds.), *Liability and Responsibility*. Cambridge: Cambridge University Press, 1991).
- Kramer, Matthew H., Simmonds, N. E. and Steiner, Hillel. 1998. *A Debate over Rights*. Oxford: Oxford University Press.
- McMahan, Jeff. 2002. *The Ethics of Killing: Problems at the Margins of Life*. Oxford: Oxford University Press.
- McMahan, Jeff. 2005. "The Basis of Moral Liability to Defensive Killing." 15 *Philosophical Issues* 386-405.
- Otsuka, Michael. 1994. "Killing the Innocent in Self-Defense." 23 *Philosophy and Public Affairs* 74-94.
- Perry, Stephen. 1992. "The Moral Foundations of Tort Law." 77 *Iowa Law Review* 449-514.
- Hillel Steiner. 1997. "Choice and Circumstance." 10 *Ratio* 296-312.

- Thomson, Judith Jarvis. 1976. "Self-Defense and Rights." In William Parent (ed.), *Rights, Restitution, and Risk: Essays in Moral Theory*. Cambridge, MA: Harvard University Press, 1986. Originally presented as 1976 Lindley Lecture at the University of Kansas.
- Thomson, Judith Jarvis. 1977. "Some Ruminations on Rights." In William Parent (ed.), *Rights, Restitution, and Risk: Essays in Moral Theory*. Cambridge, MA: Harvard University Press, 1986. Originally published in *University of Arizona Law Review* 19 (1977).
- Thomson, Judith Jarvis. 1980. "Rights and Compensation." In William Parent (ed.), *Rights, Restitution, and Risk: Essays in Moral Theory*. Cambridge, MA: Harvard University Press, 1986. Originally published in *Nous* 14 (1980).
- Thomson, Judith Jarvis. 1984. "Remarks on Causation and Liability." 13 *Philosophy and Public Affairs* 101-33.
- Thomson, Judith Jarvis. 1990. *The Realm of Rights*. Cambridge, MA: Harvard University Press.
- Thomson, Judith Jarvis. 1991. "Self-Defense." 20 *Philosophy and Public Affairs* 283-310.
- Vallentyne, Peter. 2008. "Brute Luck and Responsibility." 7 *Politics, Philosophy & Economics* 57-80.
- Vallentyne, Peter. 2005. "Capabilities vs. Opportunities for Well-being." 13 *Journal of Political Philosophy* 359-371.
- Vallentyne, Peter, Steiner, Hillel, and Otsuka, Michael. 2005. "Why Left-Libertarianism Isn't Incoherent, Indeterminate, or Irrelevant: A Reply to Fried." 33 *Philosophy and Public Affairs* 201-15.
- Zipursky, Ben. 1998. "Rights, Wrongs, and Recourse in the Law of Torts." 51 *Vanderbilt Law Review* 1-100.