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Moral Rights and the Limits of the "Ought"-Implies-"Can" Principle: Why Impeccable Precautions Are No Excuse

In a section of *The Concept of Law* that has not elicited as much scholarly commentary as some of the other parts of that classic text, H.L.A. Hart outlined four main dissimilarities between moral requirements and legal requirements.[1] He maintained that moral obligations are unlike legal obligations in that they invariably pertain to matters of considerable importance; he argued that legal norms are susceptible to abrupt and deliberate change, whereas moral norms are not similarly susceptible; he declared that there is no such thing as strict liability in morality, whereas some legal norms do impose liability irrespective of fault; and he contended that the law's typical form of compliance-inducing pressure is the threat and application of sanctions, whereas the characteristic form of moral pressure is exhortation. Each of these claims by Hart is open to challenge in certain respects, but the present essay will concentrate on the third of them. Was he correct in thinking that impeccable precautions are always fully exonerative in morality? In arguing for a negative answer, this article will tackle some knotty issues in moral philosophy and legal theory.

Chief among those issues is the soundness of the "ought"-implies-"can" principle within the realm of morality. Hart was of course correct in affirming that such a principle is not always determinative within the domain of law. People and corporations are sometimes held legally liable for their actions even if they have not been malicious or knowingly indifferent or reckless or careless in any way. Culpability is not always an element of legal wrongdoing. Hart went astray,

[1] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) [hereinafter cited as Hart, *Concept*], 168-76. I should note two points of terminology at the outset. First, I use the terms "duty," "obligation," and "requirement" interchangeably. Second, the phrase "strict liability" refers to liability that is imposed without regard to the presence or absence of culpability. Further terminological points – such as my distinction between "wrongful" and "wrong" – will become apparent as this essay unfolds.
For very helpful comments I wish to thank Andrea Baumeister, Rowan Cruft, Antony Duff, Bernard Gert, Dudley Knowles, Sandra Marshall, James Murphy, Walter Sinnott-Armstrong, Hillel Steiner, and Victor Tadros. I am grateful to audiences at Dartmouth College and the University of Stirling, where I presented an abridged version of this article.

however, in believing that morality is fundamentally different from law in this regard. Whether departures from fault-based liability are rarer or more common in morality than in law, they are by no means absent altogether. Wrongfulness (culpability) is by no means invariably a precondition for wrongness (impermissibility).[2]

The "ought"-implies-"can" principle can be construed in a number of ways. This essay will not assail that principle insofar as it is understood as a denial that anyone can be morally obligated to do something that is utterly unintelligible. We cannot make any sense of the statement that somebody is morally obligated to induce green ideas to sleep furiously or to cause the number seven to become swarthier than a non-existent baseball game. If we take the "ought"-implies-"can" principle simply as an admonition that the content of any genuine moral obligation must be minimally intelligible, then it undoubtedly stands beyond any reasonable contestation. More common renderings of the "ought"-implies-"can" precept are markedly more vulnerable, however. Still, not all of those renderings will be directly impugned here.

For example, this article will not need to defend the view that a person can be morally obligated to do something that is logically impossible. To be sure, one does not contradict oneself when one affirms that a person is morally duty-bound to perform *X* and to abstain from performing *X*.[3] If somebody has promised somebody else that he will draw a round square, then he may well be morally obligated to do so. Nevertheless, the focus of this essay will not lie on such moral obligations; that is, we shall not train our attention on moral obligations with which it would be logically impossible to comply. Nor will this article concentrate on moral requirements of which the fulfillment would be *physically* infeasible. Although my arguments will tend to support the view that such re-

[2] My distinction between wrongness and wrongfulness clearly overlaps with Heidi Hurd's distinction between wrongdoing and culpability in her "Justification and Excuse, Wrongdoing and Culpability," 74 *Notre Dame Law Review* 1551, 1557-72 (1999) [hereinafter cited as Hurd, "Justification"]. However, despite the terminological similarity between the two distinctions, they are substantively different in certain respects (which need not be recounted here). Philip Soper's dichotomy between moral error and culpability, drawn at a number of junctures in his *The Ethics of Deference* (Cambridge: Cambridge University Press, 2002), is roughly similar terminologically to my wrongness/wrongfulness distinction. In fact, however, Soper adopts a Hartian position on the exonerative effect of good intentions. See, e.g., *ibid*., at 61, 75, 85, 96.

[3] I agree here with Ruth Barcan Marcus, "More about Moral Dilemmas," in H.E. Mason, *Moral Dilemmas and Moral Theory* (Oxford: Oxford University Press, 1996) [hereinafter cited as Mason, *Dilemmas*], 23, 28. Note, incidentally, that the structure of a conflict between moral duties does not consist in one's being obligated to do *X* and to abstain from doing *X*. Rather, it consists in one's being obligated to do *X* and one's being obligated to abstain from doing *X*.

quirements are entirely possible and sometimes actual, my focus will lie elsewhere.

Specifically, as has been suggested already, this essay will be examining the notion that nobody should ever be held morally responsible for failing to avoid the infliction of any harm which he or she has not been able to avoid through all reasonably manageable precautions in the carrying out of some worthwhile activity. In other words, according to the version of the "ought"-implies-"can" precept that is controverted here, "can" means "be able to achieve through the scrupulous exercise of care and good will," and "cannot" therefore means "be *un*able to achieve through the scrupulous exercise of care and good will." In the eyes of Hart and many other theorists, a person will not have acted wrongly if she has earnestly exercised fastidious caution. Hence, in the sense of "cannot" just indicated, no one is morally required to accomplish things which he or she cannot accomplish. (Note, incidentally, that the specified sense of "cannot" goes beyond stark physical impossibility. Some outcomes that cannot be attained through the scrupulous exercise of care and good will are nonetheless attainable as a sheer matter of physical possibility. For instance, a mountain climber might not be able to avoid a fall even if he ascends a slope with meticulous circumspection and skill, yet he could have avoided the accident by altogether forgoing the activity of climbing mountains. Suppose that everyone is morally required not to become involved as a driver in any automobile accident. Although a person might not be able to live up to such a requirement through punctiliously careful driving, he can live up to it by declining to get behind the steering wheel of an automobile at all. What he can achieve as a matter of sheer physical possibility is more expansive than what he can achieve as a matter of impeccable precautions.)

This essay will present a brief summary of Hart's argument, with attention to certain distinctions that are drawn there and elsewhere in his work. It will then explain why Hart's position is unsound. In so doing, this article will explicate the concept of a moral right in order to show why violations of moral rights can occur even when no one has acted wrongfully in any fashion. Having seen that strict liability does exist in morality as well as in law, we shall then look at several potential objections to my lines of reasoning. A consideration of those objections will take us into some prominent debates among moral philosophers – debates that can be illuminated with the aid of analyses developed by legal philosophers.

I. *Hart on the Role of Good Intentions in Morality*

Hart rightly took exception to the distortively simplistic idea that legal norms regulate only external behavior whereas moral norms regulate only inner sentiments and intentions. He felt that that idea had arisen as a mistaken response to

the four dissimilarities between law and morality which he highlighted. He especially attributed the mistake to the presence of the third dissimilarity, on which we shall be focusing. In seeking to give a correct account of the matter, he indicated that there is an important difference between the conditions of moral responsibility and the conditions of legal responsibility. As he stated at the outset of his discussion of the divergences between law and morality:

If someone does something forbidden by moral rules or fails to do what they require, the fact that he did so unintentionally and in spite of every care is an excuse from *moral* blame; whereas a legal system or custom may have rules of `strict liability' under which those who have broken the rules unintentionally and without `fault' may be liable to punishment. So it is indeed true that while the notion of `strict liability' in morals comes as near to being a contradiction in terms as anything in this sphere, it is something which may be merely open to criticism when found in a legal system.[4]

In his main exposition of this ostensible dissimilarity between law and morality, Hart began by reaffirming his view that a person is to be excused from moral responsibility if he or she has not behaved culpably in any manner: "If a person whose action, judged *ab extra*, has offended against moral rules or principles, succeeds in establishing that he did this unintentionally and in spite of every precaution that it was possible for him to take, he is excused from moral responsibility, and to blame him in these circumstances would itself be considered morally objectionable."[5] Hart then reiterated his claim that morality and law are fundamentally different in precisely this respect: "It is...clear that legal responsibility is not necessarily excluded by the demonstration that an accused person could not have kept the law which he has broken; by contrast, in morals `I could not help it' is always an excuse, and moral obligation would be altogether different from what it is if the moral `ought' did not in this sense imply `can.'"[6]

Hart importantly clarified and amplified his argument by invoking a distinction between justifications and excuses. Although he regarded "I could not help it" as a valid excuse in morality, he regarded it only as an excuse and not as a justification. For Hart and for manifold other theorists,[7] the distinction between

[4] Hart, *Concept*, 168-69, emphasis in original.
[5] Hart, *Concept*, 173. In a discussion of a somewhat different point in his *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) [hereinafter cited as Hart, *Punishment*], 35-40, Hart similarly took as given that strict liability is excluded from morality.
[6] Hart, *Concept*, 174.
[7] Hart, *Concept*, 174-75; Hart, *Punishment*, 13-14. See also J.L. Austin, "A Plea for Excuses," 57 *Proceedings of the Aristotelian Society* 1, 2-3 (1956-57) [hereinafter cited as Austin, "Plea"]; Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002) [hereinafter cited as Cane, *Responsibility*], 90; Joshua Dressler, "New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and *Rethinking*," 32 *U.C.L.A. Law Review* 61, 66-68 (1984); Kent Greenawalt, "The Per-

the two is as follows. If conduct is justified, then it is at least permissible and is perhaps also laudable; someone engaging in such conduct has not thereby done anything wrong. By contrast, if the conduct of a person is excused, he has done something wrong but is absolved of responsibility for it. Justifiability consists in responsibility without wrongdoing, whereas excusability consists in wrongdoing without responsibility. An example of justified conduct is the action of a policeman in restraining a culprit who has committed a misdeed, while an example of excusable conduct (within the domain of criminal law) is the action of some person *P* who punches another person because a third party has credibly threatened *P* with death or other severe harm if he does not inflict the blow.

Now, before we explore the bearing of the justification/excuse dichotomy on Hart's argument about strict liability in morality, we should take account of another category to which Hart elsewhere adverted: the category of mitigations or extenuations.[8] Though some theorists have distinguished between totally exonerative and partially exonerative excuses,[9] we are better advised to follow Hart in using a different term or set of terms for factors that are only partially exonerative. An extenuating factor is some feature of a person's behavior or circumstances that lessens the gravity of a wrong which the person has committed. Such a feature does not remove the character of the wrong as a wrong – that is, as something impermissible – and it might not entirely remove the wrongfulness

plexing Borders of Justification and Excuse," 84 *Columbia Law Review* 1897, 1899-900 (1984) [hereinafter cited as Greenawalt, "Borders"]; Walter Sinnott-Armstrong, *Moral Dilemmas* (Oxford: Basil Blackwell, 1988) [hereinafter cited as Sinnott-Armstrong, *Dilemmas*], 42. The justification/excuse distinction is drawn somewhat differently by George Fletcher, the legal theorist who has written most extensively on it. See his *Rethinking Criminal Law* (Boston, MA: Little, Brown and Company, 1978) [hereinafter cited as Fletcher, *Rethinking*], chap. 10; "Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?" 26 *U.C.L.A. Law Review* 1355 (1979) [hereinafter cited as Fletcher, "Conditions"]; "The Right and the Reasonable," 98 *Harvard Law Review* 949, 954-55, 977-78 (1985) [hereinafter cited as Fletcher, "Right"]. I do not here need to challenge Fletcher's understanding of the justification/excuse diremption. Nor do I need to consider the bearings of jurisdictional immunities, which operate in the law alongside justifications and excuses as liability-precluding factors.

[8] Hart, *Punishment*, 14-17.

[9] See, e.g, Austin, "Plea," 3; Philip Pettit and Michael Smith, "The Truth in Deontology," in R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith (eds), *Reason and Value* (Oxford: Oxford University Press, 2004), 153, 163. Because both justifications and excuses fully exclude criminal liability, quite a few criminal-law theorists do not attach very much importance to the justification/excuse distinction. For a recent example of such an attitude, see A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart Publishing, 2000), 537-40.

thereof (that is, the status of the wrong as something impelled by malice or knowing indifference or recklessness or carelessness). Nevertheless, by reducing and perhaps eliminating the wrongfulness of what a person has done, any mitigating element will have lessened the blameworthiness of the person's conduct. It will thereby have softened the penalty or other remedy that is due. An example of a mitigating factor is offered by my last paragraph's illustration of an excuse. Although the harsh coercion employed to induce *P* to punch somebody else is undoubtedly sufficient to excuse his behavior in any criminal proceedings, it does not completely absolve him of moral responsibility. It heavily extenuates his behavior without fully exonerating him. In the absence of special circumstances, he will at least be obligated to apologize to the punched person when an opportunity arises.

Let us return to Hart's discussion of strict liability in morality. How does the justification/excuse dichotomy enter into that discussion? Hart maintained that, although "I could not help it" is always an excuse in morality, it is only an excuse. When a person *P* has wronged somebody else in spite of exercising scrupulous care and good will, the exclusion of moral liability does not indicate that *P*'s action was justified. Rather, Hart argued, it indicates that holding *P* responsible for her unjustified action would be inappropriate in the circumstances. Moral norms do regulate *P*'s outward conduct – contrary to the simplistic view of morality as pertaining only to inner sentiments and intentions – but they also prescribe when it is or is not fair to hold *P* accountable for the injurious effects of that outward conduct. Because of the latter role of moral norms, people are sometimes excused from moral responsibility for the wrongs which they have done to others. So Hart reasoned, as he concluded: "Even in morals there is a difference between `He did not do the wrong thing' and `He could not help doing what he did.'"[10]

II. *Moral Rights and Strict Liability*

For my purposes, what is especially noteworthy about Hart's discussion of strict liability within morality is the absence of any references to extenuations. Though Hart in his philosophical writings on criminal law was well aware of the import of mitigating factors, he made no mention of them in the passages quoted above. Indeed, in the first of my extracts from *The Concept of Law*, he unwittingly brushed such factors aside by writing about blameworthiness and liability as if those two properties were equivalent. In my second quotation, he did much the same with blameworthiness and responsibility. This gap in his account is more than a gap; it is a far-reaching error. As will be argued in the rest of this

[10] Hart, *Concept*, 175.

essay, there are no excuses in the domain of morality. Rather, the only relevant division in that domain is between justifications and extenuations. As a consequence, liability without culpability is present not only in some areas of the law but also in the realm of morals. With the aid of the conceptual demarcations which Hart himself carefully elaborated elsewhere, we can detect the shortcomings in his efforts to pin down the differences between legal responsibility and moral responsibility.

A. *The Remedy Principle*

To begin to substantiate the claims just made, this article will analyze what is involved in anybody's holding of a moral right. Though a number of objections will be parried as we go along, one query should be addressed straightaway. My analysis of moral rights, which will be presented below, can just as aptly be characterized as an analysis of moral duties. That is, my analysis takes for granted the correlativity of rights and duties. In other words, it takes for granted that a relationship of mutual entailment obtains between any moral right with a certain content held by some person *X* vis-à-vis some person *Y* and a moral duty with the same content owed by *Y* to *X*. *X* vis-à-vis *Y* holds a right to *Y*'s φ-ing if and only if *Y* owes a duty to *X* to φ (where "φ" represents any course of conduct by *Y*).[11] I have argued at length elsewhere that every right is correlative with a duty and that every duty is correlative with a right. Nonetheless, such a view is not uncontroversial. Many theorists have contended that some duties are not correlated with rights.[12] Is my analysis in this essay rendered dubious, then, by the controversial tenet that underlies it?

For two reasons, the foregoing question should be answered in the negative. First, anyone who denies the comprehensive correlativity of rights and duties can simply take this article's analyses to be confined to those duties that are manifestly correlated with rights. Only such duties will receive attention in the discussions below. Second, and more important, this essay's explication of the nature

[11] Sometimes the content of a moral duty pertains not to the duty-bearer's conduct but to the occurrence of some state of affairs (which will obtain or not obtain independently of his conduct). For example, if I earnestly and knowledgeably assure you that the sun will shine on a certain day, and if you reasonably rely upon my assurance, I shall have to apologize or otherwise make amends if the specified day turns out to be rainy. Purely for ease of exposition, I leave such duties out of consideration here.

[12] For my view, see my "Rights without Trimmings," in Matthew H. Kramer, N.E. Simmonds, and Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998) [hereinafter cited as Kramer, "Rights"], 7, 24-60. For citations to many writings that deny the thoroughgoing correlativity of rights and duties, see *ibid*., at 25 n.11.

of moral duties could quite easily be reformulated to eliminate any reliance on the thesis that rights and duties are invariably correlative. Likewise, my discussions which emanate from that explication could be suitably reformulated if necessary. Hence, somebody who rejects the idea of the thoroughgoing correlativity of rights and obligations can nevertheless accept all the central claims advanced in this article.

One further preliminary point should be noted. Thus far, I have referred only to persons as right-holders, and I shall largely continue to do so. On the one hand, this limitation is apposite partly because it facilitates stylistic simplicity and smoothness, and partly because the various scenarios explored in this essay will all involve adult human beings as right-holders. There is no need for quarrels with theorists who insist that the universe of right-holders comprises only such human beings. On the other hand, the singling out of persons as right-holders is apposite solely for the reasons just mentioned. Nothing herein should lead anyone to infer that I myself regard the universe of right-holders as restricted to human adults. Quite the contrary; I have elsewhere argued sustainedly in favor of a more expansive conception.[13] (Worth remarking here is that the most prominent scenario in this article will involve a duty that is owed by an organization. Readers who recoil from a portrayal of a collectivity as a duty-bearer should reconstrue the scenario as involving a duty owed by a person – or by each of several persons – within the organization.)

Let us now look at my basic exposition of the situation that obtains when someone holds a moral right. That exposition consists in a **Remedy Principle**, in which "*X*" and "*Y*" designate persons and in which "φ" designates some course of conduct by *Y*:

If and only if *X* holds vis-à-vis *Y* a moral right against *Y*'s φ-ing, *Y*'s φ-ing will place *Y* under a moral obligation to *X* to remedy the resultant situation in some way.

This Remedy Principle is paralleled by a logically equivalent **Remedy Principle***, which encapsulates the situation that obtains when someone is under a moral duty:

If and only if *Y* owes *X* a moral duty not to φ, *Y*'s φ-ing will place *Y* under a moral obligation to *X* to remedy the resultant situation in some way.

The key concept in each of these principles is obviously that of a moral remedy. A moral remedy is a measure undertaken or undergone in order to acknowledge the wrongness of what one has done to somebody else, and in order to deal adequately with the resultant situation. Among the most common types of moral remedies are apologies, acts of compensation or restitution, and punishments.

[13] See Kramer, "Rights," 49-70; Matthew H. Kramer, "Getting Rights Right," in *Rights, Wrongs, and Responsibilities* (Basingstoke: Palgrave, 2001) [hereinafter cited as Kramer, "Getting"], 28, 29-57.

Feelings of remorse also belong on this list. In every case, a remedy goes beyond merely taking steps to improve somebody else's situation or to lighten somebody else's hardships; such steps in themselves could appropriately be taken by a person who has not thitherto behaved impermissibly in any way and who therefore does not need to make amends for his conduct at all. Nor is a remedy the mere paying of a price or the paying off of a debt. When people hand over money to a restaurateur for a meal which they have just eaten, they are averting rather than correcting the commission of a wrong. A measure counts as a remedy only when it serves to indicate that some previous act or omission was impermissible and in need of rectification.

Before we proceed to ponder how the Remedy Principle and Remedy Principle* are connected with strict liability in morality, we should consider four objections that might be posed against those principles themselves. (We shall encounter additional objections later in the essay.)

1. First, as some philosophers have pertinently recognized,[14] a duty-bearer is morally obligated to seek a waiver of his duty in advance when he knows that he will not be able to fulfill the duty and when he can reach the right-holder without incurring unreasonable costs. Yet, given the possibility of being released from one's duty ahead of time, it might seem that the Remedy Principle* is false. Someone can be morally obligated to abstain from φ-ing, yet his φ-ing will not impose any remedial obligations upon him. So a critic might assert. Any such objection to the Remedy Principle* will have foundered, for two reasons. In the first place, the waiving of a duty extinguishes it. By the time a duty-bearer behaves in some way that would have run athwart the waived duty if it had still existed, it will actually no longer exist. Consequently, the fact that his behavior does not give rise to any remedial obligations is fully in accordance with the Remedy Principle*. After all, a corollary of that principle is that no such obligations are generated when somebody conducts himself in a manner which he is not duty-bound to eschew. No breach of duty, no remedy.

Furthermore, the obtention of a release from one's duty is itself an anticipatory remedy. An obligatory concomitant of a request for such a release is an apology for one's inability to abide by the specified duty. Indeed, something more than an apology might very well be obligatory if the granting of the waiver will be costly for the right-holder. Hence, the potential occurrence of waivers is perfectly consistent with the truth of the Remedy Principle*. (Of course, some-

[14] See, e.g., Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990) [hereinafter cited as Thomson, *Realm*], 91-93 *et passim*; Walter Sinnott-Armstrong, "Moral Dilemmas and Rights," in Mason, *Dilemmas* [hereinafter cited as Sinnott-Armstrong, "Rights"], 48, 54. See also Terrance McConnell, "Moral Residue and Dilemmas," in Mason, *Dilemmas* [hereinafter cited as McConnell, "Residue"], 36, 42.

body might get released from a duty and might subsequently find that he is able to adopt the course of conduct which he was obligated to adopt. In such circumstances, he might opt for exactly that course of conduct. In that event, the anticipatory remedy turns out not to correspond to any actual act or omission that would have been a breach of duty in the absence of the release. To accommodate this point, the Remedy Principle and Remedy Principle* could be reformulated to link any post-hoc remedy with an actual breach, and to link any anticipatory remedy with an expected act or omission which would constitute a breach in the absence of a waiver and which might or might not turn out to be actual. However, the analytical benefits of such a reformulation would not be worth the stylistic convolutedness introduced by it – especially since all my examples in this article will involve obligations concerning post-hoc remedies rather than requests for waivers. Thus, although the role of waivers is unquestionably important, and although it could be taken into account within the main principles of my analysis, it will henceforth be pretermitted.)

2. A second criticism that might be leveled at my explication of moral rights and duties is that I have supposedly overlooked the myriad remedial arrangements that can be set conventionally.[15] For instance, vicarious liability in some of its guises might seem to reside beyond the ambit of my analysis.[16] Much the same might seem to be true of various third-party insurance policies which commit insurers to compensating people who have been harmed by the injurious conduct of the purchasers of the insurance. Although many arrangements for vicarious liability are not even ostensible counterexamples to my analysis – arrangements under which, for instance, employers are held responsible for the damage caused by employees who were acting within the scope of their jobs – other such arrangements are similar to the third-party insurance schemes in that they shift at least part of the burden of paying compensation onto parties who cannot plausibly be deemed to have caused the harms for which the compensatory payments are owed. Even more clearly will such a shift have occurred under a scheme of first-party insurance, whereby people take out policies that will compensate them for losses which they themselves suffer at the hands of others. Let us assume that, once these conventional schemes are established, the insurers

[15] Among the philosophers who have recognized the importance of conventionally established remedial arrangements are Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992) [hereinafter cited as Coleman, *Risks*], 296-98; and Thomson, *Realm*, 95. When I designate the arrangements as conventional, I do not mean to suggest that all of them are introduced extra-legally. On the contrary, many such arrangements are required or authorized by legal norms. Because law itself is inherently conventional, the legally required or authorized status of various remedial schemes is fully consistent with their conventionality.

[16] For a recent account of vicarious liability in English tort law, see W.V.H. Rogers, *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 2002) (16th ed.), chap. 20.

or the vicariously liable parties are morally obligated to render the compensatory payments. In that case, those parties are morally obligated to remedy losses that have not been brought about by any breaches of duties on their part. Is such a state of affairs consistent with my conception of moral rights and duties?

To ascertain why the answer to this question is affirmative, we should initially probe the situation of the people from whom the compensatory responsibility is partly or wholly shifted. We should then examine the situation of the parties to whom the compensatory duties have been assigned. One minor point to be noted in connection with the former set of people is that in some circumstances the compensatory burdens will only have been partly transferred from them. For instance, under any plausible scheme of third-party insurance, the purchasers of the insurance will have to pay higher premiums if they cause mishaps that trigger the indemnification of injured parties. A much more important point is that sundry remedies – such as apologies, feelings of remorse, and punishments – can never properly be undertaken or undergone vicariously. An insurance company can take on the onus of compensating victims monetarily for their injuries, but it cannot appositely offer them an apology that originates with the company itself. If an apology is to function as an apology, it will have to come from the person who is causally and morally responsible for the injuries that have been suffered.[17] That person is morally duty-bound to apologize, whether or not he has also retained the moral duty to furnish compensatory payments. (Of course, if more than one person is causally and morally responsible for the injuries, an apology from each of them is morally obligatory.) Even more obviously, if feelings of remorse are appropriate, they are appropriate only on the part of someone who is

[17] An exception to this general point arises when a wrongdoer *W* has died or has undergone some thorough and permanent mental incapacitation (perhaps as a result of the same event that has harmed his or her victim). In such circumstances, especially when the occurrence of the wrong is known or is quite readily ascertainable, the executor of *W*'s estate or someone else who stands as a pertinent representative of *W* will be morally obligated to furnish an apology to the victim. However, such an apology is to be delivered strictly on behalf of *W* and is to be an acknowledgment of his or her wrongdoing. It is decidedly not an acknowledgment of any wrongdoing on the part of the representative, who is to initiate and present the apology only because *W* is utterly incapable of doing so.
Through some amplification, the Remedy Principle* and the Remedy Principle could overtly take into account the potential for the descent of an obligation-to-apologize upon somebody who occupies a strictly representative role in the event of a wrongdoer's death or complete mental incapacitation. Yet the requisite elaboration of each principle would introduce only a minor substantive modification at the cost of some considerable stylistic gnarls. Hence, although each principle should be understood as carrying the qualification outlined in this note, I have opted – in the interest of stylistic convenience – to forgo the explicit incorporation of that qualification.

causally and morally responsible for the harm to which the remorse pertains. Somebody who is not so responsible can still naturally feel keen dismay over the damage that has occurred, but his harboring of the sentiment of remorse for that damage would amount to a delusion rather than to a morally requisite reaction. Equally unsuitable would be his undergoing of punishment for the damage. If the harm that has been inflicted is serious enough to warrant a resort to punitive measures, those measures should be taken against the person(s) responsible for the harm and against no one else. As Peter Cane declares: "People should not be allowed to offload deserved punishments and penalties onto others....So the fundamental question in this context concerns when the imposition of criminal sanctions is justified."[18] Whatever one thinks about the notion of vicarious atonement expressed in the "suffering servant" passages of the Book of Isaiah and in the New Testament's portrayal of Jesus, no tenable set of moral principles would yield the conclusion that the undergoing of a punishment due to a malefactor for his misdeeds can ever legitimately be delegated by him to somebody else. The Bible is correct in admonishing – in conflict with some other Biblical passages – that "[t]he fathers shall not be put to death for the children, nor shall the children be put to death for the fathers; every man shall be put to death [only] for his own sin."[19] To be sure, an extreme version of utilitarianism will prescribe that a person should undergo the penalties due for another person's misconduct whenever such an arrangement is promotive of utilitarian objectives. However, as has often been remarked, an extreme version of utilitarianism is unsound partly because it generates such a prescription.

In short, a remedy such as an apology or remorse or a punishment is not susceptible to being appropriately originated or undergone by anyone other than the person whose conduct has engendered the need for the remedy. Hence, given that the offering of an apology will be morally obligatory whenever a wrong has been committed, at least one morally requisite remedy will not lend itself to being initiated by anyone other than the wrongdoer. Consequently, the Remedy Principle* does indeed encapsulate what is true of anyone who has transgressed a duty. Such a person is morally obligated to remedy the resultant situation in some way, even if somebody else (such as an insurer) is morally obligated to rectify the situation in other ways. A chief source of the strength of the Remedy Principle* – and of the Remedy Principle – lies in the fact that it does not specify the remedy that is due in any particular context. Nothing is said therein about the type or ex-

[18] Cane, *Responsibility*, 249. For an excellent discussion of the inappositeness of insurance in the context of criminal law (as opposed to tort law), see *ibid*., at 245-49. As Cane observes, there are borderline cases of punishment. For example, some regulatory fines imposed on corporations cannot correctly be deemed morally justifiable unless they are understood as taxes on the corporations' activities rather than as punishments. In such cases, insurance covering the likely imposition of the fines is probably legitimate.

[19] Deuteronomy 24:16.

tent of any remedy. Accordingly, so long as *some* rectificatory measure must be undertaken or undergone by everyone who transgresses a duty, the fact that in a particular context some additional such measure must be undertaken by someone else (such as an insurer) is perfectly compatible with my analysis. The possibility of shifting the responsibility for fulfilling compensatory obligations is consistent with the truth of the Remedy Principle* precisely because it is not the case that the responsibility for fulfilling every other remedial obligation can likewise be shifted.

We should now explore briefly the position of the parties to whom the task of fulfilling the compensatory obligations has been transferred. When an insurance company is called upon to indemnify the victims of any accidents that have been caused by its policy-holders, it does not thereby rectify any wrongs which it itself has perpetrated. Having never wronged the people to whom it is obligated to make compensatory payments, it furnishes the payments in order to keep itself from wronging them. In that respect, those payments are cognate with the payments made by diners to a restaurateur for the meals which they have consumed. Though the insurance company is helping to rectify wrongs, the wrongs which it is helping to rectify are not its own. Considered purely in relation to its own operations, its payments to any victim of a policy-holder's misbehavior are not a moral remedy at all in the sense which I have delineated. That is, the payments do not amount to any acknowledgment of wrongdoing, for there is no wrongdoing (on the part of the insurance company) to be acknowledged. The difference between the insurer's position and that of any of its miscreant policy-holders is captured straightforwardly in the Remedy Principle*. According to that principle, *Y*'s doing or omitting to do something – his φ-ing – must be sufficient for the obligatoriness of a remedy if *Y* is to be classifiable as a duty-bearer. Whereas the culpably injurious conduct of a policy-holder (for example, someone's driving carelessly into a pedestrian) is indeed sufficient for the obligatoriness of a remedy, the sheer act of an insurance company in providing coverage to policy-holders is not similarly sufficient. Nor is the insurance company's action necessary for the obligatoriness of the remedy, of course. By contrast, in the prevailing circumstances the policy-holder's misconduct is both sufficient and necessary for the activating of remedial obligations. Thus, in connection with any such obligations to which a policy-holder's misdeeds have given rise, the Remedy Principle* correctly leads us to two firm conclusions: the policy-holder was duty-bound to avoid those misdeeds, and the emergence of the remedial obligations was not due to any breach of duty by the insurers who have provided the policy-holder with coverage and who have thereby committed themselves to discharging some of those obligations.

3. A third query that might be raised about the Remedy Principle or Remedy Principle* is that some counterexamples supposedly show that violations of

moral rights and duties are not invariably associated with remedial obligations. Let us briefly investigate a few scenarios that putatively support this latest query.

Walter Sinnott-Armstrong, who is keenly alert to the links between breaches of moral duties and remedial obligations, nevertheless feels a need to concede that those links are not unfailingly present. To substantiate his view, he offers the following scenario: "Suppose that I promise to meet you for a casual lunch, but I break my promise in order to save someone's life. Later you tell me that, if we had met, we would have both been killed by a bomb in the restaurant. It would then be odd for me to feel bad about breaking my promise or to say, `I'm sorry. I'll make it up to you.'"[20] Sinnott-Armstrong has constructed his example skillfully. The original duty in the example is palpably exceeded in importance by the far more pressing duty that countervails it, and the consequences of breaching the former duty are strongly positive on the whole for each of the people involved. If any scenario were to involve the transgression of a moral duty without the engendering of any remedial obligations, Sinnott-Armstrong's would surely be it. In fact, however, his scenario fails. Its fatal shortcoming is that – like Hart's discussion of the dissimilarities between legal liability and moral liability – it neglects the distinction between absolution and extenuation.

The circumstances recounted in Sinnott-Armstrong's scenario do not completely absolve the promisor of any obligations to remedy his breach of duty, but they do very heavily extenuate that breach. Because of the extenuating force of those circumstances, neither of the remedies mentioned by Sinnott-Armstrong is apposite. Plainly, the promisor should not feel remorseful dismay over what he has done. Nor is he under the slightest obligation to make amends to the promisee beyond the mere offering of an apology. Rather, because of the exigency of the situation that impelled him to violate his promissory duty, and because of the remarkably gratifying consequences of the violation, the sole remedy required of him is the offering of an apology and a brief explanation. Any apology in this context will itself be a terse formality, accompanied no doubt by an expression of exhilarated relief. ("I'm sorry that I had to break my promise to meet up with you for lunch, but thank goodness that everything turned out so well for us as a result!") When presented with the apology and the explanation, the promisee might laughingly indicate that she is fully satisfied without them. Nonetheless, if the apology and explanation were not offered at all – not even as laconic formalities that will probably be laughed off by their recipient – their wholesale absence would bespeak insufficient respect for the promisee as a moral agent to whom a moral duty was owed.[21] The permissibility of their ab-

[20] Sinnott-Armstrong, "Rights," 54-55.

[21] This point is missed in Peter Railton, "The Diversity of Moral Dilemma," in Mason, *Dilemmas* [hereinafter cited as Railton, "Diversity"], 140, 154. However, for a valuable corrective, see *ibid*., at 166 n.23.

sence would imply that, whenever the contravention of a right of a promisee will fortuitously promote some of her own important interests and will not cause her any serious harm, the right can legitimately be altogether ignored for the sake of furthering the well-being of others. In sum, though the promisor's wrong was without wrongfulness and was morally optimal, it was a wrong that now has to be remedied. Mild though the requisite remedy is, it is the means of upholding the moral status of the promisee and is therefore something that cannot legitimately be forgone.

When we note that Sinnott-Armstrong's example is a variant of a scenario frequently discussed by Anglo-American tort lawyers, we can perceive more clearly that it fails to establish his point. Tort lawyers have posited a situation in which a pedestrian at an airport is injured by a speeding motorist who is driving carelessly or maliciously. As a result of the injuries and the attendant disruption, the pedestrian is unable to board her flight to a distant city. A bomb explodes on that flight, and everyone on the plane is killed. Now, although this scenario is quite closely parallel to Sinnott-Armstrong's example, it obviously lacks one of the main extenuating features in the latter: the absence of culpability. Whereas Sinnott-Armstrong envisages a promisor who commendably adopts a morally optimal course of action in breaching a duty owed to a promisee, the motorist in this new scenario not only commits a wrong but also acts wrongfully (either carelessly or maliciously). Moreover, even the other major extenuating feature in Sinnott-Armstrong's example – the gratifyingness of the consequences that flow from the promisor's violation of his duty – is not fully paralleled in the tort lawyers' scenario. Though it turns out that the pedestrian is better off than she would have been if the motorist had not driven into her, she has suffered injuries that are almost certainly much more serious than the inconvenience occasioned by the breaking of a promise to meet for lunch. Thus, although the gravity of the wrong committed by the motorist is extenuated by the favorableness of the ultimate outcome for the pedestrian, it is not extenuated by an absence of culpability and is likewise not extenuated by a very low level of any detriment at all. In these circumstances, the need for some remedies is evident. Especially if the driving was malicious, the motorist is morally obligated to undergo some sort of punishment (perhaps a fine or perhaps some sterner measure). The motorist is also morally obligated to apologize for his misconduct, and to provide compensation for the pedestrian's wounds. To be sure, because of the exceedingly unusual upshot of the motorist's misbehavior, the compensation morally due to the pedestrian might well exclude certain items that would normally be compensable (such as her lost earnings, if any). Nevertheless, at the very least the motorist will be morally required to pay compensation for his victim's pain and distress. As we would expect, then, the differences between the scenario of the commendable promisor and the scenario of the blameworthy motorist are reflected in a large disparity between the remedies due in the one case and the remedies due in the

other. Still, in a key respect the scenarios are fundamentally similar. In each case there has been a transgression of a moral duty, and in each case the transgressor of the duty is morally required to remedy the resultant situation. Factors present in the scenario of the promisor – and absent from the scenario of the motorist – greatly extenuate the breaking of the promise but do not eliminate entirely its nature as a breach of a moral duty. An acknowledgment of the occurrence of a wrong against the promisee is essential for a reaffirmation of her moral status, even though the fact that the wrong has proved to be hugely beneficial for her will sharply attenuate the extent of what is required for that reaffirmation. In this basic respect, the tale of the promisor is like the tale of the motorist in being crucially divergent from any scenario in which there has been no infringement of a moral duty. Dissimilarities between those two tales center on the degree to which the infringement in each has been mitigated, rather than on the questions whether an infringement in each case has occurred and whether a remedy of *some* sort is obligatory.

Let us move on to an example devised by Philippa Foot. In an important essay published more than two decades ago, she has conjured up a situation largely similar to the one imagined by Sinnott-Armstrong.[22] Somebody has promised to meet somebody else for lunch, but must instead rush an accident victim to a hospital. There is no opportunity for the promisor to alert the promisee to his inability to keep their appointment. All the same, the promisee does not suffer any sense of frustration, for she meets her future spouse (or someone who offers her a splendid job) just as she is starting to wait. Having sketched this chain of events in which "things turn out splendidly all around," Foot is initially intent simply on emphasizing that feelings of remorse on the part of the promisor would be out of place. "Are we to say that...in the general rejoicing there should be an element of distress (moral distress) because after all a promise was broken and that is something bad, and therefore regrettable".[23] As has already been indicated in my remarks on Sinnott-Armstrong's example, Foot's rhetorical question is wholly unexceptionable. Foot is correct in submitting that the promisor is in no way morally required to experience a sense of remorse for what he has done. Such a remedy would be quite unsuitable. However, having made this germane point, Foot slightly later adverts to a variant of her example in order to advance some bolder claims. Her pronouncements should be quoted at some length here, partly because they echo a bit of Hart's language and partly because they address the distinction between mitigation and exoneration:

«[T]here is an imputation against which not only physical or mental but also moral necessity is a shield. How can this be denied? There is a clear place for the

[22] Philippa Foot, "Moral Realism and Moral Dilemma," 80 *Journal of Philosophy* 379, 387 (1983) [hereinafter cited as Foot, "Realism"].
[23] Foot, "Realism," 387.

plea `I couldn't help it' (couldn't help breaking the promise because I had to attend to the accident victim, and so on). Nor does this plea simply plead mitigation, as if the offense of breaking the promise was merely lessened. If you suffer because I cannot get to the appointment I have with you, I say that I am sorry, meaning that I regret it; but if it was not my fault I do not apologize, and I certainly do not have to "make restitution" as some have suggested. If I *can't* keep the appointment it isn't my fault that you suffer, and it doesn't make any difference whether the necessity of breaking the promise was physical, mental, or moral.»[24]

Insightful though Foot's essay is in most other respects, this passage is misconceived. As Judith Jarvis Thomson has pungently commented: "This [passage] sounds remarkably cavalier to me. Can she really believe that *she* may at will make others pay the full costs of her altruism."[25]

Let us first consider what Foot says about restitution. On that topic, Thomson again supplies a pertinent observation: "But perhaps [Foot] is thinking of what is most common where an appointment is broken: the victim suffers only inconvenience, for which it is hard even to imagine what restitution would consist in."[26] In other words, Foot is doubtless correct about restitution but only because it is a remedy that is manifestly out of place in this context. Unless we stretch the notion of restitution to encompass virtually every other remedy – that is, unless we construe Foot's phrase "make restitution" as if it were "make amends" – we shall be hard pressed to understand how anyone could suggest that restitution is an appropriate means of rectifying a failure to keep a luncheon engagement. On that specific point, no one has ever seriously espoused the view which Foot is contesting.

Compensation is a more plausible remedy, but in most situations of broken engagements it will not be obligatory. If the inconvenience incurred by the promisee is substantial, however, some compensation (perhaps in the form of a gift such as flowers or candy) might very well be morally required. Yet, under many circumstances, the sole obligatory remedy for a broken luncheon engagement is an apology accompanied by an explanation. It is precisely in connection with such a remedy that Foot's remarks are so puzzling. To be sure, her remarks would be sensible if it were true that an apology perforce amounts to an admission of culpability. In the circumstances envisaged, in which a promise to meet for lunch has gone unfulfilled because the promisor has had to rush somebody to a hospital, he has behaved admirably rather than culpably. He has patently not been malicious or knowingly indifferent or reckless or careless. Hence, if an

[24] Foot, "Realism," 388-89, emphasis in original.
[25] Thomson, *Realm*, 100 n.12, emphasis in original.
[26] Thomson, *Realm*, 100 n.12.

apology were inevitably an expression of contrition for wrongful conduct, no such remedy would be apt in the situation which Foot sketches. In fact, however, an apology plays a quite different role in such a situation, where a wrong has been committed without wrongfulness. In a context of that kind, an apology serves as an acknowledgment that a duty owed by oneself to somebody else has been breached – even though the breaching was morally optimal and entirely well-intentioned. In the absence of an apology in Foot's example, as has already been argued, no adequate respect would be paid to the status of the promisee as someone who held a right that has been infringed; the promisee's right would in effect be entirely ignored. The ascribability of the infringement to a pressing emergency will have mitigated the extent of the requisite remedy (which can be a mere formality), but will not have done away with the need for a remedy completely.

Foot appears not to distinguish sufficiently between wrongness or impermissibility and wrongfulness or culpability. Both in the long quoted passage and in the accompanying parts of her essay, she repeatedly indicates that she is concentrating on the faultiness or the lack of faultiness of the promisor's conduct. While insisting correctly that the promisor is not at fault (that is, not culpable), she believes incorrectly that she has thereby established that his conduct gives rise to no remedial obligations whatsoever. Despite behaving nonculpably and indeed laudably, the promisor has committed a moral wrong in that he has failed to fulfill a moral duty which he owed to the promisee. That moral wrong, heavily extenuated though it is by the crisis that prompted it, must be rectified if the promisee's standing as a right-holder is to be shown due esteem. The absence of faultiness in the promisor's conduct will enormously affect the extent and nature of the required remedy, but will not affect its sheer status as something that is indeed required.

In the principal passage quoted above, Foot draws an unexplicated and quite elusive distinction between saying that one is sorry and apologizing. She apparently has in mind a division between the sort of consternation that should be expressed by a mere bystander and the sort of consternation that should be expressed by someone who is culpably responsible for harm to another person. Again, however, she is eliding the difference between responsibility and culpability. It is true that the promisor in her example has not behaved culpably, but it is not true that his position is morally equivalent to that of a mere bystander; unlike the bystander, he has failed to carry out a duty which he owed to someone else. Foot's verdict in the long quotation above is especially curious because her rehashing of her scenario of the promisor allows that the breaking of the luncheon engagement may have significantly inconvenienced the promisee. Given that the promisee may have suffered considerable hardships, the notion that the promisor has no obligation to apologize for the nonfulfillment of his duty is decidedly odd. Quite fitting is Thomson's harsh comment about the chilly hauteur

of a Footian rescuer who does not deign to take account of the costs which his altruism imposes on others.

Let us move on to a clever example put forward by Simon Blackburn, who endeavors to reveal that moral remedies are sometimes required in circumstances where no wrongs have been perpetrated.[27] He posits a situation in which he needs to use a chain saw and in which Alice has offered hers and Bertha has offered hers. He opts to use Alice's saw. Having accepted Alice's offer, Blackburn contends, he owes Bertha "some friendly overture to show that I took her offer seriously, that I had no particular preference for Alice, and so on....At the very least I have to show that I appreciated her offer." He then draws his conclusion: "[I]t is sometimes argued that the need for reparation or apology to a side whose interests are not met after a dilemma shows that a genuine [moral] requirement has been violated. Here I simply point out that the phenomenon is more widespread, for similar apology and even reparation may be in order when no requirements have been violated."[28] What Blackburn in effect is challenging here is the biconditionality of the Remedy Principle*. Even if that principle is correct in declaring that every breach of a moral duty will give rise to remedial obligations, it might be wrong in declaring that every occurrence of remedial obligations will have ensued from a breach of a moral duty. Blackburn in effect is assailing the Remedy Principle* on precisely that point.

Fortunately, Blackburn's example fails to clinch his challenge. Let us presume that his assurances to Bertha are felicitous. Then, either they are an obligatory apology, in which case they rectify a moral wrong; or they are merely an expression of gratitude and friendship, in which case they are not a moral remedy and are not proffered in the context of any moral wrong. The first of these two possibilities can be actual in some circumstances. For example, Blackburn may have promised Bertha that he would accept her chain saw. In that event, his decision to reject the saw in favor of Alice's is a breach of a promissory duty.

[27] Simon Blackburn, "Dilemmas: Dithering, Plumping, and Grief," in Mason, *Dilemmas* [hereinafter cited as Blackburn, "Dilemmas"], 127, 131-32. In addition to the example which I discuss in the text, Blackburn offers an example that involves the comforting of a lad by a coach who has not selected the lad for some team. See *ibid*., at 135-36. My approach to this latter example would be essentially the same as my approach to the example of Alice and Bertha. However, instead of distinguishing between apologies (or other moral remedies) and expressions of gratitude – the appropriate dichotomy for my analysis of the situation concerning Alice and Bertha – I would distinguish between apologies (or other moral remedies) and expressions of encouragement and solace. Like expressions of gratitude, expressions of encouragement and solace do not in themselves constitute any acknowledgment of wrongdoing.

[28] Blackburn, "Dilemmas," 131-32.

Or, even in the absence of a promise, he may have had good grounds for believing that Bertha would be seriously offended if he were to decline her chain saw. His snubbing of her might then be a minor wrong and consequently call for a mild apology.

Of course, on the basis of the facts of which we are apprised, we cannot say with certitude whether Blackburn has owed Bertha a duty in the circumstances just adumbrated. We would have to know more about the reasonableness of the grounds for her strong hope or expectation that he would take her chain saw in preference to Alice's. The sheer strength of her hope or expectation is not necessarily determinative. After all, if Bertha has fervently hoped that Blackburn will propose marriage to her, that fact alone does not obligate him to do so. Only if he has culpably encouraged her fervent hopes, will he have placed himself under a duty to satisfy them. We need to know whether any comparable element of culpability is present in the scenario of the chain saws, before we can judge with confidence whether Blackburn has been under an obligation to select Bertha's saw or not.

Naturally, if Blackburn has been under an obligation to Bertha, he may also have been under an obligation to Alice (perhaps because he has promised to take her chain saw, or perhaps because he has encouraged her hopes in some other way). If he is indeed under an obligation to each of the two ladies, and if he is not able to take more than one of the chain saws, then he confronts a situation of conflicting obligations. Whichever chain saw he selects, he will be committing a wrong against the person whose saw he has not accepted. In such a situation of moral conflict, the wrong undertaken will be extenuated by the fact that the commission of it is necessary for the avoidance of another wrong. Nevertheless, although extenuated, the nonfulfillment of a moral duty engenders a remedial obligation. To comply with that latter obligation, Blackburn will have to apologize to the lady whose chain saw he has declined.

More likely, however, is that the selection of Alice's saw by Blackburn has not amounted to the commission of a moral wrong against Bertha. If so, then no apology is required. Nonetheless, he still might be obligated to utter soothing words to Bertha. In such a situation, the obligatory assurances are not an apology but are instead an expression of gratitude. Instead of being morally required to say something along the lines of "I apologize for the wrong which I have done to you," Blackburn will be morally required to say something along the lines of "I'm very grateful for your generosity, but I can only take one chain saw, and I have opted to take Alice's." The key point here lies in what was observed earlier about the nature of moral remedies. Any such remedy is a way of acknowledging that one has done something impermissible. An obligatory expression of gratitude involves no such acknowledgment, for there has been no impermissible thing done. Instead, such an expression makes clear one's awareness of the generosity of someone else, and it conveys one's favorable reaction to that generosity – a reaction that can be sincerely felt even when, as in Blackburn's scenario,

one elects not to take advantage of the generosity. An assurance of one's appreciation, which does not involve any intimation that one has acted wrongly in declining an offer, is singularly appropriate for a context in which the declining of the offer is indeed not wrong. An apology, which would indicate that one has acted impermissibly, would be inappropriate for such a context. No wrong, no remedy.

In short, the message of Blackburn's thought-provoking example is markedly different from what his discussion of the example implies. Blackburn appears to think that, in scenarios like the one which he concocts, we can always unproblematically distinguish between the presence and the absence of moral requirements. He similarly appears to think that we can always distinguish unproblematically between apologies and expressions of gratitude. After all, in the passages quoted above, his prime contention is that his scenario reveals the obligatoriness of an apology in a situation where no moral duty has been breached. The true lesson to be derived from his little narrative is in a contrary direction. What the narrative discloses is that we cannot always tell straightforwardly whether a duty has been breached or not. There is a gray area of borderline cases. We therefore cannot always tell straightforwardly whether an apology or an expression of gratitude is due. Indeed, if we were to listen to the soothing words uttered to Bertha, we might not be able to determine unequivocally whether they constitute an apology or an expression of gratitude. Like the extension of any philosophical distinction, then, the extension of the distinction between apologies and expressions of gratitude is subject to vagueness. Over a certain range of cases, that extension is not clear-cut. A healthy alertness to the existence of those borderline cases is what we can gain from musing on Blackburn's valuable example. At the same time, any such alertness should be combined with a clear-eyed awareness that – in situations like that of Alice and Bertha and Blackburn – an apology is due whenever a moral duty has been breached, and a mere expression of gratitude is due when no moral duty has been breached. Though the concrete question whether a transgression of a moral duty has occurred is not always susceptible to an unequivocal answer, we can always give an unequivocally affirmative answer to the more abstract question whether a moral remedy will be due when and only when a transgression has occurred.

4. A fourth major objection that might be mounted against the Remedy Principle would highlight the fact that any remedial obligation envisaged by that principle is owed to the holder of the right that has been violated. What should we think about a situation in which the violation consists in a murder? Is the remedial obligation owed to a dead person? Indeed, some critics would balk even at the notion that a remedial obligation can be owed to the victim of an assault who has been left comatose. Are only some types of rights-violations covered by the Remedy Principle?

As was suggested near the outset of my discussion of the Remedy Principle, either of two responses to these questions is sufficient for my purposes. In many ways, the better response is to deny the premises that underlie the questions. I have argued elsewhere that dead people and comatose people are potential holders of moral and legal rights.[29] In light of those arguments and in light of the Interest Theory of rights which underpins them, a proponent of the Remedy Principle should feel no embarrassment about that principle's countenancing of the possibility of nonstandard right-holders. If dead people and comatose people can indeed hold moral rights, then the Remedy Principle is correct in implying that dead or comatose victims of attacks hold moral rights that are correlative to some of the remedial obligations of their attackers.

Still, as was stated earlier, the main lines of argument in this essay can be detached from any embroilment in the controversies over the Interest Theory and the Will Theory of rights. While blenching from the notion that dead or comatose people can hold rights, the advocates of the Will Theory can nonetheless embrace a pertinently reformulated Remedy Principle*. A reformulation satisfactory to such theorists would remove the principle's current indication that all obligations (in particular, all remedial obligations) are correlated with rights. Revised in that fashion, the Remedy Principle* would then announce simply that *Y* is under a moral duty to φ if and only if *Y*'s not φ-ing will place *Y* under a moral obligation to remedy the resultant situation in some way. Furthermore, any Will Theorist could retain my own favored wording of the Remedy Principle* as a formulation that specifically covers all cases involving moral duties that are correlated with rights. With that original principle and the broader revised principle in hand, a Will Theorist can endorse every line of reasoning in this article (perhaps with some terminological alterations here and there). Hence, although the Remedy Principle and the Remedy Principle* as currently worded are indeed expressive of my allegiance to the Interest Theory of rights, their betokening of that allegiance is a dispensable feature.

B. *No Right without a Remedy*

Legal theorists have often submitted that legal rights are invariably connected to remedies. "No right without a remedy" or "No remedy, no right" is a maxim frequently bandied about by jurisprudential writers.[30] Such a maxim, however, is too sweeping in application to legal rights. Contrariwise, as a bit of reflection on the Remedy Principle reveals, the "no right without a remedy" apothegm is true in application to moral rights. In other words, although legal rights are often

[29] Kramer, "Rights," 32; Kramer, "Getting," 29-31, 48-52.
[30] See, e.g., Karl Llewellyn, "Some Realism about Realism – Responding to Dean Pound," 44 *Harvard Law Review* 1222, 1244 (1931).

thought to be indissolubly linked to remedies, and although moral rights are often thought to be disseverable from remedies, the truth is precisely the reverse. Let us briefly probe this divergence between legal rights and moral rights, and ponder why it exists.

As I have argued elsewhere,[31] some legal duties are purely nominal in that the legal mandates which establish them do not provide for any means of giving effect to them. Although the requirements articulated in those mandates instruct people to act or refrain from acting in specified ways, the instructions receive no backing whatsoever from any legally authorized penalties or punishments. Existing solely as formulations, nominal duties imposed by those mandates are not only unenforced but also unenforceable. The potential for the emergence of nominal duties within the law is attributable to the practice of articulating the law's requirements in written or spoken formulations. Such a practice is operative in every legal system, though its specifics of course differ from system to system. Because all or some of the law's demands are presented in written or spoken formulations, gaps can arise between the demands that are expressed and the demands for which legal remedies are available. If no legal remedies are available at all for breaches of certain expressed requirements – that is, if legal remedies are wholly unprovided for rather than simply unused – then the legal requirements in question are purely nominal. The legal norms which lay down those requirements are thereby imposing legal duties and conferring legal rights that are not linked to any legal remedies whatsoever.

Within conventional or positive morality – that is, within the domain of moral precepts that emerge and obtain as such by dint of being widely accepted – there is similarly a potential for nominal duties. Because some or all of the requirements of conventional morality are set forth in written or spoken formulations, there can arise gaps between the duties articulated in those formulations and the duties of which any breaches will give rise to remedial obligations (within conventional morality). Some duties in the former sense might not be duties in the latter sense.

Things are quite different within the domain of critical or transcendent morality. Within that domain – that is, within the domain of moral norms whose status as binding mandates does not depend on their acceptance among the people to whom they apply – there is no room for nominal duties. Precisely because the norms of critical morality are always independent of conventional formulations, they do not give rise to duties that exist only as formulations. If a critical-moral duty does not exist in a formulation-independent mode, it does not exist at all. The formulation-independent mode in which any such duty exists, of course, is

[31] Kramer, "Getting," 65-78.

its standing as a requirement that will generate remedial obligations if it goes unfulfilled. Duties in the domain of critical morality are integrally and invariably connected to remedial obligations, whereas duties whose existence is not inherently formulation-independent (namely, duties in domains such as law and conventional morality) are disjoinable from remedial obligations.

Throughout this essay, except where explicitly stated otherwise, my references to obligations and rights are references to critical-moral obligations and rights. The Remedy Principle and Remedy Principle* are explications of just such rights and obligations. What those principles are designed to capture is the stark vacuity of the notion of a moral right or duty that does not engender remedial obligations in the event of its being infringed. If someone is morally obligated to do *x*, and if his abstention from doing *x* will not impose any remedial duties upon him, then what exactly does his being obligated-to-do-*x* consist in? It cannot consist in a purely nominal state of requiredness, since the relevant norms of critical morality apply as such without ever having been articulated in writing or speech. What, then, would his being obligated-to-do-*x* consist in, if its nature is not encapsulated by the Remedy Principle*? The lack of any minimally satisfactory answer to this question is what vindicates that principle. (Obviously, nothing said here is meant to imply that the contents of the norms of critical morality will perforce remain unarticulated as guides to behavior. On the contrary, it is overwhelmingly likely that some such norms will be formulated as precepts of conventional morality in virtually every society. However, the bearings of those norms as mandates of critical morality are never derivative of their having been formulated and endorsed as mandates of conventional morality. Accordingly, when we ask what some state of moral obligatedness would be if it were not a state that engenders remedial duties in the manner outlined by the Remedy Principle*, we cannot fall back on the answer that it might exist simply in the form of a pronouncement. Any state of critical-moral obligatedness is independent of every pronouncement of conventional morality, and is therefore never reducible to any such pronouncement.)

C. *Strict Liability in Morality*

During my discussion of the Remedy Principle and Remedy Principle*, we have pondered some instances of wrongs without wrongfulness. We shall now study a more extended example that can underscore the unsustainability of Hart's belief in the fully exonerative effect of impeccable precautions.

Suppose that George is tried in a criminal court for a serious crime which he has not in fact perpetrated or attempted to perpetrate. The evidence against him is compelling, as reliable witnesses testify in good faith that they saw him perform the misdeed for which he has been charged. Various other items of evidence all militate in favor of a conviction. Thus, although the court abides scrupulously by all relevant requirements of procedural fairness, and although George is provided

with ample opportunities to rebut the incriminating evidence if he can come up with contrary evidence, the decision of the court ultimately goes against him. He is convicted for a crime which he never carried out. He is sentenced to prison, where he spends six years. During his time in prison, he suffers no ill treatment at the hands of the officials or his fellow inmates; but, of course, he is deprived of his general liberty throughout the period of his detention. At the end of six years, some suitable exculpatory evidence becomes available. (Perhaps technological developments have made possible the discovery of his innocence through new forensic techniques, or perhaps the genuine culprit has confessed, or perhaps a previously reluctant witness has come forward to attest cogently to George's innocence. The precise factor behind the unearthing of his innocence is immaterial for my purposes.) With his conviction quashed, George is released from prison.

What should be done to George, according to tenable standards of morality? Should the authorities in the jail simply supply him with his belongings and direct him to the exit, and should that be an end of the matter? Should no further steps be taken? Or is some moral remedy – some measure acknowledging the wrongness of his long detention in prison – obligatory in the circumstances? Without seeking to pin down exactly what the authorities in the criminal-justice system are morally required to do in order to remedy George's situation, I shall take as given that at the very least they are morally required to extend a formal apology. Were no such measure to be taken, George would be thoroughly justified in feeling aggrieved. The wrong already done to him would be compounded by the nonfulfillment of the remedial obligations that are owed to him.

Yet, although a moral wrong has been committed against George, and although a moral remedy is therefore obligatory, the officials in the criminal-justice system have behaved impeccably. A formal apology to George will constitute an acknowledgment of the wrongness of his having been imprisoned for so long, but it will not carry any suggestion of wrongfulness. No official at his trial or in the prison has acted maliciously or recklessly or carelessly toward him. His trial was conducted with meticulous fairness, and his incarceration was the result of that fastidiously careful trial where the verdict was reached in accordance with the mass of evidence against him. The deprivation of his general freedom for several years was impermissible but not culpable. It was impermissible in that it has morally obligated the authorities in the criminal-justice system to make amends appropriately (at least by apologizing and probably also by taking further steps that will repair the contravention of his moral right-against-being-lengthily-confined-for-any-crime-which-he-has-not-committed). It was not culpable, however, in that it ensued from the workings of institutions that adhered scrupulously to all pertinent procedural safeguards. Contrary to what Hart maintained, then, worthwhile actions or activities can trigger moral liability even if the people engaging in them have exercised all reasonably attainable precau-

tions. Contrary to what he affirmed, "ought" does not imply "can." The organizations that operate the criminal-justice system have breached a moral duty through the lengthy incarceration of George, even though their operations which failed in that respect were impeccably careful.

To be sure, the remedial obligations that have descended upon the aforementioned organizations are clearly affected by the impeccableness of the procedural safeguards that attended the processes whereby George was imprisoned. However, the effect is to extenuate the wrong done to him, rather than to remove it altogether. The requisite remedies would be much stiffer if the internment of George had stemmed from malice or knowing indifference or recklessness or carelessness. Because none of those culpability-producing factors was present, the measures required for remedying the situation will be relatively light. Nonetheless, some measures are indeed required; extenuation is not exoneration. At the very least, an authoritative apology is due. After all, an innocent man has been deprived of his general liberty for six years.

The requisite apology will be more than simply an expression of solicitous consternation, for an expression of the latter sort is not an acknowledgment of the commission of a wrong by oneself and is therefore something that could just as aptly be uttered by an uninvolved observer. Nor, of course, will the requisite apology be simply an expression of encouragement and consolation. Again, such an expression, which might for example be offered to a lad who has suffered the disappointment of failing to land a place on his school's basketball team, is not an acknowledgment of any wrongdoing. An apology accepts responsibility for a certain state of affairs or chain of events, and admits that that state of affairs or chain of events is wrong. It admits, in other words, that one's treatment of somebody else has fallen short of minimally acceptable standards. Though the falling short may be heavily extenuated by one's having adopted all reasonable precautions or by one's having had to avert an even worse outcome, it remains a falling short. As such, it calls for a moral remedy or a set of moral remedies. An apology concedes as much, without denying the possible existence and weightiness of some mitigating considerations.

In the scenario of George and the criminal-justice system, a moral remedy in the form of an authoritative apology is morally obligatory. Further moral remedies may also be morally obligatory. What exactly is being remedied? One cannot very plausibly maintain that the sheer fact of the arrest of George for a crime which he had not perpetrated was sufficient to impose remedial obligations on the officials and institutions involved.[32] If the arrest was conducted in good faith on solid grounds – as we are assuming – then the moral duties owed to George by the relevant authorities were most likely satisfied at that juncture. Had his in-

[32] It should go without saying that my chief claims in this paragraph are substantive moral contentions rather than conceptual analyses.

nocence quickly become apparent, or had the grounds for detaining him otherwise soon proved to be perceptibly inadequate, then the authorities would of course have been morally duty-bound to release him. However, the duty to release him in those circumstances would not have been a remedial obligation. The release would have averted, rather than remedied, a wrong; it would not have indicated that any wrong (as opposed to a permissible error) had been committed theretofore. No apology or compensation would have been morally required. Much the same can be said in connection with the other early stages of George's ordeal. If exculpatory evidence had come to light during his trial, or if doubts had been raised at that time about the incriminating evidence, then an acquittal and a subsequent release would have been obligatory. However, once again, the acquittal and release would have averted rather than remedied a wrong. What would have been corrected was a permissible mistake, rather than something impermissible for which an apology or some other moral remedy would be required. Yet, as time went on, the continued detention of George shifted from the realm of the permissible to the realm of the impermissible. Certainly by the end of the six years during which he was incarcerated, the loss of his general liberty had become a violation of his moral rights. Obviously, we cannot specify some talismanic moment at which the transformation from the permissible to the impermissible occurred. There was no such moment, just as there is no magical point at which the accumulation of one grain of sand after another will suddenly yield a heap. Still, although a sorites problem like the shift in the moral standing of the treatment of George does not lend itself to the pinpointing of a moment of transition, we can be sure that that transition had taken place well before George had spent his sixth year in jail. By that time, his moral right-against-being-lengthily-imprisoned-when-innocent had unquestionably been infringed.

Now, since the scrupulous fairness of the workings of the criminal-justice system vis-à-vis George did not diminish or disappear during the period of his confinement, some other factor accounted for the change in the moral status of that confinement. Quite plainly, the determinative factor was the seriousness of the impact of the criminal-justice system's operations on George's basic interests. As that impact became more and more severe, the justificatory force (that is, the permissibility-sustaining force) of the impeccableness of the officials' procedures dissipated. We can safely conclude, then, that strict liability in morality is sometimes warranted because of the extent to which the unimpeachably careful actions of people impinge on the well-being or autonomy of other people. As Cane writes, "[i]n some situations, lack of fault seems a less than conclusive response to the harm suffered by a faultless victim."[33]

[33] Cane, *Responsibility*, 107.

However, we should not jump to the conclusion that strict liability in morality is never warranted in the absence of severe hardships for the people to whom remedial obligations are owed. For example, if Oliver is caught in a wholly unforeseeable and unprecedentedly large traffic jam, and if he is consequently unable to keep his promise to meet up with Susan at an appointed time, he is morally obligated to apologize to her. The circumstances heavily extenuate the breaking of the promise, but do not do away completely with the fact that a wrong has been committed against Susan and that a remedy is accordingly required. Yet, notwithstanding the sway of strict liability in such circumstances, the extent of the injury to Susan's well-being or autonomy is slight. We may presume that she has suffered no more than a bit of annoyance and inconvenience. Thus, although the chief message of the scenario of George is as it was stated in my last paragraph, we should not be misled into thinking that any easily isolable factor or set of factors will account for the division between the medley of situations within which strict liability in morality is applicable and the medley of situations within which such liability is not applicable. A thorough investigation of the sundry interacting determinants of that division is beyond the scope of this article, but we at any rate can see that many aspects of people's lives will indeed be covered by the reign of strict liability. Whatever may be the determining factors in this or that context, people will frequently be morally obligated to remedy states of affairs which they could not help bringing about. Once we discriminate carefully between extenuation and exoneration, we can perceive that Hart was wrong to insist that "ought" always implies "can."

III. *Potential Objections*

In the course of the presentation of the Remedy Principle and Remedy Principle*, we have encountered some potential criticisms of my conception of moral rights and duties. We should now come to grips with some further potential objections. An examination of these queries will help to clarify and refine the various lines of argument that have been marshaled hitherto.

A. *Frequently Rather Than Invariably*

Some philosophers, arguing that strict liability is decidedly unattractive, might question whether such liability is ever truly operative in morality. The putative unattractiveness of any rejection of the "ought"-implies-"can" principle is traced to a diversity of considerations by different theorists. For many philosophers, including Hart, the basic intuition that motivates them to subscribe to the "ought"-implies-"can" principle is the sense that it would be unfair to require people to remedy situations which they have striven with assiduous care and earnestness to avoid. That intuition imbues David Ross's remark, for example, that

"[n]o one thinks that he has failed to do his duty if he has done his best, without success, to fulfil his promise."[34] Other philosophers have concentrated on more technical considerations. For instance, Jules Coleman – who admittedly is writing principally about the moral foundations of legal liability rather than about moral liability itself – submits that strict liability is plagued by two major difficulties. It is excessively rigid as a general standard, and it leads to indeterminacy when we seek to apply it to concrete disputes.[35]

To the various arguments against the appealingness of strict liability in morality, three main replies – in an ascending order of importance – are germane. First, concerns about fairness are clearly double-edged at best. If it is unfair that somebody is morally required to remedy a harmful state of affairs which she could not avert despite her best efforts, it would be at least as unfair for someone else to have to bear the whole burden of that unremedied state of affairs. When theorists worry about the harshness of the imposition of remedial obligations on people whose meticulous efforts have come to nought, they tend to overlook the harshness of the imposition of suffering on people who have been detrimentally affected by the failure of those efforts. To be sure, if the detrimental effects of any particular failure are diffusely distributed among members of the general public, then leaving the losses where they lie – without any measures to counteract them – is probably the fairest upshot. A blameless perpetrator of some harm will most likely not be obligated to take steps to undo the harm, if such steps would be costly and if the consequences of the harm are so dispersed as to be virtually imperceptible by any individual affected. To allow as much, however, is simply to accept that the sway of strict liability in morality is limited in its reach (as it of course is). Yet the unwarrantedness of that sway in some settings does not mean that it is unwarranted in all settings. In application to any situation in which someone's impeccably careful conduct goes awry and produces harmful effects that fall upon one person or a small group of people, arguments about the unfairness of strict liability will generally be inconclusive.

[34] W. David Ross, *Foundations of Ethics* (Oxford: Clarendon Press, 1939) [hereinafter cited as Ross, *Foundations*], 108. For a view broadly similar to Ross's, albeit focused more on the guidance-providing and dignity-upholding roles of moral precepts, see Thomas E. Hill, Jr., "Moral Dilemmas, Gaps, and Residues: A Kantian Perspective," in Mason, *Dilemmas* [hereinafter cited as Hill, "Dilemmas"], 167, 175-79. For some much more favorable views of strict liability in morality, see, e.g., Fletcher, "Conditions," 1362-63; Railton, "Diversity," 143-44; Thomson, *Realm*, 171-73, 175.

[35] For the former accusation, see, e.g., Coleman, *Risks*, 316. For the latter accusation, see, e.g., Jules Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001), 47-48.

Second, when we yet again take account of the distinction between extenuation and exoneration, we can see that concerns about fairness are largely misdirected. If the only two alternatives in every context were no remedy at all and a remedy that completely removes any hardships which have been occasioned by someone's faultless nonfulfillment of a moral duty, then the onerousness of such a sweeping remedy would indeed militate (to some degree) against the idea that it is morally obligatory. However, the alternatives are never so restricted. The faultlessness of a person's nonfulfillment of some moral duty is a strong mitigating factor that markedly lessens the extent of the moral remedy which the person will have to undertake in order to rectify what he or she has done. An apology might well be the sole remedy that is due, and an apology is not terribly burdensome for anyone (save perhaps in extreme circumstances of mutual antipathy between people). As was observed earlier, the Remedy Principle and Remedy Principle* leave open the substance and expansiveness of the moral remedy that is requisite in any particular case. Among the factors which bear on that substance and that expansiveness, the culpability or lack of culpability in a person's conduct is of particular importance. Though a wrong committed in the course of impeccably earnest striving is still a wrong, its lack of wrongfulness will have reduced significantly the extent of the remedy that is sufficient for the proper making of amends. As a result, the fairness-based objection to a standard of strict liability is easily accommodated and defused by such a standard. Any apprehension animating that objection should dissipate when one remembers the role of extenuative factors in the adjustment of remedial obligations. Given that role, the required remedy for any moral wrong will be set in accordance with the demands of fairness rather than athwart them.

Third and most important is a point that has emerged already to some degree in the preceding points. One's affirmation of the possibility and actuality of strict liability in morality is perfectly compatible with one's recognition of the frequent inappropriateness of such liability. As Sinnott-Armstrong has remarked, "[t]hose who deny that `ought' implies `can' can admit that `cannot' is sometimes a reason to deny `ought.'"[36] There are plainly many circumstances in which the earnest diligence of people's precautions is exonerative rather than merely extenuative. In any such circumstances, it is not the case that the infliction of harm by one person on another is an excusable breach of a moral duty. Rather, if the facts are such that the faultlessness of the person who has inflicted the harm is exonerative, there has not been any transgression of a moral duty at all. Hence, there is no occasion for an excuse. As has already been declared, there are no excuses in the domain of morality; when an absence of culpability does not simply mitigate a breach of a moral duty, it averts such a breach and thereby obviates the need for any remedy.

[36] Sinnott-Armstrong, *Dilemmas*, 115.

An example of a situation not characterized by strict liability has already surfaced in this article. If policemen arrest George for some crime on the basis of solidly persuasive evidence, then, even if he has not actually committed the crime, they have not violated any duty owed to him. They are not morally obligated to apologize to him or to pay him any compensation. The relevant duty which they have owed to him is not a duty to forbear from arresting him for any crime which he has not carried out or attempted. Rather, the relevant duty is to exercise scrupulous care and good faith in assessing any evidence that might lead to an arrest and in executing any arrest itself. In common language, their duty is a duty of care rather than a duty of outright avoidance. If their meticulous efforts eventuate in the arrest of George for an offense which he has not perpetrated, they have not pro tanto committed any wrong against him.

The very coherence of the idea of a duty of care has recently come under challenge by Heidi Hurd in a piquant essay. She asserts that "[i]t literally makes no sense to maintain that an action is justified if and only if the actor reasonably believes that the action is justified."[37] Now, although the proposition contested by Hurd is excessively sweeping as a general thesis, it is not incoherent if it is suitably construed. Hurd contends that that proposition falls prey to vicious circularity: "[F]or an actor to believe that an action is justified, he has to have a theory about when an action is justified, and on pain of circularity, that theory cannot consist solely of the formula that an action is justified if the actor believes that it is justified."[38] The vicious circularity detected here by Hurd is escapable if we adopt a more generous approach to the thesis that an action is justified if and only if the actor reasonably believes that it is justified. Such a thesis so formulated is coherent – even though it is far too sweeping – if the first instance and only the first instance of "justified" means "permissible in light of all the relevant facts including the actor's reasonable ignorance of some of those facts (when the actor is indeed reasonably ignorant of some of those facts)," and if the second instance and only the second instance of "justified" means "permissible in light of all the relevant facts known to the actor."[39] So construed, the thesis does not run afoul of vicious circularity. Of course, to say as much is not to endorse that thesis, which disregards the myriad situations where strict liability

[37] Hurd, "Justification," 1559.
[38] Hurd, "Justification," 1559.
[39] Under this construal of the statement that an action is justified if and only if the actor reasonably believes that it is justified, the qualifier "reasonably" attaches not only to the actor's drawing of inferences from the known facts but also to his being unaware of other relevant facts. An otherwise impermissible action will never be rendered permissible if the choice made by the actor is based on an unreasonably circumscribed grasp of the situation confronting him.

prevails in the moral realm. Given that this article has endeavored to highlight just such situations, any proclamation that disregards them in a blanket fashion is bound to be condemned here as erroneous. Nevertheless, if we are to reject the proposition which Hurd impugns, we should reject it for the right reasons. Although patently overbroad in implying that the impeccable circumspection of a person's beliefs and intentions is always fully exonerative – and in consequently ignoring the countless contexts within which such circumspection is merely extenuative – the aforementioned proposition is correct in implying that the impeccable circumspection of a person's beliefs and intentions is sometimes fully exonerative. Sometimes the only relevant duty owed is a duty to exercise reasonable care. Hurd errs in thinking that there is anything conceptually dubious in the postulation of such a duty.

She seeks to sustain her attack with another line of argument, which should be quoted here at some length:

«[F]or an actor to *reasonably* believe that an action is justified, his beliefs must approach truth about the matter. There thus must be a truth about the matter separate from his beliefs about it. We cannot assess whether a person reasonably inferred from the evidence available to him that he would do no wrong without a nonepistemic theory of wrongdoing. For evidence is only evidence if it is evidence of *something*. We can only inquire into whether a person reasonably believed that a killing was justified if we have a theory of the conditions under which it is wrong to kill and can assess the evidence available to him concerning the existence of those conditions in light of that theory.»[40]

This additional strand of argument by Hurd is no more successful than her first strand, for it is subject to rebuttal in essentially the same way. We should readily accept that the reasonableness of a person's beliefs will hinge on his having acquired them through processes or sources that are normally reliable, and we should likewise accept that the reliability of those processes or sources will hinge on their generally leading to the truth about the matters to which they pertain. We should accordingly also happily grant that any adequate judgment about the reasonableness of a person's beliefs must rely on presuppositions concerning the objective facts to which the beliefs pertain. However, all of these points are consistent with the truth of the proposition which Hurd is assailing – the proposition that an action is justified if and only if the actor reasonably believes that it is justified – so long as we interpret that proposition in the manner advocated above. That is, so long as we construe each instance of "justified" along the lines suggested above, the thesis under assault from Hurd has preserved rather than elided the division between what is the case and what is believed to be the case. Wholly unproblematic, then, is the reliance of that thesis on presuppositions concerning whether particular actions are justified or not as objective matters of fact.

[40] Hurd, "Justification," 1559, emphases in original.

Likewise unproblematic, therefore, is the idea of a duty of care. A person's actions are sometimes permissible precisely because they are undertaken with sedulous care. Though many moral duties require success on pain of strict liability, some other such duties require no more than an absence of culpability (that is, an absence of malice or knowing indifference or recklessness or carelessness).

B. *Permissibility and Cases of Desperation*

In response to examples such as my scenario of George's imprisonment, some theorists might seek to invoke a distinction developed by Thomson and by Joel Feinberg: the distinction between infringements and violations.[41] Under the terms of that distinction, all violations are infringements, but not all infringements are violations. An infringement occurs when someone has a right that *p* be the case – where "*p*" designates some proposition – and someone else causes *p* to be false. For example, if Henry has a right that Ron not bang him in the nose, then Ron infringes the right if he bangs Henry in the nose. A violation is a culpable infringement. If Ron's banging of Henry's nose is attributable to malice or recklessness or carelessness, then the infringement of Henry's right is a violation thereof. Contrariwise, if the banging occurs despite Ron's careful efforts to avoid it, the infringement is a mere infringement.

Proponents of the infringement/violation dichotomy generally maintain that mere infringements are permissible. Only violations are impermissible. In other words, these philosophers take culpability to be a necessary condition for impermissibility and thus for wrongdoing. Now, in light of the distinctions drawn in this essay, such a view should plainly be eschewed as a conflation of wrongness and wrongfulness. Although wrongfulness is sometimes a necessary condition for wrongness (if the duty owed is a duty of care rather than a duty of outright avoidance), it frequently is not. Strict liability is often the operative standard in morality. Nonetheless, we should not simply brush aside the infringement/violation dichotomy. For one thing, that dichotomy will salutarily elicit here a clarification of the notion of permissibility, which this article has not really elucidated so far. Moreover, as will be perceived shortly, some situations –

[41] See Judith Jarvis Thomson, *Rights, Restitution, and Risk* (Cambridge, MA: Harvard University Press, 1986) [hereinafter cited as Thomson, *Restitution*], chaps 3-5; Thomson, *Realm*, 122; Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980) [hereinafter cited as Feinberg, *Rights*], 229-32. See also Cane, *Responsibility*, 107; Coleman, *Risks*, 282-83, 299-302; Fletcher, "Right," 977; George Fletcher, "The Nature of Justification," in Stephen Shute, John Gardner, and Jeremy Horder (eds), *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), 175, 177; McConnell, "Residue," 42; Sinnott-Armstrong, *Dilemmas*, 51-52.

in which people act out of desperation – can seem to vindicate the infringement/violation dichotomy as it has heretofore been understood. An exploration of those situations will reinforce my analyses of moral rights and duties by adding a layer of complexity to them.

1. *Two Conceptions of Permissibility*

Permissibility and wrongness are contradictories. An action or a state of affairs is permissible if and only if it is not wrong. Furthermore, under my analysis of moral rights and duties, an action is wrong (impermissible) for some person if and only if the performance of that action by that person will obligate him or her to remedy the resultant situation in some way. Given such an analysis, the notion that infringements are permissible is patently untenable. Everyone agrees that mere infringements – if they are indeed genuine infringements, rather than the ostensible infringements which we shall investigate presently – give rise to remedial obligations. From my analysis of moral rights and duties, then, it follows that mere infringements as well as violations are impermissible. Such a conclusion is correct, as will be argued below; however, when we probe a bit more deeply into the notion of permissibility, we can discern a respect in which the champions of the infringement/violation distinction are also correct. The correctness of their position in that respect can readily be conceded here, since it will cast no doubt whatsoever on my own analyses.

If some person *X* is permitted to perform some action *q*, then *X* is not obligated to not perform *q*. (To avoid any ambiguities in my prose, my placement of "not" in several of the sentences in this discussion will create some ugly split infinitives.) So much is clear, but we need now to take account of two ways in which someone can be morally obligated to do or not do something. The pertinent distinction here is between overtopping and non-overtopping obligations.[42] An overtopping moral requirement exceeds in importance all the moral requirements that run contrary to it, or is unopposed by any countervailing moral requirements. A non-overtopping moral requirement *R* does not exceed in importance all the moral requirements that run contrary to it. (Any competing moral requirements might be equal in importance to *R*, or they might exceed it in importance, or they might be insusceptible to any determinate comparisons with it because of problems of incommensurability.) With reference to these two broad types of obligations, we can apprehend two broad types of permissibility. Firstly, in affirming that some person *X* is permitted to perform some action *q*, we might

[42] Some very closely related distinctions are brought to the fore in an illuminatingly perspicacious and sustained fashion in Sinnott-Armstrong, *Dilemmas*. Although the term "overriding" is much more common than "overtopping" in discussions of these matters, I disfavor the former term because it conveys the impression that less important duties are eliminated or canceled in conflicts with more important duties.

be maintaining that X is not under any overtopping obligation to not perform q. Such a claim is consistent with the possibility that X is under a non-overtopping obligation to not perform q. Secondly, we might instead be maintaining that X is neither under an overtopping obligation nor under a non-overtopping obligation to not perform q. Let us designate the first of these two types of permissibility as "weak permissibility," and the second as "strong permissibility."

Throughout this essay, I have invoked the notion of permissibility in the strong sense. My arguments have assumed that an action q is impermissible for a person X unless X is not under any obligation at all to not do q. For the purpose of gauging whether any particular course of conduct is impermissible, there has been no attempt in this article to discriminate between situations in which someone is under an overtopping obligation to eschew q and situations in which someone is merely under a non-overtopping obligation to eschew q. Precisely because I have not discriminated between those two kinds of situations, this essay has contended that morally optimal courses of action can be impermissible. If two moral duties clash, and if one exceeds the other in importance, then compliance with the former is a morally optimal but impermissible course of conduct. The moral optimality of such compliance will extenuate but not eliminate the breach of duty involved; it will therefore not eliminate the impermissibility of the compliant course of action. My arguments on this point are sustainable because they rely on the strong conception of permissibility. Were this article instead drawing on the weak conception of permissibility, my arguments about the impermissibility of some morally optimal courses of conduct would be unsound.

By contrast, the proponents of the infringement/violation diremption have typically relied (at least implicitly) on the weak conception of permissibility when submitting that mere infringements of people's rights are permissible. They maintain that, so long as any person X is conducting himself in accordance with all the overtopping moral duties that are incumbent upon him, he is conducting himself permissibly. The fact that he might be contravening a non-overtopping moral duty – for example, by breaking an engagement for lunch in order to go to the aid of a seriously injured pedestrian – is perfectly compatible with the weak permissibility of his course of action. In their repeated affirmations of the permissibility of mere infringements, then, Thomson and Feinberg are not really committing any errors. Instead, they are exhibiting their adherence to a conception of permissibility that diverges from my own conception.

Which conception is to be upheld? Why should this essay's reliance on the strong conception of permissibility be preferred? Clearly, any apposite choice in favor of the strong notion or the weak notion of permissibility will depend on the purposes and foci of one's analyses. For the purposes of my exposition and defense of the Remedy Principle and Remedy Principle*, the strong conception of permissibility is uniquely germane. After all, irrespective of whether a moral duty is overtopping or non-overtopping, any breach of it will give rise to reme-

dial obligations. What the Remedy Principle* declares about the nature of any moral duty is true in application to overtopping and non-overtopping duties alike; thus, a pertinent defense of that principle will advance claims that are true of overtopping and non-overtopping duties alike. Of course, to say as much is not to suggest that the overtopping/non-overtopping distinction plays no role whatsoever in any of my analyses. In my very arguments about the impermissibility of some morally optimal courses of action, I have presupposed the overtopping/non-overtopping dichotomy by maintaining that the fulfillment of an overtopping moral duty is impermissible whenever it conflicts with the fulfillment of a non-overtopping moral duty. Still, the overtopping/non-overtopping dichotomy plays no role in determining whether some course of conduct will count as permissible or not – because it plays no role in determining whether the occurrence of that course of conduct will trigger the imposition of some remedial obligations. To be sure, the aforesaid dichotomy does play a role in determining the *severity* of the remedy required in the aftermath of a breach of some moral duty. A breach undertaken in order to avoid a transgression of an overtopping moral duty will be extenuated much more heavily than a breach undertaken in order to avoid a transgression of a non-overtopping moral duty. Nevertheless, the need for a remedy of *some* sort in the aftermath of the contravention of a moral duty is unaffected by the status of the contravened duty as overtopping or non-overtopping. To capture the irrelevance of the overtopping/non-overtopping distinction in that crucial respect, this article adheres to the strong conception of permissibility throughout.

One of the central principles of standard deontic logic, which I shall call the "Permissibility Theorem," tends to cloud reflection on these matters.[43] According to that theorem, the obligatoriness of any occurrence or state of affairs entails the permissibility thereof; by contraposition, then, the impermissibility of any occurrence or state of affairs entails the non-obligatoriness thereof. Although there is a way of construing the Permissibility Theorem that renders it necessarily true, most construals of it falsify it. On the whole, it impedes rigorous thinking about the structure of deontic relations.

[43] Many highly sophisticated philosophers endorse the Permissibility Theorem. See, e.g., Earl Conee, "Against Moral Dilemmas," 91 *Philosophical Review* 87 (1982) [hereinafter cited as Conee, "Dilemmas"]; Feinberg, *Rights*, 235, 237; Hill, "Dilemmas," 177; G.E. Hughes and M.J. Cresswell, *A New Introduction to Modal Logic* (London: Routledge, 1996), 43; Hillel Steiner, "Working Rights," in Matthew H. Kramer, N.E. Simmonds, and Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998), 233, 268 n.55; Peter Vallentyne, "Prohibition Dilemmas and Deontic Logic," 117-18 *Logique et Analyse* 113, 119-20 (1987); Peter Vallentyne, "Two Types of Moral Dilemmas," 30 *Erkenntnis* 301 (1989). For a fine critique, to which I am much indebted, see Sinnott-Armstrong, *Dilemmas*, 156-61. See also Sinnott-Armstrong, "Rights," 52.

The Permissibility Theorem proclaims that everything obligatory is permissible. If we construe "obligatory" as "overtoppingly obligatory," and if we construe "permissible" as "at least weakly permissible," then the Permissibility Theorem is true. It is indeed the case that every overtoppingly obligatory course of action is at least weakly permissible, for, if some such course of action were not at least weakly permissible, then a person would be under an overtopping moral duty to do q and an overtopping moral duty to not do q. Given that an overtopping moral duty exceeds in importance any moral duties that conflict with it, each of the two duties just mentioned would be morally more important than the other. Such a state of affairs is impossible, since any coherent relation of superiority (such as "more important than") is strictly non-symmetrical. Ergo, every overtoppingly obligatory course of action is indeed at least weakly permissible.

Construed in any other way, however, the Permissibility Theorem is false. It is not the case, for example, that every overtoppingly obligatory course of action is strongly permissible. One's moral duty to aid a badly injured pedestrian might well be overtopping in a given context, but the fulfillment of that overtopping duty might preclude the fulfillment of one's less important moral duty to keep one's promise to meet somebody else for lunch. In that event, one's going to the aid of the pedestrian is only weakly permissible rather than strongly permissible. Countless similar examples could be adduced.

Even more plainly, it is not the case that every non-overtoppingly obligatory course of action is strongly permissible. Indeed, no such course of action is strongly permissible. Furthermore, given that some non-overtopping moral duties conflict with overtopping moral duties, it is not even the case that every non-overtoppingly obligatory course of action is weakly permissible. Many such courses of action are impermissible in every sense. Hence, only under one interpretation is the Permissibility Theorem correct; under the three other available interpretations, it is false.

Because the only true variant of the Permissibility Theorem presupposes the distinction between overtopping and non-overtopping moral duties, and because the Remedy Principle* applies to overtopping and non-overtopping moral duties alike, the Permissibility Theorem is far more misleading than helpful for my purposes. As has already been explained, the fact that the Remedy Principle* applies to all moral duties is exactly what accounts for this essay's reliance on the strong conception of permissibility. Yet the true variant of the Permissibility Theorem excludes the strong conception of permissibility; that theorem is true only if its reference to permissibility is construed as a reference to weak permissibility. Hence, the Permissibility Theorem cannot play any role – save as a false proposition – in this article's analyses. Far from encapsulating an essential feature of every relationship of obligation, that theorem encapsulates a feature of

each relationship of obligation within a highly circumscribed range. To transcend such restrictiveness, this essay sets the Permissibility Theorem aside.

2. *Cases of Desperation*

Certain types of situations have received attention in much of the literature on the infringement/violation dichotomy. Those situations are often designated as cases of necessity, but are more illuminatingly labeled as cases of desperation.[44] In any such case, somebody resorts to contravening somebody else's moral rights in order to avert a dire fate for himself or for another person. Suppose for example that a child develops a serious illness. Alas, the only antidote that can be reached in time to save her life is owned by Joe, who has placed it in his storage shed. Joe at present is sojourning inaccessibly in another country. To save the child's life, her father (who happens to be a doctor) breaks into the shed and removes the antidote, which he then administers to his daughter. In these circumstances, Joe upon his return is entitled to an apology and to compensation for the smashing of the shed and for the appropriation of the antidote. He might cheerily dismiss the apology, and he might decline to accept some or all of the compensation. Nevertheless, the child's father is morally obligated to extend the apology and to come up with the compensation if it is not waived.[45] Remedial obligations have descended upon the father because he has acted athwart the rights of somebody else. Yet it is clear that he has behaved in a morally optimal fashion. By infringing Joe's moral rights, the doctor has fulfilled an overtopping moral duty which he owed to his daughter.

Many of the philosophers who mull over situations of this sort have been tempted to rely (implicitly or explicitly) on the weak conception of permissibility. They have concluded that anyone in a desperate position akin to that of the child's father is acting permissibly when engaging in a morally optimal breach of duty. For instance, when discussing a case of desperation involving someone named "Hal," Coleman writes that a "right can be invaded permissibly....Infringements are justified or permissible invasions of rights....Hal has acted permissibly in the circumstances, and only someone who had no understanding of human need and motivation could think otherwise."[46]

By recognizing that pronouncements such as these from Coleman rely on the weak conception of permissibility, we can avoid branding them as false or inco-

[44] Several such cases are discussed in Coleman, *Risks*, chaps 14 and 15; Thomson, *Restitution*, chaps 3-5; and Thomson, *Realm*, chaps 3-7. See also Fletcher, *Rethinking*, 774-98. One of the most famous examples of a case of desperation is offered in Feinberg, *Rights*, 230.

[45] If the father is much less wealthy than Joe, his remedial obligation might not require him to pay the full market value of the antidote that has been taken.

[46] Coleman, *Risks*, 282.

herent. Nonetheless, precisely because such pronouncements depend on the weak conception of permissibility for their truth, they cannot be accommodated in my analyses. As has been stated, this article relies throughout on the strong conception of permissibility. We should consequently now investigate whether any satisfactory account of the deontic relations in cases of desperation is compatible with that strong conception. If the only effective way of expounding the nature of a desperate person's plight were to follow Coleman and other theorists in deeming some infringements of moral rights to be weakly permissible, then my own explications of moral rights and duties – which eschew the weak conception of permissibility – would pro tanto be inadequate. Fortunately, however, two apt analyses of the deontic relations in cases of desperation are perfectly compatible with the strong conception of permissibility. One or the other of these two approaches may be more suitable in application to this or that particular situation, but each of them is effective in conveying the formal structure of a desperate person's predicament. Let us explore each of them, by reference to the scenario of the father and the antidote.

A first approach concurs with the proponents of the infringement/violation dichotomy in maintaining that the father has infringed some of Joe's moral rights by gaining access to the storage shed nonconsensually and by taking away the antidote. However, this approach further contends that the father's infringements – like any other infringements of moral rights – are impermissible. We can know that they are impermissible, exactly because they obligate the father to remedy the resultant situation fittingly. All the same, the father's behavior is morally optimal, and his transgressions of moral duties are therefore heavily extenuated. Moreover, the behavior is rightful in that the father has a right against any deliberate interference by Joe with his appropriation of the antidote. If Joe had been present rather than abroad at the time of the emergency, he would have been morally duty-bound to acquiesce in the father's obtention of the antidote. Indeed, he would probably have been morally duty-bound to assist the father in getting the antidote. In short, while the father owes Joe a moral duty to abstain from damaging the shed and removing the antidote, he has a right against any deliberate interference by Joe with his performance of those actions (insofar as the actions are necessary in order to save the child's life). In other words, he has rights against interference with his commission of some wrongs.

Thus, although my analyses of moral rights and duties lead to a characterization of the father's conduct as wrong, they are consistent with several other characterizations that adequately reveal the moral effects of the dire straits in which the father finds himself. We can and should recognize that, although the father's behavior is wrong, it is in no way wrongful. Furthermore, we should perceive that the wrongness of his actions is greatly extenuated by the fact that they amount to the fulfillment of an overtopping moral duty. In addition, we should grasp that his behavior is rightful in the sense defined by my last paragraph; in-

asmuch as that behavior is necessary for forestalling the death of the child, the father has a right against any deliberate interference with his efforts. Having recognized all of these points, we shall not be misled about the urgency of the father's plight when we also grasp that his forced entry into the shed and his procuring of the antidote are not strongly permissible (and that they are consequently impermissible in the only sense that is relevant within this essay's analyses). By emphasizing the rightfulness of the father's conduct, this first approach to cases of desperation does justice to the gravity of his situation.

Equally good in that respect is a second approach to this matter.[47] In regard to some cases of desperation, we are perhaps best advised to conclude that apparent transgressions of moral duties turn out not to be genuine transgressions when they are plumbed more closely. We should initially examine this second approach in application to the scenario of Joe and the child's father, and then in application to a scenario for which the approach is somewhat better suited.

We might arrive at the verdict that, despite superficial appearances to the contrary, the father's nonconsensual entry into Joe's shed and his gaining possession of Joe's antidote do not infringe any of Joe's moral rights. Although the father is morally obligated to make payments to Joe, the payments are for the purpose of reimbursement rather than of compensation. They will avert, rather than remedy, a wrong. The relevant moral duty owed by the father to Joe is not a duty to abstain from damaging the shed and taking the antidote in an emergency; instead, it is a more complex duty-to-abstain-from-damaging-the-shed-and-taking-the-antidote-in-an-emergency-without-subsequently-paying-Joe-the-fair-market-value-of-what-he-has-lost. That is, the relevant duty is comparable to the duty-of-reimbursement owed by customers to a restaurant at which they dine. They pay for their meals not to rectify any wrongs, but to avoid the commission of the wrong of eating-without-paying-afterward. Similarly, according to this second way of coming to grips with cases of desperation, the father avoids the commission of any wrongs by reimbursing Joe for his losses. He avoids the commission of any wrongs, because the reimbursement fulfills the complex duty (specified above) which he has owed to Joe.

In application to the story of Joe and the child's father, the second way of analyzing cases of desperation is not entirely convincing. However, some other examples lend themselves far more persuasively to such an analysis. A scenario devised by Kent Greenawalt for a somewhat different aim, and slightly modified here, is a useful illustration.[48] Suppose that Roger is a fire-prevention officer who uses advanced techniques for predicting the speed and direction of the wind. He carefully judges that the only way of preventing the spread of a forest fire to a

[47] For a classic exposition of this approach, see Robert Keeton, "Conditional Fault in the Law of Torts," 72 *Harvard Law Review* 401, 418-44 (1959).
[48] Greenawalt, "Borders," 1908.

nearby town is to burn out some large fields of crops owned by a local farmer. After the crops have been burned, the wind abruptly and unforeseeably subsides. As a result, the forest fire dissipates before it ever reaches the burnt-out fields.

For present purposes, this scenario could be altered in its closing portion with no real change in its overall import. Suppose that, instead of abating, the wind continues and drives the forest fire into the fields. Only because of Roger's timely orders has the spread of the fire been stanched. Both in this new version and in the original version of the scenario, the local authorities (or the authorities at some other pertinent level of government) are morally obligated to pay the farmer whose crops have been lost. In each case, however, the payments are for the purpose of eminent domain rather than of compensation. No moral wrong has been done to the farmer – especially if, though not only if, his own property has been protected through the burning of the fields – but a moral wrong would be done to him if he were not paid for the mandatory destruction of his crops. Having been required to let his fields be devoted to the furtherance of the public weal, the farmer now has a moral right to be reimbursed for some or all of the lost value of his crops. Of key importance here is that his right is indeed a right to eminent-domain reimbursement rather than to rectification. He has not suffered any wrong, and his condition is thus not in need of rectification, though of course he would suffer a wrong if he were not to be reimbursed.

When applied to circumstances of the kind just depicted, the second way of analyzing the deontic relations within cases of desperation is clearly germane. It is highly plausible that the relevant moral right held by the farmer vis-à-vis the local authorities is not a right-against-their-burning-of-his-crops-for-a-truly-urgent-public-purpose; rather, the relevant moral right is a right-against-their-*both*-burning-his-crops-for-a-pressingly-important-public-purpose-*and*-declining-to-remunerate-him-for-his-losses. That complex entitlement is not a remedial right that has arisen because of the authorities' breach of an anterior right. Instead, it is itself an anterior right against the authorities' combining a specified action with a specified omission. The action is not per se wrong, so long as it is not coupled with the omission. By enabling us to descry this aspect of the deontic relations within some cases of desperation, the second approach to such cases can capture what Coleman and others have sensed about the permissibility of many desperate measures. Some such measures are indeed permissible – strongly permissible – as long as they are not conjoined with certain instances of uncooperative niggardliness.

Before we leave this discussion, we should briefly ponder an interesting critique by Thomson of the second approach to cases of desperation.[49] She main-

[49] Thomson, *Restitution*, 71-77.

tains that absurd conclusions follow from the analysis yielded by such an approach. She considers an example in which a desperate person – whom I shall designate as "*X*" – has had to burn some furniture owned by somebody else, whom I shall designate as "*Y*". The owner plainly has a moral right to be paid for the loss of his furniture. With Thomson's semi-formal notation (somewhat modified here), *Y*'s moral right to be paid by *X* can be rendered as follows:

Prop1 $R_{Y,X}$ *X* pays *Y* for the loss of the furniture.

The notation "$R_{Y,X}$" stands for "*Y* has a right vis-à-vis *X*," and the sentence "*X* pays *Y* for the loss of the furniture" specifies the content of the right which *Y* holds. Now, if the situation of *X* and *Y* lends itself to the second way of analyzing cases of desperation, the complex right originally held by *Y* is to be explicated as follows:

Prop2 $R_{Y,X}$ If *X* burns *Y*'s furniture out of desperation, then he pays *Y* for the loss of the burnt items.

When conjoined with the sentence "*X* burns *Y*'s furniture out of desperation," Prop2 entails Prop1 – which means that the second approach to cases of desperation generates exactly the right result. Or so we should conclude. Thomson, however, demurs.

She takes as given a certain principle governing the relations among rights:

Prin1 "$R_{Y,X}\, p$" entails "$R_{Y,X}\, q$" if "p" entails "q"

Here "p" and "q" designate the sentences that specify the contents of the respective rights. Thomson offers no defense of this principle. Rather, she "simply assume[s] it true."[50] She then posits the following principle, on which we rely when we infer Prop1 from the combination of Prop2 and the sentence "*X* burns *Y*'s furniture out of desperation":

Prin2 "$[R_{Y,X}\,(p \rightarrow q)]\ \&\ p$" entails "$R_{Y,X}\, q$"

(Here, of course, the symbol "$\rightarrow$" denotes the "if...then" relationship of conditionality.) Thomson now pounces. She points out that, if both Prin1 and Prin2 are true, then "$(R_{Y,X}\, {-p})\ \&\ p$" would entail "$R_{Y,X}\, q$." After all, given that the truth of any conditional with "p" as its antecedent is ensured by the truth of "$-p$," "$R_{Y,X}$ $-p$" entails "$R_{Y,X}\,(p \rightarrow q)$" under Prin1; and, under Prin2, the conjunction of "$R_{Y,X}$ $(p \rightarrow q)$" with "p" entails "$R_{Y,X}\, q$." Thomson correctly complains that such a conclusion, which consists in the derivability of "$R_{Y,X}\, q$" from any proposition asserting a breach of a moral duty by *X* vis-à-vis *Y*, is preposterous. Because "$-p$" and "q" can each designate any proposition, the truth of both Prin1 and Prin2 would mean that someone who contravenes any moral right is thereby obligated to do absolutely everything in order to remedy the situation. As Thomson remarks, "[t]his is, to say the least, an unacceptable consequence. You do not give

[50] Thomson, *Restitution*, 72.

me a claim against you to anything and everything simply by bringing about some one thing which I have a claim against you that you not bring about."[51]

Strangely, Thomson submits that the upshot of her clever argument is that we must reject Prin2, on which the second approach to cases of desperation depends. We therefore have to reject that second approach, according to her. Such a verdict is exceedingly odd. Prin2 creates mischief only in combination with Prin1; in isolation from Prin1, it breeds no difficulties or peculiarities at all. Prin 1, by contrast, is hopelessly problematic. In the absence of significant restrictions on its scope,[52] it carries any number of ludicrous implications. Under it, for example, my right against being punched in the nose by Arnold entails my having a right vis-à-vis him that 2+2=4 and another right vis-à-vis him that today either is Tuesday or is not Tuesday. I likewise have a right (under Prin1) that either he punches me in the nose or he does not punch me in the nose. Perhaps most damagingly, Prin1 – in combination with my holding the aforementioned right vis-à-vis Arnold – assigns to me a right that Arnold must do-absolutely-everything-if-he-punches-me-in-the-nose. Even before that implication of Prin1 is conjoined with Prin2, it is outlandish. Manifestly, we should shun the principle that generates it.

In sum, Prin1 – in the absence of significant restrictions on its scope – is to be rejected. Prin2, accordingly, can be embraced without any untoward consequences. Thomson's ingenious argument does not cast any genuine doubt upon that latter principle. Prin2 can thus serve perfectly well as a linchpin of the second approach to cases of desperation. Anyone wanting to gain a theoretical purchase on the complexities of such cases can avail himself of either of the two main approaches that have been expounded in this subsection. We can secure such a theoretical purchase without abandoning the strong conception of permissibility in favor of the weak conception.

C. *Prima-Facie Duties and Rights*

For a final challenge to my account of strict liability in morality, some theorists might be inclined to have recourse to the concept of prima-facie moral duties. Originally given expression by Ross, that concept has figured prominently in a number of debates concerning topics that have been broached in this arti-

[51] Thomson, *Restitution*, 73.
[52] The need for some restrictions is recognized in Sinnott-Armstrong, *Moral Dilemmas*, 165-66, but the restrictions have to be more far-reaching than Sinnott-Armstrong suggests.

cle.[53] In the present context, some theorists might seek to object to my analyses on the ground that the moral duties transgressed by non-culpable behavior are merely prima-facie rather than all-things-considered requirements. With reference to the story of the conviction and incarceration of George for a crime that he did not commit, for example, such theorists might contend that the only duties transgressed by the authorities in the criminal-justice system are prima-facie duties. Those authorities have admirably fulfilled their all-things-considered duties to carry out their professional roles with concern both for the safety of the general public and for scrupulous fairness to criminal defendants. Hence, the critics of my analysis might conclude, the story of George's imprisonment does not genuinely illustrate the possibility of strict liability in morality. It shows only that prima-facie moral duties can be faultlessly contravened; it does not show that there can be faultless contraventions of any full-blown moral duties.

Such an objection trades confusedly on an equivocation in the distinction between prima-facie moral duties and all-things-considered moral duties – an equivocation which is maddeningly present in Ross's work and which has bedev-

[53] The main discussion by David Ross is in his *The Right and the Good* (Oxford: Clarendon Press, 1930) [hereinafter cited as Ross, *Right*], chap. 2. However, the notion of prima-facie duties and rights also appears recurrently in Ross, *Foundations*. For some writings that invoke or discuss the distinction between prima-facie duties/rights and all-things-considered duties/rights, see Robert Audi, "Intuitionism, Pluralism, and the Foundations of Ethics," in Walter Sinnott-Armstrong and Mark Timmons (eds), *Moral Knowledge?* (Oxford: Oxford University Press, 1996), 101, 103-06; Conee, "Dilemmas"; Jonathan Dancy, *Moral Reasons* (Oxford: Blackwell, 1993), chap. 6; Alan Donagan, "Moral Dilemmas, Genuine and Spurious: A Comparative Anatomy," in Mason, *Dilemmas*, 11, 18-21; Joel Feinberg, "Supererogation and Rules," in *Doing and Deserving* (Princeton: Princeton University Press, 1970), 3, 8-9; J.N. Findlay, *Values and Intentions* (London: George Allen & Unwin, 1961), 336-38; Fletcher, "Right," 978-79; Foot, "Realism," 385-86; William Frankena, *Ethics* (Englewood Cliffs, NJ: Prentice-Hall, 1973) (2nd ed.), 26-27 *et passim*; Hill, "Dilemmas"; W.D. Hudson, *Modern Moral Philosophy* (Basingstoke: Macmillan, 1983) (2nd ed.), 95-96; S.L. Hurley, *Natural Reasons* (Oxford: Oxford University Press, 1989) [hereinafter cited as Hurley, *Reasons*], chap. 7 *et passim*; Peter Jones, *Rights* (Basingstoke: Macmillan, 1994), 195-98; David McNaughton and Piers Rawling, "Unprincipled Ethics," in Brad Hooker and Margaret Little (eds), *Moral Particularism* (Oxford: Oxford University Press, 2000), 256, 266-71; A.I. Melden, *Rights and Persons* (Oxford: Basil Blackwell, 1977), 4-16; Mary Mothersill, "The Moral Dilemmas Debate," in Mason, *Dilemmas*, 66, 77-78; Frederick Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991), 5-6, 113-14; Sinnott-Armstrong, *Dilemmas*, 97-102; W.J. Waluchow, *The Dimensions of Ethics* (Peterborough, ON: Broadview Press, 2003), chap. 8; Bernard Williams, *Problems of the Self* (Cambridge: Cambridge University Press, 1973), 176; Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985), 176-77. Especially valuable for my purposes are the discussions by Audi, Foot, Jones, Melden, and Sinnott-Armstrong.

iled some of the subsequent literature.[54] Sometimes in ordinary discourse, the phrase “prima facie” is used to mean “on first consideration” or “at first glance.” When such a pattern of usage is operative, a person who declares that some state of affairs prima facie obtains is saying that an initial inspection of the matter indicates that the state of affairs in question does obtain. As Susan Hurley writes: “*Prima facie* reasons are like rules of thumb, that give us reasons provisionally but may turn out not to apply when we learn more about the situation at hand, in which case they have no residual reason-giving force.”[55] This pattern of usage carries over into the workings of legal institutions, where references to what is prima facie established are references to what is tentatively deemed to be established in light of the incomplete evidence that has been submitted. (In the law, the notion of prima-facie evidence is connected with issues relating to the distribution of the burden of proof between plaintiffs and defendants.) If this pattern of usage were likewise regnant in moral and political philosophy, then philosophers who discuss prima-facie moral duties would be referring to properties or states that are believed upon first inspection to be moral duties. No such property or state will qualify as a full-fledged moral duty unless the initial consideration of the factors that bear on its existence and force is confirmed by subsequent investigations of all further relevant factors (if any). In short, when prima-facie moral duties are understood in this fashion, only some of them are veritable moral duties. Many are mere appearances.

In fact, however, the meaning attached to “prima facie” in moral and political philosophy is generally quite different – though the foregoing sense of the phrase often lurks in the background and leads to muddles. “Prima-facie” in philosophical discourse means “susceptible to being overtopped” or “subject to being surpassed in moral importance.” Hence, the distinction between all-things-considered moral duties and merely prima-facie moral duties is really at one with the distinction between overtopping and non-overtopping moral duties, which this essay has already highlighted. That is, it amounts to a dichotomy between those moral duties that do exceed any competing moral requirements in importance and those moral duties that do not.

Two interrelated points should be stressed here. First, the status of a prima-facie moral duty as such has nothing to do with first appearances or tentative identifications. If someone is under a prima-facie moral duty, he is under it as a result of all relevant considerations. Insofar as “all things considered” is contrasted with “prima facie” in the first sense of the latter phrase – that is, insofar as “all things considered” means “in accordance with what would be found by a

[54] I have previously drawn the distinction between two meanings of “prima facie” in my *In Defense of Legal Positivism* (Oxford: Oxford University Press, 1999), 267.
[55] Hurley, *Reasons*, 133.

thorough investigation" – every prima-facie moral duty is an all-things-considered moral duty. The standing and scope of any such duty as a moral obligation are determined by the full array of circumstances in which the obligation obtains. Ross sometimes obfuscated this point, not least by proclaiming that any prima-facie moral obligation consists in a "[t]endency to be one's duty."[56] Such a formulation promotes confusion, for it fails to distinguish between a tendency to be a duty of any sort and a tendency to be an overtopping duty.[57] Certain considerations engender a tendency of the former kind. For example, the pain and indignity that would be suffered by Edward in the event of his undergoing a thrashing by Frank are factors that militate in favor of Frank's being under a moral obligation to forbear from thrashing Edward in any particular context. Those factors are not always conclusive, however. If Edward himself launches a serious and unprovoked assault against Frank, then Frank is morally at liberty to use as much force as is necessary to fend off Edward's attack. He is not under any moral obligation at all – not even a prima-facie duty, much less an overtopping duty – to abstain from landing blows on Edward in such circumstances. At first glance we might think that Frank is under at least a prima-facie moral duty to restrain himself from using violence against Edward, but a more detailed exploration of his predicament reveals that not even a prima-facie moral duty is applicable. There are factors that tend toward the existence of such a duty, but none of them actually eventuates in it. Such a situation is crucially different, then, from a situation in which a veritable prima-facie moral duty does exist and is overtopped by a weightier moral duty. A veritable prima-facie moral duty does not *tend* toward the existence of a duty; it *is* a duty. What it tends toward is the existence of an overtopping moral duty. Inasmuch as that tendency is realized in any particular context, the moral duty in question prevails over all contrary moral pressures. If the tendency is instead checked by the existence of some more important moral consideration(s), the prima-facie duty still obtains as such. Even when overtopped, it is indeed a moral duty rather than a mere appearance or a mere factor (like Edward's pain) that contributes toward the existence of such a duty.

Second, the way in which a prima-facie moral duty continues to obtain as a moral duty – even when overtopped – is explicated by the Remedy Principle*. Any such duty is a normative state that imposes remedial obligations upon the person to whom it attaches, if he does not behave in accordance with it. When a moral duty is exceeded in importance by some conflicting moral obligation(s), it

[56] Ross, *Right*, 28.

[57] This distinction is missed by Joseph Raz when he draws a parallel between (i) the liberty of courts in some circumstances to overrule precedents which they would in other circumstances be obligated to apply and (ii) the overtopping duty of a promisor to decline to abide by her promissory obligation in some circumstances. See Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 114.

is not thereby canceled or eliminated. It remains a normative state of the type that has just been mentioned; that is, it remains a normative state of the type expounded by the Remedy Principle*. As has been emphasized already in this article, the Remedy Principle* applies equally to overtopping and non-overtopping moral duties. To be sure, as we have seen, the difference between noncompliance with an overtopping moral obligation and noncompliance with a non-overtopping moral obligation is not devoid of significance. Ceteris paribus, an instance of noncompliance of the latter sort will trigger a lighter remedial obligation than will an instance of noncompliance of the former sort. In other words, the overtopping or non-overtopping force of a moral duty affects the nature and stringency of the remedy that will be required in the event of any breach of the duty. Nevertheless, as we have likewise seen, a remedy of *some* kind will be required irrespective of whether the duty is overtopping or non-overtopping. In that basic regard, the difference between the two classes of duties does not make a difference.

Now, in mulling over the objection that was posited at the outset of this subsection, we should observe that the various examples adduced by this essay in support of the Remedy Principle and Remedy Principle* have all involved veritable moral duties – whether prima-facie or overtopping – rather than mere factors that weigh inconclusively in favor of the existence of moral duties. Specifically in the scenario of the conviction and imprisonment of George, the duty owed by the authorities in the criminal-justice system is a duty not to deprive him of his general liberty over a long period for a crime which he has not committed. Despite their meticulous care in their procedures, they have breached that duty. To be sure, that duty may well have been overtopped by a conflicting duty to safeguard the public through the incarceration of people who have been convicted of serious crimes after scrupulously fair proceedings. Nonetheless, though the fault-independent duty owed to George is probably overtopped by the countervailing obligation owed to the public, it abides as a moral duty, and it has been contravened. We can know that it abides as a moral duty and that it has been contravened, precisely because the authorities have morally obligated themselves to remedy the situation that has been brought about by their six-year confinement of George. They obviously are morally obligated to release him promptly when they learn of his innocence, but they are also morally obligated to do more. At the very least, they must issue an authoritative apology that will serve as an acknowledgment of the wrongness of what has been done to George. In so doing, they will be remedying (or going some way toward remedying) their transgression of the moral duty which they have owed to George; a remedy is required because a moral duty has been breached, even though the conduct of the authorities has not been wrongful and even though it has indeed amounted to their fulfillment of a moral duty of superior importance. In the face of a more pressing duty, the duty owed to George has abided as a moral constraint on what the

authorities can do without incurring remedial obligations. In that respect, *mutatis mutandis*, the moral duty owed to him is like every other prima-facie moral duty. Like every other such duty, it differs sharply from anything that only appears to be a moral duty and from anything that only contributes toward the existence of a moral duty. Though overtopped by a conflicting requirement, it is a full-blown moral obligation whose status as such is invested with the normative implications delineated by the Remedy Principle*.

IV. *A Pithy Conclusion*

As this essay has tried to show, Hart was incorrect in declaring that strict liability is peculiar to law and is not to be found in morality. Indeed, not only was he incorrect, but the truth of the matter is nearly the opposite of what he contended. Although strict liability is present in the law, it is almost certainly more common in morality. In substantiation of this claim, two points deserve emphasis.

First, once we take account of the distinction between extenuation and exoneration, we can sense just how frequent the occurrence of strict liability in morality is. Because of the mitigating effects of impeccable intentions and precautions, the requisite remedy in many a case involving the innocent infliction of harm on one person by another is nothing more than an apology. Given as much, and given how often the innocent infliction of harm does call for nothing more *and nothing less* than an apology, we can quite safely presume that strict liability is not only present within morality but also widespread therein. Were there nothing between outright exoneration and onerous remedies that bespeak the culpability of wrongdoers, then exoneration would doubtless be the appropriate upshot for numerous people who faultlessly harm others. In fact, however, extenuating considerations such as faultlessness are reflected in the remedies which people are morally obligated to undertake in order to make amends for their wrongdoing. Hence, the prevalence of the principle of strict liability in morality is not unfair to the people who have to shoulder remedial obligations under that principle. Even people who have been fastidiously careful in their conduct are not inordinately burdened by being duty-bound to apologize for hardships which they have imposed on innocent victims. (Of course, nothing just said is meant to imply that every hardship imposed on an innocent victim must be remedied. Sometimes the occasioning of detriment to another person is not wrong, by any tenable reckoning. For example, if John falls in love with Mary, and if she has done nothing to encourage his love, she is not morally obligated to apologize for its unrequitedness. She is probably obligated to communicate regret over his disappointment – here the difference between expressing sorrow and apologizing is crucial – but she is not obligated to take any step that would constitute an acknowledgment of wrongdoing.)

Second, although mitigation is also operative in the punitive mechanisms of many legal systems, the application of legal penalties – even when the penalties are softened in response to the presence of extenuating factors – is generally something that stands in need of a more ample justification than does the accrual of remedial obligations in morality. The legal rectification of wrongdoing mobilizes the coercive power of governmental institutions against the person on whom the rectification is brought to bear. Most moral remedies, by contrast, do not activate the mighty power of those institutions at all. Admittedly, someone who behaves not only wrongly but also wrongfully will often thereby have morally obligated himself to undergo an appropriate legal punishment. However, a person's undergoing of punishment will very seldom if ever be a morally obligatory remedy for any wrong that is non-culpable. As Cane observes, "punishment in the absence of fault is generally considered extremely difficult to justify....[P]unishment carries with it an implication of blameworthiness that is inappropriate in the absence of fault."[58] Far more common are moral remedies such as apologies, which are implemented with no input from governmental institutions (save in unusual circumstances, including of course circumstances in which the people morally obligated to undertake such remedies are themselves governmental officials – as is true in the story of the incarceration of George). Thus, since the mechanisms of government will rarely be implicated in giving effect to any remedial obligations which are imposed by the sway of strict liability in morality and which would not be imposed by a culpability-based standard, the justification required for the existence of strict liability in the domain of morality is typically lighter than in the domain of law. Given that the heavy hand of government pervades the latter domain and is largely absent from the former, a major factor that weighs morally against the application of *legal* penalties to faultless people is hardly ever an obstacle to the incurring of remedial *moral* obligations by such people.

In sum, contrary to what Hart proclaimed, strict liability is almost certainly more prominent in morality than in the law. Though the impeccableness of one's efforts and safeguards is sometimes exonerative in morality, it more frequently is simply extenuative. When the plea "I could not help it" does not establish that the prevailing moral requirements have been satisfied, it is only a plea in mitigation and is never an excuse. Morality contains no place for excuses.

[58] Cane, *Responsibility*, 109-10.