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IN DEFENCE OF INFRINGEMENT

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1. According to a familiar and influential view, rights are not absolute. To the contrary, they can sometimes be permissibly interfered with. I find such a view of rights attractive. John Oberdiek thinks otherwise. In a recent paper in this journal, Oberdiek has argued that any account of rights that incorporates a distinction between infringing and violating a right is indefensible.¹ My aim in this paper is to argue that Oberdiek's worries are misplaced. The paper proceeds as follows. After some terminological stage-setting I present a familiar puzzle about rights and compensation and argue that the proper response to the puzzle is to distinguish between various ways in which rights can be interfered with. I then turn to a discussion of the general theoretical picture on which this account of rights rests, and I present some reasons for thinking that Oberdiek's criticisms of that picture are not successful. My conclusion is that the distinction between infringing and violating a right is a plausible one, and that an account of rights that rests on it is not for that reason problematic.

2. I begin with some terminological matters. First, a familiar distinction due to Wesley Hohfeld between rights, claims, and privileges.² Hohfeld pointed out that there is a good deal of

¹ Oberdiek, John, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights', *Law and Philosophy* 23 (2004): 325–346.

² See Hohfeld, Wesley, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Journal* 23(1) (1913): 16–59. In what follows I rely heavily on Judith Thomson's explication of Hohfeld's analysis of rights. See in particular Thomson, Judith, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990).

fuzziness surrounding our use of the term ‘right.’ As he put it, “the term ‘rights’ tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense.”³ A right in the strictest sense Hohfeld calls a ‘claim’; and correlative to every claim is a duty. By this Hohfeld meant that X’s having a claim against Y that Y allow a certain state of affairs S obtain is equivalent to Y’s being under a duty to X to ensure that S does obtain. So, for example, X’s having a claim against Y that Y stay off X’s land is equivalent to Y’s being under a duty to X to ensure that Y stays off X’s land.

Hohfeld further distinguished privileges from claims. A privilege, for Hohfeld, is the opposite of a duty, and the correlative of what Hohfeld called a ‘no-right.’ The terminology is somewhat strange, but the idea simple enough. Take X and Y again: while Y has a duty to stay off X’s land, X—let us assume—has a *privilege* of walking on his own land (after all, it’s *his* land). As Hohfeld puts it, “the privilege of entering [the land] is the negation of a duty to stay off.”⁴ The negation of the duty in question is the lack of a right, namely, Y’s no-right that X shall not enter. In other words, while X has the privilege of entering onto his land, Y has no right that X shall not do so; the correlative of X’s privilege is thus Y’s no-right and in particular, Y’s no-right that X not enter onto his land. In short: to say that X has a *claim* against Y that S should obtain is to say that Y has a duty to X to allow S to obtain; and to say that X has a *privilege* against Y that S should obtain is to say that Y has a no-right that S does not obtain.⁵

It is important not to conflate claims and privileges. For example, if my mother chastises me when I eat a bowl of ice-cream instead of a bowl of spinach I might say that I have a right to eat whatever I like. This does not amount to the assertion that somebody else is under a correlative duty to ensure that I eat whatever I like. Rather, what is meant is that

³ Hohfeld (1913, p. 30).

⁴ Hohfeld (1913, p. 32).

⁵ Hohfeld and Thomson also talk about powers and immunities. Because they are not relevant to the points I wish to make, I will ignore them in what follows.

nobody else has a right to prevent me from eating whatever I like. Thus, my assertion that I have a right to eat whatever I like is not the assertion that I have a claim that such and such be the case; rather, it is the assertion that I have a certain privilege that such and such be the case. Note: this is not to say that claims and privileges are not rights; they are. It is to say, though, that we need to be careful about how we interpret assertions of the form ‘X has a right that S obtain’. For it could mean that X has a claim against another person that S obtain; or it could mean that X has a privilege against another person that S obtain.

One final observation. It is sometimes useful to ask what the ‘cash value’ of a particular concept is. Thus, we might ask about the cash value of X’s having a claim against Y that S obtain. We might ask what, in other words, this entitles X to, or conversely, what this prevents Y from doing. At a minimum, the cash value of the claim that X has a claim against Y that S obtain is that Y’s behaviour is *constrained* in various ways: Y cannot act in such a way that prevents S from obtaining, and X can further demand that Y not act in such ways. So, at any rate, I will assume.

3. According to Judith Thomson, there is a distinction to be drawn between *violating* a right and *infringing* a right. Suppose, says Thomson, that X has a (Hohfeldian) claim against Y that a certain state of affairs S obtain. For example, perhaps X has a claim against Y that Y not walk across X’s land. Then, says Thomson, if Y allows that state of affairs to fail to obtain, Y has *infringed* X’s claim against Y. Similarly, says Thomson, “[l]et us say that Y has violated X’s claim against Y only if it is not merely true that Y let S fail to obtain but more, that Y ought not to have let S fail to obtain.”⁶ Briefly put, Y violates X’s right “if and only if [Y does] not merely infringe it, but more, [is] acting wrongly, unjustly, in doing so.”⁷

Now, it should be granted that there is something puzzling about this way of putting things. For suppose that X has a claim against Y that Y stay off X’s land. Suppose, that is, that Y is under a duty to stay off X’s land. And suppose that Y fails

⁶ Thomson (1990, p. 122).

⁷ Thomson, Judith, ‘Self-defense and Rights’, in *Rights, Restitution, and Risk* (Cambridge, MA: Harvard University Press, 1986), pp. 33–48.

to stay off X's land. Then Y has allowed the prohibited state of affairs—namely, entering onto X's land—to obtain. But more: Y has done something that she ought not to have done, since she ought not to have entered onto X's land. After all, this is precisely what it means to say that X has a claim against Y that Y not enter onto X's land. But this suggests that whenever there is an infringement of a claim there is also a corresponding violation of that same claim in which case the distinction between infringing and violating collapses.⁸

The appropriate response to this objection is, I think, to look more closely at what it means for a person to act unjustly in allowing some prohibited state of affairs S to obtain. By way of illustration, consider the following familiar example, due to Joel Feinberg, which following Oberdiek I will call *the Cabin Case*. Imagine, says Feinberg,

that you are on a back-packing trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm.⁹

Feinberg supposes—plausibly it seems to me—that it is permissible for you to do all these things in the Cabin Case. Feinberg also supposes—again, plausibly it seems to me—that even though it is permissible for you to do all these things, you nonetheless owe your unknown benefactor compensation for the use, consumption, and destruction of his property. Says Feinberg,

[a]lmost everyone would agree that you owe *compensation* to the homeowner for the depletion of his larder, the breaking of his window, and the destruction of his furniture. One owes compensation here for the same reason one must repay a debt or return what one has borrowed. If the other had no right that was infringed in the first place, one could hardly have a

⁸ A similar criticism can be found in Margery Bedford Naylor's review of Thomson's *Rights, Restitution, and Risk*. See Bedford Naylor, Margery, Review of *Rights, Restitution, and Risk*, *Noûs* 23(3) (1989): 399–401.

⁹ Feinberg, Joel, 'Voluntary Euthanasia and the Inalienable Right to Life', *Philosophy and Public Affairs* 7(2) (1978): 93–123 at p. 102.

duty to compensate him. Perhaps he would be an appropriate object of your sympathy or patronage or charity, but those are quite different from compensation. This is a case, then, of the infringement but not the violation of a property right.¹⁰

Prima facie we have a puzzle. Let H be the hiker and C the cabin-owner, and consider the following three propositions:

1. H acts permissibly in breaking into C's cabin;
2. H owes C compensation;
3. H owes C compensation only if H commits a wrong against C.

Proposition 1 is based on the intuition that the hiker does nothing wrong in breaking into the cabin.¹¹ And Proposition 3 is based on the idea, expressed by Feinberg in the second passage quoted above, that compensation flows from the interference with a right. But this means that Proposition 2 ought to be false too: it ought to be false, that is, that H owes C compensation. For H owes C compensation only if H commits a wrong; and by hypothesis no such wrong is committed. But as Feinberg points out, it is very plausible to suppose that compensation *is* owed in the Cabin Case. The puzzle, in short, is this: 1, 2, and 3, each independently plausible, together form an inconsistent triad.¹²

Now, there is an intuitive difference between the hiker's breaking into the cabin in order to save himself from perishing in the blizzard and the hiker's breaking into the cabin simply because he was tired and wanted to sit in a comfortable chair. In both cases the hiker infringes a right of the cabin-owner's not to have his cabin broken into. But in the latter case the hiker acts unjustly—he does what he ought not do—in breaking in. *Why* does the hiker act unjustly? Presumably because his reasons for breaking into the cabin are not very good ones. For example, we presumably think that the threat of starvation and exposure permits the hiker to break into the cabin because we

¹⁰ Feinberg (1978, p. 102).

¹¹ The phrase 'does nothing wrong' is purposefully vague. I will make it more precise below.

¹² For an example of somebody who sees things in this way, see Montague, Philip, 'Rights and Duties of Compensation', *Philosophy and Public Affairs* 13(1) (1984): 79–88.

think that such a reason is a good reason for breaking in.¹³ That the cabin looked comfortable and the hiker is tired, on the other hand, is not a good reason for the hiker to break into the cabin. In short, if we grant that there is an intuitive difference between breaking into the cabin to stave off imminent starvation and breaking into the cabin to alleviate boredom, we are at least acknowledging the possibility that there might be a difference between doing something that one ought not do and unjustly doing something that one ought not do.

4. Let us return to our puzzle. The problem, recall, concerns our three propositions:

1. H acts permissibly in breaking into C's cabin;
2. H owes C compensation;
3. H owes C compensation only if H commits a wrong against C.

¹³ Perhaps the hiker's reasons will give rise to actions that are either justified or excused. It is commonplace to distinguish justifications from excuses. An excuse is something that calls attention to *features of the agent* at the time that she performs an action. Thus, an agent claiming an excuse admits that the action in question was wrongful, but denies that she was appropriately responsible for its performance. A justification, on the other hand, calls attention to *features of the situation or circumstances* at the time that the agent performs an action. Thus, an agent claiming a justification admits that she is responsible for the action in question, but denies that the action was wrongful in the circumstances. It is uncontroversial, moreover, that the distinction between justifications and excuses is an important one. A justification entails that the accused has done nothing wrong, while an excuse entails that the accused has done something wrong, but that for various reasons her punishment should be subject to reduction. Thus, if the hiker breaks into the cabin because he is on the verge of starvation, his action might give rise to a justification. If he breaks in because he mistakenly believes that the cabin is his, his action might give rise to an excuse. I am not entirely sure to what extent the distinction between justifications and excuses is relevant to the Cabin Case, and if it is, how it ought to be incorporated into discussion of the example. For some discussion of these issues, see Greenawalt, Kent, 'The Perplexing Border Between Justification and Excuse', *Columbia Law Review* 84(8) (1984): 1897–1927; Gardner, John, 'Justifications and Reasons', in A.P. Simester and A.T.H. Smith (eds.), *Harm and Culpability* (Oxford: Oxford University Press, 1996), pp. 103–129, and Gardner, John, 'The Gist of Excuses', *Buffalo Criminal Law Review* 1 (1997–1998): 575–598.

And the problem is that 1, 2, and 3, while individually plausible, together appear to be inconsistent. Philip Montague, for example, writes that “it is hard to see how [H]’s destruction of [C]’s property can be permissible if [H] has a right that [C] not do so, and if as a consequence [H] has a duty to forbear.”¹⁴ As Peter Westen points out, however, this apparent inconsistency is merely apparent. For there is nothing incompatible between holding that the hiker has a right to insist that he be allowed to use, consume, or destroy the cabin-owner’s property, and also holding that the cabin-owner has a right to demand compensation from the hiker. Says Westen, “[n]othing in logic—or in morals, for that matter—precludes the state from using coercion to restrain [C] from interfering with [H]’s consumption of [C]’s property, while simultaneously compelling [H] to pay [C] for the value of the property.”¹⁵

The Cabin Case is complicated in part because the precise rights at issue are not sufficiently spelled out. For example, we are told that the cabin-owner has a property right such that the hiker may not break into his cabin. We are also told that the hiker is justified in breaking into the cabin, and I glossed this by saying that in breaking into the cabin the hiker did nothing wrong. I also noted that this was potentially ambiguous. Let me now try to resolve the ambiguity.

It might be thought to follow from the fact that the hiker did nothing wrong that the hiker had a right to break into the cabin. But it pays to ask: what sense of ‘right’ is at issue here? Appealing to Hohfeld’s distinction between claims and privileges, we might mean that the hiker had a *claim* against the cabin-owner to allow the state of affairs that consisted in the hiker’s breaking into the cabin to obtain. (For simplicity, call that state of affairs B.) Then we would be saying that the cabin-owner was under a duty to the hiker to allow B to obtain. Or we might mean that the hiker had a *privilege* against the cabin-owner to allow B to obtain, in which case the cabin-owner had a no-right to prevent B from obtaining. It seems plausible to

¹⁴ Montague (1978 at p. 80).

¹⁵ Westen, Peter, ‘Comment on Montague’s “Rights and Duties of Compensation”’, *Philosophy and Public Affairs* 14(4) (1985): 385–389, p. 386.

think that what is at issue here is a liberty. For if C had a duty to H to allow B to obtain then C can hardly complain when B did obtain. B, remember, is the state of affairs that consists in H's breaking into C's cabin and using, consuming, and destroying C's property. So if C had a *duty* to allow H to do all those things, how can C now complain and demand compensation for the very thing that H had a claim against C should obtain?¹⁶

It stands to reason, then, that H has not a claim but a privilege against C that B obtain. (Why does H have such a privilege? Presumably because H's right to self-preservation trumps C's rights to property.¹⁷) But this means that H does nothing wrong in bringing B about. That H has a privilege explains why H only *infringes* C's property right—H does not act unjustly in bringing B about. However, the important thing to note is that H's having a privilege against C that B obtain is consistent with C's having a claim against H that H compensate C for C's loss. The key idea is that H's infringement is non-criminal, while the basis for C's compensation is civil.

This seems to me to be a very attractive way of resolving the puzzle with which we began. We say that H acts permissibly *in a criminal sense* in breaking into C's cabin because H can avail

¹⁶ I am not suggesting that if X has a claim against Y that S obtain, and if as a result of S's obtaining Y suffers a harm or loss, then X should not be liable for that loss. It is worth comparing this case with another, similar, one. Suppose that X has a duty to Y to allow Y to use X's car to go to the corner store. And suppose that while driving to the store, Y gets into an accident and destroys X's car. Here X can surely demand compensation from Y even though the harm occurred while Y was doing what X had a duty to allow Y to do. The difference here is that Y had no claim against X that Y could destroy X's car whereas by hypothesis the hiker did have such a claim against the cabin-owner.

¹⁷ For a convincing defence of this idea, see Brudner, Alan, 'A Theory of Necessity', *Oxford Journal of Legal Studies* 7(3) (1987): 339–368.

himself of a defence of duress or necessity.¹⁸ Thus, H has what we might call a *criminal privilege* against C that B obtain, while C has a *criminal no-right* that B not obtain. But this is consistent with C's having a *civil claim* to demand compensation from H, and with H's having a *civil duty* to C to compensate C for C's loss. Says Westen, "[t]here is nothing contradictory about the two Hohfeldian relationships. They are simply a logical consequence of the decision to treat [H]'s act as a *non-criminal* violation of [C]'s *civil* property rights against trespass and conversion."¹⁹ And Westen is not alone in thinking this. For as Francis Bohlen has argued:

it may with perfect consistency be held that the interest of the actor which is served by his act may, as compared with that which is necessarily or probably invaded by it, be of such value that he should not be punished, and that resistance should be discouraged by imposing liability upon one who resists, while at the same time recognizing that the actor who commandeers another's interest in aid of his own necessities should pay for any damage done thereto.²⁰

¹⁸ The claim that H can avail himself of a defence of necessity might be challenged on the grounds that necessity is a complete defence, i.e., a justification. For arguments to this effect see, for example, Brudner (1987). But from the idea that necessity is a complete defence it would seem to follow that H does nothing wrong, i.e., commits no wrongful act. But if that is so, then it is harder to see how there could be a *civil* requirement that H pay C for the property used, consumed, or destroyed. I think that there are two sorts of responses here. First, one could argue that necessity only works as an excuse, and hence, as a partial defence. Or one could insist that the criminal and civil realms are distinct: that H commits no criminal wrong—that H acts in an entirely justified manner with respect to the criminal realm—does not entail that H commits no civil wrong. This seems right. For H could lack the requisite *mens rea* for the criminal act but still be guilty of negligence leading to a civil wrong.

¹⁹ Westen (1985, pp. 388–389). Of course, it is one thing to say that this state of affairs is consistent; it is another thing to say that this is the state of affairs that we ought to prefer. Why, it might be asked, should the burden of compensation fall on the hiker alone? Why shouldn't it fall in whole or in part on the cabin-owner?

²⁰ Bohlen, Francis, 'Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality', *Harvard Law Review* 39 (1926): 307–324, p. 316.

In short, Westen, Feinberg, and Thomson argue that while the hiker infringes the cabin-owner's right he does not violate it. It seems to me that this can best be put as follows: the hiker commits no criminal wrong, and so does not act unjustly in any criminal sense in using the cabin-owner's property. But by virtue of civilly infringing the cabin-owner's property rights the hiker is liable for compensation. So there is (civil) infringement but no (criminal) violation. The present proposal therefore amounts to the claim that our Propositions 1 and 3 ought to be re-interpreted as follows:

1. H acts permissibly *in a criminal sense* in breaking into C's cabin;
2. H owes C compensation;
3. H owes C compensation only if H commits a *civil or criminal* wrong against C.

Thus interpreted, there is no incompatibility between our three propositions. For Proposition 1 could be true—H could act permissibly in a criminal sense—even as Proposition 3 is true—even as, that is, H civilly infringes C's rights. But since compensation can flow from mere civil infringement, it follows that the truth of Proposition 2 is consistent with the truth of Propositions 1 and 3.²¹

5. As I have said, this seems to me to be an attractive picture of the nature of the rights in play in the Cabin Case; it also provides us with a very elegant solution to our puzzle. Somewhat controversially, however, it relies crucially on the infringing/violating distinction, since it grants that the hiker may (civilly) interfere with, without thereby (criminally) violating, the cabin-owner's rights.

In a very interesting recent article John Oberdiek has forcefully argued that the infringing/violating distinction is

²¹ I wonder whether there is a tighter connection between infringements and violations, and criminal and civil wrongs. Indeed, I wonder whether we could say that rights violations simply are what we would call criminal wrongs; and that mere rights infringements simply are what we would call civil wrongs. For speculation along the same lines, see Brudner, Alan, 'Agency and Welfare in the Penal Law', in S. Shute, J. Gardner, and J. Horder (eds.), *Action and Value in the Criminal Law* (Oxford: Clarendon Press, 1993), pp. 21–53 and Brudner, Alan, *The Unity of the Common Law* (Berkeley: University of California Press, 1995).

unmotivated, and that the picture of rights on which it depends is conceptually incoherent.²² Oberdiek has two main complaints. The first is that Thomson relies on an argument from the existence of moral residue to the existence of the infringing/violating distinction that is unsound. The second complaint is that the infringing/violating distinction presupposes what Oberdiek calls the *moral space conception of rights*, and that that conception is flawed. What I would like to do now, then, is consider Oberdiek's arguments for these claims. I will argue that Oberdiek's criticisms either miss the point, or can be accommodated, with minimal adjustments, by a theory of rights incorporating an infringing/violating distinction.

6. Let me begin with what Oberdiek calls the moral residue argument. As we have seen, part of Thomson's account of rights is the idea that rights are not absolute. That X has a claim against Y that Y stay off X's land does not entail that there are not circumstances in which Y might permissibly enter onto X's land. Again, cases of necessity and duress are precisely the sorts of cases that Thomson has in mind. Thomson, moreover, is impressed by an additional idea: that when compensation is owed the duty to compensate flows from the infringement of a right.

Oberdiek gives the following interpretation of Thomson's argument: the

basis of the infringing/violating distinction is the supposition that what Thomson calls a moral residue can linger even after one has acted justifiably, tingeing what one has permissibly done. Moral residue calls for compensation, or at least some kind of appropriate reactive attitude like regret, and its existence, on this view, strongly suggests that while one acted morally all-things-considered, one also trampled something of moral significance—namely, a right. Most fundamentally, then, it is the existence of moral residue calling for a response, and not the particular response called for (e.g., compensation) that is taken to counsel in favour of the infringing/violating distinction. Thus the argument is more accurately spelled out this way: right only if moral residue; moral residue; therefore right.²³

²² Oberdiek (2004).

²³ See Oberdiek (2004, p. 331). Oberdiek notes that the argument is strictly speaking invalid, but argues that when it is coupled with the assumption that there is no other possible explanation for the duty of compensation, the conclusion follows. I am not sure that I completely understand this claim, but no matter.

Let me say, first off, that I am reluctant to attribute this argument to Thomson. My reluctance stems from two sources. The first source derives from the observation that there could be moral residue even when rights are not implicated at all. To see what I have in mind, suppose that, while wandering around the Louvre, I accidentally stumble and fall onto the Mona Lisa, irreparably tearing it. Because I have destroyed a treasured piece of art there will surely be moral residue leading to feelings of regret on my part; but it is implausible to suppose that the presence of moral residue can be traced to any corresponding interference with rights. For it cannot be said that the Mona Lisa *has* rights. So it seems that moral residue could be generated even if there are no rights infringements involved. But this suggests that Thomson's argument for the infringing/violating distinction cannot be based on the proposition that, in general, whenever there is moral residue there is a corresponding violation or infringement of rights.

My second, and related, reason for reluctance is that it does not seem right to say that Thomson's view is that the *basis* for the infringing/violating distinction is the presence of a moral residue. Rather, it seems more charitable to interpret Thomson as claiming that the existence of moral residue is more properly viewed as an evidential matter: the fact that there is moral residue is evidence, albeit of a defeasible sort, that a right was infringed, but the existence of moral residue is not the *basis* for the infringing/violating distinction. For consider: suppose we did not experience moral residue at all. Suppose, *pace* P.F. Strawson, that we were incapable of experiencing so-called reactive attitudes; or more weakly, that we were incapable of experiencing regret in particular. Would it follow on Thomson's view that no rights were ever infringed or violated?²⁴ It seems hard to imagine that it would.

Instead, it seems to me that Thomson's point is this: in the Cabin Case, and in other cases like it, the best explanation of the existence of moral residue is that a right has been infringed. Thomson considers the case where X makes a promise to give Y

²⁴ Strawson, P.F., 'Freedom and Resentment', in Gary Watson (ed.), *Free Will* (Oxford: Oxford University Press, 1982), pp. 59–80.

a banana, and also makes a promise to give Z a banana, but where, having only one banana, X cannot keep both promises. X therefore gives the banana to Y. But Thomson then asks us to suppose that X later feels remorse and decides that she must make amends to the recipient of the second promise [Z]. Why, asks Thomson, “should this not be explained by appeal to the fact...that I broke the second promise? Why should we think we can pass from the fact of the broken promise to the fact of the later moral residue only by way of the intermediary fact to the effect that I ought to have kept the promise?”²⁵ And her answer is this: “in making a promise one gives a claim, and that fact explains the moral residue—for a claim is equivalent to a constraint on the claim-giver’s behavior that includes such things as that the claim-giver may have to make amends later if he or she does not accord the claim.”²⁶

In short, it seems to me that Oberdiek goes wrong in focusing on moral residue alone. The issue is not whether moral residue can be accounted for without appealing to interferences with rights. It can, as the Mona Lisa example illustrates. Rather, the issue has to do with how the presence of moral residue interacts with the requirement to pay compensation. Thomson’s question, in other words, is: what could explain the twin facts that there is moral residue *and* that compensation is owed other than the fact that a right has been interfered with? Feinberg’s explanation—and Thomson’s—is simple: “[o]ne owes compensation here for the same reason one must repay a debt or return what one has borrowed. If the other had no right that was infringed in the first place, one could hardly have a duty to compensate him.”²⁷ So where compensation is owed, and moral residue is present, the best explanation for both facts is the infringement or violation of a right.

7. To be fair, Oberdiek has his own explanation for why moral residue is generated in the particular cases in which it is generated. According to him, moral residue follows from the thesis of value pluralism. According to value pluralism,

²⁵ Thomson (1990, p. 85).

²⁶ Thomson (1990, p. 85).

²⁷ Feinberg (1978, p. 102).

negative [moral] residue is possible even when a right is not violated, because it can be the case that something of value is lost... [T]o the extent that there is any lingering moral residue in the Cabin Case it is no different from the ubiquitous negative residue that attend any clash between incompatible courses of action where incompatible things of value are at stake.²⁸

Thus, “[t]he possibility of moral residue need not be explained by recourse to rights at all. Moral residue can instead be explained by lost value.”²⁹

Again, I am prepared to grant that moral residue can sometimes be explained by lost value (see, yet again, the Mona Lisa example). But the issue is whether lost value by itself can explain, in the Cabin Case, *both* why moral residue is present *and* why compensation is owed. Moreover, it is not clear that Oberdiek’s proposal can be extended generally. For while Oberdiek’s suggestion seems plausible enough when what is at issue is a clash between the property rights of one person and the life of another person, it is less plausible when we are considering promises, or contractual undertakings. For example, let us ask how Oberdiek’s proposal is supposed to apply to the case of X’s broken promise to give Z a banana. Thomson supposes that X will feel regret and will also feel that amends are appropriate. I suppose Oberdiek would link the moral residue to the broken promise via a loss of value. But what exactly of value has been lost here? The opportunity to keep a promise? The keeping of the promise? These hardly seem sufficient to generate a duty to pay compensation. Or suppose Y pays X \$50 for a cow. And suppose that, through no fault of her own, X is unable to provide Y with the cow. Compensation will be owed: Y will be able to demand from X either a comparable cow, or the value of the cow in money, or the return of her \$50. Is Oberdiek’s suggestion here that the moral residue will flow from the loss of something of value? But again, what thing of value has been lost? The \$50? The cow? But both still exist. Or suppose that Y is a millionaire, so that \$50 is but a drop in the bucket for her. There might be no moral residue at all—after all, what is \$50 to Y?—but compensation will still be owed. In short, it is very hard to see how an appeal to loss of

²⁸ Oberdiek (2004, p. 332).

²⁹ Oberdiek (2004, p. 333).

value will be capable of explaining why compensation is owed in these sorts of cases.

8. Given the foregoing, it should come as no surprise to learn that Oberdiek thinks that compensation is not owed in the Cabin Case, nor in any other case where one party justifiably trespasses on, uses, or consumes the property of another. His response to the Cabin Case is simplicity itself: on his view Proposition 2 is false. Compensation is not owed to the cabin-owner because no right has been violated, and because compensation only flows from rights violations.³⁰

Let me make two points about this. First, and perhaps most obviously, whatever else its merits, this is not the view of the courts, nor is it, I think, the view of most people who think about the Cabin Case.³¹ But second, given his belief that compensation is not owed in the Cabin Case it is no wonder that Oberdiek thinks that there is no connection between moral residue and rights infringements. After all, if there is no duty to compensate, then there is no correlative claim to compensation, and so the existence of moral residue cannot be traced to the interference with a right. It turns out, then, that Oberdiek's argument is not that when there is *both* moral residue *and* the demand for compensation, this can be accounted for without appeal to rights. Rather, his argument is that when there is moral residue alone, this can be accounted for without an appeal to rights. But again, Thomson never suggests otherwise.

³⁰ Oberdiek (2004, p. 337).

³¹ The classic judicial statement about the need to pay compensation in such cases is *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910). Another case that reaches a similar conclusion concerning liability is *Ploof v. Putnam (Vt.)*, 71 Atl. 188, 20 LRA (NS) 152. For endorsement of the idea that the duty to pay compensation is compatible with permissible rights infringements see again Westen (1985); Bohlen (1926); Thomson, Judith, 'Rights and Compensation', in *Rights, Restitution, and Risk* (Cambridge, MA: Harvard University Press, 1986), pp. 66–77, and Thomson (1990); and Feinberg (1978). It should be noted, however, that although there is general agreement that compensation is owed in cases like *Vincent v. Lake Erie*, there is considerable disagreement about the basis for that liability. For an excellent discussion of the issues raised by *Vincent v. Lake Erie*, see Klimchuk, Dennis, 'Necessity and Restitution', *Legal Theory* 7(1) (2001): 59–81.

Oberdiek's argument, at bottom, seems to be this: because no compensation is owed, there need be no interference with rights, and hence, no connection between moral residue and rights interferences needs to be made. But this is puzzling. For why should the cabin-owner in the Cabin Case have to bear the full cost of the loss? And how is Oberdiek to account for those cases where there is both moral residue *and* a duty to provide compensation, as in cases of breach of contract? There an appeal to rights is surely required.

Perhaps Oberdiek is more charitably interpreted as arguing for some sort of hybrid view that holds that in the Cabin Case, and other cases like it, rights are not at issue, and moral residue flows from a loss of value, whereas in non-Cabin cases, such as contracts cases, rights *are* at issue, and moral residue flows from an interference with those rights. While there is nothing inconsistent about this position, it is nonetheless unnecessarily complicated. If Oberdiek is prepared to accept that moral residue can flow from the interference with rights in some cases then why not accept the possibility that an interference with rights is what is responsible for the presence of moral residue in the Cabin Case? Oberdiek's view presents a disjunctive account of moral residue when what is wanted is a conjunctive one. A virtue of Thomson's approach is that it presents a unified account of moral residue in cases that are relevantly similar.

To recapitulate, I have been arguing that if we grant that moral residue flows from rights interferences in contracts cases, then by parity of reasoning we ought to grant that that is the source of moral residue in the Cabin Case, and in other cases like it. Of course, if one is of the opinion that compensation is not owed in the Cabin Case and related cases, then this position will not seem particularly promising. But again, it is important to note that this is not a criticism of Thomson's views about moral residue and rights infringements in particular; rather, it is a criticism of liability in general. Thus, an argument that relies on the premise that compensation is not owed in the Cabin Case present no counterexample to Thomson's view that when compensation is owed,

and when moral residue is present, the moral residue flows from an interference with rights. I conclude, then, that Oberdiek's first objection to the infringing/violating distinction is unpersuasive.

9. Oberdiek also argues that Thomson's explanation of moral residue is "not convincing judged even on its own terms."³² According to Oberdiek's interpretation of Thomson, if X infringes a right of Y's, then X owes Y compensation. But, asks Oberdiek, what happens when X not merely infringes, but positively violates, a right of Y's? Says Oberdiek:

[p]resumably, by Thomson's lights, far more moral residue lingers after someone's rights have been violated than after someone's rights have been infringed—infringements but not violations are permissible, after all. On Thomson's own view, it would seem, this fact should be reflected in the response that is warranted by each kind of case. However, Thomson pulls out all the stops for mere right infringements. Thomson does this in the Cabin Case, for she maintains that the cabin owner is due full compensation.³³

In other words, since violating a right is worse than merely infringing a right, it stands to reason that if compensation is the appropriate response to rights interferences generally, then *more* compensation should be owed for rights violations than is owed for rights infringements. But, says Oberdiek, "the compensation that one owes in the case of a right infringement is total—enough to 'make one whole'—and thus there is nothing more that can be owed under the rubric of compensation. There is nothing more to give in cases of a right violation."³⁴

The problem with this argument should be obvious: it assumes that differences between the infringement and violation of rights must be mirrored by differences in the amount or manner of compensation. But acceptance of this principle is not mandatory: there are other ways to track the distinction between the infringement and violation of rights such as, for example, by means of punishment, by the imposition of aggravated or punitive damages, or by means of negative

³² Oberdiek (2004).

³³ Oberdiek (2004, p. 335).

³⁴ Oberdiek (2004, p. 335).

stigma. So Oberdiek's claim that Thomson's account of moral residue fails on its own terms is not demonstrative.

10. Let me turn now to Oberdiek's second argument against the infringing/violating distinction. I think this argument is very interesting, and very challenging, and I am sure that I have not gotten all the details right. Very roughly, the argument is based on the following two premises: first, that any theory incorporating the infringing/violating distinction entails a 'moral space' conception of rights; and second, that the 'moral space' conception of rights is false. The conclusion that follows is that any theory of rights that incorporates the infringing/violating distinction is false.

The general idea is this: those who endorse the infringing/violating distinction are committed to thinking that the content of a person's rights is unaffected by context. On this view, a right's content remains opposed to the same interfering behaviour regardless of the circumstances. The only thing that changes is whether the interfering behaviour is, in the circumstances, a permissible infringement of the right or an unjust violation. This is what Oberdiek calls the 'moral space' conception of rights.³⁵ More generally,

[m]oral space, on this view, is determined exclusively by facts about the rights-holder. This is to say that a right's content never depends on the situation—a right-holder enjoys the same moral space no matter what...One's moral space never changes—it's like a protective bubble that retains exactly the same shape wherever one goes and whatever happens...one that is not affected by circumstances of necessity.³⁶

On the moral space conception of rights, then, the content of one's rights, being insensitive to context, is determined by facts about the rights-holder alone. Oberdiek attributes this view to Thomson. He does so because Thomson holds that the cabin-owner's right in the Cabin Case that the hiker not break into the cabin is insensitive to context. The cabin-owner retains and maintains that right whether the hiker is facing starvation or

³⁵ The phrase 'moral space' and the general picture of rights suggested by it comes from Nozick, Robert, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

³⁶ Oberdiek (2004, pp. 326–327).

whether the hiker is simply tired. The content of the right remains the same even though the conditions that determine whether an interference with it would be permissible may vary.

As Oberdiek goes on to argue, however, this idea of context insensitivity is problematic given a certain view about causation in the law, a view discussed by Stephen Perry.³⁷ Causation, according to this view, is ‘fatally indeterminate’ since it “cannot pick out any *single* party as *the* cause of a legally cognizable harm.”³⁸ As Oberdiek puts it,

[w]hen a car runs off the road and hits a pedestrian, for example, it is true that the driver of the car caused the pedestrian’s injury, but it is also true that the pedestrian caused it, for the accident would not have happened if the pedestrian had not been walking where he was when the car veered off the road.³⁹

So the moral space conception is committed to general rights. But “if rights are general in this way, it implies that a person’s moral space, defined only by facts about the rights-holder, is thereby defined by the idea of causing harm.”⁴⁰ And the idea of causing harm—or more generally, the idea of causation itself—cannot isolate the rights-holder in the appropriate manner because it cannot distinguish causes from effects. Thus, “[g]eneral rights are therefore fatally indeterminate—if no claimant can be isolated, there is no right...[Thus to] defend the moral space conception of rights, one might say, is to defend no moral space at all.”⁴¹

There is a lot going on here. But I think the following accurately represents Oberdiek’s argument:

³⁷ See Perry, Stephen, ‘Libertarianism, Entitlement, and Responsibility’, *Philosophy and Public Affairs* 26 (1997): 351–396.

³⁸ Oberdiek (2004, p. 344). Note that Perry does not endorse this view about causation. Perry’s point, as I understand it, is that no account of causation that does not incorporate normative elements can pick out any single party as the cause of a legal harm. This is not to say, however, that other accounts of causation might not be able to do the trick.

³⁹ Oberdiek (2004).

⁴⁰ Oberdiek (2004, p. 345).

⁴¹ Oberdiek (2004, p. 345).

- (P1) On the moral space conception, the content of a right is unaffected by context.
- (P2) On the moral space conception the content of a right is determined by facts about the rights-holder alone.
- (P3) On the moral space conception rights are unqualified general rights.
- (P4) Unqualified general rights are defined by the idea of causing harm.
- (P5) If unqualified general rights are defined by the idea of causing harm, then an account of causation must be capable of distinguish a rights-holder from a rights-interferer.
- (P6) But no account of causation can distinguish a rights-holder from a rights-interferer.
- (P7) So rights cannot be unqualified general rights.
- (C) So the moral space conception is false.

The argument is dense. Still, several things jump out. First, there is the idea expressed by (P4), and supported by (P1)–(P3), that if rights are general in nature, then they must be defined by the idea of causing harm. And second, there is the claim about causation expressed by (P6): there is no such thing as *the* cause of a harm.

First, though, it pays to note that Perry's argument, from which Oberdiek draws inspiration, is directed against a libertarian conception of rights that contemplates a standard of absolute or strict liability for tort law, according to which I have an obligation to compensate for the harms I cause others, regardless of whether or not I was negligent in causing those harms. However, it seems clear that this is no part of Thomson's view since, after all, she agrees that harm alone is not sufficient to give rise to an obligation to compensate.⁴² Perhaps

⁴² Consider in particular her views on abortion, according to which a woman who aborts her fetus causes the fetus a harm, but does not owe compensation as a result. The reason is that the woman neither infringes nor violates any rights of the fetus. See Thomson, Judith, 'A Defense of Abortion', *Philosophy and Public Affairs* 1(1) (1971): 47–66. As Oberdiek also points out, however, this reveals a tension in Thomson's metaphysics of rights. On the one hand, she is generally skeptical about specificationism about rights; on the other hand, she famously believes that the right to life is not the right not to be killed, but is rather the right not be killed *unjustly*.

this merely shows that Thomson is confused about her own theoretical commitments; then again, it may also indicate that attributing such a view to Thomson and to the moral space conception of rights is problematic.

To return to (P4): are unqualified general rights defined by the idea of causing harm? Let me begin with a different question: what *is* an unqualified general right? I would have thought that an unqualified general right is a right of the form: 'X has a right that S not obtain'. But from this it would seem to follow that a right of the form 'X has a right *against* Y that S not obtain' is not a general right. After all, it is qualified by the addition of 'against Y' to our unqualified general right. But this would mean that Thomson and others could not maintain, as they evidently do, that individuals could have Hohfeldian rights against other individuals. So if 'X has a right against Y that S not obtain' is an unqualified general right, then on the assumption that there are *qualified* general rights, the qualification must enter into the picture somewhere else. This suggests that a right of the form 'X has a right that S not obtain F-ly' would not be an unqualified general right, since it would include a qualification—namely, the adverb 'F-ly'—modifying the manner in which S may not obtain.

So far, so good. But now consider a right having the following form: 'X has a right against those who owe him a duty that S not obtain that S not obtain'. This is a species of a Hohfeldian claim. Is it a general right in Oberdiek's sense of the term? It seems to have the right form to be a general right, since it contains no adverb modifying the manner in which S may not obtain. Indeed, it has *exactly* the same form as 'X has a right against Y that S not obtain' except that 'Y' has been replaced by 'those who owe him a duty that S not obtain'. On the other hand, its content is not determined by facts about X alone. After all, in order to know what the cash value of that right is, we would need to know what it is for one person to owe a duty to another person, and we would have to know who owes X that duty, and that is not something that we can read off facts about X alone. So this might suggest that it is not a general right.

But setting this worry aside, it remains the case that such rights pose a problem for Oberdiek. For either such rights are general rights or they are not. If they are general rights then there is no reason to suppose that they present problems for a theory of rights incorporating the infringing/violating distinction. And if they are *not* general rights, then no rights of the form ‘X has a right against Y that S not obtain’ can be incorporated into a theory of rights that includes the infringing/violating distinction. Since that seems *prima facie* absurd I will concentrate on the former possibility.

I am supposing that rights of the form ‘X has a right against those who owe him a duty that S not obtain that S not obtain’ are general rights. Can a friend of the infringing/violating distinction incorporate such rights into her theory? It seems to me that she can. Take the cabin-owner in the Cabin Case. He has a right that his cabin not be broken into. And that right holds against all those who owe him a duty not to break into his cabin. The cabin-owner, of course, could break into his cabin were he to forget his keys since he is under no duty not to do so. Similarly, I suppose, could his friends and neighbours. But the hiker is under a duty not to break into the cabin. That is why, when he does so, he interferes with the cabin-owner’s rights. But because he does so in circumstances of necessity his interference is a mere infringement.

As a result, it would appear that one is free to think about rights using the metaphor of a moral space (if one desires to do so). One’s moral space would then be determined by rights defined in terms of the duties owed by others. On this view, it may be that I do not have a general right that people stay off my lawn, or a general right that people not cause me harm. But I do have a general right that people who owe me a duty to stay off my lawn do so, and it is arguably general rights of this sort that form the boundary across which others may not trespass. But if this is true, then we seem to have an example of a general right that is perfectly compatible with the infringing/violating distinction. It is hard to see a problem for Thomson’s view here.

11. Finally, what of Oberdiek’s claim, expressed by (P6), that causation cannot pick out any *single* party as *the* cause of a

legally cognizable harm? Recall why this claim is important. According to the picture of rights that Oberdiek is criticizing, the content of a right is sensitive only to facts about the individual rights-holder. Moreover, a person's moral space is constituted by the rights that that person enjoys. Thus—he concludes—the content of a person's moral space can be cashed out only in terms of causing harm. Why does he think this? I *think* the idea is this: according to the libertarian view at issue, individuals are responsible for the harms that they cause. But unless it is possible to distinguish those harms that I am causally responsible for from those that I am not, this libertarian account of liability will prove to be empty. Thus, it must be possible *on normatively neutral causal grounds* to distinguish causes from effects, and to distinguish those who cause from those who are affected.

The thing to focus on here is the role played by a normatively neutral account of causation in distinguishing causes from effects. Oberdiek's position is that proponents of a moral space conception of rights cannot help themselves to an account of causation that includes normative elements. But I do not see why they ought to accept this. For if rights of the form 'X has a right against all those who owe him a duty that S not obtain that S not obtain' are general rights, then the content of those rights need not be cashed out in normatively neutral terms.

So, finally, to return to Oberdiek's claim that causation cannot pick out any *single* party as *the* cause of a legally cognizable harm. The claim is ambiguous. It might mean: there is *no normatively neutral* conception of causation capable of isolating the cause of a harm. Or it might mean: there is *no* conception of causation capable of isolating the cause of a harm. But once the claim is disambiguated it seems clear that the former claim, while arguably true, is not to the point, and that the second claim is false. The former claim is not to the point because, as we have seen, there is a conception of moral space that is not normatively neutral and so need not be cashed out using a normatively neutral account of causation. And the second claim is false because there are clearly conceptions of

causation that are capable of isolating the cause of a harm.⁴³ It's just that these conceptions involve normative elements.

The foregoing has been very quick, too quick given the deep and complex problems about the nature of causation and agency, and the scope of liability, that are raised by Oberdiek's argument against the moral space conception of rights. Nonetheless, I hope I have done enough to indicate that the situation for friends of the infringing/violating distinction is not as dire as Oberdiek takes it to be. Because there is a conception of moral rights that is not normatively neutral we need not accept that the moral space conception of rights is false. Certainly, it would be premature to conclude that "[t]o defend the moral space conception of rights...is to defend no moral space at all."⁴⁴

12. To conclude. My aim in this paper has been to defend a conception of rights that incorporates a distinction between infringing and violating. I did this in two stages. First, I indicated why such a conception of rights might be attractive by showing how it allows for the resolution of various puzzle cases, such as the Cabin Case. I then defended this conception of rights against Oberdiek's criticisms. In the end, I remain unmoved by the charge that a theory of rights that incorporates an infringing/violating distinction is incoherent. To the contrary, I find it more plausible and attractive than a theory of rights that relies on the notion of 'value pluralism', a notion which, as I have tried to show, faces serious problems of its own.

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⁴³ Perry is clear that there are such conceptions. As he points out, the dilemma that faces the libertarian is that "[s]tandard accounts of causation, while suitable for the libertarian's purpose insofar as they are general and normatively neutral, do not pick out a single person as *the* cause of a given harm. But nonstandard accounts of causation...that do generate unique attributions of harm appear inevitably to give up normative neutrality." Perry (1997, pp. 383–384).

⁴⁴ Oberdiek (2004, p. 345).