

# *Issues in Legal Scholarship*

---

VINCENT V. LAKE ERIE TRANSPORTATION CO. AND THE  
DOCTRINE OF NECESSITY

2005

*Article 1*

---

## The “Necessity” Defense And The Failure Of Tort Theory: The Case Against Strict Liability For Damages Caused While Exercising Self-Help In An Emergency

Stephen D. Sugarman\*

\*University of California, Berkeley, [sugarman@law.berkeley.edu](mailto:sugarman@law.berkeley.edu)

*Issues in Legal Scholarship* is one of The Journals of Legal Scholarship, produced by The Berkeley Electronic Press (bepress).

Copyright ©2005 by the authors.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher, **bepress**, which has been given certain exclusive rights by the author.

### *Prologue*

*In this quite lengthy and, no doubt for some, awkwardly structured, article, I take up what American tort law calls the "incomplete privilege" that arises when people are forced by circumstances of "necessity" to harm or consume the property of others. I focus on the much-written about case of Vincent v. Lake Erie Transportation Co. There a huge storm prevented a ship from leaving a dock where its cargo had just been unloaded. The captain reasonably had the crew secure the ship to the dock, and although the ship was saved, as a result of the storm the dock suffered some damage. In 1910, the Minnesota Supreme Court held the ship owner strictly liable for the damage done to the dock.*

*In the Restatement of Torts, this problem came to be analyzed as one in which the ship captain is first understood to have had a privilege to remain at the dock, even if that otherwise would have been a trespass. But, unlike, say, the full privilege of self-defense, the privilege arising from "necessity" is said to be incomplete, creating an obligation of the ship owner to compensate the dock owner.*

*This same principle, it has been widely argued, applies as well to a hiker who breaks into a cabin to save herself when trapped on a mountain in an unexpected storm. The hiker saves her life by eating some food and burning some wood she finds there. In such a case, while the hiker is understood to have a privilege to do what she did, it is generally asserted that she nonetheless owes a legal duty to compensate the cabin owner.*

*Nearly all scholars who have written about this problem support the result in Vincent and the result of the Vincent principle applied to the cabin case. Moreover, almost all the many moral philosophers who have examined the necessity issue agree that there*

*is a moral duty to pay for the food and wood and to pay for the harm to the dock. I am one of those very few who disagree.*

*My position rests on these values. First, I believe that people should be under, and should feel themselves under, a moral obligation to help others in relatively easy rescue situations (which I consider these to be). In the society in which I would like to live, ordinary people would readily act upon that obligation without expecting to be paid for what they do (that is, assuming that the rescuer is not a professional rescuer). Indeed, when fate picks you out to be the one to rescue a fellow ordinary citizen, I believe that this provides you with what should be a welcome (but rare) opportunity to demonstrate your commitment to this important social norm.*

*In situations covered by the defense of necessity, however, there typically is no would-be rescuer on the scene to make the rescue effort. Instead, the person in extreme need uses self-help to avail herself of something that, in my favored world, the other (had she been there) would have willingly provided with no expectation of payment. In effect, the cabin owner and dock owner are involuntarily forced to become the rescuers that they morally should have been had they only had the actual opportunity to have been. But this should not be troubling to them. To the contrary, they should be pleased that their property was able to be used to facilitate such a socially desirable outcome.*

*Second, if you (whose property is consumed or harmed) decide afterwards to make a claim for compensation against the self-help rescuer, you are, in my view, saying that you do not want, and implicitly, would not have wanted, simply to make a gift of what was necessary for the person in need. Unwilling simply to share what was initially yours, you seek recovery so as to force your loss on the self-help rescuer.*

*I understand that the person whose dock or cabin was used and is now demanding compensation is not arguing that the self-help rescuer was wrong in what she did. Rather, the property owner is saying that a person in need should pay for what she took or damaged. I do believe that the reasonable self-help rescuer owes the property owner an explanation of what happened so as to justify her actions, and I also believe that the self-help rescuer has a moral obligation to express gratitude for being saved. Moreover, I think it would be desirable if the self-help rescuer also make a gesture of gratitude, for example, by sending a token of that gratitude to the cabin or dock owner (or possibly to a charity) – but not by sending cash or something else meant to have a value equal to what was taken or the damage that was done.*

*What I oppose is treating the self-help rescuer as, in effect, simply having the right to purchase what she desperately needed. To me, that turns what should be personal act of charity into a business relationship, and it thereby undermines the social solidarity that I believe is strengthened in a community where sharing with other fellow citizens in emergency situations is a strongly internalized value.*

*In this article I discuss a large number of scholarly contributors to this debate. Many of them offer reasons in support of the current American legal outcome in these sorts of necessity cases. I seek to show that most of the reasons they give fall short in one of two ways or both. Either they are simply unconvincing or else they are too sweeping and imply a very different state of the law on all sorts of other issues as well. As to the latter, I am quite skeptical about whether the person making the argument about the self-help rescue situation would actually support overturning the law in those other cases. If this is so, then to me that shows an inconsistency in the person's position, and throws doubt on the power of his or her argument. On the other hand, if a person means to be consistent and genuinely favors altering legal outcomes in many other areas as well,*

*then at least we should be aware of consequences that would seem to follow from accepting the argument that is put forward in the necessity setting.*

*In the end, it seems to me that most people who favor existing U.S. law base their position on an instinct that it is the just result, and yet I believe that few have dug deeper into the values that underlie that instinct. In my view, what most likely underlies that instinct is a strong commitment to private (as opposed to common) property rights and a general preference for the commercialization of relationships between people, including those who are not otherwise in a the business of rescuing. I, by contrast, oppose turning these fate-created relationships into business deals, and I favor a regime of weaker property rights in which property is, in effect, commonly owned in special circumstances of necessity.*

*To try to make the point more specific, I think it wrong that, when I desperately need a piece of your bread to save my child's life and it is clear to both of us that there is no other place for me to get the bread, your social role should become like that of a baker or grocer whose duty it is to sell me the bread. In the society where I'd like to live, your duty and pleasure would come from giving me the bread, expecting no payment for the bread's normal market value in return. Others seem to me to understand our social relationships with "strangers" (but fellow members of society) as properly like that of bakers or grocers and their customers. Such a view is all of a piece with the position that under the Vincent rule, in a situation of unexpected necessity, my right, in effect, is to force you to sell the bread to me.*

*Whereas I favor an obligation to share even with "strangers" in such situations, I recognize that others may take a narrower view. For example, they might only support an obligation to share with those who cannot reasonably afford to pay. They would, in effect, give the hiker the right to break into the cabin to save her life even if*

*she knew she had no means available of later paying for what she took. But, as to those with the means, they only have a moral right use what is found in the cabin if they are prepared to pay for what they take. People with this view perhaps think that one's duty of charity – one's obligation to make a gift, in effect – should only run to those with more permanent financial need (i.e., the poor). As to those whose need is acute but transitory – i.e. those not in financial need – people with this view would believe that the provision of charity is not the right way to cast the moral duty of the cabin and dock owners.*

*Such narrower views of the moral duties of the cabin and dock owner are not mine. But I would be happier if those who concluded that their instincts were based on these sorts of views were to say so. Then we could more directly talk about what sort of society they think we have and what sort of society they would like to live in. Perhaps they would conclude that they prefer my favored society but believe that ours is different – indeed that evidence for that difference could be seen to arise from the U.S. law on this issue! Or perhaps they would argue that they prefer a society whose social norms call for less sharing than do mine. But then at least we could openly talk about how far sharing obligations should extend. Alas, this is not the way most writers have addressed the matter.*

## **Introduction**

This article critically reviews discussions in both the legal literature and the moral philosophy literature about whether liability should be imposed on someone who, in an emergency situation, damages or destroys another's property while making self-help efforts that are reasonably necessary to save the actor's clearly more valuable property and/or his own life.

In the U.S., the legal literature on this problem of "private necessity" centers on the case of *Vincent v. Lake Erie Transportation Co.*,<sup>1</sup> in which the Minnesota Supreme Court in 1910 held a ship owner liable for damaging the plaintiff's dock, even though it agreed that the ship owner's decision to stay moored to the dock was reasonably necessary to save the ship from the destruction that would very likely have occurred had the ship instead been cut loose in the severe storm that had arisen. The problem that has received considerable attention in the philosophy literature revolves around the compensation duties of a hiker who, in order to save his life when caught in an unexpected storm, breaks into a mountain cabin and consumes food and wood he finds there.

Both cases, therefore, ask whether there should be liability without fault – since, to emphasize the point, it is agreed by all of those whose writings I have seen that, on the grounds of "necessity," both the hiker and the ship captain acted properly and lawfully.<sup>2</sup> That is, they had the right (sometimes called the "privilege") to enter, use, and damage the property of another in order to save themselves or their own.

There are, to be sure, some differences in the two examples – perhaps most importantly that *Vincent* involves two commercial parties with (apparently) only property at stake, whereas the mountain cabin case involves two noncommercial parties and the hiker's life. Whether such differences ought to be relevant to the outcomes will be explored in due course.

I should make clear at the outset that the clearly predominant sentiment of the writers on these two cases is that both actors should have a duty to compensate their victims. I will, however, take the decided minority position by arguing that the reasons thus far advanced in support of the majority view are unconvincing. I will also offer an argument why a duty of compensation should not be imposed.

The necessity defense is by no means an important, frequently-invoked plea in modern tort litigation. Its treatment bears close examination, however, for two reasons. First, it so nicely raises the wider question of when, if ever, is strict tort liability justified; and much of my discussion will be about that question.

Second, and perhaps even more importantly, because the problem of necessity has attracted the attention of so many leading scholars, my analysis provides a window into the intellectual history of tort theory. Indeed, I have chosen to analyze this problem at length, and by moving largely from scholar to scholar, because in this way the evolution in torts thinking is revealed. Moreover, when the scholars are considered individually, one clearly sees the enormous variety of reasons and forms of argument have been put forward in the attempt to justify (or occasionally criticize) the proposition that those who cause damage to others while taking reasonable self-help measures in emergencies ought to be liable for that harm.

### **I. Some Background on *Vincent v. Lake Erie Transportation Co.***

Before turning to the scholarly writing spawned by the *Vincent* decision, however, I will provide some background concerning the case and the state of legal thinking on the problem at the time it was decided.<sup>3</sup>

At the beginning of the twentieth century, Duluth, Minnesota was home to one of the busiest ports in the world, even though harsh weather conditions kept the port closed between December and April. In the late afternoon of November 27, 1905, the 250 foot long steamship S.C. Reynolds entered the Duluth harbor and was positioned by those in charge out at the end of one of the port's many docks. Although there had been a big storm a few days before and another was predicted, it was reasonably calm when the Reynolds arrived. Soon, stevedores began to unload the cargo, and after a break



for dinner, they eventually completed the work at around 10:30 p.m. By that time, however, the new storm had developed and its power was already so great that, when the captain of the Reynolds sought to push off, the operators of the tugs that would be needed to help the Reynolds out of the harbor refused to provide assistance on the ground that it was too dangerous. Having no real choice but to remain, the captain then ordered his men to secure the Reynolds to the dock, and to replace the ropes as they chafed. A man of decades of experience in Great Lakes shipping, the captain was clearly aware that, if his ship were to break free, it would very likely crash into another ship or some other pier or perhaps simply sink because of the rough seas in the harbor.

In the course of the night, the storm, now known as the Mataafa Blow, grew to become one of the worst in Duluth's history. Thirty-six lives were lost and eighteen ships were damaged or destroyed, including the Mataafa, a 430 foot long iron ore carrier that sank. Yet, the Reynolds escaped unharmed, and departed safely the next afternoon. According to the owners of the dock to which it had been secured, however, the dock itself was damaged by the Reynolds being constantly pounded into the dock by the storm.

In their lawsuit against the owners of the Reynolds, the dock owners pursued what to modern eyes is a very confusing legal theory. They alleged that the captain of the Reynolds was at fault, even though they never offered any convincing evidence as to what he should have done differently. Rather, the plaintiffs' lawyers seemed to argue that the defendants were at fault merely by choosing to keep the ship tied to the dock, knowing that it was pounding into the dock thereby clearly risking harm to the dock. But, even in those days, knowingly taking a risk of almost certain harm was not generally thought sufficient to show that the defendant did the wrong thing, and indeed, basing liability on "negligence" in this case was thoroughly rejected by the Minnesota Supreme Court's famous decision.

In today's way of thinking, the plaintiffs are better understood as claiming that this was one of those circumstances in which the defendants should be held liable regardless of fault. And in justification of that outcome the plaintiffs' lawyer offered a Latin maxim from Blackstone to the effect that you should "use your own property in such a manner as not to injure that of another."

The *Vincent* case was decided soon after a now-famous Vermont case, *Ploof v. Putnam*,<sup>4</sup> in which the owner of a private sloop had sought safety at a private dock because of a storm. But the dock owners' agent unmoored the sloop, causing harm to the sloop, as well as its owner, his family and his cargo which were all on board at the time. The Vermont Supreme Court concluded that this was unreasonable behavior by the agent, stating that in situations of necessity the sloop owner had a right to tie up at the dock. Under such circumstances, the ordinary right of landowners to expel "trespassers" was suspended, and so the agent and his master (the dock owner) were liable for the loss. The *Ploof* principle, if followed, makes clear that the captain in *Vincent* had a right to stay at the dock in Duluth to wait out the storm. But the *Ploof* holding itself says nothing about who is to pay for any damage done to the dock in the storm, a point that was acknowledged by the editors of the Harvard Law Review in a brief note they published on the *Ploof* case.<sup>5</sup>

Emphasizing the uncertainty of what should be the proper outcome when the dock is damaged, the Harvard editors cited to an 1884 treatise by Professor Henry Terry, which points out what Terry saw as two clashing principles. On the one hand "small violations of rights ... must in exceptional circumstances be allowed in order to prevent vastly greater evils, and people must be left free to do such acts when the occasion calls for them without being checked by fear of legal liability." On the other hand, "a person who does such acts for his own sole benefit ought to make a compensation for any substantial damages done by him in so acting ..."<sup>6</sup>

Terry drew on Holmes, who also had pointed out the uncertain state of the law on this question. In his famous lectures on the Common Law, Holmes discussed the 1648 English case of *Gilbert v. Stone*,<sup>7</sup> in which a man, who was in fear of his life because of threats by twelve armed men, entered another's property and took a horse on which to escape. As Holmes put it, "In such a case, he actually contemplates and chooses harm to another as a consequence of his act. Yet the act is neither blameworthy nor punishable" – by which Holmes meant it was not a crime. But what about providing the horse owner a remedy in tort? Although English courts had earlier ruled in favor of the horse owner, Holmes suggested that this result may no longer be good law, pointing out that more recent pronouncements suggested that "... an act must in general not only be dangerous, but one which would be blameworthy on the part of the average man, in order to make the actor liable."<sup>8</sup>

Indeed, in the case of *Cope v. Sharpe (No. 2)*,<sup>9</sup> which was wending its way through the English courts at the very time of *Vincent*, the English law appears to have been understood as requiring fault before liability would be imposed in such situations, thereby seemingly coming to the opposite result of that decided in *Vincent* – a matter taken up later in this essay. Elsewhere, I have described and criticized at length the reasoning of the Minnesota Supreme Court in *Vincent*<sup>10</sup> Here, I will weave references to the Court's thinking into my discussion of subsequent scholarship on the case.

## **II. Legal Scholars Favoring a Duty to Compensate**

### **A. Francis Bohlen's "benefit" theory**

The classic legal article on the *Vincent* case was published in 1926 by Professor Francis Bohlen.<sup>11</sup> Before then, although *Vincent* quickly gained the attention of the Harvard<sup>12</sup> and Columbia<sup>13</sup> law reviews and began to appear in some torts casebooks, no serious analysis of the decision had been offered.

Supporting the *Vincent* result and criticizing those who would argue that tort liability should depend upon a showing of fault, Bohlen said that one purpose of tort law is "to adjust a loss which has already occurred in a manner which is fair to the individuals concerned and which accomplishes the maximum of social good with the minimum of loss and inconvenience to them, and which incidentally affords as near as possible a definite guide by which individuals may determine whether a particular course of conduct will or will not subject them to liability."<sup>14</sup> However useful these statements may be as criteria by which to judge a legal rule, they are certainly not an argument for the *Vincent* result.

Moreover, when it comes to making an argument, Bohlen talks neither about the value of certainty (which could well be better served through adherence to the fault requirement which dominates most of tort law) nor, really, about maximizing social good (which could plausibly involve considering the relative wealth of the parties involved, although Bohlen would appear to oppose that).

Rather, Bohlen asserts: "As between the individuals concerned, it is *obviously just* that he whose interests are advanced by the act should bear the cost of doing it rather than that he should be permitted to impose it upon one who derives no benefit from the act."<sup>15</sup> This "benefit" argument is also described by some later writers as "unjust enrichment" in the sense that it would somehow be unjust if the actor, through his deliberate choice, obtained a benefit at the victim's expense and didn't pay for it.<sup>16</sup>

But Bohlen does not explain why is it "obviously just" to make the actor pay -- why, as he puts it, the actor should have only an "incomplete" rather than a "complete" privilege to harm the plaintiff. Why not conclude instead, for example, that just as a dock owner takes risks with respect to natural disasters (say, lightning setting his dock on fire), so too, one of the risks of owning a dock is that it will

be reasonably damaged by another in an emergency? That is how the dissent in *Vincent* saw the case.<sup>17</sup> Moreover, isn't it actually congenial to describe the *Vincent* case itself as an example of damage caused by natural disaster? The captain acted reasonably, but was overwhelmed by the storm. Indeed, from the dock owner's perspective, how is this loss importantly different from the loss that would have occurred had a boat been blown into the dock by the storm? But had that occurred, even the *Vincent* majority agrees that the captain would not be liable for the dock damage.<sup>18</sup> Besides, looking broadly at the facts, why not say that since the dock owner "benefits" from the commercial exploitation of his facilities, it would be unjust for him to try to have the law shift to another the costs of these sorts of accidents that inevitably go along with dock owning?

But instead of giving explanations for his view of justice, Bohlen seeks to convince us of his "benefit" principle through the strategy of legal analogy. He points initially to the rule of maritime law known as "general average" to the effect that "if a part of the cargo is jettisoned to save a vessel from destruction, the loss is to be divided among the vessel and cargo whose safety is secured thereby."<sup>19</sup> I find this analogy unpersuasive. In the first place, as Bohlen later admits, there is also long established legal authority for the proposition that "passengers whose lives are saved by the jettison of a part of a cargo are not required to contribute to the fund which is paid to its owner."<sup>20</sup> So why shouldn't that analogy (where the beneficiaries don't pay) be invoked instead in order to decide the justness of the *Vincent* result? Bohlen doesn't say.

Moreover, the problem of jettisoning cargo is rather different from *Vincent*. When it comes to jettisoning cargo, a ship's crew, often unaware of the value of goods in sealed containers, is likely to be rather arbitrary in what they pitch over the side; and perhaps the arbitrariness of who is selected out as the rescuer of the others makes a loss sharing rule more appropriate. Besides, were we to imagine the cargo owners being present at the time, perhaps the morally proper

thing for each of them to do is voluntarily to offer to jettison a proportionate share. If so, then the rule of general average can be seen to replicate that result. In *Vincent*, by contrast, where the plaintiff's dock was the only and obvious source of protection for the ship captain, it was clear that this dock owner was the critical rescuer. Finally, perhaps the principle of "general average," which Bohlen, after all, only invoked but did not defend, is itself unjust, and reflects merely a now outmoded form of insurance.

Bohlen also offers the analogy of "eminent domain" under which, it is true, those who exercise this right are required to pay "just compensation" to those whose property is taken for public purposes. Once again, however, I suggest that there are critical differences between the two problems. In the first place, in the field of eminent domain, as with the cargo problem, there can be a serious concern about arbitrariness, or indeed invidiousness, in the process of selecting whose property to sacrifice; e.g., through whose farm does the city decide to run the road? Thus, the compensation obligation in eminent domain cases may be justified to protect against this risk of invidiousness that didn't exist in *Vincent*.

Moreover, in the eminent domain setting, unlike the emergency situation of *Vincent*, there is plenty of time for a voluntary exchange. It is just that to rely on such transactions gives the property owner the ability either to extract a monopoly price or to block a socially desirable activity. Finding neither acceptable, the law has, in effect, conditioned people's property rights by allowing certain public bodies and their delegates to impose forced sales at a neutrally determined market price.

But I don't find a forced sale of the dock (or some of its planks that were damaged in the *Vincent* case) a congenial way to view the emergency action of the ship captain. After all, it isn't as though the ship captain, like one who exercises eminent domain, is now in possession of something new that he can turn around and sell. So, if

one is looking for a comparison from the land use field, why not instead, for example, analogize the *Vincent* problem to a new zoning restriction that is imposed on a person's use of his land that both hurts him and helps a neighbor, but for which neither the neighbor nor the public is required to pay? Indeed, although Bohlen doesn't acknowledge it, my zoning example is but one instance of many under current law in which one landowner gains at another's expense without owing compensation.

Yet another reason for routinely requiring compensation in eminent domain settings is that the alternative might be thought to require the evaluation by the judicial system of the reasonableness of the actions taken by another arm of government. That is, absent the regular payment of compensation for takings, perhaps there would grow up a doctrine of liability for "unreasonable" (i.e., negligent) takings. Yet this would have the probably undesirable effect of forcing the judiciary regularly to second guess and often clash with policy judgments made by the executive and/or legislative arms of government. But with compensation routinely assured, the need for the judiciary to interfere may be properly reduced to extreme cases of irregularity. By contrast, if a negligence regime were to govern the *Vincent* situation, while the jury may have to decide whether the ship captain acted reasonably, this is a routine jury function that does not raise the separation of powers problem just noted.<sup>21</sup>

As a final analogy, Bohlen invokes the contrasting rule covering what have come to be known as "public necessity" cases – to the effect that one, typically a public official, is not liable for destroying the property of another if this is necessary to save the community. Bohlen's point is that the rescuer here isn't liable because he isn't the (main) beneficiary of the action.<sup>22</sup> I don't think this will do, however, as a justification for *Vincent*. Just because people are not liable when they act reasonably to save others, this is hardly a sufficient basis for holding them liable when they act reasonably to benefit (only) themselves; it could as well follow that they aren't liable

in that event either.<sup>23</sup> Indeed, if anything is shown by the fact that actions by public officials in emergencies don't constitute compensable "takings," it is the further weakening of the eminent domain analogy to *Vincent* that Bohlen earlier drew.

In short, what we learn from this article is that Bohlen quite clearly believed that the ship owner in *Vincent* should pay because he benefited at the expense of the dock owner. Yet in support of this position, we are given dubious and/or inconsistent legal analogies and no real argument beyond the rhetorical flourish that the *Vincent* result is "obviously just."

### B. The Restatement of Torts

I turn next to The Restatement of Torts, which, unsurprisingly, clearly reflects Bohlen's outlook – Bohlen having been its Reporter during the 1930s when the First Restatement was adopted. Section 197 of the Restatement of Torts provides, a la *Vincent*, that although private necessity gives one a privilege to enter onto another's land, one is liable for the damage done to the landowner's property even if the behavior of the one who has entered is in all respects reasonable.<sup>24</sup> I will generally cite and refer here to the updated and now current Restatement of Torts (Second), issued starting in 1965. On the matter of private necessity, however, the provisions are not changed from the First Restatement. It should also be noted that Section 197 parallels Section 122 of the Restatement of Restitution, issued in 1937,<sup>25</sup> showing that this problem is viewed by some, as I have already noted, as a matter of unjust enrichment; this is a theme to which I will return.

Not atypically, the Restatement of Torts' presentation of the law of private necessity offers no reasons for the adoption of the duty of compensation provision in Section 197, being content to cite *Vincent*, a few other old cases,<sup>26</sup> and Professor Bohlen's article.



I find noteworthy, however, three additional features of this portion of the Restatement. First, we get some clue to the thinking of those behind the Restatement in nearby Section 195, which involves the privilege to deviate from an impassable public highway and travel through someone else's property. There, the Restatement points out the parallel to *Vincent*, and provides that one who so deviates is to be held liable for unavoidable damage to the property owner.<sup>27</sup> The Reporter's Notes (which parrot Comment h to Section 195) seek to justify the analogy on the ground that, as in *Vincent*, "the exercise of the privilege is for the actor's own benefit."<sup>28</sup> In short, the Bohlen perspective is again adopted. The Notes admit, however, that there is little authority for the result favored by Section 195; indeed, such authority as there is seems to be to the contrary, thus providing further reason to reject the idea that the common law actually then followed the "benefit" principle.<sup>29</sup>

Second, Section 196 accepts the traditional counterpart position to *Vincent* noted above in my discussion of the Bohlen article – that entries onto land for reasons of public, as opposed to private, necessity give rise to a complete privilege to the actor to reasonably damage to property of the landowner.<sup>30</sup> Those behind the Restatement also realize that, absent a legislatively enacted obligation, there is no traditional legal authority imposing a duty on the (passive) beneficiaries of the actor's conduct to pay for the harm done, but they go on to assert (without giving any further reason or evidence) that "the moral obligation" of the "municipality or other community for whose protection ... the individual has acted" "to compensate the person whose property has been damaged or destroyed for the public good is obviously very great and is of the kind that should be recognized by the law..."<sup>31</sup>

In sum, while it may not have the law clearly on its side, at least the Restatement advocates consistent rules for the problems covered by Sections 195 and 196, as well as for Section 197's application to *Vincent*.

Yet third, the Restatement further provides in Section 197 that when one reasonably enters onto the land of another to protect, not the public good, but the interest of a third party, then, just as where one enters for one's own purposes, one's privilege is incomplete, and one is liable for damages reasonably caused to the landowner.<sup>32</sup> For this proposition the Restatement offers neither reasoning nor authority. I find the position here odd, because this result does not seem to follow from the proposition that one is to be held liable who is enriched at the expense of another; that principle, rather, would seem to imply that the third party (on whose behalf the entry was made), and not the actor, should be liable. As to the liability of the beneficiary, Section 197 is silent. Since those behind the Restatement don't seem to be in a position here of having to put forward a rule they oppose, how is this result to be explained?<sup>33</sup>

Section 122 of the Restatement of Restitution that is virtually identical to this provision of Section 197 offers in Comments the further proposition that one should not be able to be a good Samaritan at the expense of another.<sup>34</sup> But this is a mere assertion, not an argument. Moreover, if consistently applied, that idea arguably would lead to holding the actor liable in the public necessity setting.<sup>35</sup>

Mention should finally be made to Restatement Section 263, which is the parallel to Section 197, but it covers what would, absent the emergency, be a trespass to (or a conversion of) a chattel rather than real property. Later I will discuss a challenging example given in Section 263. For now I simply want to note that the Reporter's Notes reveal that this section too is not based on legal authority, but rather is adopted on the ground that it is logically consistent with *Vincent* and Section 197.<sup>36</sup> In sum, like Professor Bohlen, the Restatement of Torts sheds painfully little light on this problem.<sup>37</sup>

### C. Robert Keeton's "conditional fault" theory

I am not the first to find unsatisfying Bohlen's assertions about "benefit" and their easy embrace by the Restatement's authors and others.

Professor and later Judge Robert Keeton tried his hand at *Vincent* in a well known 1959 article in which he sought to justify the legal results in a variety of cases in which judges had imposed liability without fault. According to Keeton's analysis, these cases were best seen as examples of what he called "conditional fault."<sup>38</sup> Keeton's central claim is that there are some activities which we don't consider blameworthy in themselves, but which we would think the actor at fault if he failed to compensate those injured as a result. In other words, in Keeton's view you aren't negligent for, say, carefully dynamiting at a construction site where using dynamite is agreed to be the appropriate technique; but you would be wrong not to pay for any damage the blasting does. While the phrase "conditional fault" may not capture the idea in the very best way, Keeton's point is clear enough.

The issue, however, is: why is it wrong not to pay for the damage the dynamite does? Or, more important for our purposes: why is it wrong, as Keeton says it is,<sup>39</sup> for the ship owner not to pay in *Vincent*? Keeton's argument rests on what he considers to be moral claims. He assumes, with no real discussion, that there should be a legal obligation to back up this moral obligation – a point I won't deal with now.<sup>40</sup> What will concern me here, therefore, is the basis for his claim that the ship owner is morally obligated to pay.

The first point to note is that Keeton rejects Bohlen's "benefit" principle as overbroad by showing, through various examples, that the common law is full of situations in which one deliberately acts for one's own benefit and injures another but is not liable for the harm done (unless one acted negligently). Non-negligent motoring, non-negligent locating of, say, a service station near someone's home in circumstances that don't amount to a nuisance, and non-negligent

operating of railways without eliminating all grade crossings are some of Keeton's examples.<sup>41</sup> Keeton concludes that "it is apparent, on reflection, that most and perhaps all activities commonly assumed to be permissible lead to consequences which amount to enrichment to the detriment of another in the broad sense of changes in the allocation of advantages and disadvantages..."<sup>42</sup> Nor does Keeton argue that all such cases should give rise to a duty of compensation.

What then is Keeton's reason for favoring a rule of strict liability in some settings but not others? Keeton's strategy is to rely primarily on a combination of mental experiments and appeals to assumed popular opinion. Thus, he asks to reader to consider whether he or she thinks that the ship owner in *Vincent* would be at fault for not paying for the damage to the dock, and he then asserts that "many will" think that way.<sup>43</sup>

Although this appeal to popular sentiment is not wholly without value, it tells us nothing about why people might hold that opinion. Moreover, since Keeton plainly does not mean to suggest that he has conducted anything like a real public opinion poll, it is by no means clear that he is correct in his surmise. Perhaps his conclusion is drawn from conversations with years of Harvard law students, although this surely would be a dangerous group from which to identify public sentiment. In any case, as is well understood, public responses can vary enormously depending upon how the inquiry is put.<sup>44</sup>

For example, suppose one asks first what the dock owner should do in this emergency situation if he were on the scene. Assume for now that one elicits the response that the right thing would be for the dock owner to help with the rescue. Next it might be put whether it is right or seemly for the helpful dock owner to make a demand afterwards for money for his time and/or the harm to his dock incurred while he was helping out, especially when the dock owner is probably insured for the damage, as would typically be the case. Assume for now that the dominant response here is that a demand for payment

would seem inappropriate. Were that so, it might then be but a short step to get the responder further to agree that such a demand would also be inappropriate where the dock owner was absent and the ship's captain saved himself; and that under such circumstances, imposing a legal obligation on the ship captain to pay for the harm would be wrong. I don't mean to argue that lay responses would necessarily be forthcoming in this way – for I have not conducted any empirical research on this problem either. Rather, by this way of putting the matter I mean to expose the general point that one ought to be extremely cautious about what one takes public sentiment to be on this issue – even if one were prepared to employ that sentiment as a strong argument for the legal outcome one adopts, a yet additional proposition of course.

Furthermore, for reasons Keeton doesn't really explain, when he comes to consider the case of the careful dynamite blaster he argues, not merely that "many will" consider him at fault if he doesn't pay for the harm he does – the phrase used for the *Vincent* problem – but that "substantially all" who think about the dynamite blasting problem will.<sup>45</sup> Keeton then rightly observes that an explanation that might well be given by laymen for their feelings about the dynamite case – superior risk-spreading ability – is inapplicable to the *Vincent* problem. And, later on, he makes yet another distinction, saying that he believes an injunction would be appropriately given against a proposed dynamiting, if the blaster is unprepared to make advance provision for compensation of his potential victims.<sup>46</sup> That is, we would, in Keeton's view, prefer to prevent the judgment proof dynamiter from acting at all. By contrast, Keeton admits that he wouldn't want to stop one who is acting in an emergency to save his own life, even if this meant that he would damage another's property and be unable later to pay for it. In short, unlike the dynamite case, the self-help rescuer isn't seen as blameworthy in Keeton's eyes if he acts knowing he is judgment proof.<sup>47</sup>

Given these differences between the necessity and the blasting examples that Keeton himself recognizes, and given Keeton's much weaker assertion about popular sentiment about the *Vincent* problem as compared with the dynamite problem, I conclude that, even on Keeton's own way of arguing, a better way to characterize thoughtful lay sentiment about *Vincent* would be in terms of uncertainty.<sup>48</sup> And in that situation, it would seem to me that public opinion is more in need of help in its molding than of being seen as a source of leadership.<sup>49</sup>

In sum, I reject the claim that Keeton has made a convincing case that the ship owner in *Vincent* should be deemed, in his terminology, conditionally at fault.<sup>50</sup>

#### D. Clarence Morris's "cooperation" argument

When Professor Clarence Morris took his try at *Vincent* in 1953, the central justification for the result in the case that he offered was, as we will see, an instrumental one.<sup>51</sup> This approach continues in the second edition of this wonderful student handbook.<sup>52</sup> Plainly dissatisfied with a principle that would merely make people liable for acts done, Morris searches for what he calls a "forward-looking justification" that might more satisfactorily support the *Vincent* result.<sup>53</sup>

Morris argues that a justification for the ship owners' liability might be that the promise of compensation serves to keep the dock owner from cutting loose the ship; i.e., it wins his cooperation, that is non-interference, with the captain's self-rescue effort.<sup>54</sup> I have several problems with this argument, however.

First, even assuming the actors are aware of the law (a fairly strong, but not heroic assumption in this case), I have grave doubts about the behavioral proposition being asserted. We are talking about someone, after all, who by hypothesis would otherwise choose to do

the wrongful act of jeopardizing the ship (and perhaps the lives of the crew) by cutting it loose, and who furthermore is not deterred by the threat of liability that the law (as per *Plouf*) would plainly impose on him were the ship damaged. Is that person likely to respond to the promise of payment? I somehow doubt it, although I recognize that cutting the boat loose only creates the chance of liability to the dock owner since the boat, by a stroke of good fortune, might not be harmed -- a rather unlikely possibility in *Vincent*, however.<sup>55</sup>

Second, the idea that we need to pay people to comply with a legal rule they are otherwise already under an obligation to obey is very troubling and not addressed by Morris. Third, and finally, if we are going to compensate the dock owner to get his cooperation, ought we not also compensate the property owner in "public necessity" cases to keep him from interfering with such emergency efforts? But Morris endorses the rule of no liability in such cases.<sup>56</sup> In short, I am highly skeptical of the persuasiveness of Morris' "cooperation" justification for *Vincent*.<sup>57</sup>

Putting forward, rather sketchily, a quite different behavioral control argument, Morris closes by positing that if we tell the ship owner that he will be liable in such cases, this may make him more careful in the way he uses the dock.<sup>58</sup> But since he would be liable under negligence law for failing to take all reasonable care in tying up his ship, this claim too seems weak. It sounds to me like the similar claim sometimes made to the effect that strict product liability will make manufacturers exercise super-care. This, however, appears to depend upon assumptions of irrational actors or the ineffective operation of negligence law which, until they are better spelled out and defended, leads me to reject the claim that the *Vincent* rule prompts better seamanship than would negligence liability.

#### E. Albert Ehrenzweig's "negligence without fault" theory

During the 1960s there was much open endorsement of the idea of "enterprise liability." Simply put, writers who were broadly interested in victim compensation sought to encourage the imposition of tort liability on parties, usually enterprise defendants, that could and usually did insure against that loss and/or could readily absorb and widely distribute the loss through the price system.

I consider my former colleague, the late Albert Ehrenzweig, to be a good representative of this point of view. In one important article, he advocated liability for "the unavoidable and insurable consequences of lawful (enterprise) activities."<sup>59</sup> For him, so long as the harm was "typical" for the activity and "thus calculable and reasonably insurable"<sup>60</sup> the enterprise should be liable in tort. He called this "negligence without fault" and justified imposing the duty of compensation on the enterprise on the ground that "these liabilities are the price which must be paid to society for the permission of a hazardous activity."<sup>61</sup>

At first blush, given the similar language and analytical structure, "negligence without fault" and "conditional fault" may sound like the same idea. What distinguishes Ehrenzweig from Keeton, however, is that whereas Keeton, as we saw, seemed to turn to popular sentiment and intuition as a guide to when a duty to pay compensation should be imposed, Ehrenzweig was willing to assert that this obligation should properly and broadly attach to all enterprises – which is considerably further than Keeton was willing to go.

In the course of his analysis Ehrenzweig says that "the entrepreneur's duty to compensate" his victims is "analogous" to the rule in necessity cases – citing *Vincent*.<sup>62</sup> While the *Vincent* outcome may provide an analogy for Ehrenzweig, I am afraid that I have considerable difficulty with the reverse – that is, the application of Ehrenzweig's theory to *Vincent*.



If the point of "negligence without fault" is to find a party that can sensibly and not unfairly be made to provide compensation to individual non-commercial victims – as it appears to be – then this simply doesn't apply to *Vincent*. As Professor Morris had earlier put it, since this is the sort of loss for which the dock owner can provide in advance through insurance just as easily as can the ship owner, the ship owner is not the "superior risk bearer."<sup>63</sup> Thus, in Ehrenzweig's own terms, why not conclude that this is a "typical" risk of dock owning that the *Vincent* plaintiff can and should absorb?

And if there is some other reason to deem the defendant in *Vincent* "negligent without fault," I'd like to know what that reason is. But, alas, Ehrenzweig simply quotes with favor Bohlen's "obviously just" formulation that I have already considered.<sup>64</sup>

#### F. Dale Broeder and the "better risk bearer"

Other "enterprise liability" devotees fare no better. In 1965 Professor Dale Broeder published an enormously wide-ranging article on the relationship between duties of compensation in tort law and the constitutional obligation to pay compensation for "takings."<sup>65</sup>

He nicely shows that in fundamental respects both then existing tort doctrine and the favored positions of the Restatement of Torts (Second) seem hopelessly internally inconsistent. Broeder's basic theme is that, whereas the law and/or the Restatement sometimes stand for what amounts to strict liability for harms to innocent victims, yet in many other settings those victims are made to bear their own loss absent defendant fault – but without any coherent justification for putting some cases in the strict liability box and others not. In this respect, Broeder offers a very effective critique.

As to how these problems ought to be handled, Broeder is equally clear. His central criterion is that (at least absent overriding culpability considerations) "losses ... should, so far as possible, fall

upon the better risk-bearer."<sup>66</sup> A la Ehrenzweig, this is, in Broeder's view, the party best able to distribute the risk through insurance or the price system, or, at least, more likely to be insured.<sup>67</sup> With this criterion in mind, Broeder cuts a wide swath through all sorts of well known legal issues, firmly deeming then existing results right or wrong. For example, he argues that there should be strict liability for (a) ground damage caused by non-negligent air crashes,<sup>68</sup> (b) reasonable, but mistaken, arrests or detentions of ordinary citizens brought about by enterprises whose employees thought the victims of the mistaken detentions had criminally wronged them,<sup>69</sup> (c) pedestrians hit by a runaway taxi, out of which a driver instinctively and reasonably jumps when confronted by an armed bandit,<sup>70</sup> (d) banks that reasonably resist robbers at the expense of their customers who are thereby injured,<sup>71</sup> (e) doctors who, by reasonable mistake, commit a patient to a small pox institution<sup>72</sup> and so on.

Turning to the *Vincent*, however, even if one does endorse Broeder's loss spreading rationale, the point is, as already noted, and as Broeder himself recognizes, "there is little, if anything, to choose between the *Vincent* shipowner and the dockowner on a risk-bearer basis ..."<sup>73</sup> Does this lead Broeder to conclude that there should be no liability to the dock owner? No.

Rather, like Ehrenzweig, he simply asserts, a la Bohlen, that "it seems only fair that the [ship owner] should pay."<sup>74</sup> I find this mystifying, and especially so since Broeder sharply attacks other justifications that have been given in support of *Vincent*, including (1) Morris' "cooperation argument"<sup>75</sup> and (2) the suggestion offered in *Vincent* that it somehow mattered that the ship owner had strengthened the cables after the storm began, rather than having employed sufficiently strong cables from the outset.<sup>76</sup> In short, Broeder offers nothing to explain why the *Vincent* result is "only fair."

#### G. Richard Posner's and William Landes' law and economics

Professor (now Judge) Richard Posner is a key leader in the law and economics approach to tort law – indeed to law generally. This school of thought, which really took hold starting in the 1970s, rejects the "modern" idea that compensation (through loss spreading) is the central role of tort law, as well as the conventional claim that tort law resolves disputes between individuals according to ordinary notions of morality and justice. Rather, the rules of tort law (indeed, the rules of much of the law) are seen to reflect and serve the goals of economic efficiency – that is, the proper allocation of resources in society. Like economists generally, law and economics devotees are driven by a concern with incentive effects.

Posner has taken up the *Vincent* problem on several occasions. His most succinct statement of why he thinks liability should be imposed on the ship owner is contained in a critique of an article by Professor Howard Latin, which I will shortly discuss,<sup>77</sup> that argues against liability. Posner says "The owner of the pier rendered the shipowner a valuable service, for which ordinarily he would as a businessman expect to be paid. It seems at a minimum he should be compensated for out-of-pocket costs in rendering the service."<sup>78</sup>

This isn't a typical Posnerian torts analysis; rather, it is, I suppose, a contracts analysis. Indeed, Posner cites to an earlier article of his (co-authored with William Landes) in which much the same point was made, and where the added explanation was offered that one can look at *Vincent* as an instance of a contract implied-in-law; that is, by imposing tort liability, the court is reflecting the contract the parties "would have made had they had the opportunity to negotiate ..."<sup>79</sup> Although I think Posner may be on to something important, I don't think he has it right.

In the first place, I don't buy the contract metaphor. If we think of this relationship as Posner seems to imagine it, notice that had the parties actually had time to negotiate, the dock owner could well have extracted a very high fee indeed from the ship owner for the use of the

dock – nearly up to the amount of the expected loss to the ship, I would suppose. But, in turn, surely such a contract would not be enforceable – just as a person may not enforce a promise he obtains from an injured man he finds on the road to give him all his wealth in return for providing critical first aid treatment needed to save the injured man's life. This taking advantage of the rescuer's monopoly situation is simply not tolerated, and neither would it be in the dock case.

Hence, what Posner really seems to mean is that the court in *Vincent* is imposing contract terms that would have occurred, not only had there been time to negotiate, but also had there been (which there were not) many competing dock owners offering to sell the ship captain shelter from the storm. This, it seems to me, shows that we should not think of the law being used to mimic the contract that these parties would have made, but rather to provide what the judges see as a fair (market value) recompense for the service provided – because justice somehow demands it. Posner must recognize this because he analogizes *Vincent* to the example of a physician who, he says, is entitled to market value, rather presumptively bargained for, compensation from the unconscious accident victim he finds on the street and helps.<sup>80</sup>

I don't want to dispute here the right of the rescuing doctor to compensation for his services. But I want to distinguish *Vincent*. First, and central to the law and economics approach, the doctor acted, and absent his having a legal duty to rescue, it may be thought necessary (and by Posner especially) to offer him compensation for his services in order to get him to provide them. This is not relevant in *Vincent* which is a case of self-help.<sup>81</sup>

Moreover, I want to emphasize that Posner's analysis seems oblivious to the *Ploof* rule. To be sure, *Ploof* says nothing one way or the other about any possible obligation to pay "rent" for the use of the dock, but it makes clear that the ship owner has a "right" (or

“privilege”) to use the dock. That is, this is a “benefit” that the dock owner has no right to deny, and under *Ploof* any “contract” negotiation would start with that configuration of the rights of the parties. This is altogether different from the passerby physician who has no legal duty (in U.S. law) to stop and render aid.

Second, doctors are essentially in the rescue business. Hence, a world that treats their assistance of those in dire need as non-compensable threatens to undermine their entire livelihood and to deter people from going into that line of work (absent an organized national health service in which doctors are paid other than by patients or their insurers). This is not true for dock owners, who don't make a living helping those in dire need and for whom emergency rescues of the sort exemplified in *Vincent* are not everyday occurrences; it was, after all, an unusually severe storm.<sup>82</sup> In short, unlike Posner, I don't think they consider providing the “service” of sheltering dock-battering ships from extraordinary storms to be part their business; rather, it is a chance event that could well be taken care of through first party insurance.

Put differently, whereas the doctor may understandably think it odd were we to ask him to give away a service that is central to what he normally does for a fee, that analogy just doesn't follow for the dock owner. This is why I think it unwarranted to conclude, as Judge Posner does, that the plaintiff in *Vincent* should be seen as providing a service for which he would normally expect to be paid.<sup>83</sup> Rather, I think, this is exactly the sort of unusual setting in which the dock owner, like any ordinary person faced with an unexpected opportunity to save another, ought to be pleased to volunteer the moderate assistance that is called for and not dream of sending a bill afterwards for the help given. And while it is true that in the actual *Vincent* case the dock owner wasn't there to make this offer on his own, Posner's analysis proceeds an assumption about what would have happened had he been.

Like others before them, Landes and Posner also analogize *Vincent* to eminent domain with the payment of damages seen as parallel to the obligation to pay just compensation. I have already explained my objection to the mere assertion of this analogy. Posner and Landes, however, add the claim that if the dock owner is not adequately compensated, "there will be insufficient dock building."<sup>84</sup> I am not persuaded by this argument about the socially desirable allocation of resources. First, why can it not as easily be said that, if compensation must be paid, there will be too little ship operating? To select from these two assertions in cases of non-fault injuries requires, I think, an initial assignment of rights; but the whole point here is to decide who has those rights. The Landes and Posner argument merely assumes that the dock owner does; the alternative assumes that, in emergencies, the property, in effect, belongs to the ship captain – in the very same way, for example, that my neighbor traditionally has had the property right to take (use and block) my sunlight without owing compensation.

Moreover, if the Landes and Posner concern is that the ship owners themselves might prefer more investment in docks than dock owners might be willing to make were the latter not compensated in *Vincent*-type cases, then, given the actual bargaining relationship that exists between dock owners and ship owners, I should have thought that the analysis of which Landes and Posner are most fond would teach us that liability here was unnecessary after all. That is, I would think that ship owners, and eventually cargo shippers, are going to pay for dock damage costs in either case – either through higher premiums paid for liability insurance (if *Vincent* is the law) or through increased dock charges that would be imposed on them (if *Vincent* is rejected). For these reasons I find unconvincing Posner and Landes' "activity level" argument regarding allocative efficiency.<sup>85</sup>

Besides, I don't see why Posner and Landes need to come out as they do on *Vincent* to maintain fidelity to their overall outlook on the world – unless they think their law and economics approach must

explain every existing doctrine. After all, in *Vincent* we aren't talking about either paying money to induce someone to make an efficient rescue, or imposing costs to stop an inefficient one, which appear to be the central purposes of tort liability rules from the law and economics perspective. Indeed, Posner and Landes predictably end their piece from which I have been quoting by saying that what they have done is "developed an economic model designed to predict the conditions under which the law will intervene to encourage rescues . . ." <sup>86</sup> This behavioral incentive perspective is also well reflected in the section of Judge Posner's Torts casebook dealing with the issue of public necessity. There he suggests that non-liability of actors in those cases is needed to encourage them to act in ways that create net social benefits. <sup>87</sup> But, to repeat, behavioral incentives are not what *Vincent* is about. Thus, in the end, for one who reads Posner and Landes as normally extremely sympathetic to rules that would base tort liability on fault, I find their endorsement of *Vincent* rather surprising. <sup>88</sup>

In any event, I do not believe that Posner and Landes have provided a satisfactory "law and economics" explanation for the *Vincent* result. This belief is re-enforced when I later explore what other law and economics advocates have to say about the case.

#### H. George Fletcher's "nonreciprocal risk" theory

In the 1970s, as a reaction to both the law and economics writers and the enterprise liability advocates, a number of law scholars returned to moral theories of tort law. Two of the most well known efforts in this line are by Professors George Fletcher and Richard Epstein. Not surprisingly, both sought to use *Vincent* in support of their theories that generally rejected the reasonableness (i.e., utilitarian) paradigm of negligence law in favor of some other principle of stricter liability. Although they have this much in common, Fletcher and Epstein are quite different in other respects, requiring me to take up them and their analysis of *Vincent* one at a time.

In Fletcher's most famous torts article, liability is said to be morally required when one subjects another to a "nonreciprocal risk."<sup>89</sup> Without going deeply into his theory here, suffice it to say that when one acts in a way that torts normally calls negligent, then one, in Fletcher's terminology, imposes a nonreciprocal risk. More important for our purposes, Fletcher's theory is also meant to deal with what now pass for cases of strict liability in torts, such as the dynamite blasting example, which is also seen as imposing a nonreciprocal risk on the injured neighbor. Therefore, whereas Keeton employed the dual notions of ordinary fault and "conditional fault" to cover negligence cases and strict liability cases, and whereas Ehrenzweig employed the two labels negligence and "negligence without fault" to describe the two groups, Fletcher offers a single phrase – nonreciprocal risks – to do the double duty.

*Vincent*, thus, appears to be a very helpful case for Fletcher. If you adopt Fletcher's way of looking at injuries, it seems easy to agree that the ship imposed a risk on the dock, rather than the other way around.<sup>90</sup> Thus, to Fletcher's delight, yet another area of the law is shown to be consistent with his theory.<sup>91</sup> Indeed, he nicely contrasts *Vincent* with a hypothetical case in which it is assumed that two ships are tied up to the same buoy in a storm and crash into each other, harming one. Fletcher assumes there would be no liability in such a case, pointing out that this would be an example of reciprocal risk taking.

The central problem I have with Fletcher's approach is his failure to provide a convincing moral argument for why nonreciprocal risk imposing should be the basis for tort liability. He says "If the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems fair to hold him liable for the results of his aberrant indulgence."<sup>92</sup> This is a conclusion, not an argument – to say nothing of the fact that few would call the ship captain's conduct in *Vincent* an "aberrant indulgence." The same goes for Fletcher's attempt to



analogize to John Rawls' first principle of justice concerning "liberty," when Fletcher says "all individuals in society have the right to roughly the same degree of security from risk."<sup>93</sup> But isn't it equally apt to apply Fletcher's Rawls-like maxim to the *Vincent* setting by saying that it is the ship captain's right to security that permits him freely to use the dock?

Later on Fletcher suggests that the fairness notion he supports arises from the benefit that the actor gains at the victim's expense.<sup>94</sup> This only takes us back to Bohlen.<sup>95</sup> Moreover, I don't see what confines the "benefit" argument to nonreciprocal risks (Fletcher's theory). Why wouldn't it apply to all risks? For example, if I take my car on to the road knowing that it is always possible that I could have a heart attack and this happens and my car crashes into yours and injures you, I have chosen to expose you to this risk for my benefit. But Fletcher would call driving accidents like that the consequence of reciprocal risks that do not give rise to liability.

In sum, although Fletcher's theory can explain *Vincent*, I am not convinced that it justifies the result.

### I. Richard Epstein's "causation" theory

In his prominent early work, Epstein essentially argued that cases where A should be liable to B reduce to fact patterns corresponding to the causal paradigms of either A hit B, or A created a dangerous condition resulting in harm to B.<sup>96</sup> By relying on the plain meaning of the word "caused," this approach is meant to express the moral intuitions of ordinary people.

But not only are there many sorts of (complicated or ambiguous) cases in which, I think, people would disagree about the "cause" of the harm, the fundamental problem I have with Epstein's effort is his failure to provide a convincing explanation of why justice

demands that the victim recover damages from the injurer when it is agreed that the injurer "caused" the harm.

Epstein cites Dean Leon Green's statement about "a deep sense of common law morality that one who hurts another should compensate him."<sup>97</sup> This statement is too "deep" to count as an argument with me. Epstein later says that his theory has implicit philosophical premises that are "tied to a preference for equal liberties among strangers in the original position. . . . [T]he limitation upon that freedom of action is that he cannot 'cause harm' to another. . . . The justification . . . is quite simply a belief in the autonomy and freedom of the individual."<sup>98</sup> Now it is Epstein's turn to invoke a dubious analogy to the philosophy of John Rawls; for Epstein has not shown why those "preferences" and "justifications" he speaks of can't be equally well served by the traditional negligence theory of tort liability.

Epstein further says "I attach a good deal of importance to the 'natural' set of entitlements that I think are generated by a concern with individual liberty and property rights."<sup>99</sup> But calling them "natural" avoids the problem. Indeed, Epstein seems to recognize this when he concedes "by defining property rights as I have done, I have foreordained a system of strict liability."<sup>100</sup> This difficulty with Epstein's effort is well demonstrated by his treatment of *Vincent*.

Let us assume that the ship captain's actions are the "cause" of the damage in the Epstein sense, although, as I have earlier suggested, I imagine that many who, if asked to cast responsibility in causal language, would find it just as (or perhaps even more) congenial to say that the real cause of the harm to the dock was the storm.<sup>101</sup>

In an effort to justify his solution, Epstein says that since the ship captain would have had to bear the economic consequences of his choice to damage the dock, were he to have owned the dock as well as the ship, therefore "There is no reason why the ... defendant ... should

be able to shift the loss ... because the dock belonged to someone else."<sup>102</sup> But as Professor Howard Latin has argued in response to this point: "This analysis can be turned on its (empty) head. When both the dock and boat belong to the dock owner, he ... would accept the ... loss without legal recourse. ... Epstein provided no explanation whatever for why the dock company as a [plaintiff] in a lawsuit should be able to shift the loss in question because the [boat] belonged to someone else."<sup>103</sup> In other words, while it is true that by his conduct the ship captain chose to save his ship in a way that would harm the dock, the dock owner too made many (presumably equally reasonable) choices in the past that also eventually led to the dock's damage. Thus, Epstein only shows us that once you have bought into the proposition that "cause" equals legal responsibility and once you have accepted his way of assigning cause, then it follows that the ship owner should pay. But the underlying normative justification for this way of structuring the analysis is still lacking.

Epstein has also objected to the rule in public necessity cases that the actor is not liable. After all, in such cases, it seems natural to him to say that the "champion of the public" (as Bohlen called him) caused the plaintiff's loss.<sup>104</sup> This shows a determined consistency in Epstein's approach.<sup>105</sup> But until Epstein is more effective in justifying the application of his "causation" theory to the self-help rescue setting, this sort of consistency alone will hardly suffice.<sup>106</sup>

#### J. Daniel Friedmann on "unjust enrichment"

Since many writers have suggested that were the ship owner in *Vincent* not to pay this would be unjust enrichment, and since unjust enrichment is a central concept in the law of restitution, I will next consider Israeli Professor Daniel Friedmann's 1980 article offering a new comprehensive approach to the law of restitution – especially since *Vincent* figures prominently in this piece.<sup>107</sup>

Friedmann explains that the traditional English approach to restitution was to allow one to "waive" the tort and to sue for restitution, in which case restitution is understood to be no broader than tort. And, on the understanding that tort law rests on fault, then a defendant's enrichment is readily seen as unjust.<sup>108</sup> Against this narrow background, Friedmann then discusses more recent developments in restitution law and theory that look not to the commission of a wrong by the defendant but to his "appropriation of an exclusive property interest."<sup>109</sup> Building on this newer approach, yet including an expansive notion of property, Friedmann proposes: "restitution may be justified on the general principle that a person who obtains – though not necessarily tortiously – a benefit at the expense of another through appropriation of a property or quasi-property interest held by the other is unjustly enriched and should be liable to the other for any benefit attributable to the appropriation."<sup>110</sup>

For this to be a normative rather than a descriptive theory, however, Friedmann must explain what an "appropriation" of a property interest is in way that convinces us that, in such case, the defendant's enrichment is indeed unjust. More precisely, he must tell us, in terms relevant to *Vincent*, which he supports, why the use of the loaded word "appropriation" is seemly. I am not persuaded that he has done so.<sup>111</sup>

Friedmann says that an "appropriation" of a property right includes "situations in which one person's property is used or sacrificed for the benefit or protection of another" giving as an example the general average principle that applies to the jettison of cargo.<sup>112</sup> Then, *à la* Bohlen, Friedmann says: "In the typical case of private necessity, in which A sacrifices B's property in order to save his (A's) life or property, it is *obviously fair* that A should pay for the loss . . ."<sup>113</sup> But why, using Friedmann's formulation, if A has the right to take the property in order to save his own life, shouldn't we consider the property, for these purposes, as belonging to A, rather than as an "appropriation" from B?

Friedmann goes on to explain that he thinks whoever benefits in the necessity situation ought to be liable to the one who suffers the loss, whether or not the beneficiary acted; and by contrast, he thinks that one should not be liable merely for acting. As a result, under Friedmann's approach public necessity cases would give rise to public liability when the public profited, although the actors would remain free from liability as they are today.<sup>114</sup> So too, under Friedmann's principle, people acting reasonably for the benefit of private third parties would impose liability on those beneficiaries, and would remain free from liability themselves. This, as we have seen, is contrary to the solution currently contained in the Restatement of Torts (Second) and in the Restatement of Restitution.<sup>115</sup> But at least it would rationalize some of the seeming inconsistencies we saw earlier in the approach of the Restatements.

My skepticism about Friedmann's theory remains, however. First, it does seem to me a rather odd use of the word "appropriation" to apply it to passive beneficiaries of other people's action.<sup>116</sup> More importantly, that Friedmann has logically applied the benefit principle to the situations he has defined as constituting "appropriations" still doesn't amount to an argument so far as I am concerned.

Let me then lastly consider two analogies from traditional unjust enrichment law that Friedmann gives in support of the benefit principle. The first is the example of the "person lawfully in possession of perishable goods belonging to another who is unable to get in touch with the owner" where Friedmann says that, although the possessor is privileged to sell or even consume these goods, he must provide restitution for the benefit derived.<sup>117</sup>

Without quarreling with this result, let emphasize once more that this example differs importantly from *Vincent*. In Friedmann's example, in contrast to the *Vincent* setting, it is hard to imagine anyone arguing that the original owner of the goods would have a

moral obligation to say to their possessor "Thank you for saving (rescuing) my goods; go ahead and keep all the proceeds of their sale." A possibly closer analogy to *Vincent* occurs where the possessor consumed, rather than sold, the goods. But, again, could we now imagine the right thing for the true owner to say would be "Since I couldn't get at them, I am delighted that rather than wasting them you enjoyed them; and I wouldn't dream of asking you to pay for them."<sup>118</sup> Maybe, but I somehow doubt it. After all, unlike *Vincent*, the possessor had no emergency need to consume the property. Hence, when he chooses to consume the goods, the argument that he ought to pay for them seems to me considerably stronger than in *Vincent*.

Friedmann, finally, analogizes *Vincent* to the situation of "using a neighbour's fire extinguisher to put out a fire," an example taken from an English torts treatise.<sup>119</sup> This hypothetical is reminiscent of suggestions offered in the Instructor's Notes to the second edition of the Keeton and Keeton torts casebook.<sup>120</sup> There, with respect to the hypothetical case (not unlike that much discussed by philosophers) where "a traveler uses the plaintiff's vacant house to escape a storm," we are told to "note the possibility of quasi contractual recovery for the use of land."<sup>121</sup> So too, with respect to a case like *Depue v. Flateau*,<sup>122</sup> cited in *Vincent*, where a guest in one's home is "suddenly taken with a disease that prevents departure", the Keetons say "probably the guest would have to pay the host's expenses."<sup>123</sup>

I agree that both the examples given by the Keetons and the fire extinguisher example noted by Friedmann are in important respects analogous to *Vincent* (although it should be noted that they do not arise in the context of commercial transactions among enterprises). But neither authority nor reasons are offered by Friedmann or the Keetons for their proposed results in these cases – results which I find unconvincing without further argument on their behalf.

Indeed, these examples are much like a hypothetical case put forward by the *Vincent* majority in which it is supposed that had the

ship captain, in order to save his vessel, taken and used (and presumably destroyed) a cable lying on the dock, he would have been liable to the cable's owner.<sup>124</sup> But, again, merely to assert the parallel is insufficient. The question remains why should the permissible and reasonable use of the cable in the emergency setting give rise to liability. Why not instead consider the cable a modest rescue device that its owner ought to be delighted was so helpful and which he surely would have had a moral obligation to employ on behalf of the defendant had he been on the scene? Until that is answered, to draw the analogy to life saving meals, shelter and cables merely demonstrates that the *Vincent* fact pattern is not unique.<sup>125</sup>

For yet an additional hypothetical in the same vein, consider this one proposed by British Professor F. H. Newark: "If, defending myself against a murderer, I save myself by throwing my neighbour's valuable Dresden china in the murderer's face, ought I not to pay for my salvation?"<sup>126</sup> But assuming that breaking the china was reasonably necessary under the circumstances, I ask again whether this isn't just what we would have wanted the neighbor himself to have done had he been there. And, as he wasn't there, ought he not be pleased that some property of his, no doubt insured, was able to save his neighbor's life? Absent fault on the part of the near-murder victim, what social value is served by allowing the china owner to sue someone for damages who did just what he ought to have done? The would-be murderer, of course, was the real reason for the breakage. Even assuming that he, while presumably liable, is judgment proof, from the Dresden china owner's position shouldn't Newark's hypothetical be treated just as though the criminal had broken the porcelain over my head in an attempt to do me in?<sup>127</sup>

I am not the only one who has trouble seeing *Vincent* and these other examples as amounting to cases of unjust enrichment. Professor Morris too found that argument to have dubious merit. His point was that they are hardly typical unjust enrichment cases where, for example, someone has taken someone else's cow by mistake and now

refuses either to return it or to pay for it. Rather, the person rescued from danger is in the same position he was beforehand, and thus, as Morris puts it: "the ship owner was not enriched; he merely escaped impoverishment."<sup>128</sup> Presumably, he would have said the same about the would-be murder victim, the guest who became ill, the user of the fire extinguisher and so on.

In sum, while the *Vincent* result may fit nicely into Friedmann's approach to restitution law,<sup>129</sup> his defense of when restitution is appropriate does not further convince me of the correctness of *Vincent*.

#### K. Glanville Williams and the justification/excuse dichotomy

British Professor Glanville Williams published a much cited lecture on "necessity" in 1953,<sup>130</sup> in which he makes the nice point that "necessity" may not actually be such an apt label for these cases because its ordinary meaning suggests that the person had no choice. Yet, as Williams points out, this is by no means usually the case. Even if he acted quickly without time for serious contemplation, and even if he acted under enormous pressure, the defendant very clearly made a deliberate decision.

For Williams "the defence of necessity involves a choice of the lesser evils."<sup>131</sup> That is, "the infliction of an evil is justifiable if it is the lesser of two alternative evils."<sup>132</sup> As Professor David Cohen has pointed out,<sup>133</sup> whereas Williams sees "necessity" through utilitarian lenses in which the conduct is justified because it is, finally, the right thing to have done, traditional thinking, typically associated more clearly with criminal law contexts, excused the defendant even though his conduct was judged wrong – because allowances were made for his understandable human weakness that caused him to put himself before others under the press of the agonizing circumstances.



This distinction is conceptually well captured, I think, in the Model Penal Code's treatment of necessity and necessity-like problems. First, otherwise criminal conduct which satisfies the "lesser of evils" test is "justified" under section 3.02, and no criminal sanctions attach.<sup>134</sup> A clear example would be a case in which A deliberately destroys \$10 of B's property when this is critical in order to save the life of an innocent party C.

Moreover, a further escape hatch is provided by Section 2.09 which covers "excuse" cases – which, for our purposes, may be seen as examples of duress. In the cases which satisfy this section, the Model Penal Code drafters also thought it inappropriate to prosecute the defendant criminally even though he acted in a way that is not justified on the grounds of the lesser of evils. Take as an example a case in which the defendant, under clear and immediate threat to his life by a criminal with a gun at his head, obeys an order to set fire to a building knowing that innocent people are inside who will very likely be killed. While one isn't justified in setting such a fire, this conduct under these circumstances would presumably satisfy the Model Penal Code's requirement that the threat of force be such that a person "of reasonable firmness in his situation would be unable to resist."<sup>135</sup>

There can, of course, be great debate over whether a particular fact situation satisfies the "lesser of evils" test of section 3.02, assuming one accepts the idea in principle. This is especially so in cases in which one life is sacrificed to save many. There can, as well, be great debate over whether a particular fact situation involved sufficient duress so that even a person who was reasonably steadfast in his resistance to pressure could be expected to give in – thereby excusing the actor under section 2.09. And, finally, once the lesser of evils rule is adopted to justify certain conduct, there can be great philosophical debate over whether there ought to be any residual excuse category at all; perhaps those who do what is considered wrong should be criminally prosecuted but given reduced punishment in view of the circumstances. Of course, one consequence of having

these two bases for escaping criminal liability is that, as a practical matter, one will not have to face up to whether certain behavior should be deemed "justified" when it is clear that it will be "excused."

However these matters are to be dealt with for criminal law purposes, the point here is that these categories are beneficial in distinguishing among cases for torts purposes. For in those cases that at best involve "excused" conduct, even if no criminal penalty attaches, it might be thought appropriate nonetheless to impose tort liability. And, without defending that result, I will accept that position here.

The Restatement of Torts adopts this view in Section 73, giving as two of its examples: A kills B under a threat to A's life from C; and A and B are in a lifeboat that can support only one of them and A pushes B into the water.<sup>136</sup> In each instance, under the press of awful circumstances A imposes death or serious bodily harm on B because this is necessary to save himself from similar harm. Although such conduct would not qualify under the lesser of evils test (on the assumption that a life is a life), let us assume it would be excusable by the criminal law. Nonetheless, on the ground that it was wrong to sacrifice another to save yourself, the Restatement considers tort liability appropriate.

However, as I have noted at the outset, I take it as widely agreed that *Vincent* is not like that sort of case. No one is suggesting that the ship captain did the wrong thing and that it is only his understandable concern for his ship in the emergency makes us want to excuse him from criminal responsibility. Rather, it is agreed that because only plainly less valuable property was at stake, he did a clearly proper thing for which criminal liability isn't even in issue. In short, *Vincent* may be taken as an example of decidedly "justified" conduct.

Thus, the main point I want to make here is that it is insufficient to argue for tort liability in the *Vincent* setting on the ground that one thinks such liability is proper in the "excuse" cases.

Professor Broeder (considered above), in his discussion of fairness, fails to make this distinction between justification and excuse, however, for he seems to treat as analogous to *Vincent* a number of cases that I find distinguishable on these grounds. If, for example, you blow up a neighbor's house that would not otherwise have burned in order to prevent a fire from spreading to yours,<sup>137</sup> or if you use an innocent party who would not have been hurt as a shield to protect yourself from being shot by a criminal,<sup>138</sup> or if you devour another on your lifeboat to keep yourself from starvation<sup>139</sup> – all famous problems in the law which Broeder discusses – most would say you did the wrong thing, even though you might be excused from criminal prosecution because of the exigencies of the situation. That is, you traded like for like, putting your, a best equal, interests ahead of another's when the morally proper thing to do is to turn the other cheek and suffer.<sup>140</sup> Or, put in Bohlen's terms, because you did what you should not have done, there is not even an incomplete privilege for torts purposes to act as you did.<sup>141</sup> The *Vincent* defendant, however, was privileged, and the question is whether that privilege should be complete or not.

In their torts casebook, Professors Marc Franklin and Robert Rabin raise for discussion a comparison between *Vincent* and yet another example taken from Section 73 of the Restatement where one acts in a desperate situation to save his own life.<sup>142</sup> In order gain time, the defendant throws his one rider, a child, from his sleigh to be eaten by pursuing wolves. It appears, however, not only that the child would have been eaten had the defendant done nothing, but also that the defendant could not have alternatively sacrificed himself to save the child. The Restatement calls for liability, treating this no different from the case where A throws B out of the lifeboat, even though there A could have chosen to sacrifice himself.<sup>143</sup>

I am a bit puzzled by Restatement's solution to the wolf case, however. It seems to me that if there is to be liability here it should be on the ground I have discussed before – to wit, it is thought wrong to take affirmative steps deliberately to cause the death of another human being even in this situation, even though, recognizing human weakness, one might excuse the sleigh driver from criminal liability. That position would be more understandable, however, if the sleigh driver could have instead sacrificed himself in order to save the child.

Explaining the wolf case on the ground that it was wrong for the defendant to sacrifice the child distinguishes it from *Vincent*. On the other hand, I imagine many would think that the defendant's behavior in the sleigh example was reasonable, albeit anguishing, and therefore "justified." In that event, the case should now be seen importantly analogous to *Vincent*. But while the Restatement's position in favor of tort liability there can be seen as consistent with its position on *Vincent*, both remain in need of a convincing explanation.

Returning now to Professor Williams, I had imagined that his devotion to the "justification" approach would have led him to oppose civil, as well as criminal, liability in *Vincent*. Yet, in the end, he favors the outcome in the case. Alas, like the Restatement, he offers no further argument for this preference other than to cite to Bohlen's benefit principle.<sup>144</sup> Thus, despite his learned insights into the general notion of necessity, Williams takes us no further with the duty of compensation.<sup>145</sup>

I will have more to say shortly about possible differences between saving lives and saving property, as well as between taking lives and destroying property in order to do so. But first I want to introduce a comparative law perspective to the analysis.

L. John Fleming and P.S. Atiyah and the English law of necessity

As one would expect, the comments of my former colleague, the late Professor John Fleming in his multinational torts treatise are insightful on the issue of necessity in general.<sup>146</sup> Yet, I am afraid that when it comes to duty of compensation in the *Vincent* setting, Fleming's position essentially repeats the received wisdom. He invokes the "principle of restitution for benefits gained at another's expense" and asks "is it not fairer that it be borne by him who derived the benefit by sacrificing the other's property?"<sup>147</sup> Alas, as I have been arguing throughout, merely to state the question in that way is not sufficient to demand that one give an affirmative answer – especially since, as we have seen, it frequently does not follow that one is liable merely because one has deliberately acted to better one's own situation to the detriment of another.

The most interesting aspect of Fleming's commentary to me, however, is his admission that English law is seemingly contrary to *Vincent*. Thus, I think it worth some exploration here of the English developments.

The earliest important English decision is that in *Mouse's* case<sup>148</sup> where the defendant, a boat passenger, threw the plaintiff's casket overboard when the boat was endangered by an unexpected storm. Without any real analysis, the reported decision, now about 400 years old, simply holds the defendant not liable for his reasonable acts under the circumstances. It is difficult to know how much to make of this decision.

First, it appears that the defendant was but one of a number of passengers who jettisoned cargo. Second, it also seems fair to say that the defendant's effort contributed to saving not only himself, but also the rest of the passengers. Hence, while plainly Bohlen's "benefit" principle is not applied in *Mouse's* case,<sup>149</sup> and while the defendant

was not a public official, perhaps in modern times, in America at least, this would be seen as a public necessity case and hence not direct precedent for the *Vincent* type of problem.<sup>150</sup>

From the late 19th century comes *Romney Marsh v. Trinity House Corp.*<sup>151</sup> in which the defendant's ship was driven upon a sea wall and wrecked by a storm so that breaking up the vessel became necessary. The defendant delayed the breakup, however, in order to remove valuable property from the vessel, which was carried out at a reasonable speed. During the time the goods were being removed, however, the sea wall was damaged, something that, it is assumed, would not have occurred had the ship been broken up immediately. The court makes clear, albeit in dicta, that the defendant is not strictly liable for making the reasonable choice to endanger the wall in order to save the property on board. However, it was later determined that the defendant was negligent for getting onto the sea wall in the first place and hence liability in this case followed from that conduct. Seen as a necessity problem, this case is difficult to distinguish from *Vincent*, and yet the court's view of the law is the opposite.

Perhaps most closely analogous to *Vincent* is *Cope v. Sharpe*<sup>152</sup> which, I noted near the outset, was decided in nearly the same year as *Vincent*. There the defendant was the head game keeper to a man who had shooting rights on the plaintiff's land. When a fire on plaintiff's land appeared to threaten some pheasants nesting there, the defendant deliberately set fire to some of plaintiff's heather, presumably to serve as a fire break. Although this turned out to be unnecessary, as plaintiff's workers actually controlled the fire in time, defendant's act was found to be reasonable under the circumstances (i.e., it had appeared reasonably necessary). The defendant was held not liable.<sup>153</sup> This too is at odds with *Vincent*.

It might be possible to distinguish *Cope v. Sharpe* from *Vincent* on the ground that the defendant's master was a lessee (and that somehow should matter) or, more promisingly, that the plaintiff may

have only suffered nominal damages from the fire (so that this case isn't a real test of the *Vincent* issue after all). Yet, the opinion of Lord Kennedy makes clear that, at least so far as he is concerned, the circumstances gave the defendant the right to damage the property of the plaintiff without incurring a duty of compensation.<sup>154</sup> Unfortunately, Lord Kennedy tells us little about why this is so, other than that the lack of an obligation to compensate seems (to him) naturally to go along with the right to damage.

In the 1950s another English necessity case arose when defendant Esso's ship discharged oil in order to lighten it and thereby permit it and its crew to escape from danger in an estuary. There, the danger occurred in rough weather when something went wrong with the ship's steering. When the oil was then deposited on the plaintiff's shore, the plaintiff sued for substantial damages. At the lower court level, the later Lord Devlin, then a judge, made clear that in this case the defendant would not be strictly liable for the plaintiff's harm;<sup>155</sup> and this view was eventually affirmed in the House of Lords.<sup>156</sup>

As I will discuss further below, however, it appeared in the *Esso* case that not merely property but also the lives of the crew were at stake, a distinction to which Devlin attaches great importance.<sup>157</sup> In addition, because the beneficiaries of the oil discharge included a large number of individual workers, and not just the defendant enterprise, then, as in *Mouse's* case, the *Esso* case might also be viewed under the American approach as a public necessity case and hence distinguishable from *Vincent*.

A more recent English case worth mentioning is *Southwark London Borough Council v. Williams*,<sup>158</sup> where a severe housing shortage led the Williams couple to become squatters in an empty flat belonging to the local authority. When the authority sued to have them removed, they entered a defense of necessity. They lost,<sup>159</sup> but not because English law won't recognize the privilege. They lost because the privilege was found inapplicable in these circumstances. Lord

Denning said courts "must refuse the plea of necessity to the hungry and the homeless . . . and trust that their distress will be relieved by the charitable and the good"; otherwise, he continued, "necessity would open a door which no man could shut."<sup>160</sup> As Lord Edmund-Davies put it "necessity can very easily become simply a mask for anarchy."<sup>161</sup> But, as both recognized, the defense is available in what Edmund-Davies calls "an urgent situation of imminent peril" citing *Mouse's case*.<sup>162</sup>

The point of the *Williams* decision, after all, is that there exist organized and routine social welfare arrangements, as well as established private charities, designed to take care of the food and shelter needs of the poor. Thus, when the poor are in need, it is thought improper for them simply to pick out a non-poor member of the public and arbitrarily force that person to be their benefactor. Even when the system for aiding the poor is malfunctioning, the remedy lies not in just taking what is needed from another person, but rather in righting that system and/or going round to those private donors who hold themselves out as willing to help in such circumstances.

In *Vincent*, by contrast, the plaintiff's dock was not arbitrarily picked out; indeed, apart from this dock, the defendant could turn to no one else. Plaintiff, in turn, has no basis for concluding that his dock was idiosyncratically or unfairly called upon to help with the rescue. These circumstances, I believe, are what make *Vincent* properly seen as "an urgent situation of imminent peril."<sup>163</sup>

A final and even more recent English case, *Rigby v. Chief Constable of Northamptonshire*<sup>164</sup>, reconfirms, albeit in dicta, the continuing availability of necessity as a complete defense in Britain. There police used CS gas to flush a dangerous "psychopath" from a gun shop where he was holed up, firing weapons, and endangering the public. The CS gas, however, started a fire in the shop, and the owner sued the police for damages. Mr. Justice Taylor found that although the chief constable knew that the CS gas could start a fire,<sup>165</sup> his



electing to use it was reasonable under the circumstances and thus his defense of necessity was complete against plaintiff's suit in trespass.<sup>166</sup> Once again, however, unlike *Vincent*, this might well be treated as a public necessity case under U.S. law, a distinction, as we have seen, that the English cases don't seem to make.

Viewing these decisions as a whole, as Fleming notes, the English position on necessity appears to rest on the formalist notion (which he rightly rejects as not necessarily compelling) that if the emergency situation suffices to give the actor a "right" to enter or damage the property of another, then it symmetrically follows that he is not subject to liability.<sup>167</sup> Put differently, and in Bohlen's terms, those properly acting out of necessity have a complete privilege to do so, and not merely an incomplete one. But what one would like is a reasoned explanation for the English rule beyond the conclusion that tort liability must rest upon fault.

Turning to the other treatise writers on English law, however, I found nothing of the sort. Rather, one sees either merely acceptance of the position or else criticism of it. The most challenging presentation is, not unusually, that put forward by Professor Patrick Atiyah, who addresses *Vincent* in the course of his broad criticism of the fault principle.<sup>168</sup> He uses *Vincent* in order to try to show that sometimes the law, at least American law, sensibly relies on other principles. Like Fleming, Atiyah at first puts his point in the interrogative form, asking "even if" the facts justify "the infliction of all sorts of damage on others, would justice not require compensation to be paid?"<sup>169</sup> When it comes to answering this question, Atiyah adopts the Bohlen strategy of proposing analogies.

One example he gives in support of the general restitutionary principle that one should not be "unjustifiably enriched at the expense of the plaintiff" is the case in which a person has been overpaid by mistake.<sup>170</sup> Once again, however, it seems to me that one can readily grant the propriety of forcing the one who has been overpaid to return

the excess without endorsing the *Vincent* result. After all, the overpayment setting is hardly an emergency situation where rescue is required; and no one, I should think, would argue that it is the right thing for the overpayer to make the gesture of telling the payee to forget about the matter.

More challenging is Atiyah's example of the problem of sorting out the rights to stolen personal property as between an original owner and a bona fide purchaser. Suppose, for example, X steals a computer from P and then sells it to D in circumstances that D says gave D no reason to doubt X's ownership. P then finds out D has the computer and sues D for its return (or its value). Even if the common law rule that the original owner wins were the proper result,<sup>171</sup> this may well be justified for reasons inapplicable to *Vincent*.

For example, one possible justification for the rule favoring the original owner as against the bona fide purchaser is that the law reflects our fears that the trial process is unlikely to be able to determine accurately whether or not the claimed bona fide purchaser has taken reasonable precautions in dealing with the thief; or, in the same vein, the rule might reflect the fear that people who claim to be bona fide purchasers are actually often those who knowingly traffic in stolen goods, but that this too won't be able to be proved. This sort of justification might distinguish that problem from the necessity problem.

To be sure, I concede that, in the real world, in contrast to the facts of *Vincent*, it may sometimes be difficult to prove both that it was truly an emergency and that the choice to risk the plaintiff's property was a clearly reasonable one. But I believe that these concerns about proof can be well enough handled by having the burden of persuasion rest with the defendant. And, indeed, this burden normally follows from calling something a "defense" (or a "privilege"). In short, I think we can be reasonably confident that the jury won't wrongly let an undeserving defendant off in the necessity

situation, and perhaps rather more confident about this than we are with respect to the contest between the original owner and the alleged bona fide purchaser. Thus, absent a more persuasive showing, I reject the argument (not actually made by Atiyah) that proof concerns themselves justify the *Vincent* result. Alas, Atiyah does not actually seek to justify the rule governing the dispute between the original owner and the bona fide purchaser, so that it is unclear how he would react to this distinction I propose.

In the end, Atiyah, like Fleming, reluctantly allows that "the principle of *Vincent v. Lake Erie* would probably not be followed in England."<sup>172</sup> Indeed, as Atiyah clearly recognizes, *Vincent* is at odds with the core of English negligence law. Thus, for example, in the famous case of *Bolton v. Stone*,<sup>173</sup> where a cricket ball was hit out of the playing field and struck the plaintiff who was on the public way, the House of Lords relieved the defendant stadium owners of liability because they had done nothing wrong. But as Atiyah laments, just as in *Vincent*, by choosing not to erect a higher fence after cricket balls had occasionally been hit out of the stadium in the past, the defendants had deliberately elected (albeit reasonably, it was there determined) to put their financial interests ahead of those of their would-be victims. This, of course, takes us back to Bohlen. Moreover, the cricket ball case also nicely demonstrates the point that Judge Keeton recognized – that broad adoption of the "benefit" principle implies a dramatic overturning of existing tort law, both English and American.

Finally note once more that while "loss spreading" (a different rationale from the "benefit" principle) would support strict liability in the cricket ball case and is a reason for liability there that Atiyah would probably endorse, it is not, as we have seen, a rationale that is convincingly applicable to *Vincent*.<sup>174</sup>

#### M. Frederick Sussmann and Canadian law.

In Canada in the 1960s, a case arose (involving a ship called the "Sir John Crosbie") that is quite similar to *Vincent*, but the Canadian law appears to be the opposite. The defendant's ship was discharging coal for the plaintiff at the plaintiff's dock when a hurricane came along. The storm blew the vessel against the plaintiff's wharf and damaged it. In the lower court, the plaintiff claimed that the ship captain was negligent not to cast off the ship (i.e., cut the ropes), but the lower court disagreed, concluding that under the dangerous circumstances it was reasonable for the captain to remain at the dock, and, in turn, holding for the defendant.<sup>175</sup>

When the case was reported, an anonymous editor<sup>176</sup> added the comment that the case was very much like *Vincent* which this editor believed had reached the better result, referring to Bohlen's "benefit" theory. The case was appealed, the plaintiff now for the first time offering *Vincent's* strict liability theory.

On appeal the Exchequer Court ultimately held that the plaintiff could not rely on this theory he had not raised below<sup>177</sup> – but not before concluding (a) that had it been necessary to decide if *Vincent* applied, it would be inclined to go along with the *Vincent* dissenters, quoting the portion of Judge Lewis' opinion that describes this as a risk that dock owners must run,<sup>178</sup> but (b) that *Vincent* was distinguishable in any event.

Although I won't quarrel with the outcome, I am not persuaded by the court's argument that *Vincent* is different from "Sir John Crosbie" because in the former the defendant willfully caused the plaintiff's damage, whereas in the case at bar the defendant merely failed to cast off.<sup>179</sup> To be sure, when the Canadian ship captain tied down he may not have known that the wharf would be damaged; but, surely, as the hurricane's wind increased and the captain continued to elect not to cut his ship loose, he was at every step of the way making the deliberate decision to sacrifice the dock for the benefit of his ship.

Thus, I suppose it is fair to say that it remains uncertain just how the Canadian court would have come out had the issue been properly raised below and had the judges acknowledged that this sort of knowing inaction by the ship captain is equally a willful infliction of harm.<sup>180</sup>

Professor Frederick Sussmann published a short article on the case shortly after it was finally decided.<sup>181</sup> He asserts, *a la Keeton* and without empirical evidence, that "it would seem to the average reasonable man only just and fair" for the defendant to pay compensation<sup>182</sup> – although he acknowledges in a footnote that "some might feel that [plaintiff] ought to bear the property loss for the saving of [defendant's] life, but not for that of [defendant's] property"<sup>183</sup> referring to Lord Devlin's views in the *Esso* case, which I will shortly evaluate.<sup>184</sup> Sussmann, like Bohlen, then refers to the law governing takings and to the maritime rule of "general average." He acknowledges that English law seems to provide that necessity is a complete defense, citing *Cope* and *Romney*; but, like some British writers, he urges that Canadian courts avoid this problem in *Vincent*-type cases by awarding plaintiffs recovery sounding in quasi-contract, that is, unjust enrichment.<sup>185</sup> Sussmann, in short, doesn't really advance the analysis.<sup>186</sup>

#### N. George Christie and Lord Devlin on saving lives versus saving property

Professor George Christie urges a distinction between those who harm property in order to save a life or lives and those who do so only in order to save other property<sup>187</sup> – thereby adopting the distinction suggested by Lord Devlin in the British *Esso* case discussed above.

Christie offers, for example, the situation of the airplane pilot who, in order to better protect his life and that of his passengers in case of a forced landing, chooses to land on a safer but valuable

flower bed as opposed to a nearby more dangerous vacant lot. One could, of course, view this, a la *Mouse's* case and perhaps *Esso* itself, as a public necessity problem. Indeed, in the course of saying there should be no liability in this life-saving setting (absent fault of the pilot), Christie draws the parallel to the right of public authorities under American law to destroy property in order to save lives without incurring a duty of compensation.<sup>188</sup>

Yet Christie's offered justification for his position is not restricted to "public necessity" settings. Rather, he takes the more sweeping position that compensation is not owed simply because our society values life more than property, quoting with favor Lord Devlin's position that "the safety of human lives belongs to a different scale of values from the safety of property," and the "necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another's property."<sup>189</sup>

In short, the part of the Christie-Devlin rationale that emphasizes the value of life, as compared with property, would apply to situations where the defendant saved only his own life. It would apply, for example, to Christie's pilot in the flower bed even if there were no passengers in the plane. Thus, this view is squarely at odds with Bohlen's principle that one ought to pay when he benefits at the expense of another, regardless of the nature of the benefit.<sup>190</sup> So, too, it conflicts with Section 197 of the Restatement of Torts which does not exempt a defendant from liability for damage done in the course of a privileged entry onto another's property, even if the damage were done to save the defendant's life.<sup>191</sup>

By way of dicta, Devlin wondered whether it would be appropriate for a court to determine that it is permissible to destroy property of a certain value in order to save that with greater value (assuming the destroyed property was neither itself otherwise in danger nor a menace to the other's property), saying that would require "close examination."<sup>192</sup>

For Christie, it is not a close question. He believes not only that you should not have a right (or “privilege”) to consume another’s property in order to protect you own, but also that the other party has a right to physically resist; and he believes, at least in general, that you also have no right to destroy another’s property, merely to protect or save your own.<sup>193</sup>

Of course, I don't mean to oppose the result that the Christie-Devlin rationale would produce in such self-life-saving settings.<sup>194</sup> But I don't think that this rationale is successfully bounded in the way they intimate.

After all, when there is clearly a difference in value involved, public policy favors the saving of more valuable property at the expense of less valuable property. Maybe it isn't valued as much as is saving life; but it surely is valued. This is plainly the central idea that makes the conduct in *Vincent* reasonable, where, it seems, no lives would have been risked had the crew departed and the ship had merely been cut loose and allowed to drift away in the storm. Indeed, if by contrast, had tying up the ship created a greater danger than it prevented, (or had there been a safer way to save the ship) the captain would have been liable on negligence grounds.

To be sure, when the market values of the properties involved are close, perhaps the defendant is wrong to put his ahead of the plaintiff's in view of possible non-market value (perhaps sentimental or need-based) that the plaintiff attaches to his. This perhaps explains Lord Devlin's concerns about difficulties courts might have in comparing property with property.<sup>195</sup> But when there is a clear and substantial differential, as everybody assumes there was in *Vincent*, then absent substantial and unlikely wealth differences, there would plainly be a net social welfare loss were the defendant's property rather the plaintiff's destroyed.<sup>196</sup> Hence, I conclude that, in principle, the part of Christie's formulation that emphasizes what is supported by

"public policy" should lead to the conclusion that *Vincent* was wrongly decided.

Moreover, by their focus on saving lives, Christie and Devlin skirt the question of those who act to prevent bodily harm to themselves short of death. I imagine that they would agree that one ought to be able to sacrifice property to prevent grievous personal injury, but as the injury becomes less serious and the property sacrificed becomes more valuable, I would think that the issue would become cloudier for them, requiring a sophisticated comparison and not merely category comparison. Yet, if we are going to compare bodily injury with property damage, then why not compare property damage with property damage?

In any event, I don't believe that the Christie-Devlin approach really offers a strong argument for no liability even in the life-saving setting. For, as should have been clear all along, demonstrating that the defendant did the socially preferred thing is only the start of the analysis.<sup>197</sup>

#### O. The self-defense analogy

In the 11<sup>th</sup> edition of the Prosser, Wade and Schwartz casebook, the editors inventively ask (although they don't analyze) whether the *Vincent* approach might be suitable for other "privileges" like self-defense.<sup>198</sup> This is a point worth some exploration.

In the typical self-defense case, of course, the fault of the original aggressor will take the problem out of the *Vincent* paradigm. This allows *Vincent* defenders to rest easy with the result that the person employing reasonable self-defense injures his attacker is not liable for the harm done.

However, if the victim of the person who acted in self-defense is innocent, then the parallel to *Vincent* is striking. Consider, for



example, cases of reasonable but mistaken exercise of self-defense – say, the defendant who reasonably believes he is about to be attacked by the plaintiff and intentionally harms him, and it turns out that the injured person was not attacking after all (and had not unreasonably created that impression). In such situations, like *Vincent*, the defendant deliberately acted to protect himself to the detriment of the innocent victim. Yet the common law and the Restatement of Torts seem clear that the innocent victim loses his lawsuit against the party reasonably acting in self-defense.<sup>199</sup> That is, in contrast to *Vincent*, strict liability is not imposed on the self-defender.

The same result follows in other cases in this vein. Suppose someone non-negligently injures a third party while acting in self-defense. The innocent third party also loses his lawsuit against the self-defender who reasonably acted for his own benefit. In short, in Bohlen's terms, the clear rule in this situation is that the defendant's self-defense privilege is complete, and not merely incomplete.<sup>200</sup>

I do not think the self-defense cases can be distinguished from *Vincent* by using a distinction of the Christie-Devlin sort – that is, on the ground that the privilege of self-defense is complete because it involves the saving of the a life (or at least of bodily injury). I say this because the Restatement endorses a similar no-liability outcome for mistakes made in the reasonable defense of property – say, where you reasonably attempt to shoot someone burglarizing your home and the bullet hits an innocent plaintiff.<sup>201</sup>

Unsurprisingly Professor Epstein sees these self-defense rules as incompatible with *Vincent*. Plainly for him, they are cases in which the defendant "caused" the plaintiff's harm.<sup>202</sup> Hence, he favors the strict liability solution.<sup>203</sup>

My point here is not to argue that *Vincent* is wrong simply because of the way these self-defense cases come out, but rather to emphasize my basic agreement with Epstein that they are

presumptively inconsistent with each other. In the end, it isn't my purpose here actually to defend the non-liability treatment of these cases involving harms caused by the reasonable exercise of self defense. There may be good reasons, at least in some cases, for imposing strict liability – say, on loss spreading grounds where one is a victim of a bank guard's attempt to thwart a robbery. But that is the key point. We need a special justification for imposing strict liability, and these cases and Restatement sections show that it generally does not suffice merely to show that the defendant deliberately acted for his own benefit at the expense of another.

At the same time, I should acknowledge that this portion of the Restatement takes a seemingly inconsistent position in yet other self-defense settings. Section 74 first provides that you are entitled to commit a technical battery without incurring liability by, for example, pushing a stranger aside in order to flee from an attacker who is threatening you with serious harm.<sup>204</sup> This is quite understandable in my terms – since your conduct is clearly reasonable.

But Section 74 then goes on to provide, a la *Vincent*, that if the one you pushed aside in fact suffers harm you are then strictly liable for that harm – that is, without the victim having to show that your conduct was in some way unreasonable.<sup>205</sup> Just why this innocent victim of a reasonable self-defense effort wins and, as described above, other such victims of reasonable self-defense efforts lose, is not clear to me.<sup>206</sup> But there you have it.

In conclusion here, what I want to emphasize that if current law is seen to exempt some self-defenders on the quite understandable view that they are not at fault, then one has quite a lot of explaining to do to show why the self-protection efforts in *Vincent* and other private necessity cases shouldn't be given the same treatment. Surely, there is no self-evident reason why reasonable self-defense against a personal attacker ought to be treated more favorably than what amounts to self-defense against forces of nature.<sup>207</sup>

P. Should deliberate and/or certain injury be treated differently from risk taking?

Imagine (as did the *Vincent* majority) that you, the ship captain, unexpectedly caught in the severe storm, deliberately take my cable, which is critically needed to tie your ship to a dock, knowing that by the time the storm subsides, your ship will (or may be) saved, but my cable will no longer be useable.

The issue I want to address here is whether it helps make the case for strict liability that (a) you were (virtually) certain to damage the cable, as opposed to merely risking damage to it, (b) you acted in a calculating manner, as opposed to acting impulsively, (c) you knowingly intended to do damage to the cable as opposed to having unintentionally (but predictably) harmed me as a consequence of your efforts to save yourself, and/or (d) it can be congenially said that you "used" or "took" the cable rather than merely "damaged" it?

My position is that I have seen no convincing justification for drawing lines in the private necessity situation on the basis of any of these distinctions. As a result, I remain un-persuaded that a convincing case for liability has been made even in the hypothetical with which I have started this subsection where all of the possibly more favorable factors under consideration are present. Put differently, I don't think this hypothetical is critically different from one in which you tie up to my dock in a severe storm in order to save yourself and it turns out that your ship damages my dock, this having been a risk you would have been aware of had you taken the time to think about it in your frantic rush to save your ship in the emergency.

Moreover, I believe I am in good company here. Professors Atiyah and Epstein, two quite different-minded critics of the fault principle, both argued that *Vincent* and ordinary accident situations now governed by negligence were very similar at bottom. Thus,

neither thought, for example, that risk of harm should be treated differently from certain harm.<sup>208</sup> Judge Keeton too argued that, so far as the "benefit" notion is concerned, the *Vincent* problem could be seen like many other problems ordinarily covered by negligence analysis. And, he considered and rejected, as functionally no different, the distinction between "using another's property" and "causing a risk of harm to another's property without using it."<sup>209</sup>

Others, however, seem more impressed or at least intrigued by, one or more of the differences under consideration here. For example, Professor Friedmann says that his notion of an appropriation "does not extend to acts that increase the risk of harm to others' property . . ." <sup>210</sup> But he doesn't convince me that this is more than definitional. If certain damage to another's property is to be considered an "appropriation," then when the defendant deliberately, albeit reasonably, subjects the plaintiff to a high risk of loss for the defendant's benefit, why should that not amount to an "appropriation" too (when the risk falls in)? Friedmann doesn't say. Thus, for example, the familiar non-negligent dynamite blasting case, where a neighbor's property is destroyed by a blast set off in the course of building construction, would presumably not amount to an "appropriation" and thus would not be an appropriate case for restitution under Friedmann's view; whereas reasonably blowing up a neighbor's shed to prevent a fire from destroying your house would entitle the victim to restitution. The problem is trying to understand why Friedmann would think these two cases should be handled differently.<sup>211</sup>

Deans Prosser and Keeton complete their discussion of the necessity problem by seeming to endorse a rule of non-liability in the situation where someone, say a driver, is put suddenly in the dilemma of having to cause one accident or another and makes, under the circumstances, the reasonable choice, say, to run over X's property rather than to kill a child or injure himself.<sup>212</sup> But why don't the authors see this as the same as *Vincent* where they favor liability?<sup>213</sup> They don't say.

Perhaps they think an important pre-requisite to the application of the Bohlen's "benefit" principle to private necessity cases is that the defendant make a calculated (i.e., deliberate) decision, rather than an impulsive or instinctive one. Yet, not only is it by no means clear either conceptually or in application where an instinctive act stops and a calculated act begins. But also, and more importantly, merely pointing to this difference hardly suffices to justify different results. And it would be especially unsatisfactory coming from authors who favor imposing liability in public necessity cases on those members of the community who benefited but didn't act at all!

In his casebook Professor Marshall Shapo's notes raise the same issue in the course of exploring the "emergency" doctrine which is widely understood to apply in negligence cases.<sup>214</sup> By that doctrine, the reasonableness of one's act is judged by taking into account unusual circumstances that may require one to make split second decisions that might not be thought reasonable were one to have longer to deliberate. Thus, the inability to deliberate may well lie behind the no negligence finding in *Cordas v. Peerless Transportation Co.*,<sup>215</sup> a case discussed by Professors Morris and Broeder and cited by Shapo, where a cabbie jumped out of his moving cab that had been commandeered by a threatening criminal. That is, had the cabbie the time better to appreciate the danger he was imposing on those nearby by allowing his driverless cab to run onto the sidewalk, his conduct might have been judged unreasonable. But under the press of circumstances it wasn't.

Still, if *Vincent* were rightly decided, then why not impose liability in *Cordas* as well? Plainly, the deliberateness of the ship captain's decision in *Vincent* did not make it unreasonable. Thus, the traditional fault principle certainly will not serve to distinguish *Vincent* from *Cordas*. And certainly the two seem hard to reconcile on the "benefit" principle.<sup>216</sup> Thus when Professor Shapo asks: "Does the opportunity to deliberate possessed by the defendant master in *Vincent*

adequately distinguish that case from decisions exonerating actors on the basis of the emergency doctrine?"<sup>217</sup> I am still awaiting a convincing answer as to why it might.

Those behind the Restatement also seem, at least at times, to think that the intentional nature of one's act should matter. For example, Section 158 of the Restatement of Torts sets out the basic proposition that an intentional and unprivileged intrusion on the land of another is a trespass.<sup>218</sup> Moreover, later sections provide that it is still a trespass even if there is no harm and even if you acted under a mistaken belief, say, that the property was yours.<sup>219</sup> On the other hand, if your entry is only negligent, it is not a trespass and you are not liable unless there is harm.<sup>220</sup> And, most importantly, if your entry is accidental and non-negligent, not only it is not a trespass but you are not even liable for harm you do.<sup>221</sup> An example the Restatement gives here is of someone who non-negligently slips on some ice on the sidewalk and breaks the window in plaintiff's building along the walk. Thus, we see different treatments both as to whether there was a technical trespass and whether there should be liability for damages done depending upon whether or not the defendant's entry was intentional. The Restatement doesn't explain why, however, and I am left with the same doubts as ever: if the reasonable person who non-negligently damages the plaintiff's window when he slips while out on a walk escapes liability, then why shouldn't the reasonable ship captain in *Vincent* also escape liability for the damage he causes to the dock?<sup>222</sup>

Reviewing the English necessity cases, I have asked myself whether or not the factors under consideration here might be used to distinguish these cases from *Vincent*. For example, one might say about *Romey Marsh*,<sup>223</sup> where the ship on the sea wall wasn't broken up immediately, that since by this action the captain only risked danger to the wall, this case does not involve the intentional imposition of certain harm. The same might be said about the release of oil in the *Esso* case<sup>224</sup> and the release of the CS gas in the *Rigby*

case.<sup>225</sup> And perhaps even *Cope v. Sharpe*,<sup>226</sup> where the heather was burned to save the pheasants can be distinguished on this basis. Of course, the English judges themselves don't seem to have made anything of this sort of distinction.

Moreover, having studied the trial record in the case, I believe that it is not at all clear that the *Vincent* facts themselves actually parallel the cable taking example with which I began this subsection. Was the captain really (virtually) certain that his tying down the cables on his boat would harm the dock, or was it only a substantial risk? Did he really act deliberately – knowing that he was going to harm the dock thereby – or only instinctively when he ordered his men to secure the ship? In what sense, if any, did he intend the damage to the dock? Indeed, although they were apparently not believed by the jury, the defendant in *Vincent* introduced the testimony of witnesses who claimed that the ship itself never actually damaged the dock and that any damage that occurred was directly from the storm.

More importantly, even if *Vincent's* facts were to be read to give the captain considerably more awareness, cool-headedness and sureness of purpose than just suggested, my conclusion remains that no satisfactory basis has been advanced for imposing strict liability treatment in private necessity cases simply on the ground that the defendant made a clear choice to harm another.

#### Q. Distinguishing "professional" rescuers

As noted earlier, Section 263 of the Restatement of Torts states the counterpart rule to Section 197 and the *Vincent* case, but where a chattel, rather than real property, is damaged or converted. A challenging example in Section 263 hypothesizes that B seizes a bottle of medicine from A needed to save either his own life or that of his patient's, where A is a pharmacist who refused to sell the medicine to B.<sup>227</sup> For me, the problem is how to distinguish *Vincent* from this

example, assuming for now that one were to concede for these purposes that the patient (or the doctor?) is liable to the pharmacist (notwithstanding the presumably unreasonable conduct of the pharmacist) – a conclusion itself that is not self-evidently correct in my view .<sup>228</sup>

Let me suggest first that the pharmacist example might be seen to be much more like the problem of eminent domain than is the problem in *Vincent*. In both the pharmacy example and in eminent domain we are talking about property that is normally bought and sold in regular market transactions. In both settings the holder of the property is refusing to sell to a willing buyer who is prepared to pay the market price. And in both settings, because of the social value we attach to the buyer obtaining the property, the law, in effect, suspends the rule that usually allows one to sell his property or not as he pleases and permits a forced sale at the market price.

This said, there is remains the problem of showing why *Vincent* shouldn't similarly be seen as a forced sale case. Earlier, it will be recalled, I distinguished *Vincent* from eminent domain problems and suggested that *Vincent* could be seen instead as a analogous to a zoning restriction case where one benefits at another's expense and need not pay for it.<sup>229</sup> But since some of those distinctions would also apply in the pharmacist case, let me reconsider the forced sale analogy in light of the latter.

The key difference, I believe, lies in the moral duty of the pharmacist as compared with that of the dock owner. My position is that because he is in the business of selling vitally needed medicines, the pharmacist has no moral obligation to give the medicine away to the desperate patient. Rather, his moral duty is to sell it at a fair price. By contrast, as I have been suggesting, the dock owner in *Vincent* ought to allow the ship captain freely to use the dock. That is, it is the right thing for the dock owner to volunteer the dock because selling the right to damage the dock is not what he is normally about. The



dock owner, in short, should treat this loss as a risk to his dock no different from any other unusual set of natural conditions that might have harmed it.<sup>230</sup>

The Restatement's odd example about the pharmacist may seem rather different from *Vincent* because the Restatement does not present an emergency situation in which an ordinary sale is impractical. But this hypothetical can be made more analogous to *Vincent* if, say, the patient becomes desperately ill at night, there are no all night pharmacies available and the patient does the only feasible life-saving thing and breaks into the shop and takes the medicine.<sup>231</sup> Still, it seems to me to be beyond the moral duty of the pharmacist, on receiving an explanation from the patient of what happened, to then say – "The medicine is yours to have for free." Again, I react this way because pharmacists, like doctors, are in the "rescue business." They are, in short, professional rescuers, and so long as they aren't paid on a pre-arranged basis by public funds or some other guaranteed source, I don't see how they could stay in business if, every time they "saved" someone, they were thought to have the duty to do so gratuitously. Note the parallel between my position here and that I took in discussing the Posner and Landes analogy to the doctor who aids an unconscious person in the road.<sup>232</sup>

By contrast, consider once more the example, discussed in *Vincent*, of the person who becomes unexpectedly ill at a friend's home and thus has to be fed and sheltered.<sup>233</sup> This is an unusual setting where it is plain that the host is the one called upon by fate to be the rescuer. He is not a professional rescuer, and doesn't depend upon compensation for rescues for his livelihood. And in that case, I believe that the morally proper behavior of the host is to provide the food and shelter without charge. Surely that is what most people would do for a guest they have invited into their home.

I want to acknowledge now that it is one thing to say that the dock owner should volunteer his dock when he is there to do so, and

another to say that he will be treated as though he had been there and volunteered the dock when he wasn't (or didn't). Below I will explain why, in the end, I don't think this difference should matter.

#### R. Lionel Smith's view of unjust enrichment

I have already discussed Professor Friedmann's 1980 article on unjust enrichment, but I want here to address some newer work on this subject.

First, consider a 2001 article by Canadian law professor Lionel Smith,<sup>234</sup> in which Smith seeks to provide an adjustment to the legal theory offered by Professor Ernest Weinrib in his book "The Idea of Private Law."<sup>235</sup> Smith reads Weinrib to insist that corrective justice generally requires that the defendant have engaged in wrongdoing before the law will require him to compensate (or otherwise satisfy) the plaintiff. It is Smith's project first to demonstrate that the law of "restitution" or "unjust enrichment" frequently imposes strict liability, thereby holding liable a not-at-fault defendant, and second to convince us that this result is nevertheless consistent with corrective justice.

A good, and familiar, example which Smith uses is that of the mistaken payment. Suppose that P reasonably but incorrectly believes that she owes D money, and so pays a sum to him. P then realizes her error and asks for the money back. When D refuses, P sues. The legal outcome here is that P wins, a result that both Smith and I support. It is true that D is strictly liable to P, since D did nothing wrong. But there is a good reason to force D to return the money. Surely D knew when he received the funds that it was a mistake and that P had not intended to make a gift to D. Since D can offer no justification for keeping the money, if he were allowed to do so, he would indeed be unjustly enriched. This example may well show a shortcoming in Weinrib's fault-based theory.<sup>236</sup>

Smith gives other examples, another of which is also very familiar. X steals P's book and sells it to D, who buys it in good faith, reasonably believing that X is the owner. P discovers that D has the book and when she asks for it to be returned and D refuses, P sues. As I earlier discussed, the basic law here is that the "true owner" wins as against the "bona fide purchaser," and so D is indeed strictly liable for the loss. I don't intend to resist this outcome, although I am not at all convinced that it is appropriate to say that D would be unjustly enriched if D were permitted to keep the book. This, like *Vincent*, is an example that pits the claims of two innocent parties, one of whom will have to bear the loss (unless, I suppose, a shared-loss solution were embraced). Ordinarily, I would think that D should win unless P has a good reason for overcoming the conventional assumption that, absent such a reasons, losses will lie where they fall.

But perhaps P has a good reason. As I earlier suggested, perhaps this rule makes buyers more vigilant with respect to those with whom they deal, as well as avoiding having the courts determine whether D actually is an innocent buyer and not a "fence." (Although notice that the opposite rule arguably makes property holders more vigilant as to how they secure their property and avoids having the courts determine whether P was careless in how he did so in this case.) Or perhaps there are other reasons. Maybe the common law rule prompts people to buy from sources against whom they can readily claim a refund if the property turns out to have been stolen, although why the law should promote purchases from these sorts of retailers is not self-evident. Yet, perhaps it is not a matter of preferring such retailers, but rather of giving D an option either to buy from someone against whom he likely has recourse and to whom he will probably pay more, or to buy from someone who will be gone and from whom he will probably pay less, while assuming the risk of having purchased stolen goods. That is, the existing rule allows D to reject the insurance that comes from a clearly solvent retailer who will stand behind its products. Or maybe there simply needs to be a rule so that all the parties can adjust their conduct, expectations, and

insurance arrangements accordingly, although it is not evident why it should be a rule of strict liability rather than negligence. What is not convincing to me is the mere incantation that “one can not obtain title from a thief” – which seems to me to be the conclusion one draws after the rule is announced, and not a reason for the rule.

In any event, I don’t think it follows from these examples that *Vincent* was properly decided. Rather, I think that Smith has it exactly right when he says that what he terms “autonomous unjust enrichment” requires that “the defendant have been enriched, that the plaintiff have suffered a corresponding deprivation, and that there be some reason why restitution should be ordered.”<sup>237</sup> Hence, even if the defendant in *Vincent* is understood to have been enriched (although note, this can be and has been rejected by several writers, since he has nothing to return like the person receiving the mistaken payment or the person who bought the stolen book), Smith’s formulation requires that one still must offer a reason to convince us that strict liability is appropriate.

Yet, when it comes to discussing the *Vincent* case itself, Smith does not really attempt to put forward a reason. Rather, he primarily seizes on *Vincent* as an illustration of the common law adopting a strict liability solution. I find this disappointing, especially since, as I have shown earlier, the English and Canadian law both seem to be contrary to *Vincent*.

At one point Smith says “it is not necessary to find that the defendant did anything wrong ... It is enough to find that the plaintiff did not fully consent to the transfer.”<sup>238</sup> Yet, Smith does not argue for why the lack of consent should matter, especially in situations of necessity where it is agreed that the plaintiff, had he been there, would have had a moral obligation to make the property available for the use of the person in dire need. I will return to this issue below.

Finally, I also find another example that Smith offers in tension with his support of *Vincent*. Smith imagines that D has wound up in possession of P's pen, through no fault of either party, so that D ought to return it to P. But, then before D can return it to P, the pen is destroyed by some disaster – say a storm – with respect to which D is in no way at fault. In that event, Smith concludes, the law rightly frees the innocent D from any obligation to P.<sup>239</sup> Assuming for these purposes that Smith is correct about the law on this matter, I simply want to point out the parallel to *Vincent*. There too D, in effect, is in temporary justifiable possession of P's property which is then destroyed by a disaster – the storm. Why should it not also follow that D is not liable to P?

#### S. The draft Restatement of Restitution and Unjust Enrichment (Third)

As I noted earlier, Section 122 of the original Restatement of Restitution contains a provision that is very much patterned after the *Vincent* section on private necessity in the Restatement of Torts. It uses the same “privilege” language used by the Restatement of Torts, and it distinguishes cases that are, in effect, public necessity cases. Moreover, the actor's liability is not to disgorge his gain or to pay an amount that is in any way based upon the benefit he gained – common remedies in restitution – but rather he is to pay for the harm done, as in tort. As is typical of the Restatement, the comments offer little by way of justification for the black letter rules, and comment a to Section 122 simply asserts that it is “fair” that one who exercises the privilege pay for the loss.

There appear to be no actual cases, apart from *Vincent*, on which the drafters of this section relied. But, rather than give the *Vincent* illustration, the comments instead imagine someone who is pursued by a mob and who crosses someone's land in order to save his life.<sup>240</sup> Although this act, which otherwise could be a trespass, is

understood to be privileged, if the person who was fleeing damages the land to the tune of \$50, he is said to be legally obligated to pay for that harm. This result, of course, would appear to follow from *Vincent* – provided that one were not to restrict *Vincent* to cases in which the defendant reasonably acted to protect his property, rather than his life.

Apparently, although the language used by the Restatement could be sharper here, the person fleeing the mob is not liable for harm done to the land by the mob, even if it was the choice of the person who was fleeing to cut across that property which brought the mob onto the plaintiff's land. For devotees of *Vincent*, this is not self-evidently correct, but I put that aside.

As this is being written, the ALI is in the process of producing a new Restatement of Restitution and Unjust Enrichment. One thing that is clear is that there are many areas of the law of Restitution in which one can be strictly liable – that is, liable without being at fault. My discussion of Professor Smith's work (above) illustrated some of them. If the *Vincent* rule were continued in this new Restatement, it would be one more example.

But the basic question remains whether the dock owner in *Vincent* should be thought entitled to a damages remedy against the ship owner, whether in restitution or tort. The secondary issue for specialists is whether it matters to call it a liability that is based in tort or restitution or both.

Professor Andrew Kull is the Reporter for the new Restatement of Restitution project, and in May, 2005, he presented to the ALI a draft that might have contained an updated version of Section 122.<sup>241</sup> It did not. However, at the annual ALI meeting some members spoke out in favor of putting *Vincent* explicitly back in. Whether this will happen is too soon to tell.

As I understand Professor Kull's position, it is that *Vincent* seems more appropriately understood as a torts case than a case in restitution, a position that was influenced by the scholarship of Canadian Professor Dennis Klimchuk.<sup>242</sup> Without rehearsing all of Klimchuk's closely reasoned arguments here, the bottom line for him is that the ship owner simply did not enjoy the sort of unjust enrichment that restitution requires.<sup>243</sup>

ALI members who want the *Vincent* example, or the old Section 122 example, put back in the new Restatement appear to believe it belongs in new Section 40.<sup>244</sup> For my taste, the current draft language of Section 40 simply does not fit *Vincent* – even if *Vincent's* facts were thought to give rise to a right of restitution. Section 40(1) now states that “A person who obtains a benefit by an act of trespass or conversion, or in consequence of such an act by another, is accountable to the victim of the wrong for the benefit so obtained.” My point here is that I think it is not correct to call the dock owner a victim of a “wrong.” Indeed, I would also resist terming the ship captain a “trespasser” since he had a privilege to be at the dock. Put differently, draft section 40(1), in my view, would only properly apply to someone who tied up at someone else's dock when there was no necessity to do so (and without any other privilege or consent of the owner), or someone who did tie up out of necessity but did so in an unreasonably dangerous manner so as to abuse the privilege.

I am not certain that Professor Kull would see it as I do, because in draft Section 40(2)(b) he envisions that victims are entitled to some (limited) recovery for conduct in violation of Section 40(1) when that conduct is “innocent.” As I already said, I find troubling the whole idea of the “innocent” ship captain in *Vincent* having committed a “wrong.” But this is not the place to fight over the meaning, and arguably the internal inconsistency, of this draft section.

Much more exciting from my perspective are the draft provisions of Part II, Chapter 3 (i.e., Sections 20-22) of the new

Restatement of Restitution.<sup>245</sup> These, among other things, cover situations in which a rescuer comes to the aid of someone clearly in need of help, but who is unable to make an ordinary contract to obtain the necessary services. Suppose, for example, a doctor comes to aid an unconscious party in need of care. In such case, draft Section 20 provides that the doctor is entitled to reasonable compensation for his services. I support this result.

However, Section 20 applies only to the provision of “professional” services. If someone who is not a “professional” comes to the aid of another, the draft Restatement does not entitle him to recovery in restitution for the value of the services provided, and there are a small number of cases that back up this distinction.<sup>246</sup> I agree with that result, and most importantly for my purposes, this rule generally mirrors the distinction I have proposed earlier, in which I argued that we can view differently self-help rescuers who impose on “professional rescuers” and self-help rescuers who impose on ordinary fellow citizens. As I argued, it is the latter who have a moral obligation to help without an expectation of compensation.

So far, however, those who are eager to put *Vincent* back in Section 40 have either not paid attention to this distinction in Section 20, or else they presumably reject it as applied to those who (like the dock owner) are forced, in effect, to be rescuers in *Vincent*-like settings. I should perhaps also re-emphasize here – a matter to which I will return at the very end – that I do not consider the dock owner in *Vincent* to be a professional rescuer, notwithstanding his being a commercial actor. As I already noted, unlike, say, pharmacists who sell vital medicines, saving people and things (i.e., here ships in storms) is not what his business is centrally about.

#### T. Conclusion to Part II

I have so far explored many reasons advanced by legal scholars for imposing strict liability. Some, like loss spreading, creating the



right behavioral incentives, and problems of proof, while widely accepted in least in some quarters as appropriate goals of tort law, just don't convincingly apply to *Vincent*. Moral intuitions, while strongly felt in some settings, are, I have argued, ambiguous at best in the emergency self-rescue situation.

Too many inapt analogies have been drawn which have led to confusing *Vincent* with settings in which either there was no emergency need or else the conduct in the emergency was, while perhaps understandable, wrong; or where the claimant was a professional rescuer. Too much has been made of the fact that the conduct in *Vincent* was in some sense(s) intentional and that harm was thought (or might be assumed) to have been certain. No acceptable boundaries have been offered for the persistently invoked "benefit" principle; nor has a convincing case been made that the "benefit" in *Vincent* is "unjust." In sum, we have seen throughout this Part that while many have used the *Vincent* result to support their more sweeping theories of tort liability, none has put forward a theory that convincingly justifies *Vincent*.

Of course, it should be clear by now, that the forcefulness of my perspective depends importantly on the idea that ordinary people have moral duties to volunteer help to strangers in acute distress – at least when it is clear that you are the critical one who must provide that help. Later, I will return to a discussion of this theme. Before doing so, however, I want to turn to two legal scholars who have resisted the clearly predominant view that *Vincent* was correctly decided.

### **III. Legal Critics of the *Vincent* Result**

#### **A. Guido Calabresi's "cheapest cost avoider" theory**

Perhaps the most creative torts scholar of the recent era, Dean (and now Judge) Guido Calabresi has proposed, first in articles and

then in his splendid *Costs of Accidents* (1970), a whole new "systems" way of thinking about accident problems that draws heavily on the insights of economics. Calabresi is especially interested in using liability rules (that is, making private parties pay money in the appropriate circumstances for harms they do) in order to promote the proper allocation of society's resources to both goods and services in general and to safety-enhancing measures in particular.

But unlike Professors Posner and Landes and other leading law and economics scholars, Calabresi is highly critical of the existing tort system's ability to promote efficiency, especially through the negligence regime. Rather, the broad social strategy, according to Calabresi, should be to impose the costs of accidents on those parties who Calabresi calls the "cheapest cost avoiders." This is meant to force them to make the right decision as to how much to invest in safety – a decision that Calabresi finds more promisingly made by private actors driven by financial pressures than by either the judicial system (through determining what is "negligence") or the public regulatory system. Moreover, in the Calabresian view, where accident costs are properly assigned to activities, then even if those activities cannot be efficiently carried out more safely, at least those activities will carry their proper cost in the market place.

Calabresi, to be sure, is not only interested in good social cost accounting. He also sees the social advantage of loss spreading, although he recognizes that sometimes to pursue one of these goals would be to frustrate the other, so that tradeoffs are necessary. And he admits that justice serves at least as a constraint on our ability to impose costs on parties in pursuit of social engineering objectives.<sup>247</sup>

The central problem with his approach, in my view, is how to (and who should) decide who (and among which contenders?) is the "cheapest cost avoider" – a problem with which Calabresi wrestles at length. This is not the place to provide an overall critique of that

effort. Instead I will focus on the way Calabresi's approach deals with the *Vincent* problem.

At one point, he is responding to criticism of Professors Blum and Kalven<sup>248</sup> to the effect that there really is no "cheapest cost avoider" in many circumstances. More precisely, they seem to argue, as Calabresi puts it, "where two parties stand in a bargaining relationship with each other it does not matter which one is initially charged with accident losses arising out of that relationship because the market will allocate the losses in the best way possible regardless of the initial allocations."<sup>249</sup> And Calabresi puts up *Vincent* to illustrate the argument.

But Calabresi in turn responds that even in bargaining situations it often does matter after all who formally bears the loss – for example, as between car manufacturers and car buyers. This is because, in practice, either (1) one of the parties "may be far more able than the other to evaluate the accident risk,"<sup>250</sup> or (2) "it may not cost the two parties the same amount to insure against the loss,"<sup>251</sup> a consideration that goes to efficient loss spreading, or (3) one of the parties is more likely, as Calabresi puts it, to externalize the loss through transfer.<sup>252</sup> This latter notion means, by a large, that one side's insurance arrangement will more likely include all sorts of unrelated risks in the risk pool so as to undermine the social benefit of allocating costs to that side in the first place; this is a persistent problem in the case of personal injury victims, from the Calabresian perspective, since these losses may well be insured through private or public insurance schemes (e.g., Social Security or health insurance) whose financing mechanisms remove entirely from victims any financial incentive to use proper care.<sup>253</sup>

Although Calabresi then goes on to identify the injurer as the cheaper cost avoider in many bargaining situations (for example, as between rotary lawn mower manufacturers and their customers, or as between enterprises and their workers with respect to industrial

accidents), it does not follow that his approach supports the result in *Vincent*. Indeed, although in the end Calabresi doesn't seem to take a firm stand on the issue, it *appears* that he has concluded that his approach should lead to non-liability in *Vincent*.

When it actually comes down to his making a choice, Calabresi does not provide an extended analysis. He only says – in a footnote no less – "the dock owners could probably estimate with relative ease the damage a given boat would inflict to a dock during a violent storm, while ship owners might find it difficult to say which dock would most likely be hit by a violent storm."<sup>254</sup>

Nonetheless, applying Calabresi's criteria more comprehensively, it seems to me that he should indeed conclude that the dock owner is the "cheapest cost avoider." First, one would say that the dock owner is probably in as least a good a position as the ship owner, perhaps better, to evaluate and act upon the expected accident costs. That is, whereas both know about the possibility of dock damage in storms, better-built docks would seem at least as promising a safety precaution as would ships with better buffers. Moreover, although the ship owners are in a better position to consider how much will be lost if the ship is cut loose, picking up on the point Calabresi made, the dock owner knows better than does the ship owner how vulnerable his dock is and to the tune of a sum he is probably better able to estimate. Second, the dock owner's property insurance is probably considerably cheaper to administer than is the ship owner's liability insurance. And finally, there is no reason to think in this situation that one form of insurance is going to be better at avoiding externalization through transfer than is the other. Indeed, as I argued above in my discussion of the views of Posner and Landes, it would appear most likely that *Vincent*-type accidents will be paid for by ship owners (and ultimately cargo shippers) as a group in any event – either because ship owner liability insurance would generally go up a bit (were the *Vincent* result the law generally) or because dock owners would generally increase dock fees a bit in order to cover their

increased insurance costs (were there no liability in the *Vincent* setting). The latter, however, to repeat, has the advantage of having the market pass on the costs to dock users rather than employing the expensive device of liability law and liability insurance.<sup>255</sup>

### B. Howard Latin's "problem-solvers" theory

Professor Latin has offered a competing law and economics approach to those proposed by Calabresi and by Posner. Moreover, Latin has taken a clear stance against the *Vincent* result.<sup>256</sup>

Like the law and economics devotees, Latin believes in using tort liability, at least in certain circumstances, to create behavioral incentives. Along with Calabresi, he rejects Posner's broad embrace of the negligence rule as the way to do this. But rather than searching for the cheapest cost avoider as the basis for imposing tort liability, Latin would have us focus first upon whether or not the parties involved can be expected to engage in what he calls "problem-solving behavior" – meaning that they are "responsive to the potential costs of legal liability and ... are capable of informed choices."<sup>257</sup>

Simplifying here, Professor Latin argues that where both parties (or classes of parties) to an accident (or classes of accidents) don't engage in problem-solving behavior, and hence neither is likely to respond effectively to incentives created by tort liability, society is wiser to employ, instead of tort law, tailored accident compensation schemes and perhaps direct regulation in order to promote the social goals of victim compensation and the efficient level of safe conduct. Accidents involving guests in the homes of friends illustrate this category. By contrast, where one side to the accident class is a problem-solver and the other isn't, then Latin endorses the imposition of strict tort liability on the problem-solvers. Injuries caused by consumer products are representative of this category.

Finally, where both sides to the accident are problem-solvers, Latin favors a regime of liability for negligence – on the ground that this gives both sides (who will respond) the proper safety incentives. Although Latin says that this latter situation, which he calls "bilateral problem-solving," is rare, it nonetheless sometimes exists. Moreover, in Latin's view, *Vincent* is a prime example: "both categories of actors in *Vincent* are capable decisionmakers who will minimize losses if the proper incentives are created . . ." <sup>258</sup>

Thus, as the ship captain was not negligent in the *Vincent* case, Latin's efficiency-based regime would put the loss on the dock owner. As for justice considerations overriding rules adopted for instrumental reasons, Professor Latin, as I have already described, makes a strong and effective attack on at least Professor Epstein's fairness-based call for strict liability. <sup>259</sup>

### C. Conclusion to Part III

Although I am pleased to see that Professors Latin and Calabresi, the latter albeit perhaps only implicitly, favor overturning *Vincent*, I would prefer that the adoption of that view not depend upon having to embrace either of these comprehensive approaches to accident costs. Thus, what I want to take away from Calabresi and Latin together is this: law and economics concerns about optimizing accident costs do not justify the *Vincent* decision; and, indeed, concerns about efficient insuring probably point the other way.

Neither Latin nor Calabresi, however, has offered much by way of a moral basis for the non-liability result. Hence, it seems appropriate to turn next to the moral philosophers and describe what some of them have said about the necessity problem.

## IV. Moral Philosophers and the Duty to Pay Compensation

### A. Joel Feinberg

A substantial discussion in the philosophy literature, over a problem that I and others find similar to *Vincent*, was set off in 1978 by Professor Joel Feinberg when he wrote: "Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly 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."<sup>260</sup>

As in *Vincent*, we have here a clear case of private necessity, and, as Feinberg puts it, "Surely you are justified in doing all these things . . ."<sup>261</sup> The question, again parallel to *Vincent*, is whether you owe compensation to the cabin's owner.

The philosophy literature is centrally concerned with one's moral obligations, not legal obligations, which has, after all, been the ultimate concern of the writers I have canvassed thus far. Still, as we have seen, much of the legal argument has itself been couched in moral terms – even if unpersuasively. If the philosophers can offer a stronger case for the hiker having a moral duty to compensate the cabin owner, this would surely be important to the law scholars, although it would remain to decide whether this is the sort of moral obligation that should be backed up with a legal sanction. Contrarily, if the philosophers were to demolish the case for a moral obligation, this would further undermine the Restatement of Torts' position on the law of private necessity.

Unfortunately, for reasons I will now explain, in the end I don't think that the philosophy writing on this problem sheds very much new light on it.

The highly regarded Professor Feinberg should not be too much criticized, because "necessity" was not at all the problem he was addressing. Rather, his task was to explain why voluntary euthanasia could be seen as consistent with a notion, fairly attributed to the Founding Fathers, of the inalienable right to life. His discussion of the hiker's case is largely an aside, in which he seeks to illustrate a distinction he attributes to Professor Judith Thomson, another philosopher whose views we will soon re-encounter.

Feinberg wants to illustrate Thomson's difference between "violating" a right and "infringing" a right, where a violation involves an infringement plus the fact that you were acting wrongly. And he gives the hiker's case as an example, saying that, while this is not a violation, still "you have infringed the clear rights of another person."<sup>262</sup>

Notice that if "infringing" is to be equated with a duty of compensation, then this, so far, is merely conclusory or definitional. If, by contrast, "infringing" might or might not lead to a duty of compensation, then this is just another way of setting up the problem of whether there should be strict liability in these circumstances – or, to use Bohlen's terms, whether one should have a complete or incomplete privilege to infringe.

Feinberg seems to want to equate "infringing" with a duty to compensate. He later, for example, points out that some justified killings are widely agreed not to lead to a duty to compensate – such as killings of aggressors in self-defense of your life.<sup>263</sup> That sort of killing, in this terminology, is not viewed as an "infringement."

Thus, the question becomes what justifies Feinberg's treatment of the hiker's case as an infringement. Let me say first that when he says that the cabin and its contents are "clearly somebody's else's private property" I don't think Feinberg means this statement by itself to be an argument about the duty to compensate. It is rather, I think,



meant primarily to discount any confusion that might arise in the analysis if the hiker reasonably thought the cabin simply abandoned. It also expresses the clearly agreed proposition that for most purposes the owner has what we typically call property rights in the cabin and its contents – e.g., to exclude others from their use and to sell them for value.

Feinberg's brief evaluation of the problem isn't merely conclusory, however, although perhaps he didn't mean this to be a full dress argument. Initially, he makes what I think is a very important distinction. He says "We would not think it inappropriate to express our gratitude to the homeowner, after the fact, and our regrets for the damage we have inflicted on his property."<sup>264</sup> I don't disagree with this; indeed, perhaps Feinberg should have said that one has a moral duty to convey those expressions to the cabin owner.

It should also be noted, for reasons that will become more important later, that Feinberg, properly I think, talks of "gratitude" but not about offering an "apology" which would imply having done the wrong thing. The idea of "regret", which he mentioned, I take to mean that the hiker would be sorry that the damage occurred or even that he is sorry to have been put in a position that he had to do the damage to keep alive, but not that he is sorry to have done it.

But Feinberg is plainly not content to leave it at that, and continues in a style of argument we have seen before: "More importantly, almost everyone would agree that you owe *compensation* to the homeowner for the depletion of his larder, the breaking of his window, and the destruction of his furniture. One owes compensation here for the same reason one must repay a debt or return what one has borrowed."<sup>265</sup> In short, first, a la Keeton, Feinberg appeals to presumed popular sentiment;<sup>266</sup> and then, a la Bohlen (and others), he seeks to explain that sentiment by analogy.

But does "almost everyone" agree that you owe a duty of compensation? Don't some (many) people think of this essentially as damage caused to the cabin by the storm, for which the cabin owner is likely insured, and which the cabin owner (and his insurer) would have had to bear had the storm more directly broken in the window and damaged the contents?

Alternatively, or additionally, how do people think about it if they first were to imagine that the cabin owner was on the scene? Assuming almost everyone agrees that the cabin owner would have a moral duty to let the hiker in, and to feed and shelter him, don't some (many) (most) agree that it would be inappropriate for the cabin owner then to send a bill to, or to file a lawsuit against, the hiker for the value of the services rendered? If so, does that not at least cast some serious doubt on how people, on reflection, feel or would feel about the actual facts that Feinberg put? This, of course, is the same argument I have put up against Keeton's claims about popular sentiment in the *Vincent* setting.

Let me turn then to Feinberg's argument by analogy. Presumably when Feinberg talks about repaying a "debt" he means to refer here to someone who has borrowed money. Hence his analogy is that, just as you ordinarily ought to return money or property when you have borrowed it, so too you should make compensation in the hiker's case – the parallel presumably being that what you have done is, in effect, "borrowed." But it is by no means clear that the hiker's case should be thought of as a "borrowing" of the window pane, the food and the furniture.

For one thing, the hiker doesn't have these objects to return in the way you presumably would had you borrowed something, like a book, from me. To be sure a neighbor might "borrow" an egg from another in order to complete a cake recipe, intending not to return the very egg, but to replace it with another; indeed, the same goes for borrowing logs from a neighbor to burn in your fireplace. Hence, if

we understand borrowing to include this notion of substitute replacement after consumption, then I suppose that one can at least see the supposed analogy to the food and the burned furniture in Feinberg's hiker's case – if not so easily the broken window. But to recognize the comparison does not make it necessarily apt.

The ordinary noncommercial<sup>267</sup> "borrowing" is usually between friends, or at least acquaintances. Often, at least when the thing "borrowed" is of little or moderate value, the would-be lender makes it clear that he wants the object treated as a gift. Surely this is often the case among neighbors borrowing eggs – where the language of "borrowing" is used, but not meant.<sup>268</sup>

When, by contrast, there is a clear understanding that the thing borrowed should be returned or replaced, then, let me suggest, it is because the moral borrower wouldn't have it any other way. If, for example, it is one of your favorite and hard-to-find books that I want to read, I wouldn't think of asking except on the basis that I would return it. The same is true if I ask to borrow \$1000 from you to obtain a computer that I want to buy. Moreover, in these cases, unless the understanding were that I would return or replace the thing borrowed, we would hardly say that you ought to hand what I want over to me, even out of friendship, and even if you had no current use for the property.

A critical feature of these circumstances, of course, is that the person borrowing is not in desperate need so that his very life depends upon it. Were that the case, it seems to me, the friend imposed upon ought to and would provide the thing needed with no thought that it had to be repaid, indeed even knowing from the requestor's past behavior and/or the circumstances that it almost surely would not be. Moreover, most friends in such circumstances, I should think, would affirmatively want whatever they provided to be treated as a life saving gift and wouldn't think of later accepting a cash payment in return.<sup>269</sup> But that is exactly what duty of compensation usually

implies, and clearly what a legal right to compensation is about. Furthermore, unlike my request for your favorite book or the \$1000 for my computer, it seems to me clear that in the life saving situation it is all right for the person making the request to do so even if he has no expectation of making repayment.

Where friends or acquaintances are not involved, non-commercial borrowings don't seem common. But gifts plainly are. People give to individual beggars, at least in part, because they think they are responding to desperate need (even if not immediately life threatening). And people give to organized charity as well, at least in part, to help with dire need. In these circumstances the donors probably expect, as Feinberg said about the hiker's case, expressions of gratitude – but not to be repaid. Indeed, if the needy objects of charity not only survive but thrive, I don't think it is thought to be their duty to repay their earlier benefactors (assuming they knew their identity) – although they may well in turn have a duty to aid others in need.

In short, I am simply unconvinced that the mere invoking of the "borrowing" notion determines the moral outcome of the hiker's case. To be sure, in these situations I have been discussing, the donor at least has the chance of knowing what he is getting in for and parts voluntarily (at least in a sense) with the thing needed. That wasn't true in the hiker's case. But it is Feinberg, not me, who has sought to invoke an analogy that involves a voluntary transfer.

#### B. Judith Thomson

As I already noted, Professor Feinberg employed the hiker's case in an effort to illustrate the violating/infringing distinction that Professor Thomson earlier offered. Soon thereafter, Thomson returned to the fray, taking up the hiker's case herself.<sup>270</sup> Thomson says she agrees that the hiker has infringed the rights of the cabin owner – and thus has a duty of compensation.

Unfortunately, Thomson's effort isn't really aimed at my target. As I see it, she does not try to justify why the hiker should owe a duty of compensation to the cabin owner. Indeed, at the end of her piece, as I read it, Thomson says that she is leaving that question for another time.<sup>271</sup> Rather, assuming a duty of compensation, her point is that it must be because the cabin owner has some kind of right that the hiker not burn the furniture or eat the food, even though in these circumstances the hiker has the right to do so. Hence, Thomson's central claim is that these two initially seeming inconsistent ideas are in the end morally compatible – thus making moral theory, as she puts it, "more cluttered than we might have wished for it to be."<sup>272</sup>

I don't here mean to challenge the overall structure of Thomson's approach. I would be happy to accept the idea that there can be infringing of clear rights that require a duty of compensation even when the infringer has a clear right to infringe. Presumably eminent domain would fit the formula; so too, presumably, would the example from the Restatement of Torts about the patient taking medicine from the reluctant pharmacist. What I continue to resist, however, is the claim that a convincing showing has been made there has been a (compensable) infringement in the hiker's case.<sup>273</sup>

### C. Nancy Davis

Professor Phillip Montague attacked the Feinberg-Thomson position in an article I will soon discuss.<sup>274</sup> But first I want to comment upon a defense of Feinberg-Thomson that was prompted by the Montague attack. Professor Nancy Davis takes up case for the idea of rights infringement, arguing that "We can maintain that even when agents act as they are permitted to act, it may yet be true that they are obliged (by the canons of justice, kindness, or [as Thomson might say] simple decency) to compensate the person who suffers loss, harm, or serious inconvenience as a result of their actions."<sup>275</sup> Let me assume this is true, putting aside again for now whether moral

duties in these cases should lead to legal ones. The question, however, remains whether the hiker's case is an example where compensation is so owed – as Davis says it is.<sup>276</sup>

In defense of this position Davis attempts two strategies. One is to invoke Bohlen's "benefit" principle.<sup>277</sup> As Davis doesn't develop the point, I won't say more about that. The other is to put forward some imaginative illustrations that seek to make her case by analogy. But, in my view, they, if anything, suggest the opposite.

"I promise to be at your house for dinner at 7:00. I do not get there until 9:30, and dinner is ruined, because I encounter a road accident en route, and I stop to render assistance to the unfortunate victims."<sup>278</sup> While not doubting that this was the right thing for the guest to do, Davis says that nevertheless "I owe you something for having let you down and caused the ruin of the dinner (perhaps an apology and an invitation to a meal)." It seems to me, and Professor Montague agrees,<sup>279</sup> that in the first place Professor Davis is wrong about the "apology"; it is rather an "explanation" (or perhaps an expression of "regret" in the sense I defined it previously) that is owed.

But, more importantly, it also seems clear to me that the guest does not have a moral obligation to pay for the meal (and surely it is inappropriate for the host to sue the guest for the value of the meal). After all, the host presumably initiated this dinner invitation as a gesture of friendship, and ought to have no more basis for complaining that it didn't come off in these circumstances than in many other parallel circumstances that might have occurred that would have prevented the guest from arriving on time through no fault of her own. Suppose, for example, unknown to the host, a blizzard blocked the road; or suppose the guest suffered a heart attack en route; or suppose, to make the parallel closer to the hiker and *Vincent* cases than Davis has, the guest stays at home to fight a fire that would otherwise burn down her house. In all these cases, it seems to me that

while the guest owes a reasonable effort to arrive on time (and notice of late arrival if it can be reasonably given – something assumed to be infeasible in all these examples), as well as an explanation afterwards, no case has been made for why the guest owes more. Davis' tentative suggestion of a return invitation is neither argued for nor illuminating; for the guest may be thought to owe the return invitation anyway (in return for the host's initial invitation) and not for arriving two and a half hours late when the meal is ruined.

So too with Davis' second example: "I regularly teach at 10:00, but on my way to the lecture hall I discover a fire in someone's office, and I stop to put it out. Though I know this will cause me to miss my lecture, it seems to me that my action is permissible; quite possibly it is obligatory. But it seems, nevertheless, that I owe my students something; at the very least, I am obliged to do what I can to make up that lecture." First, I would say, and I trust Davis would agree, that the teacher here owes the students an explanation. Let me suppose, further, that Davis is right and the teacher has an obligation to try to make up the lecture as well. But if so, the reason, I suggest, is that this problem is different from the hiker's case (and from *Vincent*).

In the missed lecture example, there is no reason for the students in the end to pay for the generous action the teacher took – that is, for them to become part of the rescue effort. This is because in the giving of lectures (I assume Davis means in the university setting), unlike dinner parties, time is not of the essence. The only way that the guest can save the road accident victims in Davis' first example is for the host's meal to be ruined. This is like the hiker's case where the cabin owner's food and wood are critical to the rescue of the stranded hiker; the same goes for the dock in *Vincent*. But the students don't have to be part of the teacher's decision to put out the fire; instead the teacher can just as easily later give up some of her own time by rescheduling the lecture when she would otherwise be doing something else. That, after all, is what university professors presumably think is proper if they miss a lecture owing to illness, or

because they were putting out a fire at home at the time. By contrast, it is not at all clear to me that an elementary school teacher, for example, owes his pupils anything more than an explanation in these various circumstances – for in his case, time is, in effect, of the essence.

In sum, while I think that Professor Davis nicely shows how the non-fault imposition of harms on others does give rise to what she calls a "moral residue"<sup>280</sup> she has not demonstrated that the residue that is owed in the hiker's case is any more than an explanation to the cabin owner of what happened. This may show that the cabin owner has some rights, but surely not the right to compensation in the sense that is usually meant.

#### D. Phillip Montague

Professor Montague first mounted a vigorous attack on what he called the Feinberg-Thomson notion of rights infringement;<sup>281</sup> he then returned to the battle, somewhat shaken, after his critique generated other criticisms, including Davis'.<sup>282</sup> Perhaps I should make clear that the philosophers in this fight are battling, if that is what they are doing, over problems that they must see as far bigger and broader than the hiker's case itself – which is only meant as an illustration. My goal is not to resolve these grander issues, but rather to try to see to it that the hiker's case isn't misused along the way.

In his earlier piece, Montague's initial objection is, I think, a restatement of the puzzle that Thomson clearly recognizes: if there is no way that we can say that the hiker has an obligation to compensate the cabin owner for doing something he has a right to do unless we also agree that the cabin owner has some sort of a right that his cabin and its contents be left alone, this is *prima facie*, at least, disquieting. Thus, Montague's point here in the end, I think, is, as nicely put by Professor Davis, that "at least in its present stage of evolution, the



Thomson-Feinberg account of rights contains features that are puzzling and obscure."<sup>283</sup>

But Montague does more than that. In affirmatively rejecting a duty of compensation in the hiker's case, Montague argues (1) where actions are permissible – as in the hiker case – the actor has no reason to feel guilt or remorse for his or her action; thus (2) to impose a duty of compensation would be to treat the hiker like a cabin vandal whose wrongdoing should indeed give him reason to feel guilt.<sup>284</sup> In short, it is the equation of the hiker with the vandal that most bothers Montague.

But this attack is too broad for me. It would undermine strict liability everywhere, including the many examples I gave earlier which I sought, not to discredit, but to differentiate from *Vincent*. For example, isn't the same parallel apt as between the city official who properly exercises eminent domain rights against your property and the city police official who wrongly breaks into your house and causes damage there? Isn't requiring the city to pay just compensation, in Montague's formulation, equating that exercise with the vandalizing policeman? But somehow I don't imagine that Montague objects to the duty of compensation in eminent domain cases. Similarly, would he object to liability on the part of the patient who broke into the pharmacy at night out of desperate need and took the needed medicine on the ground that this would equate that patient with an ordinary thief?<sup>285</sup>

In addition to over breadth, the problem with this sort of argument, as Davis and Professor Peter Westen<sup>286</sup> have also pointed out, is that the requirement to pay compensation is not necessarily meant to be equated with, or considered to be proof of, wrongdoing, and thus should not be so equated by Montague. To be sure, there has to be a good reason to impose a duty of compensation; but others besides fault may qualify. Moreover, for clear wrongdoers we may

additionally impose criminal liability and/or punitive damages both to punish and to express our disapproval of the acts done.

In other words, we need a more fine tuned analysis than Montague offers of when a duty of compensation should follow from blameless behavior.<sup>287</sup> And, to return to my theme throughout, although there may be (indeed seem to be) very good reasons to impose a duty of compensation on some non-fault conduct, I have yet to be convinced that it is appropriate for the emergency, self-rescue situations on which I have been focusing – the hiker's case and *Vincent*.

#### E. Peter Westen

Westen is a law professor, not a philosopher. He chimed into the philosophy debate, however, because the philosophers seemed to be puzzled over things that seem straightforward to lawyers.

As Westen explains, there is nothing logically inconsistent about saying that A has a right to use some property (and to prevent B from interfering with that use), while at the same time saying that B can compel A to compensate him for that use. Moreover, he points out, the law often reflects this very pattern – and he gives as examples, eminent domain and the *Vincent* case.<sup>288</sup> Thus, for him, the hiker's case fits into this formula as well. As Westen puts it, another way of saying the same thing about the interactive rights of the hiker and the cabin owner is that "although A has the liberty . . . to enter B's cabin and consume his food, he does not have the liberty to consume B's food without paying for it."<sup>289</sup> (Note how this has a ring of Keeton about it.)

Moreover, Westen is also satisfied that it is appropriate to use the phrase "infringe" to describe what the hiker did, so long as we distinguish criminal and civil law consequences. That is, the hiker may be said to have "infringed" for purposes of having to pay

damages, but not for purposes of being punished criminally – which is perhaps appropriately limited to cases where one "violates" rights in the Thomson sense.

On the other hand, it must be clear that Westen is only talking about logical possibilities and what the law does in some situations. He doesn't offer, or even mean to offer, a moral justification for the result in the hiker's case (or *Vincent*).<sup>290</sup> Indeed, as Montague points out (echoing Keeton's similar observation), Westen's conditional liberty formulation is morally dubious when applied to the hiker's case. That is to say, it is doubtful that the hiker is really only permitted to consume the cabin items if he pays for them; surely the right of the hiker to break in to save his life does not depend upon his financial ability later to pay for what he uses. Of course, one could say that any hiker who can afford to make compensation has a duty to do so; and Westen might so modify his principle. The question remains, however, whether or not we should say that. And, to repeat, Westen's effort only demonstrates that there are areas of the law where something like that is said – but not why it is said or whether it should be said in the hiker's case.

#### F. Jules Coleman

Professor Jules Coleman is a persistent and insightful critic of various legal theories of tort liability – both moral and economic. He has also offered his own moral theory of tort liability based on corrective justice ideas. And, he has considered both *Vincent* and the hiker's case. My analysis will first focus on Coleman's earlier writings.<sup>291</sup>

Coleman has all along been careful to point out both that we need to distinguish wrongful gains from undeserved losses, and that we need to be open to modes of rectification other than tort law as ways of serving corrective justice goals. A paradigm case for using tort to serve corrective justice goals is that where I steal your book.

You have suffered a wrongful loss, and I a wrongful gain. Thus, corrective justice, as Coleman's earlier work put it, requires that my wrongful gain be annulled, and that your wrongful loss be restored. Rectifying both these improper distortions from our original and assumed proper holdings can nicely be achieved by having me either compensate you for the book or return it. (I may also be made to pay extra – punitive damages – not, according to Coleman for corrective justice reasons, but rather for deterrence or punishment reasons.)

By contrast, Coleman went on to argue, many people wrongfully gain, for example, by careless driving, and yet they hurt no one. Perhaps a way to annul that gain would be to have them all pay fines into a pool. Moreover, those who happen to be hurt by careless driving, have suffered wrongful losses all right; but, he argues, the injurer doesn't gain anything extra by harming the victim (that is, beyond the gain from driving dangerously in the first place). Hence the injurer has no special gain to disgorge to be used to rectify the victim's loss. This led Coleman to favor, for example, a pooling system in which the mode of rectification of the negligently injured victims is through a fund financed by all negligent drivers. (In fact, the current fault-based system for handling auto accidents, when seen in conjunction with liability insurance pricing practices that surcharge for both accidents and citations, could be said to conform reasonably well to Coleman's ideas of corrective justice. Yet, for reasons not worth pursuing here, he seems to prefer an auto no-fault compensation plan, funded with first party premiums that reflect one's driving record.)

How does this perspective on corrective justice apply to the *Vincent* problem?<sup>292</sup> Coleman initially tried to argue both that the ship owner has obtained a wrongful gain and that the dock owner has suffered a wrongful loss – even though he recognized that the ship captain was not at fault. This is puzzling, and Coleman realized he might be on thin ice here.

One move is to argue that since the dock owner's loss is, after all, undeserved, what Coleman has been calling wrongful losses do not have to arise from wrongful conduct. Indeed, Coleman adopted this strategy by conjoining wrongful with the label unwarranted. Note, however, this also implies that the dock owner would suffer a wrongful/unwarranted loss were his dock wrecked in a storm by floating debris – or by the Reynolds (the ship in *Vincent*) simply being blown into the dock. In short, this approach turns the idea of a wrongful loss into any untoward loss, at least so long as the victim was not at fault.

But this only takes the argument half way. For even if the principles of corrective justice require rectification of untoward losses, this hardly demonstrates that they should be rectified by the injurers. And, indeed, I think it quite clear that Coleman would not think the ship owner required to make the rectification were his ship merely and unavoidably blown into the dock.

Thus, to say that the defendant in *Vincent* must pay still centrally rests, in Coleman's earlier analysis, on the conclusion that there the ship owner did obtain a wrongful gain. To reach this conclusion Coleman first argued that one has a wrongful gain through the "taking of what another has a well-established right to."<sup>293</sup> This merely begs the question. Coleman recognizes that when he says that this formulation turns the key question into what is a "taking."<sup>294</sup> I would add that it perhaps implies a meaning for the idea of having a "well-established right" that need not follow; that is, you may have a well-established right to some property for most purposes, but not for this one.

In any event, what should be seen as a "taking"? Coleman admitted "I do not have a fully worked out analysis of a 'taking,' but I did not want the reader to think that I had not realized the importance of developing one."<sup>295</sup> Lacking this fully worked out analysis, Coleman adopts a different strategy – the analogy. And, lo and

behold, his analogy here is to Professor Feinberg's hiker's case, about which he says: "Feinberg argues, and I concur, that in spite the justifiability of what you have done, you owe the owner of the cabin compensation for his food and furniture."<sup>296</sup> In effect, Coleman has argued that whatever a taking is, the hiker's case is an example of one; from there it is but an easy step to say that in critical respects *Vincent* and the hiker's case are identical so that *Vincent* constitutes a "taking" as well.

This will not do. It renders Coleman no more persuasive than was Feinberg, and leaves us still in the dark about just why either *Vincent* or the hiker's case should be seen as "takings" – assuming one defines takings as non-fault actions that nonetheless generate wrongful or unwarranted or undeserved gains. After all, setting aside the intermediate step of calling it a "taking," and focusing on the underlying structure of justice that Coleman advanced, the gains of the ship captain and the hiker just don't seem to me to be self-evidently either wrongful, unwarranted or undeserved. To be sure, Coleman's use of the phrase "takings" has linguistic appeal, for it conjoins the reader's easy embrace of the notion that what the hiker and the ship captain did was "take" with the widespread acceptance that when it "takes" through eminent domain, the government must pay compensation. But as an argument, this verbal move amounts to the same bootstrapping that we saw in Professor Friedmann's effort to carry the day by using the term "appropriation."

Indeed, Coleman had second thoughts, and he later admitted that, unlike the book stealing example, we certainly don't think it right to annul the advantages that the self-rescuers obtained from their actions. That is, we plainly don't want to sink the ship or kill the hiker.<sup>297</sup> This recognition might also help one better appreciate what I meant when I said that the self-rescuers' gains weren't unwarranted.

Coleman thus conceded that, even if it is still assumed that the victim suffered a loss needing rectification, perhaps the mode of

rectification should not, after all, be through having compensation paid by those who were saved. Just where the rectification is then supposed to come from is not clear, however – although, consistent with Coleman's other remarks, one could imagine all dock owners agreeing in advance to a mutual aid pact in case any one suffers an untoward harm that does not amount to a wrong. But that solution, of course, can be achieved through dock owners buying first party insurance, and is consistent with the dissent's position in *Vincent* that this is a risk of dock owning that dock owners can plan for and absorb.

Despite this concession, Coleman returned to his earlier, yet unsatisfactorily justified, preference for including "justified takings" in the category of wrongful gains. He admitted, nevertheless, that "Aristotle's conception of corrective justice ... appears to have held that a wrongful gain or loss requires that a wrong has been done."<sup>298</sup> Although I would not be so bold as to claim Aristotle for my side of this argument, it is at least comforting that a scholar as talented as Professor Coleman believes that Aristotle and I sit together on this one.<sup>299</sup>

Coleman later returned to the necessity problem in his book "Risks and Wrongs" (1992).<sup>300</sup> In the book he offers a somewhat altered version of his basic theory of corrective justice, a matter beyond the scope of my focus here, except to note that he creates a special place in his theory for necessity problems. The difficulty, however, is that he does not offer any convincing justification for his solution. It is as though he felt he needed to put forward a theory of corrective justice that is consistent with the Restatement's view of necessity cases, realized that his core theory would reach the opposite result, and hence, slapped on a special exception.

Coleman focuses on a hypothetical in which Hal, a diabetic in immediate need of insulin to save his life, takes some from Carla, another diabetic. Carla's supply is the only source available to him at

the time (owing to no fault of Hal), and he does not leave her with too little as to endanger her own life. Assuming we can stipulate that Hal was not at fault in finding himself without adequate insulin, then to me this is simply another nice example of the problem raised by the cabin case: it involves two ordinary citizens, in which one engages in self-help rescue of a sort that I assume, and Coleman assumes, is fully justified and hence not wrongful in the ordinary sense. The question is whether Hal nonetheless has a duty to compensate Carla by paying her for what he took (or perhaps replacing it with other insulin). Coleman claims that he does. But his justification which treats Carla as having suffered a “wrong,” in my view, is conclusory.

Why, under these emergency conditions, should not the insulin be viewed as Hal’s to take – that is, “his” property? Indeed, as among diabetics, is it not likely to assume that Carla, had she been there, would have readily offered some of hers to him? Surely Coleman would conclude that she has a moral obligation to do so. For example, would it be all right for her to say that she would provide it only if he agreed to pay for it and hence to withhold it if Hal, at that moment, were poor and unable to pay? I doubt that Coleman would support her refusal. In view of that, I don’t see what grounds Coleman’s position.

#### G. Stephen Perry

Professor Stephen Perry has the same problem with Coleman’s treatment of necessity in Coleman’s book as I do.<sup>301</sup> But Perry’s solution is not to argue that corrective justice imposes no duty on Hal to compensate Clara. Rather, Perry seeks to reformulate Coleman’s theory in order to defend Coleman’s outcome. Perry does this by styling the conduct of the actors in *Vincent*, the cabin case, and the Hal-Carla hypothetical as “fault-like.”

Perry admits that these actors are not at fault in the normal use of the word. He instead emphasizes the intentionality of the act, terms



the act a “regrettable” one, and points to the benefits obtained by the actor. Together, these make the act “fault-like” and, according to Perry “fairness seems to require that {the actor} compensate the victim after the fact for this intentionally-imposed cost.”<sup>302</sup> I find this unsatisfactory. “Fault-like” is not fault, and so something more is needed than the label; the mere assertion of fairness hardly makes it so. For Perry, the elements he points to make it morally preferable to him that Hal, not Carla, bear the loss. But why? To me this is no more than a return to Bohlen.<sup>303</sup>

Perry’s formulation would appear to require compensation in the mistaken self-defense examples I discussed earlier, where the law currently does not require compensation. Perry may realize this and, rather than addressing self-defense problems along side necessity problems, he puts the former off for another day by saying that his whole point is that the comparative equities need examining in each case. I don’t disagree with the need to explore cases individually.

But I am still looking for a convincing reason, in Coleman’s hypothetical, why it is not sufficient for Hal to tell Carla why he used what had been her insulin and to express to her his gratitude that it was available for him to use.

#### H. Claire Finkelstein

My former colleague Claire Finkelstein jumped into this fray, by trying to re-formulate both the Perry and Coleman approaches in a way that avoids the pitfalls of both, but at the same time supports their shared belief in a duty of compensation in necessity cases.<sup>304</sup>

Finkelstein, in my view, properly disposes of Perry’s “fault-like” criteria as unhelpful. These actors are not at fault and terming their behavior fault-like only obscures the analysis. She also shows that intentionality should not be viewed as the core of the justification for liability, echoing points long ago made by others.

Rather, according to Finkelstein we should simply accept that on some occasions tort liability should follow in the absence of fault by the actor – which is the Coleman position. But when and why should the actor be liable? Here she returns to Perry and embraces situations in which Perry (drawing on Professor Tony Honore<sup>305</sup>) asserts that the actor is to be viewed as “outcome-responsible” and the victim is not. It appears that Finkelstein (along with Perry) would deem you outcome-responsible when you foreseeably cause a loss. To me it hardly matters whether such actors or deemed “outcome-responsible” or “fault-like.” The issue remains why they should owe a duty of compensation if they are not actually at fault.

For both Finkelstein and Perry, some moral responsibility attaches to outcome-responsible conduct. But why? Would they consider airplane ground damage cases the result of as outcome-responsible acts? Would they view as outcome-responsible the shooter in self-defense whose bullet hits an innocent party? What about the player who hits a bystander with a cricket ball, or even the baseball player whose foul ball strikes a fan in the stands? None of these, and many other cases in which it might be said that the actor foreseeably caused a loss to an innocent party, are addressed – all cases in which the law today does not appear to impose liability on the actor. Does Finkelstein believe that all these cases are wrongly decided? Perhaps, but she does not say.

Instead Finkelstein simply asserts, invoking Coleman’s Hal-Carla insulin example, “he must compensate Carla simply because he casually contributed to a reasonably foreseeable loss which it would be unfair to impose on anyone else.”<sup>306</sup> By now it should be clear that I find these sorts of assertions insufficient to rule out the fairness of Carla bearing the loss herself.

### I. Howard Klepper

Like me, Professor Howard Klepper is impatient with those who would defend a duty to compensate in the necessity context by putting some label on that actor's conduct.<sup>307</sup> He, too, is searching for the underlying reason for the widespread instinct that the victim should have a right to compensation from the party who justifiably acted in circumstances of necessity.

Klepper believes that an "actor who decides that an unwilling stranger ought to bear the risk of a harm incurred through the actor's choices does not respect the stranger's freedom to weigh risks and ends for herself."<sup>308</sup> Later he puts his point this way: "In effect, the party appropriating the aid has presumed upon the benevolence of his unwitting benefactor; his intent to compensate is not supererogatory, but merely reciprocal."<sup>309</sup> Finally, he restates his argument this way, saying that it is wrongful to transfer a loss to another and let it lie there because "it does not allow the innocent party to freely choose the risks she is willing to undertake."<sup>310</sup>

Klepper must appreciate that in many of the cases that are dealt with by the law of necessity, the party whose property is used or harmed for the benefit of the actor is not around to volunteer that assistance and there is no time to seek him out and ask for his help. To be sure, the result is that he becomes an involuntary supplier of assistance in what I have been calling throughout "self-help rescue." And I agree that choosing to make a charitable gift or to come to another's aid is not the same as being forced to do so.

Nevertheless, I have been assuming that we are only talking about cases in which the property "owner" – had he been there – would be understood to have had a moral obligation to provide the property to the person in dire straits, and decent people would happily do that. Indeed, as illustrated by *Ploof*, the property owner in these settings who is around and who resists the self-help rescue by the party in distress commits a tort.

Hence, Klepper is arguing that a person who had forced on him something he should have and, we hope, would have done had he been there, has a right to compensation. I am not convinced. If the property "owner" now says he would have immorally refused aid, is this the sort of ungracious person to whom the rest of society feels compensation should be owed? I don't think so. And, if the person says that he would have provided the aid, but only on the understanding that he would be compensated for it, this presumably means he would have resisted helping an impoverished person, allowing that person to die. Again, I don't see why, when a poor person manages to use what is needed to save his life, that poor person now owes compensation he cannot afford to pay just because he request for help would have been indecently refused (as I see it) if the "owner" only had the opportunity to do so.

This leaves the more difficult situation of the property "owner" who says that had he been there he would have provided the aid on the understanding that he would be repaid by the person needing the help, provided that the person is able to repay. This is to be contrasted with the person who would have provided the aid with no requirement or expectation of repayment even from those with the ability to do so. Some may think that a duty of compensation should be owed by self-help rescuers with means. But Klepper's argument is not up to pinpointing this narrower sub-group. Moreover, his argument says nothing about whether the state should open its courts and use its force to reward the stingy.

### J. Michael Zimmerman

Finally, I come to Professor Michael Zimmerman, the last of the philosophical contributors to this debate who I will discuss. And unlike nearly all the other writers I have considered (i.e., apart from Montague), Zimmerman rejects the claim that a duty of compensation is owed by one who causes harm in situations of justified necessity.<sup>311</sup> Although his argument is presented in a much more complex way,

basically Zimmerman argues that imposing a duty of compensation in such cases is the imposition of strict liability, and that strict liability is generally unjustified. He also argues that convincing justifications for strict liability in this setting simply have not been offered, although he doesn't really address any of the contributors explored here apart from Professor Thompson.

Of course, I am pleased to have an ally in Zimmerman for my positions on *Vincent*, the cabin case, and the Hal-Carla example. But I disagree with Zimmerman's across-the-board attack on strict liability. I believe that there are defensible grounds for strict liability in tort in cases involving abnormally dangerous activities carried on by commercial actors, in cases involving defectively manufactured products, and perhaps even in necessity cases in which the needy party takes property from what I have termed a professional rescuer who normally charges for it. (Zimmerman, by contrast, doubts whether compensation is owed by the person in desperate need of medicine who takes it from a pharmacy at midnight when no stores are open.<sup>312</sup>) In short, as with Professor Montague's position, I fear that Zimmerman's sweeping rejection of the duty of compensation in necessity cases is too sweeping for my taste.

#### K. Conclusion to Part IV

Because my discussion of legal scholars addressed their treatment of *Vincent*, and because so much of the philosophical literature explores Professor Feinberg's cabin case, I will briefly consider here how several of the different legal approaches discussed earlier would apply to the hiker's case.

I start with the instrumental-based theories of tort liability. As for Professor Morris' cooperation theory, I am highly skeptical that the cabin owner would be influenced in how he stocked or boarded up his cabin by the way the hiker's case comes out. Remote cabin owners are worried about property loss, if at all, primarily at the hands of

vandals, wild animals or the elements. Hence having taken whatever precautions they wish to in order to protect their property from those dangers, it is hard to imagine that they would take yet additional precautions if the law allowed the hiker to use the cabin and its contents without compensating the owner. (I should add here as well my view that this same point applies to the *Vincent* setting. Although at least two colleagues have informally argued to me that the failure to make the ship owner pay for the harm to the dock would cause dock owners to make their docks less hospitable to ships, this seems altogether implausible to me in these very settings in which it is the core business of the dock owner to welcome ships for purposes of collecting a fee for having them unload their cargo there instead of somewhere else.)

As for the loss distribution objectives of Professors Ehrenzweig and Broeder, the hiker is quite possibly a poor loss distributor (unless he has applicable liability insurance, a topic to which I return later). By contrast, cabin owners are probably, in general, good loss distributors via their own first party property insurance.

As for Professor Latin's "problem-solvers," probably neither hiker nor cabin owner qualifies; and so, I suppose that Latin would also reject imposing tort liability on the hiker. And, so far as Professor Calabresi's "cheapest cost avoider" is concerned, while I am puzzled about how to decide that question, my sense is that, in the end, he would pick the cabin owner.

And finally, so far as the law and economics thinking of Professors Landes and Posner usually favors a regime of negligence law to achieve the efficient allocation of resources, I want to underscore that under this approach the loss would fall on the cabin owner as well.

In short, in none of these theories do I find a basis for imposing a duty of compensation on the hiker. Of course, since the moral

philosophers I have reviewed here care most about "rights," it is not surprising that we have seen no talk in this section about the instrumental objectives that lie behind the legal theories just mentioned.

I turn now to more clearly morally-based theories of tort liability. Professor Bohlen's (and the Restatement's) "benefit" principle would, of course, point to liability – as would the other strict liability approaches such as Professor Freidmann's "appropriation" notion, Professor Epstein's "causation" theory, and Professor Fletcher's "nonreciporical risk" theory. But these approaches, which are "rights" theories, are subject to the same objections in the hiker's context as were made in the *Vincent* setting. And although the philosophers may have provided some deeper insights into the emergency self-rescue problem, they have not advanced convincing arguments in support of the theories of any of these legal scholars, or more broadly in support of the conclusion that the hiker and the ship captain, rather than the cabin and dock owners, should pay for the losses sustained in the problems under consideration. Rather, we are left, as before, with insufficient analogies from areas where duties of compensation may well be justified but which are distinguishable.

To be sure, the weight of the ultimate conclusions of the philosophers examined here, whether convincingly argued or not, does, I suppose, lend support to Judge Keeton's claim about popular moral sentiment. Yet these opinions have been put forward, disappointingly, without exploration of the moral obligations of those whose property has been used in the rescue effort. That is a critical side of the equation, I believe, and is central to the argument I present against the duty to pay compensation in the following section. It is, moreover, the basis upon which I conclude, with respect to Judge Posner's implied contract theory, that the cabin owner ought not have an expectation of payment from the hiker. My conclusion does not, I should emphasize, depend upon the fact that the hiker's life was at stake – although that would seemingly be decisive for Professor

Christie and Lord Devlin. Rather, it is sufficient, in Professor Williams' terms, that the hiker was justified in his self-rescue effort under the "lesser of evils" test – and under circumstances in which the non-professional rescuer, cabin owner, had he been there, would have had the moral duty to make the same sacrifice of his property on behalf of the hiker.

## **V. A Case for No Legal Duty of Compensation**

### **A. Conversations between ordinary people**

In the community where I would like to live, this is the sort of conversation that would occur once the hiker got back from his mountain ordeal and contacted the cabin owner:

(1) HIKER: A dreadful and unexpected storm came up while I was hiking in the mountains. Fortunately for me, I happened onto your cabin. I hope you will understand when I tell you that I broke in, and ate and burned what I needed to keep me going until the storm cleared and I could hike out. Although I tried to limit myself to what was essential, I am afraid that I have caused you some loss.

(2) CABIN OWNER: The most important thing is that you are alive. I am glad that my cabin and its belongings happened to be there so as to have allowed you to save yourself from freezing or starving to death.

(3) HIKER: I was lucky, and I am grateful. I hope that I will someday be able to repay my debt of gratitude. If not to you, because I don't wish you to experience an ordeal like mine, perhaps by being able to help someone else who finds himself in dire need.

A parallel conversation can easily be imagined between Hal and Carla, the insulin users, in the example discussed by Professor Coleman and his reviewers.



In either case, after a conversation of this sort, in the community where I would like to live, the hiker would then make an appropriate gesture of appreciation that was suitable in light of who was the particular cabin owner. This might be sending a written note to the cabin owner thanking the owner for his empathy with the hiker, along with flowers, or a case of wine, or a contribution to a charity in honor of the cabin owner, etc. The amount spent by the hiker would be modest (with his own means relevant to the amount spent). But, in any event, this gesture would not be meant to compensate in any equivalent sense for either the amount of the cabin owner's loss or the value of the hiker's having saved his own life. The same would be true in the Hal-Carla case, where even a modest gesture of gratitude is likely to cost more than the market value of the insulin that Hal took.

In my view, the self-help rescuer in these settings first owes the other party a moral obligation to come forward and explain what happened. More precisely, the taker/user of the property should not keep quiet about what he did, but instead should explain that he did it and why it was necessary. This serves not only to force the taker/user justify his conduct to the other party, but also to notify the other party that his cabin (or insulin) was not cavalierly taken or used, stolen or vandalized, by a criminal, or even destroyed or damaged by some non-human force. Put differently, the cabin (or insulin) owner is owed an explanation showing that he was involuntarily made to aid in a self-help rescue by someone to whom the cabin (or insulin) owner would have had a moral duty to assist had he been there at the time.

Second, I believe that the self-help rescuer has a moral obligation to express gratitude to the other party for his good fortune of being able to save himself, acknowledging that the self-help rescue was made possible by property that had belonged to the other party. Whether more than words of gratitude should suffice is not completely clear to me. Influenced by the way I, and those around me have lived, I think that it would be properly polite for the person saved

to add a modest, materially-based expression of gratitude of the sort I illustrated, with the sum spent well within the means of the sender.

Notice that in the verbal exchange I have described there is no mention by either party of paying for the harm to the cabin or its contents (or for the insulin). This is because, in the community in which I would like to live, it would go without saying that the self-help rescuer had no moral obligation either to offer or to pay.<sup>313</sup> Suppose he did offer, however:

(4) HIKER: I want to replace the food I ate and the things I burned up. Let me pay you for them.

In response, I would want the cabin owner to reply:

(5) CABIN OWNER: Absolutely not. After all, had I been there, I obviously would have happily given you food and warmth myself without expectation of payment for my help. Please, let us hear no more of this matter of payment.

Notice that by raising the issue of compensation, the hiker gives the cabin owner the opportunity to refuse (which might be viewed as a positive), and yet this also ever-so-slightly insults the cabin owner by suggesting that the latter might expect payment (which is why I prefer the conversation in which talk of compensation is absent).

In special cases, where the facts warrant it, however, the conversation described above might proceed differently. After (3) above, add the following:

(4) HIKER: Look, I don't mean to be insulting, but we both know that I am considerably wealthier than you, and so it seems to me only right that I bear this loss rather than having us treat it as a gift from you to me. So, please let me pay for the food I ate and the things I burned up.

(5) CABIN OWNER: I hadn't thought of this before, but now that you mention loss bearing, I realize that my property insurance will pay for this loss anyway. So, you see, it is not going to be a burden on me after all.

(6) HIKER: O.K., although now that you mention insurance, I realize that maybe my liability insurance might also cover the loss. But, I suppose having one insurance company pay is as good as another.

(7) CABIN OWNER: Amen!

And then, as above, the hiker would afterwards make a gesture of appreciation like sending flowers.

Thus, in this example, even in the special case where the hiker is understood by both to be the wealthier party, the end result of their talking about loss bearing will be the same as before – no payment of money would be made by the hiker to the cabin owner.

Now let me offer a different conversation that would proceed like this after (3) above:

(4) HIKER: I want to replace the food I ate and the things I burned up. Here, let me pay you for them. It's the least I can do. After all, I benefited, and I don't think it right that I benefit at your expense. Besides, even if you would have welcomed me had you been there, you weren't there, and I just helped myself. That is like forcing you to make a gift to me.

(5) CABIN OWNER: Look, you don't have anything you didn't have before the storm came up. Anyway, who is being forced? Keep your money.

(6) HIKER: Please see it my way. I acted then; let me act now. Here, take the money.

To this the cabin owner might reply

(7a) CABIN OWNER: Absolutely not. Please, let us have no more talk of payment.

Or even

(7b) CABIN OWNER: All right. Thank you, although I hope you realize that you are paying for something that my insurance would cover anyway.

Now, I don't mean in any way to suggest that a community in which the conversation plays out along these lines and even comes out in the 7(b) way is a morally bad one. It is just that I prefer the conversation to terminate at (3) as originally envisioned. Why?

With (1) the hiker has provided the explanation I believe him obligated to give; with (2) the cabin owner has rightly demonstrated that saving the hiker's life is the matter of greatest importance here, and with (3) the hiker expresses his gratitude.

No further exchange produces what I find to be a more satisfying result. To the contrary, further talk along the lines I have suggested here begins to convert the instinctive generosity displayed on both sides into a fruitless search for reasons why one or the other should pay, and that serves only to demean and diminish the initial gestures of both parties. Moreover, the upshot could be that the cabin owner feels worse for taking money he neither wants nor needs.

Put differently, in the conversational exchange I prefer, there has been an expression of community solidarity, not a commercial transaction (in which the self-help rescuer, in effect, buys the food and firewood, or the insulin). The understanding ultimately reflected in the conversation I prefer is that, although the cabin's food and wood

are the owner's to employ for most purposes, in a true non-fault emergency of the sort that occurred, they are there for the hiker to use as needed. By contrast, the understanding ultimately reflected in the conversation ending with 7(b) is that the emergency creates a right in the hiker to acquire the things he needs in the cabin at their market price.

I do not expect that everyone will prefer to live in the sort of community I would. Some may believe so strongly in property rights that they reject the necessity principle entirely. For them, had the cabin (or insulin) owner been on the scene, he would have had the right to refuse to provide the aid needed to save the other's life, and indeed he would have had the right to resist the other's self-help rescue effort. Note well that this is a view that rejects the *Ploof* decision. For such people, the self-help rescuer is no more than a common thief and compensation is clearly owed to the owner. Needless to say, I find this inhumane.

Other people may prefer a community in which people believe that had the cabin (or insulin) owner been on the scene, he would have had a moral obligation to provide the needed aid, but only on the understanding that he be later repaid (at least if the person in need could possibly do so), and such people might assume that the cabin (or insulin) owner would (and indeed, should) insist on this condition. For such people, it would surely follow that if the cabin (or insulin) owner were not on the scene, compensation would be owed and properly insisted upon. I consider ordinary people who would sell, but not give, to others in times of necessity – as reflected in the cabin and insulin examples – to be unattractively selfish.

Still other people may believe that the moral obligation of the cabin (or insulin) owner on the scene is not the same as the absent owner. They may believe the former to have a duty of charity, but the latter to have the right to resist being forced involuntarily to be charitable. At a minimum, those in this group would insist that the

self-help rescuer make an offer of compensation that the original property owner could then choose to accept or reject. Yet, to me, if you would have had a moral duty to make a gift had you been there, it is unattractively ungracious not to want the transfer to be treated as a gift in necessity circumstances when you are not there.

What I wish to emphasize then is that, for me, the moral obligation to pay (or even offer) compensation (or not) should turn on the sort of community we want (or, perhaps, that we have). More precisely, I think it is a question of how selfish we think the original owner ought to be able to be; or put differently, how much do we think he ought simply to share what he has. When fate picks you out to help (or picks your property out to help) a fellow member of the community who, for no fault of his own, desperately needs that help (and cannot get it elsewhere), should it be your duty to share? Or even stronger, since there was no time to ask you, is it your duty to allow him to force you to share? In settings illustrated by the cabin and insulin examples, I think so. I am comforted that this appears as well to be the view of Saint Thomas Aquinas. Aquinas concludes that one may "take ... and use another's property in a case of extreme need: because that which he takes for the support of his life becomes his own property by reason of that need," and he goes on to say that in such cases "all things are common property."<sup>314</sup>

When Professor Keeton and others say that "most people" think a duty of compensation is due in private necessity-takings settings, they may mean that they reject the values I favor. More likely they mean that, regardless of what they personally think, they believe that most people in America in the 20<sup>th</sup> and 21<sup>st</sup> centuries reject the values I favor. As for the latter, while I concede that the U.S. is something of a bastion in terms of the idea of private property, I also believe that, in other respects, Americans are very charitable.

Hence, I would actually be surprised if "most" Americans rejected unconditional sharing of their modest-value property if taken

in a non-commercial setting by another when needed to save that person's life – even if that person is a “stranger.” And I also would be surprised if “most” Americans rejected unconditional sharing of their modest-value property when taken to save the clearly much more valuable property of a friend or extended family member.

With respect to property of some value taken to save the clearly more valuable property of a stranger and with respect to property of substantial value taken to save someone's life, I am more uncertain as to what others believe. But I should add that it is hard for me to confront these issues while remaining blind to the reality of the widespread role that insurance plays in our lives today.

Someone who owns property of value knows (or surely should know) about insurance, and, in my view, the prudent thing is to buy insurance to protect losses beyond what, for that person, is a modest and readily absorbable loss. Of course, the owner may choose to decline to buy insurance and thereby deliberately elect to run the risk that the property might be lost or damaged owing to, say, a natural force like a storm, accidental breakage, theft, or some other peril. If a loss then occurs through no one's fault, then, it seems to me, this is the very sort of loss that the owner risked by going uninsured. And so, to be quite clear, I would put the innocent self-help reasonable rescuer in the same category as a natural peril – indeed, as I have suggested throughout, I ultimately see the storm as primarily responsible for the cabin owner's loss.

Assuming that cabin owners generally do have insurance, note further that, in practice, one would anticipate that the real claimants behind a large share of the legal claims against self-help rescuers, if they are allowed, would be property insurance companies. That is, if the loss were more than nominal, the cabin owner could claim against his policy for his loss without having to bother the hiker. But the insurer could then step forward and sue the hiker.

Yet, I find it unappealing to impose a legal obligation on the innocent hiker in order to protect the interests of insurance companies – which can, after all, be well protected anyway through premium charges. What this really means is that denying a legal duty of compensation from hikers to cabin owners in the necessity setting would result in a somewhat (although presumably extremely small) increase in insurance rates for cabin owners as a group (over what the rates would be were hikers liable for damages in these cases). But as a group – at least where I would want to live – the great majority of cabin owners would be happy to pay voluntarily that extra bit.

Indeed, I would imagine that individual cabin owners might well appreciate that, as people who also enjoy the mountains, they too might someday find themselves trapped in a storm and in need of breaking into another's cabin. From that perspective, it might be comforting to view the situation as one in which one was not expected to pay at the time of the break-in because fellow cabin owners had, in effect, anted up in advance. If a cabin owner follows the argument this far, any complaint against a hiker would be reduced to the now almost petty point that the hiker (if he turned out not to be a fellow cabin owner) didn't help out in paying for that little extra that was added to cabin owners' insurance costs.

Once the reality of cabin owner property insurance comes into the picture, it is also appropriate to consider the issue of the hiker's ability to pay. My view is that the hiker might well be much less able to absorb this loss. First, he may well be poorer to start with. Second, even if his life is saved, he might have been seriously impaired by this experience, and thus have to bear his own loss in any event. Third, he is less likely to have liability insurance than the cabin owner is to have property insurance. Fourth, even if the hiker has liability insurance (because he has otherwise purchased "homeowners" or "renters" insurance that includes this coverage) there is reason to be concerned that his insurer will deny coverage. That is because the hiker acted intentionally, and the events covered by liability insurance are usually



restricted to “accidents,” in which case the insurer might claim this was not an “accident.” I have been unable to get a satisfactory answer one way or another on this issue from the insurer representatives I have questioned. It seems reasonably clear that the defendant’s liability insurer in *Vincent* did not deny coverage, but in more recent years, in a variety of settings, liability insurers have sought to escape paying tort claims on the ground that the insured’s act was deliberate. Fifth, even if the hiker were insured, assuming that the cabin owner were also insured, then, as expressed in the insurance-related exchange (6) and (7) above, so far as the parties are concerned, it is primarily a waste of money to have a lawsuit just to transfer money from the pocket of one insurer to another.

I appreciate that there are some people would probably both (1) volunteer their property with no wish to be compensated if they found themselves at the scene and their property were needed to aid someone in dire need, and (2) press hard to pay for the damage to property if the shoe were on the other foot and they were the one who needed the property owing to necessity. Some people like this are perhaps best understood as viewing themselves a super-charitable. They are always eager to bear the loss if they in any way were connected to the transaction. But I think it should also be recognized that the super-charitable can sometimes be annoying to those who feel that, in the particular setting, they also want to be charitable. A hiker in that setting might feel better by pressing the cabin owner to accept compensation, but that might not make the cabin owner feel better. (Think of a friend who always insists on picking up the check when the two of you go out for coffee or a meal.)

Other people may have a different motivation for pressing compensation on someone in these sorts of situations. If you are the beneficiary of property used in circumstances of apparent necessity, providing compensation may be a way to put an end to any question about whether the harm or use was truly necessary. Indeed, a person might well choose to say “I probably took too much or I probably

damaged things more than necessary" (even if he doesn't really think so). By just slightly throwing the blame on himself, this may create an easy way to allow compensation to be offered and accepted. If the self-help rescuer instead claims it was a situation of necessity, there is always the chance that the person whose property it had been might harbor doubts that the self-help rescuer is most eager to avoid.

This may well suggest, as a prudential matter, that compensation may be appropriately offered, and even accepted, in settings where necessity is at all in doubt. But when the necessity of the innocent self-help rescuer acting as he did is very clear, then I fail to see the point or desirability of thus sort of subterfuge.

Assume now that the conversation between the hiker and the cabin owner has reached (3) above, in which the hiker has provided an explanation and expressed gratitude and the cabin owner has expressed relief that the hiker's life was saved. But suppose now that, not having my values, the cabin owner believes that he should be compensated for his loss (putting insurance aside here). It seems to me that the cabin owner can certainly ask for compensation, and if the hiker responds by paying, that is the end of it. The hitch comes when the cabin owner asks and the hiker responds that it was not his fault and resists providing the compensation.

To me this presents, by my values, a case of someone who is ungracious against someone the former thinks is insufficiently grateful. Should the society then use its legal power to force the hiker to pay (as supported by the Restatement's position)? I think not. Even though this will disappoint those with values different from mine, I still want to protest that, by giving the cabin owner legal rights, this means that society as a whole is branding this neighborly setting a commercial one. Cabin owners are thus characterized as sellers and not fellow citizens. To me this represents a social loss that others who have explored this issue seem not to have appreciated or valued.

Perhaps I am out of touch with American values and the society in which I actually live is not, in this respect, like the one I which I would like to live. Perhaps in our society everything is understood as commodified and transactionalized – to be bought and sold. I hope not.

I hope instead that the widespread instinct to favor the *Vincent* rule in the cabin or insulin settings is rather a result of an insufficiently thought out, nearly automatic, reaction to the fact that we initially describe the cabin and its contents (or the insulin or the dock) as someone's "property." In turn, it is my hope that on more careful reflection others will appreciate that property is a bundle of rights that ordinarily give the holder strong rights of use and exclusion of others, but that this bundle can include the proviso that, in circumstances of true necessity, the property effectively belongs to the person in need. Put differently, necessity (like self-defense) can be readily understood to create a complete privilege and not merely an incomplete privilege as I believe Professor Bohlen too quickly announced so many years ago.

I concede that it would be morally offensive for the hiker never even to notify the cabin owner and offer an explanation for the damage. Of course, in most of those cases, the cabin owner would never discover the hiker's identity, and hence giving him a legal obligation would be of no practical value. Moreover, in at least some of those cases, the reason that the hiker would not come forward is that he behaved unreasonably (either it was not a true emergency situation or he took or destroyed well more than he needed to). But, if this sort of hiker were somehow identified, the cabin owner, I have been assuming, could, if he wished, resort to litigation anyway in order to collect from the hiker who, in effect, abused his privilege.

This then leaves us with the possibility of a non-disclosing hiker who is later identified but can then demonstrate that he, in fact,

acted reasonably at the cabin. As to him, my view is that liability for the physical damages he has done is neither his apt penalty nor the apt sort of compensation to the cabin owner for that of which he has been deprived. The cabin owner is owed an explanation and an expression of gratitude, not money. In any event, a rule narrowly aimed only at impolite hikers is not what those who favor applying the duty of compensation to the cabin setting have in mind. They want strict liability even for those who immediately come forward, offer a convincing explanation, and express their gratitude.

In that respect, I note that it is conceivable that the *Vincent* rule actually deters some innocent hikers from coming forward with explanations – with the result that they might well remain unidentified, thereby depriving the owner of any satisfaction at all. Indeed, in such cases the cabin owner might not even know that his cabin had saved someone's life rather than having served the frivolous needs of thoughtless vandals.

I should add an important caveat to my general argument, however. Notice that at the core of my moral argument is the idea that the hiker has no duty to pay, or even to offer to pay, for a loss that the cabin owner would have had a duty to volunteer unconditionally had he been there. So far as we can tell from the facts, that seems properly to characterize the items sacrificed in Professor Feinberg's cabin example and Professor Coleman's insulin example, as well as in the hypothetical examples in the literature involving using the neighbor's fire extinguisher or rope, getting blood on someone's scarf, breaking the china over the head of the would-be murderer, and so on. If one contests the moral obligation of the person who had owner the property, it is a different matter entirely. So, for example, I trust that it is agreed that you do not have a moral obligation to sacrifice your life to save a neighbor's hat. Indeed, it may well be agreed that you don't have a moral obligation sacrifice your life for any reason.

Of course, if the value of what is being saved is less than the value of what is sacrificed, then I take it that, even if it is a matter of necessity for the actor, the self-help act would nonetheless be viewed as unreasonable (e.g. the “only” way you could save your hat was to sacrifice the life of X.) Hence, in these settings the actor would be considered at fault and the victim would have a legal right to recover.

But suppose instead it is argued that the value of the property that is sacrificed by a reasonable self-help rescuer is more than the moral owner of that property willingly ought to volunteer were he on the scene. Here things become more difficult (as least discounting the availability of insurance). Just what such cases look like would be a matter of dispute, I imagine, but I suspect that the most promising area of consensus would be where the self-rescuer saved himself from serious bodily harm but at the expense of valuable property of the cabin owner. Other examples that might fit in this category could be cases in which the hiker saves his life but causes some bodily injury to the cabin owner, or cases in which the self-help rescuer saves a great deal of his property but at the expense of substantial (but clearly less valuable) property of the cabin owner.

What I have in mind more generally here are cases that would amount to rather more than an “easy” rescue<sup>315</sup> by the cabin owner, insulin owner, and the like. I can understand why we might be reluctant to ask or insist that someone volunteer to be more than an easy rescuer. But the question we face here is what to do when someone has, in effect, been forced to assist what is more than an easy rescue through the socially appropriate and acceptable, self-help efforts of the party in peril. Yet I don’t think we can properly address this issue without taking into account the realities of insurance (here now, not only property insurance but perhaps also health insurance and disability insurance). From that vantage point, my instinct remains that, at least when property losses are at issue, once they have claimed against their own insurance carrier, prudent victims of someone else’s self-help rescue should normally wind up with losses

that are equivalent to those in the "easy" rescue category after all. (I think, for example, of the valuable, but insured, Chinese vase reasonably used by necessity by the self-help rescuer to save his life.) Nonetheless, I concede that I find my argument more powerful as applied to what from the start are clearly understood to be "easy" rescue cases.

### B. Transactions between commercial actors

Let me then return finally to *Vincent*. So long as it is agreed that the dock owner has a duty to allow even a judgment-proof ship captain to remain tied up at his dock, so long as it is understood that the dock owner can readily insure against this loss, and so long as it is conceded that even a commercial dock owner like the plaintiff should not be considered a professional rescuer (in light of the rarity of a storm of such power during the season when the port is open for business), then my conclusion about *Vincent* is as it was regarding the cabin owner and hiker. There should be no legal obligation for the ship captain to pay; and there is no moral obligation either.

The conversational exchange between these commercial actors that I would like to hear might be somewhat different from what I suggested as between non-commercial private citizens, although the overall gist would be the same. It is not that I view commercial parties as appropriately ungenerous in emergencies and naturally expecting to turn all relationships into financial transactions. To the contrary, I expect such generosity from everyone in such circumstances (professional rescuers aside).

It is rather that the parties, as business people, would be clearly aware of the insurance considerations from the start and know that we are really only talking about whether one side or the other's carrier will pay. Indeed, to me it is easy to see how the dock owner would be content to characterize this as damage caused by a storm for which his insurance will pay and which, in the end, is simply a cost of doing

business that is already built into the fees he charges for his services. Any further discussion, I think, would be re-treading ground already covered.

### **Conclusion**

I have argued first that I find unconvincing all of the many arguments advanced by both law professors and philosophers in favor of imposing strict liability on self-help rescuers who reasonably use or damage the property of others (when those others are not professional rescuers). Second, I have argued that the underlying reason that a reasonable self-help rescuer should not be held liable in tort is that the party whose property he used or damaged would have had a moral duty to provide the property without charge had he been available to do so. In view of that, I argued, community values of caring and sharing are re-enforced if there is no tort liability. By contrast, under the *Vincent* rule, socially desirable kindness is converted into commerce.

Perhaps the values I favor are out of step with American values. If so, then the supporters of strict liability should be clear that, in times of true necessity, their position is that you only have the right to force the party, who fate picks out to be your rescuer, to sell you what you need.

I continue to believe, however, that it suffices if the self-help rescuer provides the other party with a convincing explanation of why his behavior was required by the circumstances, offers a verbal expression of gratitude that he was able to save himself (or his valuable property), and then makes a modest and culturally appropriate gesture of thanks. And I find it inappropriately ungracious for the party whose property was used or damaged to insist in court on precise repayment of his loss (especially considering the realities of insurance). In that light, giving a legal right to that party seems to me a socially wrongheaded solution.

\*Roger J. Traynor Professor of Law, University of California, Berkeley (Boalt Hall). I want to thank several people who have provided helpful criticism and support over the decades during which this project has been underway: Berkeley colleagues Steve Barnett, Mel Eisenberg, Sandy Kadish, and Mike Smith; and Glanville Williams, who first wrote about this topic more than a half a century ago.

- 
1. 109 Minn. 456, 124 N.W. 221 (1910).
  - 2.. Thus, no one means to suggest in these cases that the injurer should be held liable because he was somehow imprudent in respect to the storm or that he did more damage than he reasonably should have done.
  3. For an extended treatment, see Stephen D. Sugarman, *Vincent v. Lake Erie Transportation Co.: Liability for Harms Caused by Necessity*, in *Torts Stories* (R. Rabin and S. Sugarman, eds. 2003) at 259-290.
  4. 71 A. 188 (Vt. 1908).
  5. *Necessity as an Excuse for a Trespass Upon Land*, 22 Harv. L. Rev. 298 (1908-09).
  6. H.Terry, *Some Leading Principles on Anglo-American Law* 423 (1884).
  7. 82 Eng. Rep. 539 (K.B. 1648).
  8. O.W. Holmes, *The Common Law*, 147-49 (1881).
  9. 26 T.L.R. 172 (Eng. K.B.D. Dec 15, 1909), [1912] 1 K.B. 496.
  10. See, Sugarman, *supra* note 3.
  11. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 Harv. L. Rev. 307 (1926).



- 
12. Trespass to Realty, 23 Harv. L. Rev. 490 (1909-10).
  13. Trespass-Necessity, 10 Colum. L. Rev. 372 (1910).
  14. Bohlen, *supra* note 11, at 314.
  15. *Id.* at 316 (emphasis supplied).
  16. This analysis was adopted early on, for example, by the Restatement of Restitution Section 122 (1937).
  17. 124 N.W. at 222.
  18. *Id.*
  19. Bohlen, *supra* note 11, at 317.
  20. *Id.* at p. 321, n. 20. I will have more to say later about the famous Mouse's case, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (1608), from which this rule comes.
  21. To be sure, in some cases there may be a dispute over whether the defendant's conduct was reasonable (including the question of whether it was truly a necessary act). Resolving this issue may well turn on the nature of the proof offered and on whom the burden of proof is placed. For more on that, see text following footnote 171 *infra*.
  22. He says "there is no reason why one who acts as a champion of the public should be required to pay for the privilege of so doing." Bohlen, *supra* note 11, at 317-18.
  23. Later in his article Bohlen seems to say that the law then seemed to give an actor a complete privilege to destroy chattels in instances of private necessity. *Id.* at 313. But see *Id.* at 319. While this could, of course, be used on the other side, the point of Bohlen's discussion is that there should be no difference between realty and personalty, and that the privilege should be incomplete -- requiring compensation, therefore -- in both instances. *Id.* at 319-22.
  24. Restatement of Torts (Second) Section 197 (1965).
  25. Restatement of Restitution Section 122 (1937).

---

26. These cases are ambiguous in their import. In *Swan-Finch Oil Corp. v. Warner-Quinlan Co.*, 167 A. 211 (1933), the defendant's barge, which was burning, was set loose in the water and eventually struck the plaintiff's dock and burned it. Although the court embraced *Vincent*, saying necessity was no excuse, this turned out to be dicta -- since the court concluded that the defendant had been negligent and could be held liable on that basis. Somewhat in the same vein is *Currie v. Silvernale*, 142 Minn. 254, 171 N.W. 782 (1911).

By contrast, in *Commercial Union Assur. v. PG & E*, 220 Cal. 515, 31 P.2d 793 (1934), the court rejects the *Vincent* rule, in a case where the defendant sought to bring some of its property out of a warehouse which was seemingly burning out of control, but which action, alas, according to the plaintiffs, caused the warehouse and all its contents to be destroyed. Although the court said that a person is not liable for damaging the property of others in the course of making a reasonable effort to save his own, this too turned out to be dicta since the plaintiffs had based their case on a negligence theory and, in the end, were held to it.

Most useful for *Vincent* supporters is *Latta v. New Orleans Ry. Co.*, 59 So. 250 (1912), where the defendant's boxcars containing cotton caught on fire, and the defendant moved those cars away from his other property in order to protect it. The fire, however, burned up the plaintiff's staves. At one point the court rather plainly says that since the defendant got the benefit from moving his cars, he should pay. It also seems to balk at the idea that it would be proper to compare the values of the property at stake and then let the defendant off if it was worth more, suggesting as well that this might involve it in making difficult and perhaps undesirable comparisons of how important the property was to each of the parties (e.g., it may have been the plaintiff's only property). Nonetheless, the court seems to go ahead and do that very thing, saying that it is by no means clear here that the defendant's effort was actually intended to save more valued property than was put at risk; that, of course, would make the case altogether different from *Vincent*. And, while not actually finding the defendant negligent, the court verges on that, being plainly disturbed by the fact that the fire originated in the defendant's own cars and saying that, as between the two, the defendant was "least innocent."

Arguably inconsistent with *Vincent*, yet also cited by the Restatement is *Newcomb v. Tisdale* 62 Cal 575 (1881). Yet another early decision, not cited by the Restatement and also arguably inconsistent with *Vincent*, is *The Chickasaw*, 41 F. 627 (C.C.W.D. Tenn 1890).

- 
27. Restatement of Torts (Second) Section 195 (1965).
28. Reporter's Notes to Section 195, Restatement of Torts (Second) (1965).
29. Id.
30. Restatement of Torts (Second) Section 196 (1965). Although Comment h to Section 196 recognizes that the traditional rule has been one of governmental immunity in such cases, it points out that, in fact, the Section only covers the privilege to enter for reasons of public necessity and is technically silent on the question of compensation.
31. See Comment h to Section 196.
32. Restatement of Torts (Second) Section 197(2) (1965).
33. One could rationalize the provisions of Section 197 by suggesting, for example, that they stand for an alternative proposition: to wit, that when one deliberately chooses to enter onto another's property and causes damage, one is liable for that damage, even if one is entitled to enter and is not liable for what otherwise would be the mere trespass. The problems with this explanation, however, are: (1) while this states a rule, it hardly justifies it; and (2) such a rule is not only inconsistent with the common law position regarding public necessity (as reflected in Section 196), but it is also at odds with how the Restatement would prefer public necessity cases to be treated -- i.e., that the beneficiaries of the entry, but not the actor, are liable.
34. Restatement of Restitution Section 122, comment b.
35. I note further that nearby Restatement Section 198, seemingly also meant to parallel *Vincent*, says that one who is privileged to enter onto the land of another to retrieve his own goods is strictly liable for damages he does to the other's property. Yet this provision can be distinguished on the ground that it is unreasonable to use self-help in such situations (i.e., where damage occurs), since the goods' owner there has the alternative, and presumably non-damaging, remedy of a lawsuit and the aid of the sheriff. For Bohlen's discussion of this issue, see Bohlen *supra* note 11 at 309 and 313-14, where he points out that Chief Justice Cooley, in his famous torts treatise first published in 1879, strongly resisted non-fault liability in such situations.

---

36. Bohlen criticized the seeming then rule (contra to Section 263) that, in the situation of injury to chattels rather than to realty, the party causing the harm out of necessity would not be liable. See Bohlen footnote 11 *supra*. In this regard, consider *McKeesport Sawmill Co v. Pennsylvania R.R.*, 122 F. 184 (W.D. Pa. 1903), cited in the Notes to Section 263. The court there said that the defendant had the right to destroy the plaintiff's barge without having to pay compensation when this was reasonably necessary to keep the barge from damaging the defendant's (presumably more valuable) bridge. Yet it is also clear from the opinion that the court thought the plaintiff in the wrong in this instance for making no effort to save its own barge once it slipped its moorings. That, of course, takes the case out of the two-innocent-party pattern with which section 263 is meant to deal.

Note that Restatement of Torts Section 262 parallels for chattels the public necessity provision of Section 196.

Later in this Article I will discuss the Restatement's provisions on privileges to strike others and to cause bodily injury in necessity and necessity-like situations.

37. The American torts treatise writers also take up *Vincent*.

1. In the first edition of their highly influential and usually carefully reasoned treatise, Professors Fowler Harper and Fleming James argue that ". . . the policy which requires a privilege . . . to invade ... requires that the actor make good any actual harm inflicted because this is the same sort of danger which he has escaped." F. Harper and F. James, *The Law of Torts* (1956) Vol. 1 Section 1.22 at 61. This strikes me as a non-sequitur, however. Then they go on: "The actor may not divert to another the loss threatened by a situation over which neither has any control and for which neither is culpably responsible." *Id.* at 61. This may state the rule of *Vincent*, but hardly seems to be a reason for the result. Then they cite to Bohlen.

Harper and James also advance this proposition about the defendant in the *Vincent* setting: "since he profits by the intentional invasion of what are normally legally protected interests of another, it is fair that he make good the loss." *Id.* at 63. (Emphasis supplied.) But it seems to me that the issue is whether, in the non-normal, emergency situation, the plaintiff should have legal rights to recover for damage to his property.

---

For a somewhat differently expressed position to the same effect, see F. Harper, F. James and O. Gray, *The Law of Torts* (2nd ed. 1986) Vol. 1 Section 1.22 at 74.

2. The best known American torts treatise, by Deans William Prosser and Page Keeton, essentially sets out the law with approving commentary – to wit, in cases of private, as opposed to public, necessity the privilege to enter is described as "properly" incomplete. Prosser and Keeton on Torts (5th ed. 1984) at 147.

In what is now, in effect, the successor to the Prosser treatise, Professor Dan Dobbs devotes little attention to the matter apart from this baffling comment "...if the captain was a trespasser, he is liable for actual harm done in spite of his incomplete privilege to trespass." D. Dobbs, *The Law of Torts* (2000) at 250.

38. Keeton, "Conditional Fault in the Law of Torts" 72 *Harv. L. Rev.* 401 (1959).

39. *Id.* at 410-21.

40. Keeton points out that in some settings people are thought to have a moral obligation to offer compensation even though under current law they have no legal obligations to do so. *Id.* at 425. He does not consider, however, whether it would be wise in the cases he is evaluating to take the position that while the defendant has (or might have) some kind of moral obligation, he should not have a legal obligation to pay compensation.

Keeton does take up the different question of whether people's feelings that someone has a moral obligation to pay aren't simply a product of the fact that they have a legal obligation to do so; that is, for example, do we think dynamiters should pay because tort law says they must? But he, properly I think, rejects this as a serious challenge to his theory. *Id.* at 425.

41. *Id.* at 414 and 418.

42. *Id.* at 415.

43. *Id.* at 420.

44. For example, in the context of law school discussions where the casebook early on presents the *Vincent* decision, and given the probable student awareness of Keeton's support for the result, one would likely predict that, except in heady radical times now past, student opinion would generally fall into line with the majority view.

---

45. *Id.* at 419.

46. *Id.* at 429.

47. In pondering this difference, Keeton suggests two distinctions. *Id.* at 429. One is that his self-rescue example involved life; but then, as he points out, the blaster might be wanting to blast to build a new hospital, thus rejecting the life-property distinction. Actually, I am not much taken with this point since presumably one could find a blaster for the hospital who could post the bond. But this takes us to Keeton's other distinction which is that the blaster can make advance provision to protect his victims and the person acting in an emergency cannot. However, that, of course, is true for those acting in situations of necessity both to save their own lives and to save their more valuable property.

For further discussion of efforts to distinguish life saving from property saving cases, see text at footnote 187 *infra*.

48. Of course, notwithstanding these differences between the blasting and necessity cases, Keeton in the end does not propose a different result. My point is that at a minimum these distinctions rob the blasting result of its persuasive power to resolve the necessity problem.

49. At one point Keeton is comparing non-negligent motoring for which there is no strict liability with non negligent dynamite blasting and suggests that the former involves a "relatively slight risk of injury" and is "nearly universal" *Id.* at 421. The notion that blasting, by contrast, is uncommon and ultrahazardous, of course, underlies the justification currently offered by the Restatement of Torts (Second) for strict liability for blasters. See Sections 519 and 520. In passing here, let me note that I have never been altogether sure what it means to say that careful blasting is especially dangerous. Does anyone really have data comparing the frequency with which careful dynamiting has caused harm as compared with prudent motoring? Perhaps, there is simply a visceral reaction to deliberately set explosions that could be seen to underlie many of the examples used by the Restatement.

In any event, while I suppose that one could try to argue that the *Vincent* facts constitute an "abnormally dangerous activity," I have not found any writer who has argued that the *Vincent* result should be based on this part of the Restatement. That is not surprising. After all, if (as discussed further below) the ship's captain took and damaged X's ropes that he found lying at the dock to use in order to help

---

secure his ship to the dock during the storm, I assume that defenders of *Vincent* would favor imposing liability on the captain in favor of the ropes owner. But, that sort of harm is surely not what "abnormally dangerous activity" liability is about.

50. One irony in Keeton's article should be mentioned. Recognizing that non-negligent motoring did not then (nor now) give rise to driver liability to victims, he nonetheless suggests that perhaps public sentiment, then in 1959, was changing; and, although he is not completely clear about this, perhaps this changing sentiment could lead to the imposition of "conditional fault" liability on motorists akin to that imposed, as he sees it, in *Vincent*, the blasting cases, through the operation of the Worker's Compensation system, etc. Yet when Keeton took on a leadership role in the auto no-fault movement a few years later, the plan he backed did not generally require those who non-negligently hurt others with their cars to compensate their victims; rather victims were to be made to provide compensation for themselves. See R. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim* (1965).

51. See Morris, *Torts* 42 - 46 (1953).

52. Morris and Morris, *Torts*, 39 - 42 (Second Edition, 1980).

53. *Id.* at 41.

54. *Id.* at 41-42. In putting forward this argument, Morris is also trying to distinguish *Cordas v. Peerless Transportation Co.*, 27 N.Y.S. 2d 198 (N.Y. City Ct. 1941), where a taxi driver (for his own benefit) jumped from his moving cab that had been commandeered by an armed bandit and the taxi ran into some people on the sidewalk. Having been determined to have acted reasonably under the circumstances, the taxi driver was held not liable. Morris' point is that in *Cordas*, unlike *Vincent*, we don't have to offer the plaintiffs a promise of compensation to get them to cooperate, since there is nothing they can do to prevent their loss. *Id.*

55. Incidentally, before he is willing to cooperate, that sort of dock owner might well insist on payment in advance -- obviously not available in the emergency setting -- in fear that the ship captain would turn out to be judgment proof; although, perhaps he could count on having the boat at hand and might think that he could prevent it from setting off before a bond is posted.

56. *Id.* at 40.

- 
57. Professor Broeder, whose views on the *Vincent* problem I'll discuss shortly, has remarked about Morris' "cooperation" argument: "I have yet to find the student who would buy the analysis, and I seriously doubt whether Professor Morris ever did either." Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 *Hast. L. J.* 217, 231 (1965)
58. Morris, *supra* note 52, at 42.
59. Ehrenzweig, *Negligence Without Fault*, 54 *Calif. L. Rev.* 1422, 1459 (1966).
60. *Id.* at 1457.
61. *Id.* at 1455 (*italics in original*).
62. *Id.* at 1456.
63. Morris, *supra* note 52, at 41. It is because people can and do readily protect their built up property through first party insurance, that Morris endorsed the common law rule (disfavored as a matter of policy by the Restatement, as we saw) that one whose property is destroyed out of "public necessity" must bear his own loss -- rather than have the community which benefited pay. *Id.* at 40.
- Keeton, too, as we saw, found the loss spreading argument inapplicable to *Vincent*. See Keeton, *supra* note 38.
64. Ehrenzweig, *supra* note 59, at 1456.
65. Broeder, *supra* note 57.
66. *Id.* at 228.
67. *Id.* at 235.
68. *Id.* at 242. The Second Restatement of Torts recognizes that, because of the safety record of commercial air travel, this problem does not seem to call for liability under the basic structure of the Restatement of Torts (Second). Nonetheless, the authors adopted a special section, avowedly carving out a exception, that calls for strict liability in such cases. See Restatement of Torts (Second) Section 520A. For the Third Restatement of Torts, Professor Gary Schwartz, the then Reporter, proposed eliminating the special section on airplane



---

ground damage since it had been so widely rejected by state courts, and the American Law Institute has now agreed. Restatement of Torts (Third): Liability for Physical Harm, Section 20, Comment k (Final Draft Approved by the ALI in May 2005).

69. Broeder, *supra* note 57, at 229-30 and 238. Here the Restatement, responding to business concerns about shoplifters, calls for limiting liability to cases of negligence. See Restatement of Torts (Second) Section 120A.

70. *Id.* at 232. This is based on the *Cordas* case discussed by Professor Morris as well. See Morris, *supra* note 52.

71. Broeder, *supra* note 57, at 233.

72. *Id.* at 245.

73. *Id.* at 229.

74. *Id.*

75. *Id.* at 231.

76. *Id.* at 229.

77. Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 Calif. L. Rev. 677 (1985).

78. Posner, Can Lawyers Solve the Problems of the Tort System?, 73 Calif. L. Rev. 747, 753 (1985).

79. Landes and Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. Leg. Stud. 83, 113 n.74 (1978).

80. *Id.* at 128. Indeed, Posner says the dock owner "should in principle receive the competitive market value of [the ship captain's] use of his dock (which would include any risk premium to cover possible damage)" *Id.* Here, however, his point is to argue that merely paying for the damage done is insufficient, which in turn explains the phrasing in his comment on Latin's article to the effect that damages awarded in *Vincent* is what the dock owner is minimally entitled to.

---

81. Morris' behavioral incentive arguments were quite different. See Morris, *supra* 52.

82. "The storm ... surpassed in violence any which might have reasonably been anticipated." 124 N.W. at 221.

83. I also can't imagine how the dock owners would know in advance what to charge for this service.

84. Landes and Posner *supra* note 79, at 128.

85. Posner seems to be getting at this same point in his torts casebook where, after presenting *Vincent*, he asks: "Does the award of damages in a case like Vincent have any desirable incentive effects . . .? (Hint: recall the distinction stressed in Chapter 1 between care and activity.)" R. Posner, *Tort Law: Cases and Economic Analysis* (1982) at 182.

86. Landes and Posner *supra* note 79, at 128.

87. Posner, *Tort Law* *supra* note 85 at 187, which provides a very interesting discussion of the alleged failure of some key officials to attempt to stop the Great Fire of London by destroying buildings that would create a fire break because of their fear of personal liability for doing so.

88. Moreover, Posner's torts casebook well recognizes the seeming inconsistency between *Vincent* and other classic tort rules that conform to the fault principle that he typically favors. *Id.* at 184.

89. Fletcher, *Fairness and Utility in Tort Doctrine*, 85 *Harv. L. Rev.* 537 (1972).

90. At least it is clear that the ship, or at least the ship captain, did the "imposing." In terms of "being at risk", however, once the ship was tied down, I suppose that it could well have been that the ship's hull was as much at risk as was the dock -- although the *Vincent* case itself tells us nothing about my factual surmise. I will pass over here this ambiguity about when and how to measure "nonreciprocal risks."

91. One problem with *Vincent* from Fletcher's point of view is that his theory is about "stranger" injuries. For example, doctors plainly impose nonreciprocal risks on their patients, but Fletcher does not want to hold them liable for injuries they cause absent their malpractice. But, of course, the ship owner and dock owner in

---

the real *Vincent* case had an ongoing relationship. Fletcher recognizes this problem and assumes it away; see *id.* at 546 n. 38.

92. *Id.* at 548.

93. *Id.* at 550.

94. *Id.* at 564.

95. So, too, does his claim that an individual "can not fairly be expected to suffer . . . in the name of a utilitarian calculus." *Id.* at 568. In a later essay, Fletcher argues that because *Ploof* takes away the dock owner's right to cut the ship loose, it is only just that the dock owner (whose "rights are compromised") is awarded compensation by tort law. Fletcher, *Corrective Justice for Moderns*, 106 *Harv. L. Rev.* 1658, 1671 (1993). In further support of this argument, Fletcher describes the ship captain as one who "dominates another" and the dock owner as a victim who has been put in a "subordinated position." *Id.* at 1676. But all of this depends on accepting the crucial assumption that the dock remains the property of the dock owner in the strong sense of property ownership – which is the crucial issue to be decided. Hence, I see Fletcher using this sort of language to describe the *Vincent* outcome on the assumption that it is correct, and not as an argument for the result. After all, in public necessity situations one could also say that the injured party has been "subordinated," and because his rights were "compromised" for the social good, he too is owed compensation - although that is not the law, as we have seen.

96. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151 (1973).

97. *Id.* at 168 n.48.

98. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 *J. Legal Stud.* 477, 479 (1979).

99. *Id.* at 488.

100. *Id.* at 499.

101. Of course, on a "but for" basis (the approach to causation used in traditional negligence theory) the ship, the storm and the dock were all causes of the harm.

---

102. Epstein, *supra* note 96, at 157.

103. Latin, *supra* note 77, at 705-06. Latin here has cleverly employed Epstein's own language with the parties reversed to make vivid the point.

104. Epstein, *supra* note 96, at 160. In his torts casebook Epstein puts it this way: "Should the person whose property is converted to the public use be required against his will to become the champion of the public?" R. Epstein, *Cases and Materials on Torts* (8th edition) 56 (2004).

105. But see the discussion in Epstein's casebook where it is recognized that the public official might be disinclined to rescue if liable for damages since he won't get the benefits of rescuing; here, as contrasted with Epstein's earlier writing, it is suggested that the victim might be better compensated by a source other than the actor. *Id.* at 57.

106. In his extensive Teachers' Manual to his torts casebook, Professor Dan Dobbs supports *Vincent* and endorses Professor Epstein's analysis which Dobbs describes as "one who chooses to engage in conduct gets the rewards of that conduct and must equally pay for the harms he does." Dobbs Teachers' Manual (for the 5<sup>th</sup> edition 2005) at 125. Dobbs' formulation does no more to persuade me that Epstein's approach is the proper one to take.

107. Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property of the Commission of a Wrong*, 80 *Colum. L. Rev.* 504 (1980). See also, Friedmann, *Valid, Voidable, Qualified, and Non-existing Obligations: An Alternative Perspective on the Law of Restitution*, in *Essays on the Law of Restitution* (A. Burrows, ed. 1991) 247 at 255.

108. *Id.* at 505.

109. *Id.* at 506.

110. *Id.* at 509.

111. Friedmann gets in trouble at the outset when he defines property interests as including "those interests that a person is entitled to exploit and has a right to exclude others from enjoying." *Id.* at 510. This definition would appear to give "landowners" no property rights at least as against public bodies who "take" their land for public purposes, just as it would appear to make the dock not the "dock owner's" property at least with respect to the ship owner in *Vincent* who he has no

---

right to exclude -- results that Friedmann clearly doesn't want to reach. He avoids this solution, as least as to eminent domain, in the entirely conclusory way of saying that while it is true that the landowner doesn't have the right to exclude the city, he is entitled to compensation! *Id.* at 510. So as to move the analysis along, I will simply concede that the dock owner in *Vincent* has rights to the dock, which I am happy to call property rights, that would entitle him to compensation were the dock taken through eminent domain.

112. *Id.* at 530.

113. *Id.* at 541 (emphasis supplied).

114. This imposition of liability, it will be recalled, is consistent with the preferences of Bohlen, although contrary to the usual understanding of the common law rule.

115. Restatement of Torts Section 197 and Restatement of Restitution Section 122. Friedmann says that his approach fits in better with traditional restitutionary thinking than with traditional torts thinking because he doesn't require the defendant to have acted -- only to have benefited. He also admits that, in contrast with his proposal, the law at present generally has not been very receptive to the idea of imposing liability where the benefit was unsolicited. *Id.* at 541, 544-45.

116. It also seems a bit odd to use "appropriation" at all when someone damages rather than uses something.

117. *Id.* at 541, citing Section 121 of the Restatement of Restitution.

118. This is different from the possessor claiming his storage or selling costs. If nothing else, their payment might be thought required to entice the possessor to take the proper steps with the goods.

119. *Id.* at 541 citing P. Winfield & J. Jolowicz on Torts, who offer this example and about whom I will have more to say in due course. See *infra* note 174.

120. P. Keeton and R. Keeton, Instructor's Notes for Keeton and Keeton, Torts: Cases and Materials (2nd ed. 1978). The other Keeton is Page Keeton, torts scholar and former Dean of the Texas Law School.

121. Keeton Notes *supra* note 120 at 15.

---

122. 100 Minn. 299, 111 N.W. 1 (1907).

123. Keeton Notes supra note 120 at 15. In *Vincent*, the majority asks hypothetically whether the guest in *Depue* would be liable to the host, suggesting that it thinks he ought to be, but citing no authority for the proposition. 124 N.W. at 222.

124. 124 N.W. at 222. A different problem would arise were the captain to use the rope and then simply not give it back.

125. The Restatement of Torts (Second) in Section 263 offers yet another similar example: someone uses another's scarf as a tourniquet to stop his bleeding while awaiting an ambulance after an auto accident. The Restatement provides that there would be liability for the harm to the scarf caused by the blood. As noted above, those behind the Restatement, who give no reasons beyond the analogy to *Vincent*, agree there is no real authority for this result.

126. Newark, reviewing the first edition of Street's Law of Torts, in 19 Mod. L. Rev. 319, 320 (1956).

127. Newark also puts a more complicated hypothetical. "If I save myself from a pursuing murderer by taking a taxi, of course I must pay for the taxi." *Id.* at 320. As I have explained earlier in my discussion of compensation due doctors who rescue people on the public way, one can accept the proposition that compensation should be paid to a person whose regular job is to rescue people in acute distress without agreeing that the dock owner in *Vincent* should win. Moreover, as I there also noted, the right to collect compensation may be needed to induce the doctor to provide the rescue services. On the whole, it seems to me, the taxi driver is rather like the doctor; surely a private ambulance service would be. In sum, while I find this a difficult example, it nonetheless seems to me that if one were to give the taxi driver a right to compensation, it would be for reasons that don't apply to *Vincent*.

128. Morris, supra note 52 at 41. Of course, Morris shouldn't be seen as denying that the ship owner benefited; it is rather that this is not the usual unjust enrichment case where you have made yourself better off than before.

129. In his treatise on restitution, Professor George Palmer also questions the adoption of *Vincent* by the Restatement of Restitution. G. Palmer, *Law of Restitution* (1978) Section 2.10 at 139-40. It isn't that he objects to the result, but rather than it should be defended on torts grounds. Palmer's first point is that

---

liability should not depend upon the captain successfully saving the ship. Yet, absent that, he wonders where there is any benefit of the sort that restitution traditionally requires. (It is not clear to me, however, why one could not as easily deem the "opportunity" to save the ship as the benefit.) Palmer further objects to measuring recovery based on the amount of damage to the plaintiff because "this almost wholly obliterates the distinction between gain to the defendant and loss to the plaintiff, a distinction which is fundamental in the law of restitution." *Id.* at 140. (No one has suggested that the ship captain in *Vincent*, as in traditional restitution cases, ought to give up his gain -- presumably the full value of his ship.) Palmer concludes "An unjust enrichment theory that produces the same recovery solves no problems; it only creates problems to no good purpose." *Id.*

Professor Dobbs also expressed Palmer's concern about the use of traditional unjust enrichment thinking here – not wanting the result in *Vincent* to depend on the ship being saved. See D. Dobbs, *supra* note 106, at 126. I note also that *Vincent* was not even cited when Professor Dobbs published his treatise on restitution. See D. Dobbs, *Handbook on the Law of Remedies: Damages - Equity - Restitution* (1973).

130. Williams, *The Defence of Necessity*, 6 *Curr. Legal Probs.* 216 (1953).

131. *Id.* at 224.

132. *Id.* at 227.

133. Cohen, *The Development of the Modern Doctrine of Necessity*, 4 *Rechtshistorisches* 215 (1985).

134. Model Penal Code Section 3.02.

135. Model Penal Code Section 2.09.

136. *Restatement of Torts (Second) Section 73* (1965).

137. Broeder, *supra* note 57, at 242-43. See Hall and Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 *Ill. L. Rev.* 501 (1907).

138. *Id.* at 236-38. This is based on the famous case of *Laidlaw v. Sage*, 158 N.Y. 73, 52 N.E. 679 (1899).

---

139. This is based on the famous criminal law cases of *Regina v. Dudley*, [1884], 14 Q.B.D. 273, 15 Cox. C.C. 273, and *U.S. v. Holmes*, Fed. Cas. No. 15, 383 (Cir. Ct. E.D. Pa. 1842).

140. This like-for-like notion perhaps also explains decisions in which defendants are held liable for damages caused by directing flood waters off their property onto that of a neighbor. See e.g., the leading English case of *Whalley v. Lancashire & York R. Co.*, [1884] 13 Q.B.D. 131, and those cited by Prosser and Keeton in their Torts treatise, *supra* note 37, at 48 n.29.

141. That this is the Restatement's analysis is shown by the fact that the victims in these Section 73 cases have the privilege to resist the effort to do them in, something not available to the dock owner in *Vincent*.

142. M. Franklin and R. Rabin, *Tort Law and Alternatives* (7th ed. 2001) at 927.

143. Restatement of Torts (Second) Second 73 (1965) illustration 4.

144. Williams, *supra* note 130, at 231.

145. Williams points out that, unlike *Vincent*, under English law the plaintiff "cannot sue the doer in tort" *Id.* Further, Williams says, English law as well denies recovery in quasi contract (i.e., for unjust enrichment); but that is a result he thinks should be changed. *Id.* I will later discuss the English cases,

146. J. Fleming, *The Law of Torts* (9th ed. 1998) at 102-109.

147. *Id.* at 106.

148. 12 Co. Rep. 63, 77 Eng. Reports 1341 (1608).

149. As Bohlen well recognized.

150. The Restatement of Torts (Second) so treats it. See references to Section 196. Just why this isn't seen as a Section 197 case, however, in which defendant was aiding himself and/or a third party and for which he has but an incomplete privilege, is not made clear.



---

And on another front, Fleming suggests that perhaps the admiralty principle of "general average" did not apply in *Mouse's* case because the case occurred, not at sea, but on a river. Fleming, *supra* note 146, at 104.

151. [1870] L.R. 5 Ex. 204.

152. [1912] 1 K.B. 496.

153. The only seriously contested issue seemed to be whether or not actual necessity or apparent necessity was required.

154. [1912] 1 K.B. at 507. Could it matter that the game keeper and not the master was sued? I doubt it, but this is not at all discussed in the opinions.

155. *Esso Petroleum Co. V. Southport Corp.*, [1953] 2 All E.R. 1204 (Q.B.), 3 WLR 773.

156. [1956] A.C. 218, [1955] 3 All E.R. 864, [1955] 2 W.L.R. 81. For the intermediate opinion in the Court of Appeal which found the ship captain negligent for getting the ship into danger, see [1954] 2 Q.B.D. 182.

157. See text at note 187, *infra*.

158. [1971] 2 WLR 467.

159. So far as I can tell the authority, at least in this action, did not actually sue for the rent to which the opinion seems to imply it would be entitled. Were it not so entitled, then the upshot would be that the Williams would have been allowed free use of the flat because of their plight; that is, notwithstanding the language of the opinion, their defense of necessity would have been valid after all, at least up until the time they were evicted.

160. 2 W.L.R. at 473.

161. 2 W.L.R. at 474.

162. 2 W.L.R. at 474-75.

163. This discussion also helps to explain the inaptness of the analogy drawn by the *Vincent* majority to the "starving man" who, they say, "theologians hold ...

---

may, without moral guilt, take what is necessary to sustain life." But, as the majority sees it, that person has an obligation "to pay the value of the property so taken when he became able to do so." 124 N.W. at 222. Even if the majority in *Vincent* is right about the duty of compensation, at least in some situations, one reason could be that when there are places available that provide food, it may actually be morally wrong for a starving man just to take food from a stranger. And even if food is not otherwise available when it should be, one may be legitimately concerned that the stranger who is picked out and forced to help may be arbitrarily selected (and indeed thereby subject to being unfairly selected over and over again); that is, he may by no means be a person who, say, by natural circumstances becomes positioned to be the proper rescuer in this instance, and rather is called upon to be an involuntary rescuer where he is thought to have no moral duty to be one. On the other hand, where he does, then I am by no means convinced that the starving man owes a duty of compensation. This difference is perhaps illustrated by the difference between the *Southwark* case and *Depue v. Flateau*, discussed earlier, where the person took ill at his hosts' home and needed shelter for the night. For the views of St. Thomas Aquinas, who appears to have believed that private property becomes common property when needed by the starving man in situations of necessity, see *infra* text at footnote 314.

164. [1985] 2 All E.R. 985 (Q.B.D.)

165. The fire was larger and spread faster than the police might have anticipated (apparently because the psychopath had spread flammable powder on the floor while rummaging around in the shop); but the opinion does not let the defense off on this basis.

166. The necessity finding turns out to be dicta because the defendant was found to have been negligent in the way he prepared for the fire risk that he knew the gas could cause. Ironically, the fire service was then on strike and would not come out to await being needed at the scene. So instead the chief constable called out an army pumper which arrived and was available for some time. But later on, during the siege, it was called away to fight another fire and hence was absent when the gas was eventually used. Justice Taylor didn't really say it was negligent not to wait to use the gas until the pumper returned, because the police had pretty strong reasons to give up hope of a peaceful surrender and to act promptly when they did. But fault was found in allowing the army pumper to leave and failing to take steps then -- presumably to call in a replacement, although just where it would come from if the army pumper was needed elsewhere is unclear.

---

This suggests that although the English judges are firm, in principle, in their support for the necessity defense, some may also be quick to find negligence in those settings. Recall the Court of Appeal decision in *Esso*, supra note 155, and the holding in *Romney Marsh*, supra note 151.

167. Fleming, supra note 146, at 104-07.

168. In P. Atiyah, *Accidents, Compensation and the Law* (3<sup>rd</sup> ed. 1970) at 485, Atiyah says about *Vincent*, although he makes nothing more of it, that "the defendant was requested to remove his ship." I can find no evidence of this.

169. *Id.*

170. *Id.* at 485.

171. Dobbs, supra note 37, at 146.

172. P. Atiyah, supra note 168, at 488.

173. [1951] A.C. 850.

174. Other English treatises, casebooks and articles I have examined and that address the necessity question add little more to the picture.

1. Salmond and Heuston state "The precise limits of the defence [of necessity] are not clear . . . The defence, if it exists, enables a defendant to escape liability. . . ." citing *Cope v. Sharpe*; and "The obligation to pay compensation for any damage done is uncertain." Salmond and Heuston, *Law of Torts* (15th ed. 1981 by R.F.V. Heuston and R.S. Chambers) at 463-64.

2. Harry Street's treatise continues in this vein: "There is no English authority . . . that the privilege is incomplete in the sense that he must compensate the plaintiff for the actual loss sustained. . . ." Street on Torts (7th ed. 1983) at 74 n. 12.

3. Tony Weir's torts casebook says, disapprovingly, English law leaves the loss on the plaintiff unless the defendant's act was wrongful. He favors what he says is the French solution -- that the defendant must pay because he enriched himself

---

(by reducing his loss) as the plaintiff's expense. T. Weir, *A Casebook on Tort* (5th ed. 1983) at 271.

4. Winfield and Jolowicz offer a more extended discussion of English law. Winfield and Jolowicz, *Tort* (12th ed. 1984 by W.V.H. Rogers). After *Cope v. Sharpe* is described, they discuss the possibly analogous situation in the famous case of *Scott v. Shepherd*, [1773] 2 W. Bl. 892, where a firecracker was tossed into a crowd, tossed around like a hot potato and eventually exploded injuring the plaintiff. Two judges said in dicta that those persons who passed the firecracker on would not be liable because they acted "under a compulsive necessity for their own safety and preservation." *Id.* at 900. Winfield and Jolowicz first wonder if those passing on the squib really did act reasonably notwithstanding the need for immediate action. But, then turning to the heart of the matter, they suggest an approach that would seemingly make that issue irrelevant.

Admitting that "It is clear that no damages can be claimed in tort where the defendant's act is justified by necessity", they go on "but that does not settle the question whether the defendant is liable to make restitution . . ." Winfield and Jolowicz at 725. And while it is true, they say, that "there is no English decision on point" (Winfield and Jolowicz at 726 n.86.) they add "it is suggested that bare restitution or compensation for the use or consumption of property might be claimed on quasi-contractual grounds: e.g., using a neighbour's fire extinguisher to put out a fire in one's own house." Winfield and Jolowicz at 726.

This, of course, offers no new reasons in support of *Vincent*. As I explained earlier in my discussion of Professor Friedmann's article, although I agree that the fire extinguisher example is analogous to *Vincent*, it is hardly a novel example, merely echoing the cable-taking example given in *Vincent* itself. To repeat, however, what needs arguing is why the fire extinguisher and cable should not simply be seen as the defendant's freely to use in the circumstances. Moreover, as it stands, the *Scott v. Shepherd* dicta is further support for the anti-*Vincent* position.

5. In two short entries in the *Modern Law Review*, Professor F. H. Newark takes an aggressively pro-*Vincent* position. He argues that direct authority for a contrary position in English law is negligible. (I leave it to the reader to decide whether this is a fair reading of the cases I have described.) Thus, seeing the question as open, Newark says in the first of these pieces: "On principle it would seem that [necessity] ought not be countenanced in civil proceedings. ... We may approve an act done . . . but there is no more justice in charging up to a stranger

---

the cost of saving your life than there is in requiring him to foot the bill for your daily keep." Newark, Note, Trespass or Nuisance or Negligence, 17 Mod. L. Rev. 579, 580-81 (1954). This analogy misses the point that those called upon to help in the *Vincent*-type situation aren't just any strangers; and they are hardly being asked to take over responsibility for the regular maintenance of the person in need of rescue.

Later, in a book review, Professor Newark says "Another heresy is that the common law recognises a defence of necessity in the case of an intentional tort" (Newark reviewing the first edition of Street's Law of Torts in 19 Mod. L. Rev. 319 (1956)) and goes on to give the example of the would-be murder and the broken china that I have previously discussed. See Friedmann, *supra* note 107.

175. *Manor & Co. Ltd. v. M.V. "Sir John Crosbie"*, [1966] 52 D.L.R. (2d) 48.

176. Perhaps Dean Cecil A. Wright from the University of Toronto or a member of his faculty -- according to Professor Sussmann, *infra* note 181.

177. *Munn & Co. Ltd. v. M.V. "Sir John Crosbie"*, [1967] 1 Ex C.R. 94, at 100.

178. *Id.*

179. *Id.* at 99.

180. In his Canadian torts treatise, Professor (now Justice) Allen Linden says "when damage is caused by someone acting under private necessity, there is a conflict of authority." A. Linden, *Canadian Tort Law* (5th ed. 1993) at 80. On the one hand, he says, there is the English view exemplified by *Romney Marsh* case providing a complete privilege and on the other there is the *Vincent* case reflecting Bohlen's incomplete privilege analysis about which Linden says: "This approach is preferable, for although private interests must yield to the greater public good, there is no reason why they must be sacrificed to other private interests without requiring the beneficiaries to pay for the benefits derived." *Id.* at 75. This, alas, is an assertion and not an argument. For a similar conclusion, see the other leading Canadian torts treatise, by Professor Lewis Klar: L. Klar, *Tort Law* (2<sup>nd</sup> ed. 1996) at 120-24.

181. Sussmann, *The Defence of Private Necessity and the Problem of Compensation*, 2 Ottawa L. R. 184 (1967).

---

182. *Id.* at 190.

183. *Id.* at 190 n. 34.

184. See text at note 187 *infra*.

185. Sussmann *supra* note 181, at 192.

186. He does offer some interesting tidbits, however. First, he points out that from the facts found below in the "Sir John Crosbie" case, perhaps the dock would have been equally damaged had the ship been cut loose; if so, the plaintiff ought not be entitled to recovery even if *Vincent* were followed, his dock being doomed by the hurricane in any event. *Id.* at 193. Second, he points out that the captain in the Canadian case was unloading coal for the plaintiff at plaintiff's dock, whereas in *Vincent* the ship had finished its business -- thus making the defendant more clearly an invitee at the time of the storm in "Sir John Crosbie." *Id.* I don't see why this should matter, however, as it is generally conceded that even a complete stranger ship that puts in at the plaintiff's dock has the right to be there if necessary to save the ship in a storm; the issue in both situations is which innocent party should bear the loss. Finally, Sussmann tells us that French law and the law of Quebec would hold defendant liable in the *Vincent* case on an unjust enrichment theory -- but without giving us new arguments for that outcome. *Id.* at 193 n. 46.

187. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 *Duke L. J.* 975 (1999).

188. *Id.* at 995.

189. *Southport Corp. v. Esso Petroleum Co.*, [1953] 2 *All E.R.* 1204, 1209-10. It will be recalled that in the *Esso* case Devlin found the defense of necessity applicable and constituting, in Bohlen's terms, a complete privilege, where the lives of its crew were saved by the discharge of the oil by the defendant.

190. Bohlen *supra* note 11, at 313.

191. Illustration 13 to comment j of Section 197 of the Restatement of Torts (Second) (1965).

192. *Esso*, *supra* note 189, at 1209.

---

193. Christie, *supra* note 187, at 999-1010.

194. By contrast, and consistent with his other views, Judge Keeton seems to believe that, even though lives were saved, *Esso* was wrongly decided when he asserts that "most persons" would think Esso blameworthy for not compensating the plaintiff. See Keeton, *supra* note 38, at 425.

195. Recall *Latta*, *supra* note 26, where the court was reluctant to compare property values.

196. Professor Bohlen wasn't too worried about the problem of comparing property values to see which was properly saved. He, of course, didn't seek to make this distinction for purposes of freeing from liability the one who has a privilege to destroy less valuable property to save more valuable property. Rather, the question for Bohlen arose in the context of considering when the party whose property was being threatened by the self-rescuer could properly resist. See Bohlen, *supra* note 11, at 323. For the Restatement's provisions on this issue, see especially Sections 77 and 78.

197. In Section 73 of the Restatement of Torts (Second), by way of a caveat, the Restatement takes no position on the case in which A, in order to avoid "disproportionately greater" harm (like death) inflicts "comparatively slight" bodily injury on the plaintiff. The purpose of the Restatement here is to distinguish this situation from that in which the defendant imposes serious bodily harm – like taking a life to save his life. What I find odd (albeit encouraging) is that the Restatement would even entertain the possibility in Section 73 that, where the harm is relatively less, and hence one might say the "lesser of evils" test is met, then there might be no liability. For recall that in Section 197 it is envisioned that, notwithstanding his satisfying the "lesser of evils" test, the defendant would be liable for property damage even if his life depended upon it.

198. V. Schwartz, K. Kelly and D. Partlett, *Prosser, Wade and Schwartz's Torts: Cases and Materials* (11th edition 2005) at 124.

199. See Section 63 Restatement of Torts (Second) (1965), especially comment h, illustration 7. The leading cases on this point are *Courvoisier v. Raymond*, 23 Colo. 113, 47 P. 284 (1896) and *Crabtree v. Dawson*, 119 Ky. 148, 83 S.W. 557 (1904). In the Reporter's Notes, Prosser wonders whether the defendant ought not bear the costs of his mistake.

---

See also Section 76 of the Restatement of Torts (Second) (1965) which provides for a complete privilege for one who reasonably comes to the aid of a stranger who appears to be in need -- even where he makes a mistake and injures an innocent person.

200. See Section 75 Restatement of Torts (Second) (1965). The leading case here is *Morris v. Platt*, 32 Conn. 75 (1864).

201. See Sections 75, 83 and 137 of the Restatement of Torts (Second) (1965) for parallel provisions involving the non-negligent harm to third parties in the course of self-defense, the defense of possession of property and the making of arrests. See also the Restatement's similar position on the mistaken but reasonable detentions of shoplifters as not constituting false imprisonment. Section 120A, Restatement of Torts (Second) (1965).

See also, Section 77 of the Restatement of Torts (Second) (1965) which denies the right of parties like the dock owner in *Vincent* to resist the privileged self help efforts of parties like the ship owner. So far so good.

But this section additionally imposes strict liability on the property owner who makes a reasonable mistake, believing the one who enters is not privileged to do so. On the one hand, this provision can be used as evidence to show that in this situation the defense of property is less protected than is defense of the person. On the other hand, since it puts those exercising private necessity privileges in a stronger position when they are mistakenly injured than are innocent bystanders when they are so injured, it casts further doubt on why, in turn, strict liability should apply in the first place to someone like the ship captain in private necessity settings.

202. Again, however, in using causal language to assign responsibility, I imagine that many would say that the real cause of the plaintiff's misfortune was the wrongdoing of the third parties who were attacking the defendant.

203. Epstein, *supra* note 96, at 158-60. In his analysis of *Vincent*, Professor Bohlen made clear that he was not expressing any opinion on these self-defense rules which, in his terms, provide complete privileges to harm innocent plaintiffs. See Bohlen, *supra* note 11, at 324.

204. Restatement of Torts (Second) Section 74 (1965).



---

205. *Id.* at comment a, illustration 1. Compare the Restatement's treatment in the trespass to land area in Sections 164, 165, and 166.

206. The Restaters seem to think that when "reasonable belief" itself generates a privilege to impose harm, this properly yields different results than when innocent mistakes do not. For a parallel treatment see Section 164 of the Restatement of Torts (Second) (1965) which provides that intentional entry onto another's land constitutes a trespass even if you reasonably but mistakenly believe that the land is yours; on the other hand if you enter in the reasonable but mistaken belief that you are needed to prevent a murder, this is not a trespass because that belief itself is said to give you a privilege to enter. See also section 244 involving trespasses to chattels in which reasonable mistakes do not permit the defendant to escape liability unless it is an instance in which reasonable belief itself provides the privilege to trespass. But, not only is this sort of distinction inadequate to explain all the seeming inconsistencies in the self-defense area, it is in the end merely a formalistic solution that by itself does not explain why some reasonable conduct is given this extra protection and some isn't.

For my discussion (and rejection) of the idea that something about the intentional nature of the defendant's conduct might matter, see text following note 207, *infra*.

207. One can think about the hypothetical of the driver who threw his passenger to the wolves (discussed earlier) in terms of self-defense against forces of nature. To reconcile the Restatement's position on the wolf case (favoring liability) and in the mistaken self-defense case (opposing liability) requires, I believe, that one accept that sleigh driver's conduct was wrong, even though the child would have been eaten anyway. Then one can say that, although in both cases the defendants take innocent lives for their own benefit, whereas the self-defending sleigh driver is presumed to know that what he was doing was wrong, the mistaken self-defender reasonably thought he was doing something he had a right to do. This perspective, of course, reinforces the similarity between *Vincent* and the mistaken self-defender.

208. See Atiyah, *supra* note 168, and Epstein, *supra* note 96, at 159-60. Professor Bohlen, too, seemed to be of this view. See Bohlen, *supra* note 11, at 308, n.3.

209. Keeton *supra* note 38, at 415-18.

210. Freidmann *supra* note 107, at 531.

- 
211. Nor it is helped for Friedmann to admit that the line between certain harm and the high probability of harm is a fine one. *Id.* at 531 n. 137.
212. Prosser and Keeton, *Torts* (5th ed. 1984) at 148. A case raising this problem and favoring the no liability principle is *Phillips v. Pickwick Stages, Northern Division, Inc.* 85 Cal. App. 571, 259 P. 968 (1927); but there, in the end, the defendant bus driver was found to have acted negligently.
213. Indeed, they earlier seemed to endorse the *Vincent*-based Restatement position to the contrary, which favors strict liability even in cases of emergency actions on behalf of third parties. *Id.* at 147.
214. M. Shapo, *Tort and Injury Law* (2<sup>nd</sup> ed. 2000) at 519.
215. 27 N.Y.S. 2d 198 (N.Y. City Ct. 1941).
216. Professor Morris, it will be recalled, tried to reconcile the cases by his "cooperation" argument, which applies in *Vincent* but not in *Cordas*. See Morris, *supra* note 52.
217. Shapo, *supra* note 214, at 519.
218. Restatement of Torts (Second) Section 158 (1965).
219. Restatement of Torts (Second) Sections 163 and 164 (1965). Section 164 does provide, however, that in the special circumstances where your mistaken belief gives you a privilege to enter it is not a trespass-- e.g., where you enter in the reasonable belief that someone is about to be murdered on the property.
220. Restatement of Torts (Second) Section 165 (1965).
221. Restatement of Torts (Second) Section 166 (1965).
222. Moreover, for a now familiar example that shows the lack of consistency of the Restatement on this matter of intention, recall that the Restatement allows those who intentionally harm innocent people in self-defense to escape liability when the injurer reasonably mistakes the innocent victim for an attacker. See Section 63 of the Restatement and text at note 198, *supra*.

---

223. [1870] L.R. 5 Ex. 204.

224. [1953] 2 All E.R. 1204 (Q.B.).

225. [1985] 2 All E.R. 985 (Q.B.).

226. [1912] 1 K.B. 496.

227. Section 263 of the Restatement of Torts (Second) (1965) comment e, illustrations 2 and 3. This section was also discussed by Professor Broeder, see Broeder, *supra* note 57, at 239. Broeder's purpose, however, is to demonstrate the difficult problem of deciding, as one must under the Restatement's approach, whether something is a public necessity or a private one. Hence, Broeder wonders, what distinguishes a doctor who takes the medicine for his patient (which the Restatement calls a case of a private necessity of a third party) from a policeman who takes the medicine for a whole group of desperately needy patients (which, presumably, would be a public necessity case). Admitting this difficulty with the Restatement's approach, I frankly don't know quite what to do with Broeder's analysis here. Under his best risk bearer criterion, at least where the medicine was taken by the desperately ill individual, the pharmacist, not the patient, should bear the loss. But that is clearly not Broeder's preference, although he never really says why other than to make the parallel to the equally undefended *Vincent* result.

228. One might, alternatively, argue that there should not be patient liability here. But for now at least, I am going to accept that the Restatement's view of this example is right, and that whereas perhaps the pharmacist should lose his professional license, the patient should pay for the medicine.

As part of the discussion of *Vincent* in his casebook, Professor Marshall Shapo puts forward a complicated hypothetical about a former medical corpsman who takes blood from a hospital in order to administer it to his friend who has been injured in a mass accident and is lying on a stretcher outside the emergency room because the accident has overtaxed the hospital staff who are attending those it initially judged to be in greater need. See Shapo, *supra* note 214 at 520-21. This, it seems to me, is a variation on the examples put forward in Section 263. And, as Shapo doesn't provide an analysis of his hypothetical, I hope I will be forgiven for centering my discussion here on the Restatement examples instead.

229. See Bohlen, *supra* note 11.

---

230. Returning to the pharmacist case, while it is true that the pharmacist is also subject to natural disaster risks like fire, and while it is also true that one could term the illness to the patient a natural disaster, that characterization just doesn't feel right to me. This is because, as I indicated above, the pharmacist's entire business, unlike the dock owner's, centers on such disasters.

231. Now we are perhaps closer to Professor Shapo's hypothetical, *supra* note 228, although in his (as in one of the Restatement's examples) the friend, rather than the patient, took the needed blood. Shapo's is made even more complicated, however, by the possible critical need for the blood by the others in the emergency room.

232. See Posner, *supra* note 79. And note too how this fits the position I took in my discussion of the example in the Newark article of the person who takes a taxi ride to escape a would-be murderer. See note 127 *supra*.

233. This is based upon *Depue v. Flatau*, 100 Minn. 299, 111 N.W. 1 (1907).

234. Smith, *Restitution: The Heart of Corrective Justice*, 79 *Texas L. Rev.* 2115 (2001).

235. E. J. Weinrib, *The Idea of Private Law* (1995).

236. But see Weinrib, *id.* at 197-198.

237. Smith, *supra* note 234, at 2134.

238. *Id.* at 2140.

239. *Id.* at 2149.

240. Arguably, this is a variation on the 1648 English case of *Gilbert v. Stone*, discussed by Holmes. See Holmes, *supra* note 8.

241. Restatement of Restitution and Unjust Enrichment, Tentative Draft No. 4, April 8, 2005.

242. Klimchuk, *Necessity and Restitution*, 7 *Legal Theory* 59 (2001).

---

243. Klimchuk does not oppose the result in *Vincent*, however, terming it a "plainly fair outcome." *Id.* at 81. Rather, for him, the explanation must lie in the law or torts (or perhaps the law of property).

244. For yet another argument that compensation is due in *Vincent* under the law of restitution, see, Finan and Ritson, *Tortious Necessity: The Privileged Defense*, 26 *Akron L. Rev.* 1 (1992). Like Keeton and others, they appeal to "most people's sense of justice." *Id.* at 4.

245. *Restatement of Restitution and Unjust Enrichment, Tentative Draft No. 2*, April 1, 2002.

246. *Id.* at Section 20, comment b and Reporter's Note b to Section 20. I read Section 21 to this same effect, although the sharp distinction between professional and non-professional assistance does not appear in the black letter. *Id.*

247. See generally, G. Calabresi, *Cost of Accidents* (1970) (*passim*).

248. W. Blum and H. Kalven, *Public Law Perspectives on a Private Law Problem - Auto Compensation Plans* 58-59 (1965).

249. Calabresi, *supra* note 247, at 162.

250. *Id.* at 163.

251. *Id.* at 164.

252. *Id.*

253. I don't mean by this description to endorse the notion that victims, who already have their own bodily security to worry about, are importantly influenced in the self-care they take by financial incentives created by private law mechanisms.

254. Calabresi, *supra* note 247, at 169 n. 28.

255. Note, however, that in discussing the uncertainty that surrounds the application of Calabresi's approach to actual cases, Professor Latin has said "the dock owner would surely have argued that the captain was the better risk-

---

avoidance decision maker and cheaper cost avoider." Latin, *supra* note 77, at 709 n. 141.

256. Latin, *supra* note 77, at 705 - 10.

257. *Id.* at 707.

258. *Id.*, at 708.

259. See Latin, text at note 103 *supra*. Interestingly enough, when it comes to the *Vincent* court's analogy to the case of the ship captain taking someone's cable lying on the dock in order to secure the ship to the dock, Latin seems to shy away from his theory, and seeks to distinguish *Vincent* on the ground that the captain was "restoring the status quo that existed before the emergency arose. The boat was moored to the dock when the storm became foreseeable, and it was still moored to the dock in the same position after the captain's deliberate actions" Latin, *supra* note 77, at 707, n. 132. I frankly don't see the force of this point, or even of the attempted distinction. Just as the dock is now damaged, so too it could well be said that when the storm clears and the now damaged and no longer needed cable is left on the dock, the captain, on his side, merely restored the status quo. In short, it seems to me that the theory that Latin has presented should have the non-negligent cable-damaging case turn on the problem-solving nature of cable owners.

260. Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 *Philos. and Pub. Affairs* 93, 102 (1978). Feinberg was not the first to advance this sort of example, which was used, for example, in the Model Penal Code, section 302, comment 1.

261. *Id.*

262. *Id.*

263. Feinberg also gives as examples war killings (presumably he means here those other than those strictly needed to save one's own life) and capital punishment. *Id.* Feinberg's point is that, assuming you agree that such killings are justified, you would not then argue for a duty of compensation.

264. *Id.*

---

265. *Id.* (Emphasis in original.)

266. Feinberg too does not report empirical research on this point.

267. I discuss noncommercial settings here because that is the situation in the hiker's case. For some relevant perspectives in the commercial setting, review my discussion of the case of the medicine taken from the pharmacist, text at note 227 *supra*.

268. Of course, this altruism has benefits to the donor, who might in turn seek to "borrow" an egg later on and in any case builds up a feeling of community with the one who asked.

269. While not suggesting that you have a moral duty to donate a kidney to a friend or relative who needs one to save his life, surely if you do make the donation you are unlikely to expect money in return. See also, A. Ripstein, *Equality, Responsibility, and the Law* 117-22 (1999) who treats the ship captain as having, in effect, temporarily borrowed the dock (as he might borrow a coat) and thus having a restitution-based obligation to return the dock (as he would the coat) in its original condition (or, what is the same, pay for the harm done while he had possession). That is an analogy, but the question remains as to whether it is the right analogy.

270. Thomson, *Rights and Compensation*, 14 *Nous* 3 (1980).

271. *Id.* at 14.

272. *Id.* at 15.

273. One wonders what Thomson would say about the non-negligent infliction of injuries through reasonable risk-taking generally. For example, did the cricket stadium owners "infringe" the rights of the passerby who was struck by the unusually well hit cricket ball in *Bolton v. Stone*? Or what of the mistaken self-defense example, or the injuring an innocent third party in self-defense? Or what about public necessity cases? In all these cases, as we have seen, the law traditionally does not impose liability. Does Thomson think the actor has a moral duty to compensate anyway?

274. Montague, *Rights and Duties of Compensation*, 13 *Philos & Pub. Affairs* 79 (1984).

---

275. Davis, Rights, Permission, and Compensation, 14 *Philos. and Pub. Affairs* 374, 381 (1985).

276. *Id.*

277. *Id.*

278. *Id.* at 382-83.

279. Montague, Davis and Westen on Rights and Compensation, 14 *Philos. and Pub. Affairs* 390, 394 n. 11 (1985).

280. Davis, *supra* note 275, at 383.

281. Montague (1), *supra* note 274.

282. Montague (2), *supra* note 279.

283. Davis, *supra* note 275, at 377. Thomson, as we saw, called the problem "cluttered." See Thomson *supra* note 263.

284. See Montague (1), *supra* note 274. at 84 and 87.

285. One could go on. E.g., the careful dynamiter and the bomb terrorist make another parallel.

286. I will come to Westen's contribution shortly. Westen, Comment on Montague's "Rights and Duties of Compensation", 14 *Philos. and Pub Affairs* 385, (1985).

287. Indeed, after his second piece on this subject Montague now is wavering on the duty of compensation in the hiker's case. See Montague, *supra* note 279.

288. Westen, *supra* note 286, at 386-87.

289. *Id.* at 388.



---

290. Westen says that his analysis shows us how to conceptualize "legal relationships we deem to be normatively sound" without telling us "whether such relationships are indeed sound." *Id.* at 389.

291. See, e.g., Coleman, Corrective Justice and Wrongful Gain, 11 *J. Legal. Stud.* 421 (1982); Coleman, The Morality of Strict Tort Liability, 18 *Wm & Mary L. Rev.* 259 (1976); and Coleman, On the Moral Argument for the Fault System, 71 *J. Philos.* 473 (1974).

292. See Coleman, Corrective Justice, *supra* note 291, at 423-28.

293. *Id.* at 423.

294. *Id.* at 423 n.7.

295. *Id.*

296. *Id.* at 424.

297. *Id.* at 428 n.16.

298. *Id.* at 436.

299. I rather imagine that my colleague Professor James Gordley, believes that Aristotelian thinking would favor liability in the *Vincent* case, as well as other proper cases for strict liability – whatever they are. See, e.g., Gordley, Tort Law in the Aristotelian Tradition, in *Philosophical Foundations of Tort Law* (D. Owen, ed. 1995) at 131.

300. J. Coleman, *Risks and Wrongs: Philosophical Analysis* (1992).

301. Perry, The Mixed Conception of Corrective Justice, 15 *Harv. Jnl. Law & Pub. Pol.* 917 (1992).

302. *Id.* at 937.

303. For another critique of Coleman that endorses the result in *Vincent* but rejects the application of Coleman's corrective justice, see Gauthier, Jules and the Tortist, 15 *Harv. Jnl. Law & Pub. Pol.* 683 (1992). There Professor David Gauthier invokes 'the principle that in benefiting from interaction no agent should

---

worsen the situation of another.' *Id.* at 705. This, of course, is the Bohlen claim, which, as I have noted throughout, is dramatically more sweeping than those who invoke it seem to realize or address and would call for a widespread revision of tort law.

304. Finkelstein, Tort Law as a Comparative Institution: Reply to Perry, 15 *Harv. Jnl. Law & Pub. Pol.* 939 (1992).

305. See generally, Honore, Responsibility and Luck, 104 *Law Quarterly Review* 530 (1988), which explores the justifications for strict liability more generally.

306. *Id.* at 960.

307. Klepper, Torts of Necessity: A Moral Theory of Compensation, 9 *Law and Philosophy* 223 (1990).

308. *Id.* at 229.

309. *Id.* at 230.

310. *Id.* at 239.

311. Zimmerman, Rights, Compensation and Culpability, 13 *Law and Philosophy* 419 (1994),

312. *Id.* at 445.

313. Professor Montague is perhaps after this sort of idea when he says that "it might be *desirable* for A to compensate B, but this is not to suggest that he has a duty to do so." Montague (1), *supra* note 274, at 84.

314. Thomas Aquinas, *Summa Theologica* Part II-II, Question 66, Article 7.

315. See generally, Ames, *Law and Morals*, 22 *Harv. L. Rev.* 97 (1908) and Weinrib, *The Case for Duty to Rescue*, 90 *Yale L. J.* 247 (1980).