Journal of Ethics and Social Philosophy
VOL. 30 NO. 3 · MAY 2025
https://doi.org/10.26556/jesp.v30i3.4137

RIGHTS INFRINGEMENT, COMPENSATION, AND LUCK EGALITARIANISM

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Suppose that *C* has a Hohfeldian claim against *A* ϕ-ing, where this claim implies a correlative moral duty on *A*'s part to not ϕ.[1] Further, suppose that *A* infringes on *C*'s claim by ϕ-ing in a way that imposes a cost upon *C*. Many rights theorists hold that *A*, in virtue of her ϕ-ing, acquires a unique duty to (at least partially) compensate *C* for this cost (where this duty is *unique* in that no one else acquires a similar duty to compensate *C* for her loss).[2] Call this proposition the *compensation thesis*. To illustrate the compensation thesis, consider the following case (adapted from a case originally produced by Joel Feinberg):

> *Permissible Infringement*: Hiker is deep in the mountains when a surprise blizzard strikes. She knows that she will die without shelter but fortunately stumbles across Owner's unoccupied cabin. Hiker breaks a window to enter the cabin and thereby survives the storm.[3]

1 For Hohfeld's complete schema of incidents, see "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." For a helpful summary, see Wenar, "Rights." For a presentation of Hohfeldian incidents that treats them as the component parts of moral rights (as opposed to legal ones), see Thomson, *The Realm of Rights*, 37–78.

2 See Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 102; Davis, "Rights, Permission, and Compensation," 381–84; Lomasky, "Compensation and the Bounds of Rights"; Skorupski, *The Domain of Reasons*, 310–13; and Jorgensen Bolinger, "Moral Risk and Communicating Consent," 186n18. There are also theorists such as Thomson (*The Realm of Rights*, 95) and Frederick ("*Pro Tanto* Versus Absolute Rights," 388) who endorse the thesis but posit a set of exceptional cases in which compensation need not be paid, including cases in which the agent blamelessly infringes on another's claim. By denying that blameless infringement implies a duty to compensate, these theorists sidestep the argument of this paper. That said, they also do not provide a principled reason for excepting blameless infringements from the general duty to compensate wronged parties. This paper can be understood as providing such a reason. One might also think that *A* does not have to compensate *C* for any costs caused by her infringement that are unforeseeable. Here again, the paper can be understood as developing a principled basis for this carve-out.

3 For the original version of the case, see Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 102.

There is widespread agreement that Hiker acts permissibly in this case—and that she acts permissibly even on the assumption that Owner has moral property rights such that Hiker has a correlative duty not to use the cabin. However, there are rival explanations of why Hiker's act is permissible. According to *specificationists*, the content of a right often includes tacit exception clauses that limit the set of actions against which the right holder has a claim. In this case, a complete specification of Owner's property rights would assert (among other things) that Owner has a claim that Hiker not use-the-cabin-when-Hiker's-survival-does-not-depend-on-using-the-cabin.[4] Given that Hiker's survival does in fact depend on using the cabin, Owner's claim does not apply to Hiker's action. Thus, Hiker acts permissibly because Owner has no claim against her action. Alternatively, there is a second variety of specificationism that reaches this same result without positing that there are exception clauses built into the content of Owner's claim. On this approach, the existence of the claim itself is held to be conditional on certain states of affairs obtaining.[5] Specifically, Owner's claim against Hiker using her cabin obtains only if Hiker's survival does not depend on that use. Given that Hiker's survival does depend on her use of the cabin, her circumstances negate Owner's claim, with this negation rendering Hiker's action permissible.

For these purposes, it will be helpful to set specificationism aside and focus on the primary rival account of why Hiker acts permissibly in Permissible Infringement. According to this influential view, Owner does in fact have a claim against Hiker using her cabin in virtue of Owner's property rights. However, this does not imply that Hiker ought not use the cabin; rather, Owner's claim is merely a *pro tanto* moral consideration that is overridden by the moral importance of Hiker's survival.[6] That Owner has an overridden claim in this case is evidenced by the apparent "moral residue" that it leaves behind (where this residue does not accompany more pedestrian permissible actions): even though Hiker acts in a way that is permissible, all things considered, she now owes it to Owner to pay for the repair of the cabin's window. In other words, the *pro tanto* proponents' reason for thinking that Owner's claim was infringed is that Hiker acquires a new unique duty to compensate Owner for the costs imposed by her infringement. They thus presuppose the compensation thesis: in any case where some agent *A* infringes on some claimholder *C*'s claim, *A* acquires a unique duty to compensate *C* for at least some of the costs imposed.

4 For a defense of this approach, see Shafer-Landau, "Specifying Absolute Rights."

5 See Wellman, "On Conflicts Between Rights."

6 This view is most famously endorsed by Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 102; and Thomson, *The Realm of Rights*.

While the compensation thesis is both popular and intuitively plausible (as illustrated by the Permissible Infringement case), this paper will present two arguments for rejecting it. First, section 1 argues that rights theorists face a trilemma when it comes to cases in which *A* blamelessly infringes on one of *C*'s claims by ϕ-ing. Section 2 considers—and rejects—the proposal that the trilemma can be resolved by positing that *C* does not in fact have a claim against *A* ϕ-ing in such cases. Section 3 then presents an alternative way of resolving the trilemma that has been recently advanced by Renée Jorgensen.[7] However, section 7 argues that this proposal is implausible, as its supporting argument rests on a false dilemma. Thus, the paper concludes that the best way to resolve the trilemma is to reject the compensation thesis. The intervening sections (sections 4, 5, and 6) present a second argument against the compensation thesis, namely, that it is incompatible with (a plausible interpretation) of luck egalitarianism. Given this incompatibility, any rights theorist who endorses the thesis will be yoking their position to the negation of (a plausible interpretation of) a popular theory of distributive justice. Finally, section 8 considers six quick arguments for the compensation thesis and finds all of them lacking.

1. A TRILEMMA FOR RIGHTS THEORISTS

The first argument against the compensation thesis is that it gives rise to a trilemma that is best resolved by rejecting said thesis. This trilemma arises when one considers cases in which an agent blamelessly wrongs someone. Consider, for example, the following pair of cases (the former adapted from a case presented by Tom Dougherty and the latter adapted from a case presented by Jeff McMahan).

> *Consent Evidence*: An unforeseeable glitch causes Claimholder's computer to send Aggressor an email from Claimholder's account reading "Please ϕ, I want you to ϕ, and you have my permission to ϕ." Aggressor then ϕs on the basis of this message, causing Claimholder to incur significant costs as a result.[8]

> *Forfeiture Evidence*: Claimholder has an identical twin who is a well-known mass murderer. Unbeknownst to Claimholder, her twin is on a killing spree, and Aggressor has seen the twin's picture on the news. By coincidence, Claimholder's car breaks down in Aggressor's neighborhood, and Claimholder goes up to Aggressor to ask for help. Before

7 See Jorgensen Bolinger, "Moral Risk and Communicating Consent."

8 See Dougherty, *The Scope of Consent*, 67.

> Claimholder has a chance to say anything, Aggressor knocks Claimholder unconscious by ϕ-ing. Claimholder incurs significant costs as a result.[9]

In both cases, Aggressor seems to blamelessly wrong Claimholder. She wrongs Claimholder because Claimholder has (by hypothesis) a claim against Aggressor ϕ-ing in both cases, and Aggressor wrongs Claimholder when she fails to discharge the correlative obligations. By contrast, the blameworthiness of an action depends (at least in part) on the agent's epistemic state, where this state might include her knowledge, her beliefs, the evidence she possesses, and/or the available evidence that she does not possess but has a duty to acquire, depending on one's particular theory of blameworthiness. For these purposes, the exact set of necessary and sufficient conditions of being blameworthy will be left unspecified, but it will be assumed that a person blamelessly ϕs if both her possessed evidence and the *relevant* evidence—i.e., the available evidence that she *should* have gathered (a notion that will also be left unspecified)—suggest that a state of affairs obtains wherein it would be permissible for her to ϕ.

When this placeholder account is applied to Consent Evidence and Forfeiture Evidence, one gets the result that Aggressor is blameless in both cases. In the former case, the evidence that Aggressor possesses suggests that Claimholder has consented to Aggressor ϕ-ing, where such consent would negate Claimholder's claim against Aggressor ϕ-ing.[10] Granted, there was available evidence that Aggressor could have gathered that would have suggested a different conclusion. For example, Aggressor could have called Claimholder to confirm that she has Claimholder's permission to ϕ, where this would have resulted in Claimholder clarifying that she does not in fact intend or want Aggressor to ϕ. However, it does not seem like Aggressor was epistemically negligent in forming her belief that Claimholder consented based on the email alone. Thus, her relevant evidence is coextensive with her possessed evidence in this case. Given that this evidence suggests that Claimholder has consented to Aggressor ϕ-ing—i.e., it is permissible for Aggressor to ϕ—it follows that Aggressor blamelessly ϕs in Consent Evidence.

Similar remarks apply to the Forfeiture Evidence case. There, the evidence possessed by Aggressor suggests that Claimholder poses an imminent threat to her life, where posing an imminent threat is typically taken to negate claims

9 See McMahan, *Killing in War*, 164.

10 Whether some piece of evidence suggests that Claimholder consents to Aggressor ϕ-ing depends on one's preferred theory of which acts qualify as consent. That said, the email that Aggressor receives in Consent Evidence would be evidence that Claimholder consents to ϕ-ing on practically any theory of consent.

against aggressive actions that would disarm that threat and are proportionate to the threat. Stipulating that Aggressor ϕ-ing would be proportionate to a threat on her life, it follows that Aggressor's possessed evidence suggests that ϕ-ing is permissible in her circumstances. And again, it does not seem like Aggressor was negligent in failing to gather additional evidence prior to ϕ-ing. Thus, her ϕ-ing is blameless, as both her possessed evidence and the relevant evidence suggest that ϕ-ing is permissible.

Granted, the proposed account of blameless action is speculative, and different theorists might fill in the details in different ways. However, any adequate theory will seemingly yield the same result—namely, that Aggressor acts blamelessly when she ϕs. Thus, in both Consent Evidence and Forfeiture Evidence, Aggressor wrongs Claimholder but does so blamelessly.

The trilemma for rights theorists arises when the compensation thesis is applied to these cases of blameless wronging. Recall from above that this thesis holds that if *A* wrongs *C*, then *A* alone must (at least partially) compensate *C* for the costs that *C* incurs in virtue of *A*'s ϕ-ing. Given that Aggressor wrongs Claimholder in both Consent Evidence and Forfeiture Evidence, the thesis implies that Aggressor must make substantial transfers to Claimholder such that Aggressor internalizes the costs of ϕ-ing rather than Claimholder. However, this seems unfair. After all, in both cases, Aggressor is morally fastidious and acting appropriately in light of her possessed evidence. Further, it does not seem that she has negligently failed to gather additional evidence relevant to assessing the permissibility of ϕ-ing. Together, these facts support the judgment that it would be unfair if Aggressor had to fully internalize the costs that ϕ-ing imposes on Claimholder.

If one thinks that any acceptable theory of rights must fairly distribute the costs of rights infringements, then a contradiction is reached.[11] It cannot simultaneously be the case that (1) Aggressor wrongs Claimholder in Consent Evidence/Forfeiture Evidence, (2) the compensation thesis is true, and (3) the unfairness of Aggressor internalizing the costs of ϕ-ing in Consent Evidence/Forfeiture Evidence disqualifies any theory that implies that Aggressor must do this. Thus, one of these independently plausible propositions must be rejected.

11 This premise is notably presupposed by Jorgensen, whose defense of the proposition that it is fair for Aggressor to internalize her imposed costs is discussed at length in sections 3 and 7 below (Jorgensen Bollinger, "Moral Risk and Communicating Consent"). Those writing on self-defense also tend to insist that fairness is a decisive consideration when determining who should internalize the costs of threatened rights infringements. See, e.g., Otsuka, "Killing the Innocent in Self-Defense"; and Gordon-Solmon, "What Makes a Person Liable to Defensive Harm?" For a discussion of how the literature on self-defense interacts with the argument of this paper, see notes 40 and 42 below.

2. THE NONINFRINGEMENT SOLUTION

One possible resolution of the trilemma is to reject proposition 1—i.e., deny that Aggressor wrongs Claimholder in either Consent Evidence or Forfeiture Evidence. Call this the *noninfringement solution*. One way to formulate this denial is to hold that Claimholder initially held a claim against Aggressor ϕ-ing but lost that claim, either because she consented to Aggressor ϕ-ing or acted in a way that caused her to forfeit her claim. Given that Claimholder no longer has a claim against Aggressor ϕ-ing, Aggressor does not wrong Claimholder and thus does not owe her any compensation.

However, this proposal seems like an unacceptable way of resolving the trilemma. As a matter of pretheoretical intuition, it seems clear that that Claimholder does not consent to Aggressor ϕ-ing in Consent Evidence (or in Forfeiture Evidence, where nothing even resembling consent occurs). Further, while there are many theories of what constitutes consent, none supports the judgment that Claimholder consents in this case. On some views, Claimholder consents to Aggressor ϕ-ing when Claimholder forms some positive attitude toward Aggressor ϕ-ing (e.g., she intends that Aggressor ϕ).[12] Alternatively, some hold that Claimholder consents to Aggressor ϕ-ing when Claimholder communicates some relevant bit of information to Aggressor (e.g., that Claimholder intends that Aggressor ϕ).[13] And others hold hybrid views that attach other necessary or sufficient conditions to the formation of the aforementioned attitudes and/or communicative acts. For example, Jorgensen posits that *either* a relevant attitude *or* an act of communication is sufficient for consent.[14] And Dougherty holds (roughly) that Claimholder consents iff she issues a relevant directive or permission to Aggressor *and* various evidentiary conditions obtain that would justify Aggressor's belief that Claimholder issued the directive/permission.[15]

Irrespective of which of these accounts one favors, one will not get the result that Claimholder consents to Aggressor ϕ-ing in Consent Evidence. While Aggressor has evidence that Claimholder intends that Aggressor ϕ and issued a directive that she ϕ, Claimholder does not in fact form any relevant pro-attitude toward Aggressor ϕ-ing and does not issue a directive or communicate any information at all to Claimholder. Given that all of the listed accounts of consent take either attitude formation or an attempted communicative act

12 See Hurd, "The Moral Magic of Consent"; and Alexander, "The Moral Magic of Consent (11)" and "The Ontology of Consent."

13 See McGregor, *Is It Rape?* 124; and Dougherty, "Yes Means Yes." Tadros holds that consent requires only an *attempt* to communicate ("Causation, Culpability, and Liability").

14 Jorgensen Bolinger, "Moral Risk and Communicating Consent."

15 Dougherty, *The Scope of Consent*.

to be a necessary condition of consent, it follows that Claimholder does not consent to Aggressor ϕ-ing. Granted, the foregoing list of accounts is just a quick survey, and there are many other accounts that have not been considered. However, it seems unlikely that any omitted account will hold that Claimholder consents in Consent Evidence for the simple reason that Claimholder does not act at all—indeed, it can be stipulated that her mental states do not even change—and seemingly any account of consent will hold that Claimholder must act or, at the very least, undergo some change in state if she is to consent to some action. Thus, it does not seem that Claimholder could have consented to Aggressor ϕ-ing in Consent Evidence (or Forfeiture Evidence).

Similar remarks apply to theories of forfeiture. Irrespective of which theory one endorses, one will seemingly hold that Claimholder must act or change in some way to forfeit a right. But given that, by hypothesis, she takes no action and undergoes no change in either Consent Evidence or Forfeiture Evidence, it does not seem that Claimholder could forfeit her claim against Aggressor ϕ-ing.[16]

Given that Claimholder neither consents to Aggressor ϕ-ing nor forfeits a claim against Aggressor ϕ-ing in either Consent Evidence or Forfeiture Evidence, the proponent of the noninfringement solution must maintain that Claimholder either loses her claim involuntarily or never had a claim against Aggressor ϕ-ing in the first place. With respect to the latter proposal, one might argue that a complete specification of Claimholder's claim in Consent Evidence would reveal that its content is actually qualified such that Claimholder has a claim against Aggressor ϕ-ing *except when* Aggressor receives an email from Claimholder's account telling her that she may ϕ. Similarly, in Forfeiture Evidence, one might hold that Claimholder has a claim against Aggressor ϕ-ing *except when* Aggressor is justified in believing that Claimholder poses an imminent threat to her life.

This specificationist approach is the alternative way of assessing the Permissible Infringement case discussed above. Recall that specificationists explain the all-things-considered permissibility of Hiker's actions by holding that Owner's claim against Hiker using her cabin is really a claim against Hiker using her cabin when Hiker's life is not otherwise at risk. However, applying this

16 Jonathan Quong argues that whether some person *G* has a claim against *A* ϕ-ing depends on various facts about *A*, including *A*'s beliefs, how costly it would be for *A* to not ϕ, whether she could have avoided the choice to ϕ versus incurring the costs of not ϕ-ing, etc. Does such a view imply that Claimholder might lose her claim—even absent any action by Claimholder or change of Claimholder's state—simply because one of these facts about Aggressor changes? Quong affirms that this is not the case: even if one accepts his view, Claimholder loses a claim only if she acts in certain relevant ways, as such a restriction is needed to both make his view cohere with core judgments about claim loss and ensure that claimholders have adequate control over which claims they possess ("Rights Against Harm," 262).

specificationist approach to Consent Evidence and Forfeiture Evidence seems misguided. The appeal of specificationism is that it can explain why it is permissible for Hiker to break into the cabin without making claims merely *pro tanto* considerations. But in Consent Evidence and Forfeiture Evidence, Aggressor's ϕ-ing is seemingly *not* permissible, all things considered. Thus, positing that Claimholder's claim in each case contains an exception clause renders the proposed theory of rights extensionally inadequate. By denying that Claimholder has a claim against Aggressor ϕ-ing, the specificationist version of the noninfringement solution avoids the implication that Aggressor must bear the unfair burden of compensating Claimholder; however, the absence of a claim against ϕ-ing also unacceptably implies that Aggressor acts permissibly when she ϕs.

Similar remarks apply to the proposal that Claimholder involuntarily loses her claim against Aggressor ϕ-ing in both Consent Evidence and Forfeiture Evidence. If Claimholder does in fact lose her claim in this way, then there is no remaining basis for declaring Aggressor's action to be impermissible, all things considered. Insofar as one wishes to preserve this all-things-considered deontic judgment, one must reject the involuntary claim loss version of the noninfringement solution as well.

3. THE COMPARATIVE FAIRNESS SOLUTION

The previous section has argued that there is no version of the noninfringement solution that can adequately resolve the trilemma of section 1. This leaves two other propositions as candidates for rejection: the compensation thesis and the proposition that it would be unfair for Aggressor to internalize the costs of ϕ-ing in Consent Evidence and Forfeiture Evidence by compensating Claimholder. This section will consider a defense of rejecting the latter proposition that has been raised by Jorgensen in her discussion of cases of blameless wronging.[17] Call this proposal—i.e., the contention that it is not disqualifying for a theory to imply that Aggressor must internalize the costs of ϕ-ing—the *comparative fairness solution*.

17 See Jorgensen Bolinger, "Moral Risk and Communicating Consent." Jorgensen advances this argument in the context of defending her account of consent described in section 2 above. Because she maintains that *P* can consent to *Q* ϕ-ing via communication even when *P* does not intend that *Q* form any particular belief, she has to posit an account of communication via *signals*—and, more specifically, signaling conventions that do not require intentions on the part of the signaling party (194–95). However, the general argument of hers discussed in this section does not rest upon this account of communication (or her account of consent more generally).

While Jorgensen concedes that there is something superficially troubling about a morally and epistemically fastidious Aggressor having to uniquely internalize the costs of ϕ-ing, she argues that this result should not be taken to be disqualifying, as one cannot simply assess the fairness/acceptability of Aggressor internalizing the costs of ϕ-ing in isolation; rather, the assessment must be *comparative* such that one considers the fairness/acceptability of the alternative(s) to having Aggressor internalize these costs. Thus, one must consider whether it would be fair/acceptable for Claimholder to internalize the costs of Aggressor ϕ-ing in cases of blameless wronging rather than Aggressor internalizing them. And Jorgensen plausibly contends that this would be even *more* unfair than Aggressor internalizing the costs.[18] In defense of this point, one might note that even though Aggressor was morally fastidious, the imposed costs are still attributable to her choice, while Claimholder had no such direct causal connection to the generation of costs. Given this lack of connection, it seems more plausible that Aggressor should internalize the costs, even if there is something theoretically unattractive about this outcome given Aggressor's blamelessness.

Additionally, Jorgensen points out that it would be even more unfair for the victims of rights infringements to have to internalize the associated costs in cases where some members of society are more prone to having their rights blamelessly infringed than others.[19] For example, suppose that there is a social practice that consistently generates misleading evidence about Claimholder's intentions such that multiple agents Aggressor and Infringer blamelessly infringe on Claimholder's claims by ϕ-ing. If each infringing agent has to internalize the costs that she respectively imposes, then the collective imposed costs in this case would be divided across Aggressor and Infringer. By contrast, if Claimholder has to internalize the costs of infringement, then all of those costs would be concentrated on her, which seems like a much less fair outcome.

In other words, irrespective of whether one endorses the compensation thesis, one must have a view about who should internalize the costs in cases of blameless infringement like Consent Evidence and Forfeiture Evidence. Given the comparative implausibility of making Claimholder internalize those costs, one should hold that Aggressor must internalize these costs. Thus, one should resolve the trilemma presented in section 1 by endorsing the comparative fairness solution: it is not disqualifying for a theory or thesis to imply that Aggressor internalizes the costs of ϕ-ing, as all theories must ultimately have

18 Jorgensen Bolinger, "Moral Risk and Communicating Consent," 202.

19 Jorgensen Bolinger, "Moral Risk and Communicating Consent," 203.

this implication to avoid the comparatively worse implication that Claimholder must internalize the costs of Aggressor ϕ-ing.

While this proposed solution to the trilemma is superficially plausible, it will subsequently be argued that it does not succeed. First, however, sections 4–6 will provide an independent argument for rejecting the compensation thesis—namely, that the thesis is incompatible with (a plausible interpretation of) luck egalitarianism. This means that proponents of the thesis must incur the theoretical cost of committing themselves to the rejection of a (plausible interpretation of a) popular theory of distributive justice. Section 7 will then return to the comparative fairness solution, arguing that the previously introduced luck egalitarian approach reveals that Jorgensen's argument for this solution rests on a false dilemma. If one accepts a luck egalitarian theory of the kind described below, then one will have a principled basis for distributing the costs of Aggressor's ϕ-ing in an alternative way that is more plausible than either of the two options discussed just above. Thus, one cannot defend the implication that Aggressor must internalize the costs of ϕ-ing on the grounds that it is the most plausible of all the available options.

4. THE COMPENSATION THESIS AS A RIGHTS-BASED ALLOCATIVE THESIS

Before completing the foregoing argument against the compensation thesis, a second argument against the thesis must be introduced. This argument contends that the compensation thesis should be rejected because it is incompatible with (a plausible interpretation of) an influential theory of distributive justice, namely, luck egalitarianism. However, to show that these two positions are incompatible, one must first show that they both pertain to the same subject matter. To this end, the present section and section 5 will demonstrate that both positions are *rights-based allocative* theories of justice in the sense that they both (a) assign persons rights where (b) that assignment is a function of a prior judgment about the appropriate share of advantage that at least some persons should possess (where 'advantage' is a placeholder term referring to whatever it is that matters morally when it comes to distributive justice).[20] Having demonstrated this, section 6 will then argue that the two positions are incompatible, as they imply contradicting rights assignments, with luck egalitarianism implying the existence of rights that are negated by the compensation thesis. Thus,

20 Note that a theory need not provide a complete ascription of all of the rights possessed by all persons to qualify as a rights-based allocative theory; rather, it might merely posit *some* rights on the basis of a prior judgment about appropriate shares of advantage, with complementary theories then positing additional rights to complete the picture of which rights persons possess.

endorsing the compensation thesis requires rejecting luck egalitarianism (and vice versa).

That the compensation thesis implies an assignment of rights is readily apparent, as it asserts that person *A* owes duties of compensation to person *C* when *A* infringes one of *C*'s claims. Additionally, it is an *allocative* thesis in the following stipulative sense: the particular rights that it assigns to *C* and correlative duties that it assigns to *A* are a function of the shares of advantage that *A* should distribute to herself and *C ceteris paribus*.[21] Note that the compensation thesis is a thesis about how imposed costs are to be distributed in cases of rights infringement, where any theory of cost distribution is ultimately a theory about how *A* is to distribute advantage: to say that *A* should incur a cost of *x* in virtue of ϕ-ing is just to say that *A* should give herself a share of advantage equal to however much advantage she ends up with after ϕ-ing minus *x*. Finally, note that the thesis's assignment of rights is a function of these prescribed shares, as it assigns rights in such a way that agents discharging their correlative duties would realize the prescribed distribution of advantage. For example, in Consent Evidence, the thesis assigns Aggressor a remedial duty of compensation such that Claimholder does not end up with an improper share of advantage. More specifically, it holds that Aggressor, in virtue of her blameless ϕ-ing, uniquely loses rights—specifically Hohfeldian permissions—such that Claimholder ends up with the same share of advantage that she would have had otherwise, with Aggressor thereby fully internalizing the costs imposed by

21 This is not to say that *A*'s duty to compensate *C* is grounded in the fact that *A* should distribute certain shares of advantage to *A* and *C*, *ceteris paribus*. Rather, the fact that *A* has a compensatory duty is grounded in her prior infringement of *C*'s claim. However, the *particular* duty of compensation that is owed *is* grounded in the shares of advantage that *A* should allocate to *A* and *C*. Suppose that *A* trespasses on *C*'s property, causing *C* significant emotional distress. Given this costly infringement, the compensation thesis would assign *A* a duty to compensate *C* by providing a payment of, say, $1,000. The fact that *A* now has a compensatory duty—as opposed to no duty at all—is explained by the fact that *A* infringed *C*'s claim. However, if the question is what explains why *A* owes *C* $1,000 as opposed to $5 or $2,000, then the answer is facts about what shares of advantage *A* and *C* should possess in light of *A*'s infringement. Note that the mere fact that *A* infringed *C*'s claim cannot explain why *A* owes $1,000 versus $5. Thus, some other fact must function as the *explanans* beyond the fact of *A*'s infringement. Specifically, most rights theorists would seemingly affirm that *A* owes $1,000 to *C* because *C* is entitled to the share of advantage that she would have possessed absent *A*'s infringement (perhaps excluding any loss of advantage that *A* could not have foreseen). That facts about appropriate shares play this grounding/explanatory role is what makes the compensation thesis an allocative thesis (with this explanatory relation being what makes the thesis about appropriate shares "prior" to the assigned rights), without there being any contradiction between this proposed grounding relation and the proposition that *A*'s compensatory duty is grounded in the fact that she infringed on *C*'s claim.

ϕ-ing. Or alternatively, Aggressor might uniquely lose claims against Claimholder acting in ways that would make Aggressor internalize those costs. For example, she might lose claims against Claimholder seizing some of her holdings. In this way, the compensation thesis is revealed to be a thesis that assigns and negates rights—both permissions and claims—such that the discharging of all corresponding duties would realize a particular distribution of advantage among at least certain persons.

One might object that in describing the compensation thesis as an allocative thesis—with all the associated talk of distributing appropriate shares of advantage—the foregoing argument conflates *corrective justice* and *distributive justice*.[22] This distinction is one often drawn by torts theorists who see torts as a matter of corrective justice and *not* distributive justice.[23] Most minimally, those who endorse this distinction hold that principles of distributive justice assign shares of advantage while principles of corrective justice apply only in circumstances where an agent has wrongfully interfered with another.[24] In other words, corrective principles are distinct from distributive ones in that the former apply to only a subset of cases to which the latter apply. Given that the compensation thesis applies only in this proper subset of cases, one might conclude that it qualifies as a corrective principle rather than as a distributive principle. Some theorists elaborate on this minimal account by suggesting that principles of corrective justice differ from distributive principles in that they posit a more limited set of persons who either owe—or are owed—advantage-producing actions. For example, Jules Coleman argues that principles of corrective justice imply that only the wrongdoer has a duty to deliver resources to the wronged party; by contrast, distributive principles imply that other agents (e.g., the state) have duties to ensure that each person ends up with her appropriate share of advantage.[25] Finally, some theorists contend that corrective principles are distinct from distributive principles because the former imply a distinct set of rival prescriptions about which transfers persons should make.[26] On this

22 I am indebted to an anonymous reviewer for raising this worry.

23 For some influential examples of corrective theories of torts, see Weinrib, *The Idea of Private Law*; Coleman, *The Practice of Principle*; Gardner, *Torts and Other Wrongs*; and Ripstein, *Private Wrongs*.

24 See Gardner, *Torts and Other Wrongs*, 40; and Miller, "Justice," sec. 2.2. Strictly speaking, Miller puts things in terms of interference with *legitimate holdings*. However, unless one endorses the self-ownership thesis, it is not clear that Aggressor is interfering with Claimholder's holdings in Consent Evidence and Forfeiture Evidence, despite these being paradigmatic circumstances of corrective justice.

25 Coleman, *Risks and Wrongs*, 310–11. See also Weinrib, *The Idea of Private Law*, 71.

26 See Miller, "Justice," sec. 2.2; and Goldberg and Zipursky, *Recognizing Wrongs*, 356.

account, principles of corrective justice imply that wrongdoers should make remedial transfers to their victims even when doing so upsets the distribution of advantage that is just according to the correct principle of distributive justice.

For these purposes, one can grant there is a distinction between distributive justice and corrective justice, as the incompatibility argument that will be made in section 6 requires affirming only that the compensation thesis is an allocative principle in the very weak sense described above: it must simply assign at least some person(s) a duty to ensure that another person ends up with a particular share of advantage. So long as the compensation thesis assigns duties in this way, it will have overlapping subject matter with the interpretation of luck egalitarianism that will be provided in section 5, thereby allowing for the subsequent demonstration that the two positions are incompatible.[27] Granted, the compensation thesis may not qualify as a distributive principle as the tort theorists above use the term. However, for the purposes of this argument, the thesis need not be distributive in this strong sense, and this is not what is asserted above. Rather, the contention advanced here is merely that the compensation thesis has at least some implications for when persons have duties to ensure that others attain a particular share of advantage, where this makes the thesis of a kind with luck egalitarianism (albeit a more general kind than what the tort theorists label "distributive principles").

5. Luck Egalitarianism as a Rights-Based Allocative Theory

To show that luck egalitarianism has the same subject matter as the compensation thesis—and that the two positions are in fact incompatible—the theory must be presented in some detail. Specifically, luck egalitarians hold that the distribution of advantage is just if and only if any inequality corresponds to some sanctionable choice on the part of the worse-off.[28] Different luck egalitar-

27 Indeed, despite holding that there is a difference in kind between corrective principles and distributive principles, Weinrib grants that the two have overlapping subject matter (*The Idea of Private Law*, 70).

28 This statement of luck egalitarianism must be precisified in two respects. First, 'corresponds' must be read as implying that the inequality is proportionate to the sanctionable choice in question (as a given sanctionable choice might justify an inequality of only a certain magnitude). Second, many luck egalitarians hold that there is an additional individually necessary and jointly sufficient condition of a distribution being just: not only must any inequality imply a corresponding sanctionable choice, but any sanctionable choice must also imply a corresponding inequality. That said, some luck egalitarians such as Shlomi Segall reject this additional necessary condition (*Why Inequality Matters*). Additionally, note that 'sanctionable' here should not be read as implying some sort of wrongdoing on the part of the worse-off party. Rather, a sanctionable choice is any choice

ian theories then render this proposition fully determinate by specifying what advantage includes and which choices count as "sanctionable."

One can get a pretheoretical, intuitive sense of which actions count as sanctionable by considering the following pair of cases alongside the standard luck egalitarian evaluation of said cases.

> *Coyote Bite*: When she was a baby, Agent was bitten by a coyote while momentarily left unattended on the front stoop. As a result of the bite, she now suffers from untreatable pain. She otherwise lives a life identical in quality to that of her neighbor, Compensator.

In this case, Agent is left worse-off than Compensator by her injury. Additionally, there is no sanctionable choice on her part that would justify this inequality. She did not cause her own injury, and even if she did, she would not have been responsible for that injury given that she was a baby. And by hypothesis,

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made by the worse-off party that justifies inequality, with the "sanction" in question being the party losing any claim to redistributive transfers. For example, if making avoidable gambles is what justifies inequality, then someone who invests in a risky stock and ends up worse-off as a result chooses sanctionably, even though she does not commit any sort of wrongdoing by investing.

Some might take this presentation of luck egalitarianism to be idiosyncratic, as it follows my favored characterization of the position (as developed in Spafford, "Luck Egalitarianism Without Moral Tyranny" and *Social Anarchism and the Rejection of Moral Tyranny*), where this characterization departs from more orthodox characterizations of luck egalitarianism. For example, an anonymous reviewer objects that luck egalitarians do not want to sanction/penalize choices; rather, they want to hold people responsible for their choices. However, the paper uses my formulation because it is a maximally general way of defining luck egalitarianism that is inclusive of the reviewer's formulation while also accommodating other articulations of the position. According to the reviewer's orthodox formulation of luck egalitarianism, an inequality is just iff (roughly) it resulted from the worse-off party's choice(s). By contrast, luck egalitarians like Jens Damgaard Thaysen and Andrea Albertsen (discussed below) take an inequality to be just if the worse-off party created a cost that must be borne by someone. See Thaysen and Albertsen, "When Bad Things Happen to Good People." The advantage of my proposed formulation of luck egalitarianism is that it can declare both of these rival views to be variants of luck egalitarianism, differing only with respect to the account of sanctionable choice they incorporate into the broader theory. On the orthodox formulation, a person chooses sanctionably when she leaves herself worse-off than another; on Thaysen and Albertsen's view, she chooses sanctionably when she creates a cost that someone has to internalize. But despite this point of disagreement, both proposals would qualify as variants of luck egalitarianism on my proposed account. Finally, one might also note that my proposed formulation resembles the general formulation of luck egalitarianism posited by G. A. Cohen (*Rescuing Justice and Equality*, 7), which similarly departs from the orthodox formulation posited by the reviewer. For various alternative statements of luck egalitarianism, see Temkin, *Inequality*, 13; Vallentyne, "Brute Luck and Responsibility," 58; Arneson, "Liberalism, Capitalism, and 'Socialist' Principles," 243; and Lippert-Rasmussen, *Luck Egalitarianism*, 1.

she has not done anything else that might play the appropriate justificatory role. Thus, luck egalitarians would hold that the inequality between Agent and Compensator is unjust, with justice thereby requiring that Compensator make transfers to Agent such that Agent is partially compensated for her suffering. Specifically, if there are n total people including Agent and Compensator, they are otherwise equally situated, and the loss of advantage that Agent incurs is equal to x, then justice would require that each person make a transfer to Agent such that all persons incur a cost equal to x/n, thereby realizing an equal distribution of advantage.[29] Thus, given the simplifying assumption that there are no other parties present in Coyote Bite besides those who are named—a simplifying assumption that will also be made for all other cases discussed in this paper—Compensator must make transfers up to the point where both she and Agent end up with $x/2$ fewer units of advantage than they would have had absent the coyote attack.

This assessment can be contrasted with that of the following case.

> *Coyote Wrestling*: Despite knowing the dangers involved, Agent decides to wrestle a coyote for fun. In the process, she is bitten by the coyote, and the resulting injury leaves her with untreatable pain. She otherwise lives a life that is identical in quality to that of her neighbor, Compensator.

In this case too, Agent is left worse-off than Compensator by her injury. However, unlike in Coyote Bite, luck egalitarians will say that Agent made a sanctionable choice when she decided to wrestle the coyote, where this choice renders the inequality between Agent and Compensator just. By declaring the inequality just, they are thereby able to avoid the implausible conclusion that justice requires Compensator making costly transfers to Agent. Given that it would seemingly be unfair if Agent and Compensator had to equally share the costs generated by Agent's choice, a theory of justice that prescribes such a distribution—e.g., one that demands strict equality—lacks extensional adequacy.

29 This assumes that the marginal advantage produced by the transfers is neither diminishing nor increasing. There is also a further assumption that what matters is equality across lifetimes, with the posited transfer making Agent better-off later in her life to make up for her being worse-off than others prior to the transfer. There is some debate among egalitarians over whether equality must be realized across entire lives (see Dworkin, *Sovereign Virtue*, 89; Lippert-Rasmussen, *Luck Egalitarianism*, 154–56; and Segall, *Why Inequality Matters*, 86–89) or across shorter segments of time as well (see McKerlie, "Equality and Time" and "Justice Between the Old and the Young"; and Temkin, *Inequality*). However, as Segall notes, those in the latter camp still hold that egalitarians are concerned with lifetime equality such that one has reason to realize it at the expense of creating inequalities across shorter spans of time (*Why Inequality Matters*, 84).

By contrast, luck egalitarianism preserves its extensional adequacy by requiring that Agent internalize these costs.

There are various accounts of sanctionable choice that yield the judgment that Agent chooses sanctionably in Coyote Wrestling but not Coyote Bite. For example, the classical account holds that a person chooses sanctionably iff her choice leaves her worse-off than others and she is responsible for this outcome.[30] However, in light of the various concerns that have been raised about this account, one might instead follow Jens Damgaard Thaysen and Andreas Albertsen, who contend that sanctionable choices are ones that generate costs that must be borne by someone.[31] More precisely, these choices generate a smaller quantity of total advantage than some alternative choice available to the agent. In other words, they are choices that make it such that someone must end up with less advantage than they otherwise could have had.

By declaring choices of this kind sanctionable, luck egalitarians ensure that it is the agent who ends up internalizing these imposed costs rather than anyone else. For example, in Coyote Wrestling, Agent chooses sanctionably because she makes it such that there is less total advantage to go around. Had she made a different choice, everyone could have lived rich, pain-free lives. However, by wrestling a coyote, she makes it so that someone must be left comparatively worse-off: either Agent's life goes worse due the resultant pain, or she is compensated for her suffering but at Compensator's expense. Given that someone must bear a cost as the result of her choice, that choice is sanctionable.

30 See Dworkin, *Sovereign Virtue*, 73; Cohen, *Why Not Socialism?* 17–18; and Lippert Rasmussen, *Luck Egalitarianism*, 2, 5.

31 Thaysen and Albertsen, "When Bad Things Happen to Good People." For an influential objection to the classical account, see the "boring problem" raised by Susan Hurley, *Justice, Luck, and Knowledge*, 160–61. Granted, I have recently argued that the boring problem is not, in fact, a problem for luck egalitarians (Spafford, review of *Strokes of Luck*, 432–33). However, there are other significant challenges to the classical account that are much harder to dismiss. See, e.g., Olsaretti, "Responsibility and the Consequences of Choice." Regarding the choice to adopt Thaysen's and Albertsen's account here, it should be noted that I actually defend a rival account of sanctionable choice in Spafford, "Luck Egalitarianism Without Moral Tyranny" and *Social Anarchism and the Rejection of Moral Tyranny*. That said, my favored account largely aligns with Thaysen's and Albertsen's while being a fair bit more complex; thus, for the sake of simplicity, I use their account in what follows (though the account is ultimately adjusted such that it more resembles mine for reasons discussed in section 6 below). (See also note 34 below.) Granted, there are other accounts one might adopt instead. For example, the boring problem has led Gerald Lang to reject the classical account of sanctionable choice and propose an original alternative ("How Interesting Is the 'Boring Problem' for Luck Egalitarianism?" and *Strokes of Luck*). However, given his doubts about the adequacy of his own proposal (*Strokes of Luck*, 196–99), one might reasonably endorse Thaysen's and Albertsen's account (either independently or as a comparatively-easy-to-work-with approximation of my own favored view).

Thus, on this interpretation of luck egalitarianism, any inequality generated by her internalizing the generated costs is just.

So far, this discussion has all attempted to describe the particular shares of advantage that luck egalitarians think that a person should distribute to others, *ceteris paribus*. In other words, it has discussed the allocative aspect of luck egalitarianism. However, to show that the position is a rights-based allocative theory, it must show that luck egalitarianism assigns rights on the basis of its prescribed shares. To see why this is a plausible interpretation of the theory, note that the characterization of the theory above already suggests that the theory is appropriately stated in terms of rights. Specifically, note that the apparent questions that luck egalitarians seek to answer are (a) whether Compensator acquires a *duty* to eliminate inequality in Coyote Bite/Coyote Wrestling by either transferring advantage to Agent or simply leveling down by reducing her own share of advantage and (b) whether Agent has a *duty* to refrain from acting in ways that would involuntarily transfer advantage from Compensator or level down by reducing Compensator's share of advantage. After all, the point of the theory is seemingly to determine the permissibility of redistribution, where this permissibility will be a function of persons' various permissions and duties to redistribute. Thus, luck egalitarianism must be construed as a theory of duties. Of course, duties do not necessarily entail the existence of some correlative right, as they might be nondirected, i.e., not owed to any particular person(s). However, it seems plausible to think that luck egalitarianism's posited duties *are* directed given the fact that it seems that Compensator would *wrong* Agent in Coyote Bite if she were to refuse to transfer any advantage to Agent. To fail to discharge this duty would be to deny Agent her just share and also benefit at Agent's expense. Such a choice would seemingly give Agent a basis for complaint against Compensator and render feelings of resentment on her part apt—where both of these facts are signature features of Agent having a right infringed. And for identical reasons, it seems that Agent would wrong Compensator in Coyote Wrestling if she were to try to restore equality by either taking some of Compensator's holdings or otherwise diminishing Compensator's advantage.[32]

32 Note that pure telic luck egalitarians would likely not endorse a rights-based interpretation of luck egalitarianism. For such luck egalitarians, inequality in the absence of sanctionable choice is a bad-making property of states of affairs that consequentialist agents must weigh against their various good-making properties when determining which realizable state of affairs has the maximal quantity of moral value. Given this view, telic egalitarians tend not to posit that persons have any sort of right to equality (for the original introduction of this distinction, see Parfit, "Equality or Priority?" 84). However, their views might end up being coextensive with the proposed theory depending on how much comparative moral weight they assign to the badness of inequality versus good-making properties like the

While luck egalitarianism is not typically articulated using the language of rights, I have recently defended a luck egalitarian theory that rejects the existence of property claims and instead assigns persons natural luck egalitarian rights over resources. On my view,

> Each person [is assigned] a set of claims such that the luck egalitarian principle would be satisfied if all persons respected the claims of others—that is, any inequality would appropriately correspond to some sanctionable choice on the part of the worse-off individuals. Or, to put this point slightly differently, each person would have a claim against anyone else using an unowned resource in some way if and only if that use would leave her with less than her appropriate share of advantage, where her *appropriate* share is either (a) equal to the respective shares of those who have not yet chosen sanctionably if she has also not yet chosen sanctionably or (b) adjusted downward from this value if she has chosen sanctionably.[33]

Notably, condition b implies that sanctionable choice leads to rights forfeiture. For example, prior to wrestling the coyote, Agent has a set of claims against others using resources in ways that will leave her worse-off than them. However, after her choice, she loses some subset of these claims. Specifically, if one endorses the general approach to sanctionable choice posited above, she loses a subset of claims such that justice requires her fully internalizing the costs that she produces (such that Compensator does not have to internalize those costs).

When luck egalitarianism is presented in these terms—namely, as a theory of egalitarian rights that are forfeited when agents choose sanctionably by generating costs—then it becomes apparent that it is a theory of the same kind as the compensation thesis. Specifically, both theories assign rights and duties such that everyone discharging their respective duties will realize a desired

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total quantity of advantage that persons possess. Note that even if persons have directed luck egalitarian duties to realize particular distributive states of affairs, these are just *pro tanto* considerations that might be overridden by other consequentialist considerations such as the effect that discharging those duties would have on the total quantity of advantage. Typically, this overriding occurs when the goodness of the consequentialist considerations is x times greater than the badness of infringing the right. Thus, very roughly, if telic egalitarians declare the badness of luck-based inequality to be x times weightier than the goodness of rival considerations, their judgments of all-things-considered permissibility will be coextensive with those of rights-based luck egalitarians. That said, telic luck egalitarianism would fail to capture the apparent directedness of redistributive duties just described in the main text, making rights-based luck egalitarianism the superior theory even if the two views prescribe/proscribe the same actions.

33 Spafford, *Social Anarchism and the Rejection of Moral Tyranny*, 52.

distribution of advantage across at least certain persons. The question then becomes whether these two theories are compatible. The subsequent section will answer this question in the negative: the two theories imply incompatible judgments when applied to cases of blameless wronging like Consent Evidence and Forfeiture Evidence.

6. The Incompatibility of Luck Egalitarianism and the Compensation Thesis

According to the interpretation of luck egalitarianism provided just above, an agent loses claims against others using resources in advantage-diminishing ways when the agent makes a choice that generates costs. However, the proposal is arguably imprecise, as a natural amendment to this statement is that the agent loses these claims only if the evidence she possesses (and the evidence that she reasonably ought to have gathered) suggests that her action will generate such costs. To motivate this thought, consider the following case.

> *Coyote Surprise*: Agent decides to go for a run in an urban area known for its safety. However, in an unprecedented event, a coyote that had just escaped from a nearby zoo leaps out of a bush and bites Agent, and the resulting injury leaves her with untreatable pain. She otherwise lives a life that is identical in quality to her neighbor, Compensator.

Intuitively, it seems that Agent's normative status in Coyote Surprise is of a kind with Agent's status in Coyote Bite rather than with Agent's status in Coyote Wrestling. Specifically, in both Coyote Bite and Coyote Surprise, it seems unfair if Agent is left worse-off than Compensator. By contrast, it does not seem unfair if Agent is left worse-off than Compensator in Coyote Wrestling—and in fact, it would seemingly be unfair if Compensator had to compensate Agent for her suffering.

If this intuitive judgment is determinative, then one must adjust the proposed account of sanctionable choice to accommodate it. As currently stated, the account implies that Agent chooses sanctionably in Coyote Surprise, as she acts in a way that generates costs: had she not chosen to go for a run, the coyote, by hypothesis, would not have bitten anyone, with no distributable costs thereby being generated. To avoid this implication, the account must be amended such that Agent's choice in Coyote Surprise does not count as sanctionable. An extensionally adequate account will thus deliver this judgment while still preserving the implications that (a) Agent chooses sanctionably in Coyote Wrestling and (b) Agent does not choose sanctionably in Coyote Bite.

To deliver these results, one can adjust the account by making sanctionable choice a function of *blameworthy* cost imposition, with evidence-based foreseeability being a necessary condition of blameworthiness.[34] On this approach, the explanation for why it is fair to hold Agent accountable for the imposed costs in Coyote Wrestling is that Agent is to blame for those costs (as she both causes them, and the possessed and relevant evidence suggests that her choice will bring them about). Similarly, it would be unfair to hold Agent accountable in Coyote Bite because she is not to blame for those costs (since she did not cause them). And while Agent *does* cause the costs in Coyote Surprise, that imposition of costs is also not blameworthy (due to the fact that given both her

34 This proposal has been endorsed by various luck egalitarians such as Carl Knight ("Egalitarian Justice and Expected Value" and "An Argument for All-Luck Egalitarianism"), and it is one that I defend elsewhere (Spafford, "Luck Egalitarianism Without Moral Tyranny" and *Social Anarchism and the Rejection of Moral Tyranny*, ch. 6). More precisely, I make sanctionable choice depend upon whether the agent has *reason to expect that* her action will generate costs (where the expected value of an action might be positive even if it is foreseeable that it might impose costs). However, making mere foreseeability a necessary condition of sanctionable choice is a weaker assumption than adopting my full account, so this argument incorporates the former position rather than the latter.

The posited proviso could be made weaker still by making foreseeability alone a necessary condition of sanctionable choice (rather than blameworthiness more generally) without compromising the validity of the paper's argument. However, the theoretical advantage of the more general proviso is that it seems less ad hoc, as it provides a unifying explanation of *why* foreseeability is a necessary condition of sanctionable choice that is intuitively plausible (as it is plausible that one must be blameworthy if one is to be left comparatively worse-off). The disadvantage of positing the more general proviso is that it will not be applicable to various other accounts of sanctionable choice. Note that a blameworthiness proviso seems apt when appended to the account of sanctionable choice endorsed by the paper (namely, Thaysen's and Albertsen's account); however, it would not seem apt if one adopted instead an account that declared a choice sanctionable iff it resulted in the chooser ending up worse-off than another party. This is because imposing avoidable costs that must now be distributed seems like a form of wrongdoing that might therefore be blameworthy while simply leaving oneself worse-off is not obviously wrongdoing and thus is not the sort of choice that can be blameworthy. That said, rival accounts of sanctionable choice will still seemingly need to posit some analog to the blameworthiness proviso to avoid objectionable implications (e.g., that an agent chooses sanctionably if she leaves herself worse-off in a way that she could not have foreseen). For example, while Dworkin articulates his version of luck egalitarianism very differently from how things are presented here, he would hold that (a) an inequality between Agent and Compensator in Coyote Surprise—i.e., holding Agent responsible in this case—would be justified only if Agent had declined an opportunity to insure against this outcome and (b) Agent has such an opportunity to insure only if she knows the risk of the outcome occurring (*Sovereign Virtue*, 77). Given that one cannot know the risk of an unforeseeable outcome occurring, it follows that foreseeability is a necessary condition of holding individuals responsible on Dworkin's view, where this is akin to the posited blameworthiness proviso.

evidence and the evidence more broadly available to her, she could not foresee that her action would impose those costs).

If this is correct, then the rights-based approach to luck egalitarianism can be understood as asserting the following: in any case where some person carries out some cost-imposing action ϕ, her *rights to advantage*—i.e., her permissions to act in ways that would yield some specified share of advantage and her claims against actions that would reduce this share of advantage—are uniquely lost only if either her possessed evidence or the relevant evidence suggests that ϕ-ing will generate costs that must ultimately be distributed across persons.[35] Thus, Agent would not uniquely lose any rights to advantage in Coyote Surprise but would uniquely lose such rights in Coyote Wrestling.

Contrast this result with that implied by the compensation thesis. The latter holds that when Aggressor ϕs in cases like Consent Evidence and Forfeiture Evidence, she uniquely loses those rights to advantage that would cause her to fully internalize the costs that she generates. Further, Aggressor loses these rights even though neither her evidence nor the relevant evidence suggests that ϕ-ing will impose these costs. However, note that this conclusion directly contradicts the luck egalitarian thesis presented in the previous paragraph, namely, that blameworthiness is a necessary condition of a person uniquely losing rights to advantage. Thus, accepting the compensation thesis requires rejecting rights-based luck egalitarianism.[36] This is a high theoretical cost for a rights theorist to incur, as it yokes the adequacy of the thesis to the falsity of a plausible interpretation of a popular theory of distributive justice. While this might not trouble libertarians and others who explicitly reject luck egalitarianism,

35 The reason for the qualifier 'unique' is that, strictly speaking, luck egalitarians will hold that a person's rights set *is* diminished in any case where she either imposes or incurs costs, e.g., Coyote Surprise and Coyote Bite. However, it is diminished along with everyone else's set of rights, as each person's set of rights are adjusted to ensure that the imposed/incurred costs are evenly distributed (i.e., full compliance with everyone's adjusted rights will result in each person receiving a share of advantage that is smaller than the one she would have otherwise received and smaller to an equal degree).

36 One might try to avoid contradiction by amending luck egalitarianism's necessary condition of unique rights loss such that is disjunctive: a person loses rights to advantage in virtue of ϕ-ing when *either* the relevant evidence indicates that ϕ-ing will impose costs *or* ϕ-ing infringes someone's rights. However, this proposal seems unacceptably arbitrary. Why is it that in some cases (e.g., Coyote Surprise), being blameless for ϕ-ing precludes Agent from forfeiting rights to advantage that she otherwise would have forfeited, but in other cases (e.g., Consent Evidence), blamelessness does not preclude Aggressor from forfeiting such rights? Absent a principled explanation of this supposed difference, one cannot plausibly maintain that blamelessness sometimes precludes forfeiture but does not have this effect in cases of rights infringement.

rights theorists without such commitments might be reluctant to take on such a significant commitment vis-à-vis distributive justice.

More directly, to affirm the compensation thesis is to deny that blamelessness insulates agents from uniquely losing rights to advantage. Thus, proponents of the solution cannot appeal to Agent's blamelessness in Coyote Surprise to support the exculpatory judgment that Agent does not have to fully internalize the costs she incurs as a result of going for a run. Absent this theoretical resource, they may find themselves committed to the proposition that justice requires Agent fully internalizing the costs of being attacked by a coyote in Coyote Surprise—a result that many might find troubling even setting aside the more general question of whether the compensation thesis is incompatible with rights-based luck egalitarianism.

7. AGAINST THE COMPARATIVE FAIRNESS SOLUTION

Having introduced luck egalitarianism, it is now possible to explain why the comparative fairness solution does not adequately resolve the trilemma of section 1. Recall that this solution holds that it is in fact fair for agents to internalize the costs of blameless ϕ-ing. Granted, this position is *prima facie* implausible, as even Jorgensen concedes that it seems unfair to make agents like Aggressor bear the costs in cases of blameless rights infringement. However, as noted above, Jorgensen suggests that it is ultimately fair to make Aggressor internalize the costs of blameless ϕ-ing because this is the least unfair option available (since the alternative of making Claimholder internalize those costs is even less fair).

This section argues that this inference rests on a false premise: if one accepts the luck egalitarian position, then one can—and indeed must—endorse a third, alternative prescription vis-à-vis Consent Evidence and Forfeiture Evidence. Further, this alternative appears to be a fairer option than either of the ones that Jorgensen considers. Thus, one cannot defend the comparative fairness solution by appealing to the comparative unacceptability of the available alternative(s).

To see what luck egalitarianism implies vis-à-vis Consent Evidence/Forfeiture Evidence, recall first what it prescribes in cases like Coyote Bite and Coyote Surprise, wherein an agent imposes costs but is not blameworthy for doing so. As noted in section 5, if all parties start out equally situated, then any imposed costs must be equally distributed across persons. Thus, in both cases, if the pain of the coyote bite reduces Agent's advantage by x units, then Compensator must make transfers to Agent such that they each incur a cost of $x/2$ (since there are only two parties present in the scenario). This distribution of costs ensures that the overall distribution of advantage remains equal, thereby

avoiding the injustice of an inequality that cannot be vindicated by some sanctionable choice on the part of the worse-off.

Given that Consent Evidence and Forfeiture Evidence are of a kind with Coyote Bite and Coyote Surprise—i.e., they are cases in which an imposed cost that does not correspond to some sanctionable choice must be distributed—luck egalitarians would prescribe the same distribution of costs: Aggressor and Claimholder should each internalize half of the total costs of Aggressor ϕ-ing.[37] Thus, luck egalitarianism reveals (via its prescription) that there is an alternative way of distributing the costs of blameless ϕ-ing beyond having either Aggressor or Claimholder fully internalize them. Further, note that this proposed distribution seems fairer than either of the proposed alternatives. Given that no one is to blame for the imposed costs, it would be arbitrary—and thus unfair—to make only Aggressor or only Claimholder incur those costs. By contrast, an equal division of costs across persons seemingly avoids this arbitrariness/unfairness.

Finally, note that this proposal also resolves Jorgensen's worry that it would be comparatively less fair for Claimholder to internalize the costs of Aggressor ϕ-ing in cases where Claimholder, for social reasons, is prone to having her rights infringed. Recall the case from section 3 wherein Claimholder ends up having her claims infringed by both Aggressor blamelessly ϕ-ing and, later, Infringer blamelessly ϕ-ing. The plausible suggestion above was that it would be fairer for Aggressor and Infringer to internalize their respective imposed costs than have Claimholder internalize both sets of costs. However, again, to consider only these two options is to propose a false dilemma, as the luck egalitarian would endorse a third option that seems fairer than either of the aforementioned ones: for each instance of blameless rights infringement, each party should internalize an equal share of the costs. In other words, Aggressor, Infringer, and Claimholder would each absorb one-third of the costs of Aggressor ϕ-ing and one-third of the costs of Infringer ϕ-ing. This outcome precludes Claimholder from having to bear any special burden resulting from others' propensity to infringe her rights.

Given that Aggressor internalizing the costs of blameless ϕ-ing is not the least unfair option available, Jorgensen cannot infer that it is fair *tout court*. Thus, Jorgensen's argument for the comparative fairness solution must be rejected. Further, one should reject the solution itself, as it is *prima facie* implausible and

37 For a related suggestion, see Preda, who proposes that in certain cases of permissible infringement where someone infringes a claim as an unavoidable side effect of enforcing a different claim to some state of affairs obtaining, the costs of that infringement should be shared by everyone who had a correlative duty to realize that state of affairs ("Are There Any Conflicts of Rights?" 686–87).

is no longer backed by a supporting argument capable of overriding that *prima facie* judgment.[38] This rejection, when paired with section 2's rejection of the noninfringement solution, leaves only one remaining option for resolving the trilemma of section 1: reject the compensation thesis.

8. ARGUMENTS FOR THE COMPENSATION THESIS

The previous sections have presented two distinct arguments against the compensation thesis. First, there was the incompatibilist argument of sections 4–6, which tried to show that those who endorse the thesis must pay the high theoretical price of rejecting (rights-based) luck egalitarianism. Second, there was the argument by elimination: to resolve the trilemma of section 1, one must choose between endorsing the noninfringement solution, endorsing the comparative fairness solution, or rejecting the compensation thesis, where only the last-mentioned option is theoretically acceptable. However, these arguments must be weighed against the positive arguments that can be marshalled in support of the compensation thesis. This section considers six such arguments and argues that none of them succeed.

To begin, one might argue for the compensation thesis—and simultaneously object to the incompatibility argument of section 6—by suggesting that, actually, luck egalitarianism *implies* the judgment that Aggressor must uniquely compensate Claimholder in cases like Consent Evidence and Forfeiture Evidence, which is to say that luck egalitarianism implies the compensation thesis. This argument takes the signature commitment of luck egalitarianism to be holding people responsible for their choices by making them internalize the resulting costs. For example, when agents gamble and lose, luck egalitarians classically hold that any resulting inequality is just, with the losers thereby not being entitled to any compensation for their bad *option luck*.[39] Further, to compensate them would be *unjust*, as that would make others absorb the costs of their reckless choices.

38 Jorgensen also gives a second quick argument in defense of the comparative fairness solution. Specifically, she notes that it would be appropriate for Claimholder to internalize the costs of Aggressor ϕ-ing if Claimholder had consented to that ϕ-ing; however, given that Claimholder has not consented in cases of blameless wronging, it would be inappropriate for her to internalize those costs—where this leaves only Aggressor to absorb the costs (Jorgensen Bolinger, "Moral Risk and Communicating Consent," 202). The problem with this argument is that just because Claimholder consenting is a sufficient condition of it being appropriate for Claimholder to internalize the costs of ϕ-ing, it does not follow that it is also a necessary condition.

39 Where option luck contrasts with *brute luck*, i.e., inequality-grounding costs that are the result of luck but not avoidable gambles (e.g., the costs imposed by congenital health conditions).

However, when applied to Consent Evidence and Forfeiture Evidence, luck egalitarianism would then imply that Aggressor should absorb the costs of her choice to ϕ, as this outcome would be just (because it is simply making Aggressor internalize the costs resulting from the gamble she made by ϕ-ing), with the alternative being unjust (as Claimholder would then be forced to absorb the costs created by Aggressor).[40] Further, the way to make it such that Aggressor internalizes the costs of her wrongdoing is by having her pay compensation to Claimholder. Thus, contrary to the foregoing argument, luck egalitarianism actually supports the compensation thesis's contention that wrongdoers have a unique duty to compensate the wronged parties for any harm inflicted.[41]

The reply to this argument begins with the observation that there are many rival interpretations of luck egalitarianism, each with its own distinct set of implications. Some of these interpretations offer rival accounts of what qualifies as advantage (i.e., what it is that must be distributed equally in the absence of sanctionable choice); others differ with respect to whether they declare an equality unjust when one party has chosen sanctionably (as discussed in note 28 above). For these purposes, the relevant point of interpretive disagreement is over which choices qualify as sanctionable. Specifically, note that the just presented luck egalitarian argument for the compensation thesis presupposes the

40 Note that this judgment also aligns with the prescriptions of the *responsibility account*, a widely endorsed position in the literature on self-defense. According to those who defend some version of this account (e.g., McMahan, "The Basis of Moral Liability to Defensive Killing"; Otsuka, "Killing the Innocent in Self-Defense," 91; and Gordon-Solmon, "What Makes a Person Liable to Defensive Harm?"), when *P* threatens *Q* with wrongful lethal harm, fairness requires that *P* internalize that harm rather than *Q*. Thus, *Q* can permissibly defend herself by killing *P* in such circumstances. This seems to be an implication of the more general luck egalitarian view that fairness requires agents internalizing the costs they create (as noted by Gordon-Solmon, "What Makes a Person Liable to Defensive Harm?" 546). If this is right, the advocate of the proposed argument/objection might hold that the compensation thesis and the responsibility account are both facets of luck egalitarianism. Notably, similar remarks might apply to Jorgensen's fairness-based account of self-defense, which builds on the responsibility account by positing that *Q* can permissibly defend herself if *P either* threatens *Q* with wrongful harm *or* gives *Q* evidence that she has threatened *Q* with harm (along with various constraints that cannot be listed here). See Jorgensen Bolinger, "The Moral Grounds of Reasonably Mistaken Self-Defense," 147. While this account diverges from standard responsibility accounts in that it makes permissible self-defense a function of evidence versus mere harm, this extension might be seen as aligning with evidentialist versions of luck egalitarianism such as the one that I endorse ("Luck Egalitarianism without Moral Tyranny" and *Social Anarchism and the Rejection of Moral Tyranny*). If both Jorgensen's responsibility account and her defense of the compensation thesis do indeed follow from a more general luck egalitarian approach to justice, that would make her views of consent and self-defense coherent in a way that is theoretically attractive.

41 I am grateful to an anonymous reviewer for raising this argument/objection.

following interpretation of sanctionable choice: an agent chooses sanctionably if she makes it such that an otherwise avoidable cost must now be absorbed by some person(s). Thus, when Aggressor generates a distributable cost in Consent Evidence/Forfeiture Evidence, she is held to have made a sanctionable choice, making the just outcome one where she is left worse-off than Claimholder.

This proposed account of sanctionable choice is seemingly identical to the one proposed in section 5. There, following Thaysen and Albertsen, it was suggested that a sanctionable choice is one that generates costs that must be borne by someone—with this account supporting the just presented argument's conclusion that Aggressor chooses sanctionably in Consent Evidence/Forfeiture Evidence. However, recall that section 6 argued that an interpretation of luck egalitarianism that incorporates this account of sanctionable choice is extensionally inadequate, as it generates unacceptable results in Coyote Surprise. In that case, it was posited that Agent does not choose sanctionably (i.e., it would be unjust if she were left worse-off than others) despite the fact that she made a choice that generated costs. Given that the posited interpretation of luck egalitarianism/sanctionable choice yields an unacceptable result in Coyote Surprise, it was argued that one must reinterpret the notion of sanctionable choice such that sanctionable choices include only those where the agent is *blameworthy* for producing some cost (where blameworthiness is a function of what is foreseeable given the available evidence). Finally, since Aggressor is not blameworthy in either Consent Evidence or Forfeiture Evidence, this extensional adequacy-improving (re)interpretation of luck egalitarianism implies that she does not choose sanctionably and thus that it would be unjust if she had to fully internalize the cost of ϕ-ing. In short, while some interpretations of luck egalitarianism do imply the compensation thesis—and thus function as arguments for the thesis—these interpretations are unacceptable due to being extensionally inadequate.[42] The first proposed argument for the compensation

42 What, then, is the relationship between luck egalitarianism and the responsibility account discussed in note 40 above? Answering this question is complicated by the fact that proponents of the responsibility account are typically interested in determining how to distribute only *indivisible* costs, whereas the proposed interpretation of luck egalitarianism generally presupposes that costs are divisible, e.g., when it prescribes that costs are to be equally shared in cases of blameless cost imposition. One possibility is that the proposed interpretation of luck egalitarianism is incompatible with the responsibility account, as the former might imply that if *P* threatens *Q* with wrongful indivisible harm—but is not blameworthy for doing so, i.e., her choice is not a sanctionable one—then a coin should be flipped to determine who should incur the cost. Such incompatibility would mean that the argument from Coyote Surprise would have to be weighed against whatever reasons there are for accepting the responsibility account. Alternatively, one might take luck egalitarianism and the responsibility account to have distinct subject matters, with the former applying only to cases where costs are divisible while the latter applies only to

thesis is therefore unsound (and also fails as an objection to the incompatibility argument of section 6).

Second, one might endorse the compensation thesis on the more general grounds that it would be unfair if the rights holder had to incur costs generated by someone violating her rights.[43] However, the discussion of the previous section serves to undermine this proposal. While it might initially seem unfair to impose costs on Claimholder in cases like Consent Evidence and Forfeiture Evidence, this judgment is substantially softened once one considers that the only alternative is making a blameless Aggressor fully internalize the costs—an alternative that runs contrary to both luck egalitarianism and the broad set of intuitive judgments to which its proponents appeal. As discussed in section 7, once one notes that it seems equally unfair for either a blameless Aggressor or a wronged Claimholder to fully internalize the costs of Aggressor's blameless action, then having Claimholder internalize half of the imposed costs does not seem unfair.

Third, one might appeal to Loren Lomasky's argument for the compensation thesis.[44] Unfortunately, this argument rests partially on Lomasky's theory about the grounds of rights, and fully recapitulating and critically engaging with this theory would go beyond the scope of this paper. However, a more general version of the argument can be posited that does not presuppose Lomasky's grounding theory. On this reconstruction, when assessing who should internalize the costs of ϕ-ing, one must look to whose projects are advanced by the ϕ-ing (where a project is roughly an end that a person is committed to realizing via some long-term, self-conception-modifying, life-structuring plan).[45] For example, in the Permissible Infringement case, Lomasky notes that it is only Hiker whose ends are advanced by the use of Owner's cabin. Again, setting aside the exact details of Lomasky's account, he suggests that it would be inappropriate for Owner to then incur the costs associated with Hiker using the cabin to survive for the sake of pursuing Hiker's various projects. Indeed, one might generalize this judgment by positing that it is unfair to make a victim of rights infringement internalize the costs of said infringement when the benefits

cases where costs are indivisible (and those costs will be imposed via one party wronging another). This approach would render the two positions compatible, as luck egalitarianism would imply that costs should be shared equally in Forfeiture Evidence without the further implication that it would be wrongful for Claimholder to kill Aggressor if Aggressor would otherwise kill her (i.e., if the costs to be distributed were indivisible). Unfortunately, a comparative assessment of these two possibilities cannot be provided here.

43 For an example of this worry, see Davis, "Rights, Permission, and Compensation," 381.

44 Lomasky, "Compensation and the Bounds of Rights."

45 Lomasky, *Rights Angles*, 50.

of that infringement are internalized by the perpetrator of the infringement.[46] Given that such a distribution of costs would seemingly be unfair even if the cost-imposing action were not a rights infringement, this Lomasky-inspired principle seems plausible.

Despite its plausibility, this principle fails to support the compensation thesis for two related reasons. First, there will be many cases of infringement where the beneficiary of the action is someone other than the infringing agent. For example, suppose that in Consent Evidence, Aggressor ϕs with the intention of benefitting both Claimholder and a third party, Beneficiary, the latter of whom actually benefits (unlike Claimholder, who incurs a cost as per the initial description of the case). Given that Aggressor does not intend to benefit from ϕ-ing and does not internalize any benefits, the Lomasky-inspired principle would not support the judgment that Aggressor should internalize the costs of ϕ-ing. Rather, seemingly either Beneficiary or both Claimholder and Beneficiary should internalize the costs given that they are the (intended) beneficiaries of the action.[47]

The second problem with the argument from Lomasky's principle is that it fails to take into consideration how luck egalitarianism bears upon the question of whose projects are advanced by a given act of ϕ-ing. Note that if luck egalitarianism is correct, the benefits of any given action are effectively socialized, as justice requires that any generated advantage be distributed in a way that realizes an equal distribution (or, more precisely, a distribution that is either equal or unequal in a way that corresponds to previous sanctionable choices). For example, suppose that Augmenter blamelessly wrongs Costbearer by ϕ-ing, where ϕ-ing produces y units of total distributable advantage but also imposes a cost of x on Costbearer. Further, suppose that (a) y is greater than x, (b) Augmenter and Costbearer are the only existing people (an assumption of all the cases in this paper), (c) they possess equal quantities of advantage, and (d) neither has previously made a sanctionable choice. How then should x and y be distributed? If the compensation thesis were false, the luck egalitarian would say that Costbearer's loss of x should first be offset using the gain of y (to restore equality), with the remainder of the gains from y being divided equally between Augmenter and Costbearer—i.e., both Augmenter and Costbearer receive $(y - x)/2$ units of advantage. This distribution of the costs and benefits of ϕ-ing would result in Augmenter and Costbearer ending up with equal quantities of advantage, which is what justice requires.

46 Jorgensen also seems to endorse something like this principle. See Jorgensen Bolinger, "Moral Risk and Communicating Consent," 203.

47 A similar argument is advanced by Montague, "Davis and Westen on Rights and Compensation," 393–94.

Suppose now that the compensation thesis is correct in addition to luck egalitarianism. Seemingly, one would first prescribe that advantage should be equalized in the way just described, as this is what luck egalitarianism requires. One must then factor in the compensation thesis, where its contribution must seemingly be that Augmenter must pay additional compensation to Costbearer even after the costs incurred by Costbearer have been offset by egalitarian redistribution. For example, if the thesis is taken to hold that Augmenter must pay full compensation to Costbearer, then one might hold that Augmenter must now make additional transfers to Costbearer such that Costbearer gains an additional x units of advantage.

There are two things to note about this proposal. First, this case functions as an additional reply to the fairness argument for the compensation thesis. Given that luck egalitarianism already ensures that Costbearer is fully compensated for her incurred costs—at least in cases where Augmenter's actions generate a positive quantity of distributable total advantage on net—then fairness does not seem to require her receiving any additional compensation from Augmenter. Second, the luck egalitarian prescription makes it unclear that Augmenter is the beneficiary of her ϕ-ing, thereby undermining the Lomasky-inspired rationale for endorsing the compensation thesis. Given that Augmenter must redistribute her gains in an equality-realizing way, it no longer seems that Augmenter's ϕ-ing is advancing her project; rather, it is advancing a collective egalitarian project, only the particular shape of which is influenced by Augmenter's choice. Granted, Augmenter might be the *de facto* beneficiary of her ϕ-ing if she declines to carry out the mandated luck egalitarian transfers to Costbearer. And in such a case, she would be obliged to make transfers to Costbearer. However, this obligation would be an implication of luck egalitarianism rather than one grounded in the appropriate distribution of the benefits of a rights infringement. Thus, the Lomasky-inspired argument does not seem to support the compensation thesis.

A fourth argument for the compensation thesis is that it is needed to adequately recognize Claimholder's status of having a claim against Aggressor ϕ-ing in Consent Evidence/Forfeiture Evidence. Note that a luck egalitarian theory of rights that excludes the compensation thesis yields identical distributive prescriptions in Consent Evidence, Forfeiture Evidence, and Coyote Surprise: in all three cases, the imposed costs of blameless choice (i.e., Aggressor's and Agent's choices) are distributed equally across all parties. Thus, the fact that Claimholder has a claim violated in Consent Evidence/Forfeiture Evidence—while Compensator does not suffer such violation in Coyote Surprise—seems to make no normative difference as far as the proposed compensation thesis-rejecting theory is concerned. However, it seems as though Claimholder's claim *should* make some normative difference.

This argument can be sidestepped by maintaining that even though Aggressor does not have to compensate Claimholder when Aggressor blamelessly wrongs her, Aggressor still has a duty *to apologize* to Claimholder for violating her claim. Such a remedial duty can then serve to distinguish the normative status of Compensator in Coyote Surprise from Claimholder in Consent Evidence/Forfeiture Evidence. While both agents impose costs, only Aggressor must apologize for her action, where this fact reflects Aggressor's unique species of wrongdoing. Thus, no duty of compensation is needed to distinguish agents who impose costs by wronging others (e.g., Aggressor in Consent Evidence) from those who simply impose costs (e.g., Agent in Coyote Surprise).

Fifth, one might be attracted to the compensation thesis because it serves other important normative functions. Consider, for example, an argument that Jorgensen makes in the context of defending the fairness of person Acculturated internalizing the full costs of ϕ-ing when (a) she (blamelessly) wrongs person Communicator because (b) Acculturated relies on a social convention that is morally problematic in some way (e.g., Communicator says, "You may not ϕ," but there is a conventional understanding in her society that this really means "You may ϕ" when uttered by women). Jorgensen argues that holding people responsible for acting on the evidence furnished by bad conventions—i.e., making them internalize the costs of their resulting wrongful actions—helps maintain and improve their responsiveness to moral reasons.[48] Jorgensen argues that when Acculturated relies on a bad convention, she fails to respond to the various moral reasons for not acting on that convention. This mistake is then corrected by holding Acculturated responsible as, by making Acculturated internalize the costs of her ϕ-ing, Acculturated and others are put "in a position to recognize that the [conventional] signals are bad ones."[49] Assuming that an adequate moral theory will be one that countenances this

48 Jorgensen Bolinger, "Moral Risk and Communicating Consent," 203. Here she cites Victoria McGreer and Philip Pettit, who argue that it is appropriate to hold agents responsible (via both blame and the associated reactive attitudes like resentment and indignation) in social contexts where third parties can make agents more disposed to respond to moral reasons via exhortation and expectation (McGreet and Pettit, "The Hard Problem of Responsibility," 177–79). However, as an interpretive matter, McGreer and Pettit seem more concerned with whether blame and emotions like resentment are *appropriate* than whether they are *useful* for cultivating reason-responsiveness. On their view, *the mere ascription of reason-responsiveness to agents* is a form of exhortation that cultivates the agents' capacity to respond to reasons, with blame/resentment merely being apt responses when agents fail to appropriately attend to those reasons. By contrast, Jorgensen seems to take blame to function as the exhortation that cultivates agents' moral capacities. This paper will focus on Jorgensen's construal, as it more directly supports endorsing the compensation thesis.

49 Jorgensen Bolinger, "Moral Risk and Communicating Consent," 203.

educative process, it follows that one should allow for Acculturated being held responsible for the costs of ϕ-ing.

Jorgensen's discussion focuses on cases where (a) Acculturated's available evidence suggests that ϕ-ing is permissible and (b) the fact that the evidence suggests this is morally problematic. However, her reasoning might equally apply to cases like Consent Evidence and Forfeiture Evidence, where the evidence is not morally problematic.[50] In cases of morally problematic conventions, the badness of those conventions gives agents reason to refrain from acting on the evidence furnished by those conventions. Holding them responsible for any resultant wrongs is then a way of drawing their attention to those overlooked reasons. Note, though, that the same reasoning might apply in Consent Evidence/Forfeiture Evidence: Aggressor has reason to refrain from acting on the evidence provided to her because it is not reliable. Thus, Jorgensen might maintain that Aggressor should be held responsible for ϕ-ing as a way of attuning her to this overlooked reason—where the compensation thesis must be affirmed if Aggressor is to be held responsible in this way.

The first thing to note about the foregoing argument is that it has an empirical element that might be questioned. Does discharging compensatory duties really educate wrongdoers in the posited way? Without collecting actual relevant data, it is hard to affirm this with certainty. Further, insofar as pre-empirical hypothesizing goes, it seems equally plausible that discharging a duty to apologize would educate at least as effectively as discharging a compensatory duty. Note that Jorgensen's hypothesis is that discharging compensatory duties will draw the agent's attention to the relevant reasons on which she should have acted. However, Aggressor apologizing to Claimholder would seemingly equally emphasize to Aggressor that she should not have ϕ-ed in cases like Consent Evidence and Forfeiture Evidence. In fact, the semantic nature of apology makes a duty of apology seem *better* suited for educating Aggressor than a duty of compensation. In theory, Aggressor could discharge a duty to compensate Claimholder without any understanding of what she did wrong or why she must carry out the act of compensation. By contrast, an adequate apology *would* require such an understanding. Thus, the educative effect of complying with a theory of rights that posits a duty of apology seems likely to be even greater than the effect of complying with the compensation thesis—though,

50 It is not fully clear whether this implication is intended by Jorgensen. Her proposal is specific to cases where morally problematic social conventions obtain. However, it follows immediately on the heels of a general defense of Aggressor having to internalize the costs of ϕ-ing in cases like Consent Evidence, suggesting that the proposal applies in these cases as well.

ultimately, empirical observation and experimentation would be needed to conclusively demonstrate this point.[51]

Finally, it is worth considering an argument for the compensation thesis developed in the literature on tort theory and advanced in various forms by Ernest Weinrib, Arthur Ripstein, and John Gardner.[52] In particular, the discussion will focus on Gardner's version of this argument, as he develops the point in greater detail and in explicitly moral terms. Consider the case where *A* owes *C* a duty not to ϕ. As Gardner presents the argument, there is some more fundamental moral reason *R* that grounds—and thus explains—*A*'s duty (60).[53] Now suppose that *A* breaches her duty by ϕ-ing. Gardner argues that in such a case, *A* no longer has a duty not to ϕ (as, presumably, agents cannot have duties to do what cannot be done) (59). However, while the duty is negated, Gardner argues that *R* persists. First, it persists in the sense that *A* still has reason not to ϕ *were she able to do so*, e.g., if she had the power to change the past (63). More importantly, it persists in the sense that the same reason for refraining from ϕ-ing can also be a reason to undertake other actions now that *A* has ϕ-ed. Specifically, it will (often) be a reason to compensate *C* via some compensatory action ψ (60–61), as compensating at least partially conforms to *R* now that full conformance is impossible. For example, Gardner suggests that everyone who rides a bus might have a duty to pay the fare up front because they all share the following reason to pay: paying "helps to see to it that the bus company gets paid for the services it provides, and hence is . . . encouraged to provide them" (60). If someone then forgets to pay the fare, she no longer has a duty to pay the fare before riding, but the posited grounds of this duty now become a reason for her to retroactively mail a check to the company, with this reason grounding an associated compensatory duty (60). Gardner calls this account of remedial duties the *continuity thesis*, and it seems to function as an argument for the compensation thesis: *A* acquires a duty to compensate *C* in virtue of her ϕ-ing because the ground of her duty not to ϕ becomes a duty-generating reason to compensate *C*.

While this is an elegant explanation of *A*'s remedial duty, it is vulnerable to two objections. First, the extent to which the continuity argument supports the compensation thesis depends on the specific reasons that ground all existing and future duties. In the bus case, it is apparent how post-infringement compensation advances the same end as discharging the initial duty; however, it is far from clear that the ground of every duty will also be a reason for the duty

51 Thanks to an anonymous reviewer for pressing me to be clearer about the role that empirical hypotheses play in these arguments.

52 Weinrib, "The Gains and Losses of Corrective Justice," 295; Ripstein, "As If It Had Never Happened," 1979; and Gardner, *Torts and Other Wrongs*.

53 All parenthetical citations are to page numbers in Gardner, *Torts and Other Wrongs*.

holder to provide compensation after she breaches that duty. If it turns out that there are even some duty-grounding reasons such that one cannot conform to those reasons by providing compensation, then the continuity argument will not support the compensation thesis in its very general form.

Second, even if one sets aside this first objection, the continuity argument does not support the compensation thesis's contention that *A uniquely* has a duty to compensate *C* in virtue of her ϕ-ing. To see this, consider an abstract version of Gardner's bus case wherein everyone has a duty not to ϕ grounded in some shared reason *R*.[54] Further, suppose that *A* breaches her duty/fails to conform to *R* by ϕ-ing, where the next best mode of conformance is compensating *C* by ψ-ing. Thus, according to the continuity thesis, *R* now grounds *A* having a compensatory duty to ψ. But why does third party *B* not also have a duty to ψ? After all, *B* had the same duty not to ϕ as *A*, where that duty was grounded in *R*. And now, just like *A*, she cannot conform to *R* by making it such that *C* is not subjected to ϕ-ing. Finally, given that *A*'s optimal conformance with *R* requires ψ-ing under such circumstances, it seems that conformance with *R* would equally require that *B* ψ under the circumstances—where this requirement gives rise to a remedial duty to ψ.

In short, *A* and *B* seem to be symmetrically situated vis-à-vis *R*, ϕ, and ψ. Thus, if the continuity thesis implies that *A* acquires a remedial duty to ψ, it seemingly also must imply that *B* acquires a duty to ψ. Or, put another way, Gardner seems committed to affirming that when it comes to conforming to *R*, the best thing to do is ensure that *C* does not suffer from ϕ-ing and, failing that, ensuring that *C* is the beneficiary of an act of ψ-ing. Given that by hypothesis, *R* applies equally to both *A* and *B*, *B* must ψ to conform with her reasons. Thus, the continuity thesis seemingly implies that *B* also has a remedial duty to ψ. Such a result fails to support the compensation thesis's contention that *A*—and *A* alone—has a duty to ψ given her ϕ-ing.

This point can be made less abstract by applying it to Gardner's bus case. There it was posited that each person has a duty to pay her fare because (a) she has reason to ensure that the bus company continues to operate, and (b) paying the fare conforms to that reason—presumably because, absent payment, the company will scale back its operations. When *A* breaches her duty by failing to pay her fare, she threatens the operations of the bus company; thus, Gardner

54 Some might wish to individuate actions in a more fine-grained way such that only a particular agent can ϕ because ϕ-ing incorporates her body and no one else's. For simplicity, it will be assumed that actions are individuated in a slightly more coarse-grained way such that different persons can ϕ; however, for those attracted to fine-grained action individuation, the case can be redescribed in terms of *R* being a reason for each person to undertake her own agent-relative action to realize a particular non-agent-relative state of affairs.

concludes that she must pay compensation to conform to her reason, as such compensation will have a similar effect with respect to sustaining the company's operations. However, note that some other bus rider *B* equally has the same reason to pay *her* fare—namely, she aims to preserve the company's operations. And now that *A* has threatened these operations via nonpayment, it seems that *B* too has reason to mail a compensatory check to the company to keep the buses running (with her payment being just as good as *A*'s payment vis-à-vis sustaining the company's operations). Granted, such action might not be needed if she knew that *A* were mailing a check instead. And she would be better off if *A* were the one to compensate the company. However, the same things can be said of *A* with respect to *B*. Thus, as far as having reason to compensate goes, the two seem to be symmetrically situated, with the continuity argument failing to demonstrate that *A*—rather than *B*—has a duty to provide compensation.

Against this objection, the proponent of the continuity argument might reply that *A* and *B* are not in fact symmetrically situated in either this case or its more generalized version above. This is because *A*, unlike *B*, has previously failed to conform to *R* by ϕ-ing, where any adequate interpretation of the continuity thesis holds that this gives *A* special reason to compensate *C* such that only *A* ends up with a compensatory duty. The problem with this reply is that it begs the question. Note that the proposition that *A* has a special duty-grounding reason to compensate *C* in virtue of breaching her duty not to ϕ is just a reassertion of the compensation thesis. Thus, if the continuity thesis is interpreted in these terms—or the continuity argument relies upon this proposition in any way to establish the asymmetry of *A* and *B* vis-à-vis *C*, *R*, and ψ-ing, then it is assuming what it aims to prove, namely, that prior duty infringement grounds a unique duty to compensate.

There may well be further arguments for the compensation thesis beyond the six listed above. Given this possibility, this section cannot be treated as a conclusive demonstration that no argument for the thesis succeeds. That said, there is, *prima facie*, limited reason for endorsing the compensation thesis. It should thus be rejected to both resolve the trilemma of section 1 and avoid any contradiction with rights-based luck egalitarianism.

9. CONCLUSION

This paper has presented two arguments against the compensation thesis. First, it has argued that the thesis is incompatible with (a plausible interpretation of) luck egalitarianism, as the latter posits that blameworthiness is a necessary condition of forfeiting rights to advantage while the former implies that rights to advantage are forfeited in cases where that condition is not met. Second,

the paper has presented a trilemma for rights theorists: in cases of blameless wronging, one cannot simultaneously hold that (1) someone is wronged, (2) the compensation thesis is true, and (3) it is unfair for a blameless party to have to fully internalize the costs of her action, where this unfairness renders a posited theory unacceptable. The paper has argued that one cannot resolve this trilemma by rejecting either proposition 1 or proposition 3. Thus, one must resolve the trilemma by rejecting the compensation thesis. Finally, the paper has objected to six potential arguments in support of the thesis. Given the absence of a successful supporting argument for the compensation thesis and the two arguments against it, the compensation thesis should be rejected.[55]

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55 I am grateful to Adina Preda for her many helpful comments on an early version of this paper. The paper also benefitted from the comments of two anonymous reviewers, as well as from the questions and comments raised by audience members at the Te Herenga Waka—Victoria University of Wellington philosophy program colloquium.

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