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

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The Unwarranted Conclusions Drawn From Vincent v. Lake Erie Transportation Co. Concerning The Defense Of Necessity

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I. INTRODUCTION

Few cases have captured more attention from philosophers interested in the law than *Vincent v. Lake Erie Transportation Co.*,[1] decided by the Supreme Court of Minnesota in 1910. Even though *Vincent* was concerned only with the taking of property to save other property from destruction, the case has become the starting point for nearly all scholarly discussions of the propriety of taking or destroying the property of others to save life, and even figures in some discussions of the propriety of killing an innocent person to save the lives of others. The extensive range of situations in which the *Vincent* case is thought to be relevant is illustrated by an ongoing discussion of the defense of necessity that focuses on two basic paradigm cases.

The first type of paradigm involves the destruction of property to save human life. As we shall see, this paradigm also raises questions as to when one may take or destroy the property of others in order to save one's own property or to further some other important interest. Joel Feinberg, for example, poses the situation in which a backpacker is stranded in a remote area by an unexpected blizzard.[2] The backpacker breaks into an unoccupied cabin and waits there for three days until the storm abates and he may safely leave.[3] During that time, the backpacker consumes the food stocks in the cabin and breaks up his unknown benefactor's furniture, burning it in the fireplace to keep warm.[4] Jules Coleman has constructed a simpler version of this first paradigm in which Hal, a diabetic, loses his insulin in an accident.[5] Before Hal lapses into a coma, he rushes to the house of Carla, another diabetic.[6] Carla is not at home, but somehow Hal manages to get into her house.[7] After first assuring himself that he has left Carla enough insulin for her own daily dosage, Hal takes the insulin he needs to survive.[8] In Coleman's view, both his example and Feinberg's "are like the famous case of Vincent v. Lake Erie…."[9]

Coleman and Feinberg assert that the backpacker and Hal were justified, both legally and morally, in doing what each did.[10] Both rely on a supposed distinction between "infringing" a person's rights and "violating" that person's rights.[11] Coleman and Feinberg argue that neither the cabin owner's nor Carla's rights have been violated because the backpacker and Hal have not

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[1] 124 N.W. 221 (Minn. 1910), hereinafter cited as *Vincent*.
[2] Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978).
[3] *Id.*
[4] *Id.*
[5] JULES L. COLEMAN, RISKS AND WRONGS 282 (1992).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] COLEMAN, *supra* note 5, at 293.
[10] *See* COLEMAN, *supra* note 5, at 300; Feinberg, *supra* note 2, at 102.
[11] *See* COLEMAN, *supra* note 5, at 300; Feinberg, *supra* note 2, at 101. The distinction appears to have been developed by Judith Jarvis Thomson in Self-Defense and Rights, The Lindley Lecture, University of Kansas (Apr. 5, 1976), *in* JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION,AND RISK 33 (William Parent ed., 1986) [hereinafter THOMSON, RIGHTS, RESTITUTION, AND RISK]. She states that person *A infringes* person *B*'s right that *P* (where *P* is a statement about a state of affairs), when *B* has a right that *P* should be true (i.e., that the state of affairs should exist) and *A* causes *P* to be false. *Id.* at 40. *A* does not *violate B*'s right that *P*, however, unless *A* acts *wrongly* or *unjustly* in causing *P* to be false. *Id.* Although *A* is free from blame when he merely *infringes B*'s right, *A* has a moral and/or legal obligation to compensate *B* because he did something *B* had a right that he not do. *Id.* at 41.

acted wrongly or unjustly.[12] The rights of the cabin owner and of Carla have only been infringed.[13] Accordingly, since neither the backpacker nor Hal has acted wrongly, the takings in both cases are justified rather than perhaps merely excused. Both the cabin owner and Carla have, however, a right to be compensated for their losses.[14] If they are not compensated by, respectively, the backpacker and Hal, then their rights would indeed be violated.[15]

Coleman and Feinberg build upon the conclusions drawn from the backpacker and diabetic examples to develop more sweeping conclusions about the conditions under which one may take or destroy property, provided one is prepared to pay compensation for the property destroyed.[16] These conclusions have very little legal support, but they are, as we shall see, consistent with the treatment of these subjects in both the *Restatement of Torts* and *Restatement (Second) of Torts*, which are equally lacking in precedential support.[17]

The second type of paradigm case has been discussed in great detail by Judith Jarvis Thomson. It involves not the destruction of property to save life, but the killing of one innocent person to save the lives of a greater number of innocent persons. The core of the paradigm is the situation first presented by Philippa Foot[18] in which, as developed by Thomson, "[a]n out-of-control trolley is hurtling down a track."[19] Ahead of the trolley are five men who will certainly be killed if the trolley continues on its course. "Bloggs is a passerby, who happens at the moment to be standing by the track next to the switch."[20] If Bloggs throws the switch the trolley will be shunted off to a spur. The five men will be saved, but unfortunately a sixth man, who is immobilized on the spur, is certain to be killed. In short, if Bloggs does nothing, five men will be killed. If he throws the switch, the five will be saved but a sixth man, equally innocent, will be killed. What should Bloggs do? Thomson concludes that Bloggs would be morally justified in throwing the switch, although he would not be morally compelled to do so.[21] She spends the better part of two books adding more and more permutations to the paradigm in an effort to explain and justify her conclusions. Her conclusions are echoed, albeit less ambitiously, in the

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[12] *See* COLEMAN, *supra* note 5, at 300; Feinberg, *supra* note 2, at 102.
[13] *See* COLEMAN, *supra* note 5, at 300; Feinberg, *supra* note 2, at 102.
[14] *See* COLEMAN, *supra* note 5, at 300-01; Feinberg, *supra* note 2, at 102.
[15] *See* COLEMAN, *supra* note 5, at 300-01; Feinberg, *supra* note 2, at 102.
[16] *See* COLEMAN, *supra* note 5, at 296-302. As we shall see, these more sweeping conclusions include the supposed obligation to pay compensation when property is destroyed to save human life. Indeed, Feinberg extends these principles, suggesting that if an aggressor's potential victim, threatened with death, unavoidably kills a child the aggressor employs as a shield, the would-be victim should pay compensation for the death of the child. *See* Feinberg, *supra* note 2, at 103.
[17] *See infra* Part III, B.
[18] *See* Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5, 8-9 (1967), *reprinted in* PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 23 (1978).
[19] JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 176 (1990) [hereinafter THOMSON, REALM OF RIGHTS]. Thomson also devoted considerable attention to the "trolley problem" in her earlier work. *See, e.g.*, Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 THE MONIST 204 (1976) [hereinafter THOMSON, *Killing*], *reprinted in* THOMSON, RIGHTS, RESTITUTION, AND RISK, *supra* note 11, at 78; Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985) [hereinafter THOMSON, *Trolley Problem*], *reprinted in* THOMSON, RIGHTS, RESTITUTION, AND RISK, *supra* note 11, at 94. There are minor verbal differences in the formulation of the core case as it appears in each of these pieces. For stylistic reasons, I have chosen to use one of the verbal formulations from her later book.
[20] THOMSON, REALM OF RIGHTS, *supra* note 19, at 176.
[21] *Id.* at 176-77.

Model Penal Code, which suggests, with an express reference to the *Vincent* case, that what it calls the "Choice of Evils defense" can indeed apply not only as a moral justification but also as a legal justification for killing an innocent person in cases that resemble Thomson's Trolley case.[22]

As will be evident from the discussion below, the facts in *Vincent* are quite unlike Thomson's Trolley case. Accordingly, this article will not discuss any further the issue of whether one can (or should) take the life of an innocent person to save the lives of a larger number of other innocent people.[23] Rather, since the focus of this collection of papers is on the *Vincent* case, and since that case figures much more prominently in the discussion of when property can be destroyed or taken to save the life or property of others, this paper will focus on the first paradigm and the conclusions drawn by Feinberg and Coleman and supported by the Restatements. I think these conclusions are seriously flawed, and that the provisions in the two Restatements are equally flawed. In the discussion that follows, I will attempt to justify these assertions. In order to help the reader follow the discussion, I set out my ultimate conclusions in advance. Unlike Coleman, Feinberg, and others including the Restatements, I do not think that one has to pay compensation if property is destroyed to save human life. At the same time, again unlike Coleman, Feinberg, and others, including again the Restatements, I do not think that a private person has a privilege either to destroy someone else's property to save his own property or to use or consume the property of others, for whatever reason, over their objections.

II. WHAT DID *VINCENT V. LAKE ERIE TRANSPORTATION CO.* DECIDE?

In *Vincent*, the steamship *Reynolds* was moored to the plaintiff's dock while discharging cargo.[24] During the unloading process, a storm developed which, by the time the unloading process was completed, was producing winds of fifty miles per hour.[25] The storm continued to increase in intensity throughout the night.[26] After the *Reynolds* discharged her cargo, she signaled for a tug to tow her from the dock, but no tug could be obtained because of the storm.[27] The court accepted as fact that, had the *Reynolds* cast off her lines, she would have drifted away from the dock.[28] The *Reynolds* instead kept her lines fast and "as soon as one parted or chafed it was replaced, sometimes with a larger one."[29] In the course of keeping fast to the dock, the wind and waves struck the *Reynolds* with such force "that she was constantly being lifted and thrown

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[22] MODEL PENAL CODE, § 3.02, cmt. 3, n. 11 (Official Draft and Revised Comments, 1985), hereinafter OFFICIAL MODEL PENAL CODE. Most of the literature uses the term "Leser Evil defense."

[23] Those interested in my views on this issue can find them in the second half of my article, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 Duke L. J. 975, 1011-42 (1999), from the first half of which much of this paper has, with some modification, been taken, and from Chapter 7 of my book, THE NOTION OF AN IDEAL AUDIENCE IN LEGAL ARGUMENT (2000). The latter, which is based on the former article, has a somewhat more extensive discussion of the non-Anglo American law on the issue. I should note here, however, that I completely disagree with the conclusions of Foot and Thomson, as well as the suggestion in the *Model Penal Code* that a person acting in a private capacity can ever intentionally kill an innocent person to save the lives of a greater number of other people.

[24] *Vincent*, 124 N.W. at 221.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *See id*.

[29] *Id*.

against the dock, resulting in its damage, as found by the jury, to the amount of $500."[30] In affirming a judgment for that amount in favor of the dock owner, the court declared that the master of the *Reynolds* was justified in not attempting to leave the dock during the storm.[31] Nevertheless, the court continued:

> [T]hose in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.[32]

Two judges dissented. They interpreted the argument of the majority as accepting "that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability."[33] Given that the master could not reasonably have anticipated the severity of the storm and the need for stronger cables, they did not believe that liability should attach for the "renewal of cables to keep the boat from being cast adrift at the mercy of the tempest."[34] For the dissent, the damage to the dock was simply storm damage -- the consequences of an act of God. This certainly would seem to be the correct conclusion if the *Reynolds* had not finished unloading; and there was in fact a House of Lords decision on point which escaped the notice of the court in *Vincent*. [35]

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[30] *Id*.
[31] *See id*.
[32] *Id.* at 222.
[33] *Id*. (Lewis, J., joined by Jaggard, J., dissenting).
[34] *Id*.
[35] In *River Wear Comm'rs v. Adamson*, 2 App. Cas. 743 (1877), a ship was trying to enter the plaintiff's dock to escape a violent storm. The ship went aground and the crew were rescued. After the rescue, when the tide rose, the abandoned ship was driven against the dock causing substantial damages of over £2800. *Id.* at 749. (It should be noted that this amount is much more than the $500 involved in *Vincent*.) The question before the House of Lords was whether the common law rule that a showing of negligence was required before liability could be imposed had been changed by statute. Their Lordships held that it had not. *Adamson*, [1877] 2 App. Cas. at 750-52 (construing The Harbours, Docks, and Piers Act, 1847, 10 Vict. c. 27). As Lord Blackburn declared:

> [T]he Common Law is, I think, as follows: Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by shewing that he is the owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is the owner.

Id. at 767.

For liability to arise, the damage must have been done "wilfully," or have arisen as a result of negligence. *Id.*

To give a more modern illustration of the same issue that is more closely patterned on *Vincent*, suppose one visits a friend at the beach and parks his car in the friend's driveway. If a storm develops and the car is thrown against the side of the friend's house, should the driver be liable for the damage to the house merely because the house kept the car from being cast into the sea? Should the law require the driver to move his car when the wind whips up so as to avoid such a risk?

III. THE CONCLUSIONS IMPROPERLY DRAWN FROM THE *VINCENT* CASE

A. Some Possible Reasons Why Vincent Has Been Interpreted the Way It Has

In his extensive discussion of the case and its support for his legal and moral conclusions about the circumstances under which one may justifiably take or destroy the property of others, Coleman describes *Vincent* simply as a case in which "[t]he court held that even though the ship's captain acted correctly in firmly tying the boat to the dock, he was required to compensate the dock owner."[36] However, Coleman fails to note, much less to attach any significance to, the insistence of the dissenters in *Vincent* that it was common ground between themselves and the majority that, had the original lines not failed, there would have been no liability, a conclusion that I believe is legally the correct one.[37] Had the majority addressed themselves to this portion of the dissenting opinion, they might have made less sweeping statements about when compensation must be paid for the destruction of another person's property. That is, accepting as an obvious truism that one may not consciously sacrifice someone else's property to save one's own property does not require one to conclude that, any time property is damaged or destroyed in emergency conditions, any person who benefits from that damage or destruction is under a legal obligation to pay compensation.

Nevertheless, given the actual opinion produced by the majority, Coleman might justify his failure to consider what was a significant factor in the *Vincent* decision -- the continual replacing of the ship's moorings as they broke -- by pointing to a number of broad dicta in the majority opinion.[38] These dicta seemingly support his conclusion that if one destroys property in order to save one's life -- an issue that was clearly not involved in *Vincent*[39] -- one must pay compensation, even if one is in no way at fault in creating the life-threatening situation.[40] This conclusion is clearly against the weight of legal authority[41] and, from a moral perspective, is highly questionable. Moreover, as will be seen, although the law does sometimes permit property to be destroyed to save life, the situations in which that may be done are much more limited than Coleman acknowledges. Coleman is also mistaken in his further conclusion that, so long as one

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[36] COLEMAN, *supra* note 5, at 168. S*ee also* RICHARD EPSTEIN, A THEORY OF STRICT LIABILITY, at 11-12 (1980) (using *Vincent* to show that legal liability does not always turn on whether a party acted improperly).

[37] My confidence in this conclusion is strengthened by the argument in *Adamson*, [1877] 2 App. Cas. 743, discussed *supra,* at note 35.

[38] *See, e.g.*, *Vincent*, 124 N.W. at 222 ("Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such a person to pay the value of the property so taken when he became able to do so.").

[39] There is absolutely no indication in either of the opinions in *Vincent* that the storm presented a danger to the lives of the crew of the *Reynolds* and several indications that there was no such danger. For example, the crew was able safely to replace the cables and no one challenged one witness's assertion that the worst that would have happened if the *Reynolds* tried to leave her berth is that she would have gone aground in the mudflats. *See id.* at 221. In rejecting the conclusiveness of that testimony, the court noted that "those in charge of the dock and vessel . . . were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested *for the preservation of their property*." *Id.* (emphasis added).

[40] *See* COLEMAN, *supra* note 5, at 292-96.

[41] *See infra* notes 61-73 and accompanying text.

is prepared to pay appropriate compensation, one has a privilege not only to destroy but also to consume the property of others in order to save his own life.[42]

A second way in which Coleman might justify his failure to consider the significance of the constant reattaching of the cables is by pointing to the *Vincent* majority's discussion of the only two cases cited in support of its decision. The first, *Depue v. Flatau*,[43] a Minnesota case decided only a few years earlier, involved a cattle and fur buyer who had been invited to stay for dinner by a farmer. The buyer testified that he became ill after the meal and asked the farmer if he could stay for the night.[44] The farmer refused and assisted the buyer to his buggy, pointing him in the direction of a town some seven miles away.[45] The buyer was found the next morning by the roadside, nearly frozen to death.[46] He brought an action against the farmer and his son.[47] The court held that the plaintiff could recover for the injuries he had suffered as a result of his exposure to the elements if the jury found on remand that the defendants were aware of the plaintiff's "serious condition."[48]

In discussing *Depue*, the *Vincent* court asked "[i]f . . . the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would [the traveler] have been able to defeat an action brought against him for their reasonable worth?"[49] Certainly, if the farmer had paid for medical care and medicines for the buyer, his request for reimbursement for these items would have been legally appropriate on a *quantum meruit* basis.[50] The same conclusion would arguably hold for any food given to the buyer after he had ceased to be a guest. That the buyer would have been liable to pay for the privilege of remaining sheltered during a very cold night until he could safely make other arrangements for himself is, however, a highly questionable conclusion about a matter that was not at issue in *Depue*.

The other case discussed in *Vincent* was *Ploof v. Putnam*,[51] a case decided by the Supreme Court of Vermont two years before *Vincent*. In *Ploof*, according to the complaint, a husband and wife and their two minor children were sailing on Lake Champlain on a "loaded sloop."[52] There "then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction."[53] Whereupon, "to save these from destruction or injury, the plaintiff was compelled to . . . moor the sloop to defendant's

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[42] *See* COLEMAN, *supra* note 5, at 292-98.
[43] 111 N.W. 1 (Minn. 1907).
[44] *Id*.
[45] *Id.* at 1-2.
[46] *Id.* at 2.
[47] *Iid*.
[48] *Id.* at 3.
[49] *Vincent*, 124 N.W. at 222.
[50] *See, e.g.*, RESTATEMENT OF RESTITUTION § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."); *id.* § 112 ("A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.").
[51] 71 A. 188 (Vt. 1908).
[52] *Id*. at 188.
[53] *Id*.

dock,"[54] the defendant being the owner of an island in the lake. It was then alleged that the defendant's servant unmoored the sloop, which was cast upon the shore with the result that "the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children [were] cast into the lake and upon the shore, receiving injuries."[55] The complaint charged the defendant alternatively with trespass (i.e., battery) and trespass on the case (i.e., negligence).[56] The defendant demurred.[57] The trial court overruled the demurrers and this decision was affirmed on appeal.[58]

The *Vincent* majority asserted that "[i]f, in [*Ploof*], the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done."[59] It is this statement in *Vincent* that most directly supports the assertion made by Coleman and others, that compensation must be paid when property is destroyed to save innocent life.[60] This conclusion is not, however, supported by anything in *Ploof*, as can be easily demonstrated. For example, a case cited and discussed at length in *Ploof* is *Mouse's Case*,[61] an English case decided in King's Bench in 1609. In *Mouse's Case*, personal property belonging to the plaintiff had been thrown overboard by a fellow passenger to lighten a barge that was in danger of foundering while being used as a ferry across the Thames at Gravesend.[62] The plaintiff subsequently brought an action in trespass against the passenger who had jettisoned his property.[63] The court non-suited the plaintiff and declared that if the ferryman had overloaded the barge, "for [the] safety of the lives of passengers . . . it is lawful for any passenger to cast the things out of the barge."[64] The court added that the owners would have a remedy against the ferryman for overloading the barge; "but if no surcharge was, but the danger accrued only by the act of God, as by tempest, *no default being in the ferryman*, everyone ought to bear his loss for the safeguard and life of a man."[65] Nothing could be more contrary to the statement of the *Vincent* majority.

This, to me, self-evident proposition of law was unequivocally reaffirmed by the House of Lords more recently in *Esso Petroleum Co. v. Southport Corp.*[66] That case involved a claim for the "considerable expense" incurred to clean up the plaintiff's premises after a tanker in difficulty discharged oil to prevent "breaking her back," which would have endangered not only the ship and her cargo but also the lives of the crew.[67] The case was brought under the common

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[54] *Id*.
[55] *Id*. at 189.
[56] *Id*.
[57] *Id*.
[58] *Id.* at 188.
[59] *Vincent*, 124 N.W. at 222.
[60] *See* COLEMAN, *supra* note 5, at 300-01; *see also* Feinberg, *supra* note 2, at 103 (arguing that compensation would be owed to parents of an innocent child used as a "shield" who is killed along with an aggressor to preserve another innocent life).
[61] 77 Eng. Rep. 1341 (K.B. 1609), *cited with approval in Ploof*, 71 A. at 189.
[62] *Id*. at 1341-42.
[63] *Id.*
[64] *Id.* at 1342.
[65] *Id.* at 1342 (emphasis added); *see also Ploof*, 71 A. at 189 (citing *Mouse's Case*, 77 Eng. Rep. 1341, and quoting this passage).
[66] 1956 App. Cas. 218.
[67] *Id. at 220.*

law headings of trespass, nuisance, and negligence.[68] Accepting the trial judge's finding that the tanker's owner had not been guilty of negligence, the House of Lords affirmed that there was no liability on the part of the tanker's owners.[69] The trial judge, Sir Patrick Devlin (later Lord Devlin), had declared that "[t]he safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another's property."[70]

The principle that property may be destroyed to save human life is recognized in United States admiralty law as well. In modern times, if the circumstances involved in *Mouse's Case* had arisen within the admiralty jurisdiction (i.e., somewhere on the high seas or in navigable waters),[71] all of the cargo and the vessel itself would have been assessed a general average contribution to pay for the portion of the cargo that was jettisoned, but no contribution would have been assessed against those whose lives were saved.[72]

In summary, the very few cases addressing the issue have all held that property may be destroyed when necessary to save human life. These cases have also held that no compensation is

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[68] *Id.* at 219.
[69] *See id*.
[70] Southport Corp. v. Esso Petroleum Co., 2 All E.R. 1204, 1209-10 (Q.B. 1953).
[71] *See* 28 U.S.C. § 1333 (1994).
[72] *See* GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 778-79 (1939) (describing the "general average" rule). Both the Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, [hereinafter Brussels Convention], and its successor, the International Convention on Salvage, Apr. 28, 1989, Hein's No. KAV 3169 [hereinafter London Convention], provide that "[n]o remuneration is due from the persons whose lives are saved," although both conventions also provide that "nothing in this article shall affect the provisions of the national law on this subject." Brussels Convention, *supra*, art. 9, 37 Stat. at 1671; London Convention, *supra*, art. 16(1), at 10. Both the United Kingdom and the United States are parties to the Brussels Convention, *see* Brussels Convention, *supra*, 37 Stat. at 1668 (naming the United Kingdom and the United States as signatories), and the London Convention, *see* M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES 79-80 (Supp. 1995). To encourage the rescue of human beings, the London Convention grants a "salvor of human life" a share of the payment awarded to the salvor of the vessel or other property or awarded to someone for preventing or minimizing environmental damage. London Convention, *supra*, art. 16(2), at 10; *see also* Message from the President of the United States Transmitting the International Convention on Salvage, S. TREATY DOC. NO. 102-12, at iii ("[The London] Convention is designed to promote sound environmental practices by commercial salvors and to strengthen the maritime transportation industries by ensuring that salvors receive adequate compensation."); Mark J. Yost, *International Maritime Law & the U.S. Admiralty Lawyer: A Current Assessment*, 7 U.S.F. MAR. L.J. 313, 337-38 (1995) (arguing that the London Convention strikes a balance between preserving life and protecting the environment).

Whether in the modern age *Mouse's Case* would fall within the admiralty jurisdiction in England is not important for present purposes. Indeed, *Vincent* would undoubtedly not fall within the admiralty jurisdiction in the United States. *See* ROBINSON, *supra*, at 56-57 ("*Suits by land structures, even for injury by vessels, must be at common law*. . . . [I]n a collision between a vessel and a structure not within the maritime categories the vessel alone may resort to admiralty.") (citing Hough v. Western Transp. Co (*The Plymouth*), 70 U.S. (3 Wall.) 20 (1865); *Ex parte* Phenix Ins. Co., 118 U.S. 610 (1886)). *Cf. id.* at 57 & n.7 ("The curiosity now obtains that while the shore victim may not himself invoke the admiralty law, the floating tort-feasor may invoke it against the shore victim's common law suit.") (citing Richardson v. Harmon, 222 U.S. 96, 106-07 (1911) (holding that, under the Limited Liability Act of 1851, a ship owner is entitled to employ admiralty law to limit common law claims "whether the liability be strictly maritime or from a tort non-maritime")). At any rate, both *Mouse's Case* and *Vincent*, as well as *Ploof* and *Southport*, were brought as common law cases.

payable for having done so, so long as the person who destroys the property and the person whose life is saved are not at fault in creating the life-threatening danger which necessitates the destruction of property.[73] Nevertheless, as the next few pages will demonstrate, the siren song of the dicta in *Vincent* has proven irresistible, not only to academics who are more interested in the theoretical questions raised by the case, but also to those who purport to state what in fact the law is.

B. The Legally Unsupported Conclusions of the Restatements

As intimated above, several provisions in the *Restatement of Torts*, which appeared in 1934, and the *Restatement (Second) of Torts*, which appeared in 1965, would seem to support the conclusions of Coleman and Feinberg. For example, sections 197 of both the original *Restatement* and the *Restatement (Second)*, with reliance on *Vincent*, take the position that one is privileged to enter the land of another in order to prevent serious harm to oneself, to one's land, to one's chattels, or to the person, land, or chattels of another.[74] A person who enters under this privilege, however, must pay compensation for any harm done to the possessor's interest in the

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[73] It is not clear how this situation would be handled under continental legal systems. For example, section 904 of the German Civil Code denies the owner of property the right "to prohibit the interference [with his rights of ownership] if the interference is necessary for the avoidance of a present danger and the damage threatened is disproportionally great compared to the damage caused" to him as the owner of the property destroyed. Section 904 BGB, *translated in* THE GERMAN CIVIL CODE 169 (Simon L. Goren trans., 1994). Section 904 also declares that "[t]he owner [of the property destroyed] may demand compensation for the loss suffered by him." *Id*. That article covers risks to property as well as life. Whether the provisions for compensation are applicable when property is destroyed to save life is quite unclear. If the property destroyer is in the process of actually threatening human life then innocent people have the right to destroy it under § 228 of the German Civil to avert the threat but that question only covers the self-defense situation. It should be noted that Germany is a party to the Brussels Convention, *see* Brussels Convention, *supra* note 72, 37 Stat. at 1668, which suggests that no compensation would be payable under German admiralty law when property is destroyed to save lives. The scope of the privilege to destroy property to save property under Section 904 is also unclear. *See infra* note 138.

Article 122-7 of the French Penal Code provides that a person who, faced with a present or imminent danger to himself or another or to property, performs an act necessary for the safety of a person or of property is not subject to criminal responsibility unless there is a disproportionality between the means employed and the seriousness of the threat. *See* CODE PÉNAL [C. PÉN] art. 122-7 (Fr.) (author's translation). Gaston Stefani and his colleagues, Professors Levasseur and Bouloc, assert that the highest court of ordinary jurisdiction, the Cour de cassation, does not appear to accept the proposition that compensation is due when property is destroyed to save life - thus favoring the position taken by the English and American cases - although the authors observe that commentators continue to debate the issue. *See* GASTON STEFANI ET AL., DROIT PÉNAL GÉNÉRAL 315 (15th ed. 1995).

[74] *See* RESTATEMENT OF TORTS § 197 cmt. a, illus. 2 & cmt. j, illus. 13 (1934) [hereinafter RESTATEMENT]; RESTATEMENT (SECOND) OF TORTS § 197 cmt. A, illus. 2 & cmt. j, illus. 13 (1965) [hereinafter RESTATEMENT (SECOND)]; RESTATEMENT (SECOND) OF TORTS, APPENDIX, Reporter's notes to § 197 (1966) [hereinafter RESTATEMENT (SECOND) APP.] (stating that illustrations 2 and 13 were each "based on" *Vincent*); *see also* RESTATEMENT OF TORTS (Tentative Draft No. 11), § 1041 cmt. b, illus. 2 & cmt. i, Reporter's notes [hereinafter RESTATEMENT (Tentative Draft No. 11)] (characterizing *Vincent* as a case in which A was held "liable for . . . harm occasioned to B's dock by the pounding of A's boat against it"). Section 1041 of the tentative draft prepared in 1933 became section 197 when the original *Restatement* was completed. These provisions deal with the privilege to enter land in emergency situations and, in describing the scope of the privilege, discuss the permissibility of destroying or damaging the property of others in the course of exercising the privilege.

land.[75] A similar provision, section 263, covers what amounts to trespass to chattels and the conversion of chattels. Section 263 of the *Restatement* limited the privilege to situations in which chattels were destroyed or used to save life or to avoid serious bodily harm,[76] and took no position as to whether one was authorized to take a chattel over the objection of its owner.[77] Section 263 of the *Restatement (Second)* not only extends the privilege to cover the destruction or use of chattels to save property, but also permits the taking of property even if its possessor objects.[78] The person destroying or using the property is, however, liable for any harm done.[79] The reason given by the drafters of both the *Restatement* and the *Restatement (Second)* for recognizing a "privilege" to destroy or use others' chattels to save one's property was the same: to take from the possessor of the chattel "the privilege . . . to use reasonable force to defend his exclusive possession."[80] The Reporter's notes to the *Restatement (Second)* are at least candid enough to admit that "[t]here is scarcely any authority to support the principle stated in this Section, and it must rest largely upon the analogy to the corresponding privilege to interfere with the exclusive possession of land, stated in § 197."[81] There then follows a "see" citation[82] to *Mouse's Case* which, as we have seen,[83] held that no compensation is due when property is destroyed to save life.[84]

The Restatements fail to cite any cases in which compensation was actually awarded when property was *destroyed* in order to save life. The Reporter's notes to section 197 do cite a

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[75] RESTATEMENT (SECOND), § 197(2). The first *Restatement* required the payment of compensation when a person destroyed property to protect his own interests, but took no position on whether one who acted to protect the interests of third party was obliged to pay compensation. *See* RESTATEMENT, § 197(2) & § 197 first caveat.

[76] *See* RESTATEMENT, § 263(1) ("One is privileged to use or otherwise intentionally intermeddle with a chattel while in the possession of another for the purpose of protecting himself, the other, or a third person from death or serious bodily harm . . . .").

[77] *See id.*; *see also infra* note 126(discussing this point in greater detail). The *Restatement* also declared that the Institute "expresse[d] no opinion" as to whether chattels could be destroyed to save *property*. *Id.* § 263 first caveat.

[78] *See* RESTATEMENT (SECOND), § 263 cmt. b ("Since the actor does not become a trespasser when making reasonable use of or otherwise intermeddling with another's chattel to protect himself or another, such intermeddling cannot be restricted by the possessor of the chattel.").

[79] *See id.* § 263(2) ("Where the act is for the benefit of the actor or a third person, he is subject to liability for any harm caused by the exercise of the privilege."). The first *Restatement* contained a caveat as to whether an actor was liable for damages to a chattel caused by his intermeddling for the benefit of a third party. *See* RESTATEMENT, § 263 third caveat.

[80] RESTATEMENT, § 263 cmt. b; RESTATEMENT (SECOND), § 263, cmt. b.

[81] RESTATEMENT (SECOND) APP., *supra* note 74, Reporter's notes to § 263.

[82] *See id.* The other case cited in the Reporter's notes to the *Restatement (Second)* is *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 F. 184 (W.D. Pa. 1903), which involved a runaway barge that became embedded in the defendant's bridge and which was destroyed in the process of dislodging it. Not surprisingly, the defendant was *not* required to compensate the plaintiff. *See McKeesport*, 122 F. at 187 (stating that "[the defendant] does not have to try and save the plaintiff's property, but simply not to recklessly or unnecessarily injure or destroy it"). It was clearly a type of self-defense.

[83] *See supra* notes 61-65.

[84] *See* Mouse's Case, 77 Eng. Rep. 1341, 1342 (K.B. 1609):

> [I]n such a time . . . of necessity, it is lawful for any passenger to cast the things out of the barge: and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only the act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man.

seventeenth-century English case that ostensibly involved the *taking* of property to save life. That case is *Gilbert v. Stone*,[85] in which the court held that duress was no defense for trespass to the plaintiff's land or for taking the plaintiff's gelding when the defendant claimed he did so because "twelve armed men . . . threatened to kill him" if he did not.[86] The fact that duress was held to be no justification for the trespass or for taking the horse, however, hardly supports the American Law Institute's contention that compensation must be paid whenever real property or chattels are destroyed in an effort, however justifiable, to save lives. No one who reads the case could reasonably conclude that the court was not simply requiring the defendant to pay for the horse he took, but also recognizing a *privilege* on the part of the defendant to take the horse. Yet the drafters of the *Restatement* disposed of *Gilbert* by suggesting that it is not inconsistent with the recognition of an "incomplete privilege."[87] Leaving aside what might be said to be an "incomplete privilege," there is certainly no indication that by citing the case the American Law Institute intended to support the proposition that one is privileged to engage in what would appear to be theft in response to criminal threats. Furthermore, since the court in *Gilbert* held that damages for trespass were also appropriate, despite the absence of any indication of damage to land or buildings, the case, if anything, is actually inconsistent with the general privilege that the Restatements espouse.

The lack of a precedential basis for the original *Restatement* position was not cured by the more extensive case citation that accompanies the *Restatement (Second).* One of the additional cases cited in the Reporter's notes to section 197 of the *Restatement (Second)* is *Newcomb v. Tisdale*,[88] a California case decided in 1881 and involving an action to recover the damage which occurred because the defendants cut a levee. The defendants raised the defense that the levee was cut in order "to save *life* and property."[89] The trial judge refused to let the jury consider this defense.[90] The Supreme Court of California reversed, observing, in a brief opinion, that "such necessity existed" and therefore the case should have been submitted to the jury.[91] Two justices dissented because they did not believe that the cutting was necessary to save lives and because, in their view, "[n]ecessity, to save their own property, would not have justified defendants in this destruction of plaintiffs' property."[92] Both the majority and the dissent therefore contradict the Restatements, first in denying the landowner compensation because his property was destroyed to save life, and then in refusing to recognize any privilege to destroy property to save property.

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[85] 82 Eng. Rep. 539 (K.B. 1648), *cited in* RESTATEMENT (SECOND) APP., Reporter's notes to § 197, cmt. j; RESTATEMENT (Tentative Draft No. 11), Reporter's notes to § 1041, cmt. i. As already noted, when the original *Restatement* was completed in 1934, it adopted Section 1041 of the tentative draft as Section 197.
[86] *Gilbert*, 82 Eng. Rep. at 539.
[87] RESTATEMENT (Tentative Draft No. 11), Reporter's notes to § 1401, cmt. i. The *Restatement (Second)* simply buries the case without comment in a long string cite. *See* RESTATEMENT (SECOND) APP., Reporter's notes to § 197, cmt. j.
[88] 62 Cal. 575 (1881), *cited in* RESTATEMENT (SECOND) APP., Reporter's notes to § 197, cmt. j.
[89] *Newcomb*, 62 Cal. at 576 (emphasis added).
[90] *Id.* The jury was instead instructed that if the levee was lawfully constructed, "then the defendants had no right to cut [it] without the consent of the owners"). *Id.*
[91] *Id.*
[92] *Id*. at 579 (Myrick, J., dissenting).

A case decided after publication of the *Restatement (Second)*, however, does offer some support for the position taken by the two Restatements. In *Ruiz v. Forman*,[93] decided by the Texas Court of Civil Appeals in 1974, a driver swerved to avoid an oncoming vehicle and entered the plaintiff's land, causing $270 worth of property damage.[94] The jury found for the defendant but the trial court granted the plaintiff's motion for judgment notwithstanding the verdict.[95] On appeal, the parties stipulated that the defendant had intentionally entered the plaintiff's land.[96] If that were so, the court declared, the case would clearly come within the ambit of section 197 of the *Restatement (Second)* as a privileged entry onto the property of another.[97] The "culpable or moral fault, *if any*, is said to be attributed to the actor's refusal to pay for the damage done in the course of serving his own interests rather than in what he did," while "[t]he legal fault centers around the notion that there was an intentional invasion of a legally protected interest."[98] These considerations "would afford a basis for a simple affirmance of the case."[99] The court went on to note, however, that the defendant testified at trial that he "'consciously and intentionally turned his wheels to the right to avoid hitting the truck.'"[100] Based on this item in the trial record, the defendant-appellant argued that notwithstanding his stipulation, his entry upon the plaintiff's land was in point of fact not a trespass because the entry upon the plaintiff's land was neither intentional nor the result of negligence.[101] The court concluded that the defendant would be liable under Texas law, even if he did not intend to invade anyone's land, because it was sufficient that he intended the act (namely, turning the wheels) that eventually caused the trespass.[102] While the court noted that "[p]ossibly some comfort can be afforded the Appellant by Professor Prosser, who anticipates that Texas will abandon its present position," it concluded that "[t]his is for the Texas Supreme Court to decide."[103] It is perhaps amusing that the only case that clearly echoes the *Restatement (Second)* is one that cites the *Restatement (Second)* as its sole authority.

What conclusion is to be drawn from this review of the case law? There are few cases in England or the United States directly on point but the weight of such cases as there are,

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[93] 514 S.W.2d 817 (Tex. Civ. App. 1974).
[94] *Id*.
[95] *Id*.
[96] *Id.* at 818.
[97] *See id.*
[98] *Id*. (emphasis added). The court cited an article that briefly addresses the elements of trespass to land but has no analysis at all of the problem with which we are concerned. *See id.* (citing W. Page Keeton & Lee Jones, Jr., *Tort Liability and the Oil and Gas Industry II*, 39 TEX. L. REV. 253 (1961)).
[99] *Id.*
[100] *Id.*
[101] *See id.*
[102] *See id.* at 819.
[103] *Id*. (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 13, at 64-65 (4th ed. 1971) (predicting that decisions in Texas limiting liability "to cases in which the defendant has done some affirmative volitional act which immediately causes the invasion of the land . . . foreshadow ultimate abandonment [of the rule]")). At the time, Texas was one of a minority of states that still imposed liability upon a person who accidentally trespassed on real property by stumbling or losing control of a vehicle. Most states would not impose liability in such circumstances in the absence of a showing that the defendant's stumbling or loss of control of his vehicle was a result of his own negligence. *See* PROSSER, *supra*, § 13, at 64-65 ("[The] prevailing position is that of the Restatement of Torts, which finds liability for trespass only in the case of intentional intrusion, or negligence, or some 'abnormally dangerous activity' on the part of the defendant.").

particularly in England, is clearly contrary to the position taken by sections 197 and 263 of the Restatements, and by Coleman and Feinberg. These cases and the doctrines of admiralty law support my contention that when neither the actor nor those whose lives are saved are legally at fault for placing themselves in the perilous position from which they can only be saved by destroying the property of another, they bear no legal liability for destroying that property.

Most of the legal scholarship tracks and relies on the Restatements' position,[104] but some is in accord with the position taken by the courts in *Mouse's Case* and *Southport* and with the admiralty rule. Francis Bohlen, for example, asserted that where others' lives, but not one's own, are at stake, property may be destroyed without any corresponding obligation to pay compensation.[105] Robert Keeton generally supports the position taken by the Restatements but is skeptical about whether a person who destroys property to save the lives of others has any obligation to pay for the property.[106] Neither Prosser[107] nor Page Keeton[108] really discusses the situation where property is destroyed to save life; they merely note the Restatements' position. There is a somewhat more extensive discussion in the Harper, James, and Gray treatise,[109] but this largely tracks the Restatements' position. Common sense and a moment's reflection, I submit, clearly show that the position actually taken by the few cases on the subject is the most rational and sensible one.

Consider the following situation. In many states -- including, for example, California,[110] New York,[111] and Washington[112] -- the owners and operators of aircraft are not strictly liable for ground damage that is not occasioned by their fault. Requiring someone to pay for property destroyed in order to save lives would encourage an airline pilot who is obliged by an act of God to make a forced landing to place his life and those of his passengers in greater jeopardy because the safest alternative landing place has very valuable flower beds on it, while nearby less valuable vacant land is rockier and less flat. Surely the possible value of the property that might be destroyed should not enter into the pilot's consideration at all. The situation becomes even more ludicrous when the actor is in no danger himself but destroys property to save the life of a third party. The *Restatement (Second)* clearly makes the actor liable for the property he has

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[104] *See* CHRISTIE, *supra* note 23, at 981, n.26 for references to the more general theoretical literature prompted by the *Vincent* case.
[105] *See* Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 317-18 (1926).
[106] *See* Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 415-18, 427-30 (1959).
[107] *See* PROSSER, *supra* note 103, § 24, at 126-27.
[108] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24, at 145-48 (5th ed. 1984). DAN B. DOBBS, THE LAW OF TORTS § 108 (2000) gives the matter only the very briefest consideration.
[109] FOWLER V. HARPER, ET AL., 1 THE LAW OF TORTS § 1.22, at 1:84-89, § 2.43, at 2:140-42 (3d. ed. 1996).
[110] *See* Southern Cal. Edison Co. v. Coleman, 310 P.2d 504, 505 (Cal. App. Dep't Super. Ct. 1957) (declaring that "[t]here is no California case which holds that a pilot is liable for collision damage independent of negligence"); Boyd v. White, 276 P.2d 92, 98 (Cal. Dist. Ct. App. 1954) (identifying as the general rule in California that "the owner (or operator) of an airship is only liable for injury inflicted upon another when such damage is caused by a defect in the plane or its negligent operation").
[111] *See* Wood v. United Air Lines, Inc., 32 Misc.2d 955, 958 (N.Y. Sup. Ct. 1961) (rejecting strict liability in the context of operating an airplane, and applying the rule that "to constitute an actionable trespass there must be an intent to do the very act which results in the immediate damage").
[112] *See* Crosby v. Cox Aircraft Co., 746 P.2d 1198, 1202 (Wash. 1987) (holding that "owners and operators of flying aircraft are liable for ground damage caused by such aircraft only upon a showing of negligence").

destroyed.[113] One would be hard put to create a doctrine more calculated to discourage people from coming to the aid of imperiled human beings.[114]

One should finally note that public authorities also have a privilege to destroy property in order to save life or to deal with public emergencies, and are under no common law duty to pay compensation to the owner of the property when they exercise the privilege.[115] Of course, in many jurisdictions, statutory schemes provide for compensation in some situations when property is destroyed on grounds of public necessity.[116] But that is another matter.

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[113] *See* RESTATEMENT (SECOND), § 263(2).

[114] Professor Weinrib, who seems to accept that the Talmud requires a person who saves his own life by destroying the property of innocent third parties to pay compensation, asserts that the Talmud specifically declares that rescuers are under no such liability, although this is not in accordance with strict law (*min hadin*). *See* Ernest Weinrib, *Rescue and Restitution*, 1 S'VARA, 59, 62-64 (1990).

[115] *See, e.g.*, National Bd. of YMCA v. United States, 395 U.S. 85, 92 (1969) (stating that where the government takes action to protect a private party, the public need not bear the cost of losses that might result from that action); United States v. Caltex, Inc., 344 U.S. 149, 154 (1952) (noting that "in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"). The *YMCA* case involved property destroyed when U.S. troops took refuge in private buildings to escape raging mobs in the Panama Canal Zone. *See YMCA*, 395 U.S. at 87-88. *Caltex* involved the destruction of property in the Philippines during World War II to keep it from falling into the hands of the invading Japanese. *See Caltex*, 344 U.S. at 151. In *Burmah Oil Co. v. Lord Advocate*, 1965 App. Cas. 75 (appeal taken from Scot.), the House of Lords rejected the traditional approach taken in *Caltex* which distinguished between property taken for consumption, for which compensation was due, and property destroyed to prevent its falling into the hands of the enemy, for which no compensation was due. But Parliament disagreed and promptly reinstated the traditional doctrine, directing dismissal of the claim in *Burmah Oil* itself while that case was on remand for an assessment of the plaintiff's claim. *See* War Damage Act, 1965, ch. 18 (Eng.). For cases discussing municipal government liability in peacetime contexts, see Surocco v. Geary, 3 Cal. 70 (1853) (holding that the government was not liable for the costs of destroying buildings to prevent the spread of a fire); Seavey v. Preble, 64 Me. 120 (1874) (holding that the government was not liable for the costs of destroying wallpaper in the homes of smallpox victims); Putnam v. Payne, 13 N.Y. 311 (1816) (holding that the government was not liable for the costs of destroying mad dogs). Governmental destruction of property also does not give rise to any constitutional claim for compensation against state governments under the Fourteenth Amendment. *See* Miller v. Schoene, 276 U.S. 272, 280 (1928) (holding that Virginia did not have to compensate owners of cedar trees destroyed to save apple trees because "preferment of [the public] interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property"). The *Restatement (Second)* tries to capture, in a simplified way, the essence of these cases. *See* RESTATEMENT (SECOND), § 262 ("One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster."). For a discussion of the importance of the distinction in the domestic context between the public destruction of property in situations of necessity and the consuming or using of such property whatever the justification, see Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1118-30 (1993).

[116] For example, municipal ordinances providing compensation to owners of urban real property whose buildings are destroyed to prevent the spread of fire are of long standing. *See, e.g.*, Mayor of New York v. Lord, 17 N.Y. 285 (1837) (discussing a municipal ordinance in New York passed in 1806 which directed the mayor to compensate property owners whose property was destroyed at the mayor's direction to prevent the spread of fire). There is a federal statute providing partial compensation to the owners of cattle that are legally required to be destroyed because they suffer from foot-and-mouth disease. *See* 21 U.S.C. §§ 114a, 134a (2000). The latter scheme not only recognizes that the public should bear a large part of the loss, since the benefits of destroying the cattle to prevent the spread of the disease redound to the public good, but also recognizes the more pragmatic consideration that the cattle owners, whose cooperation is essential, are more likely to cooperate with the public authorities if they receive at least some compensation.

The difficult legal problems raised when property is destroyed to save lives concern not the question of compensation, but rather the question of whether force may be used against the protesting owner of the property that needs to be destroyed.[117] In the cases of private necessity that have thus far been litigated, this has not been a major issue. The typical case concerns a trivial trespass on someone's land or the destruction of property in an emergency situation in which the possibility of serious strife did not arise.[118] But might not a situation arise in which the possessor seriously objects to the invasion of his interests, such as when a desperate person attempts to break into his home? We will discuss this question at length when we come to consider Coleman and Feinberg's principal contention, also endorsed by the Restatements and supposedly supported by *Vincent*, that, in order to save one's life, one may take and consume another person's property,[119] since the problem presented by a resisting owner is more likely to arise in that context.

IV. Even If There Is No Legal Obligation, Are There Moral Obligations That Arise from the Destruction of Property to Save Lives?

Assuming that the destruction of property is morally as well as legally permissible when necessary in order to save human lives, is there nevertheless a moral obligation to pay for the harm done? I have maintained that if one destroys property in order to save life and is not at fault in creating the underlying situation, then one has no legal obligation to compensate the owner for his loss.[120] How does that affect Coleman's implicit additional claim[121] -- which Feinberg makes explicitly[122] -- that, in these kinds of situations, one has a *moral* obligation to pay

[117] Recall that it was this concern which served as the American Law Institute's rationale for recognizing the privilege to destroy or use another's chattels to save one's own property in section 263 of the *Restatement* and the *Restatement (Second)*. *See supra* note 78and accompanying text.

[118] The cases involving trespass to land are in many ways just extensions of the generally recognized common law privilege that travelers on a road can enter private property to avoid an obstruction on the road. *See*, *e.g.*, Restatement (Second), § 195(1) ("A traveler on a public highway who reasonably believes that such highway is impassable, is privileged . . . to enter . . . upon neighboring land in possession of another . . . ."). Of course, since the entry normally does not involve a situation in which entry is necessary to save human life, the actor is under a legal obligation to pay for any harm his entry might cause. In areas where there are no sidewalks, and such areas are quite common in the United States, everyone at one time or another has walked across the edge of someone's lawn to avoid puddles or on-coming vehicles. It is an odd person who would object to these invasions of his property interests. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), the case in which the defendant's employee unmoored the plaintiff's sloop during a storm, seems bizarre and the implication of that case that the plaintiff might have been legally justified in using force to prevent his boat from being unmoored, *see id.* at 190 (describing the employee's action to unmoor the plaintiff's vessel from his employer's dock as wrongful), does not raise disturbing implications.

[119] *See infra* Part VI.

[120] *See infra* notes 158-160 and accompanying text.

[121] *See* Coleman, *supra* note 5, at 297-98.

[122] *See* Feinberg, *supra* note 2, at 101-03 (proposing that when you invade another's home to escape the elements in an emergency "almost everyone would agree that you owe *compensation* to the homeowner for the depletion of his larder, the breaking of his window, and the destruction of his furniture").

compensation?[123] After all, it is not necessary that one should have a legal obligation to do something in order for it to be true that one has a moral obligation to do that something.

A moral universe in which the options are between no compensation at all or compensation for full replacement value strikes me as an overly legalistic universe and not a moral universe. Morality, for most people, requires subtler distinctions.[124] What if the person who saves his life by destroying someone else's property is practically penniless? Is such a person morally obliged to spend his last nickel in an attempt to compensate, at least partially, the person whose property he has destroyed? What if the person who has destroyed the property of another to save his life or that of a third person could, without completely impoverishing himself, afford to compensate the property owner, but the property owner is a far wealthier person? To many it would be insulting even to be offered compensation in such circumstances. To others, even payment of full replacement value might not be enough in some circumstances. I accept that some moral obligations arise when one destroys property in order to save life, but the exact content of these obligations will vary with the culture and the particular circumstances. They might require payment of even more than full replacement value, or might require only an expression of gratitude. The set of moral obligations could, of course, also include an obligation that one be similarly forbearing and generous when others need to destroy his property in order to save themselves.

V. IS THERE REALLY A LEGAL PRIVILEGE TO DESTROY THE PROPERTY OF OTHERS TO PROTECT ONE'S OWN PROPERTY?

The fact that the privilege recognized by *Restatement* section 263 has been extended by the *Restatement (Second)* to cover the destruction of someone's chattels to save someone else's property[125] shows how poorly considered that provision is, and how much has been read into the cursory opinion of the majority in *Vincent*. That the *Restatement (Second)* also authorizes the use and *consumption* of other people's property, even over their objections,[126] only reinforces that

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[123] The lack of any legal obligation to pay compensation, of course, prevents us from arguing that the existence of a legal obligation provides one reason for recognizing a similar moral obligation.

[124] David Hume, for example, argues that justice is an artificial virtue because it makes sharp distinctions whereas the natural virtues and vices "run insensibly into each other." DAVID HUME, A TREATISE OF HUMAN NATURE 529 (L.A. Selby-Bigge ed., London, Oxford Univ. Press 1888) (1739).

[125] *Compare* RESTATEMENT, § 263(1) ("One is privileged *to use or otherwise intentionally intermeddle with a chattel* while in the possession of another for the purpose of protecting himself, the other, or a third person from death or serious bodily harm . . . .") (emphasis added), *and id.* second caveat ("The Institute expresses no opinion as to whether . . . Subsection (1) is applicable to one who dispossesses another of a chattel for the purpose of protecting himself, the other or a third person from death or serious bodily harm."), *with* RESTATEMENT (SECOND), § 263(1) ("One is privileged to commit an act which would otherwise be a trespass to the chattel of another *or a conversion of it*, if it is . . . reasonable and necessary to protect the person or *property* of the actor, the other or a third person from serious harm . . . .") (emphasis added).

[126] *See* RESTATEMENT (SECOND), § 263(1), the relevant portions of which are quoted in the preceding note, *see supra* note 125. By using the shorthand "trespass" in addition to the word "conversion" in section 263(1), the *Restatement (Second)* is of course including use of another's property over his objection. *See id.* § 217 ("A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) *using or intermeddling with a chattel* in the possession of another.") (emphasis added).

conclusion. For the moment, however, let us extend the focus of our discussion of the privilege to destroy property to include only the additional situation in which someone destroys the property of others to save his own property or that of others.[127]

What is particularly aggravating about the Restatements is their attempt to formulate simple general rules to cover exceedingly complex and diverse situations. Indeed, though the Restatements fail to recognize it, there are even some situations in which property may be destroyed to save other property and no compensation is required, as for example, when an out of control ship or vehicle is about to collide with one's own property.[128] As I have already noted, the *Restatement (Second)* admits that there is "scarcely any authority" to support its conclusions.[129] And for good reason. No one, not even those who think it is sometimes permissible to kill an innocent person to save the lives of a *greater* number of other innocent persons, believes that there is a general privilege to kill an innocent person to save one's own life or the life of a third party.[130] Why, then, should there be a general privilege to destroy someone else's property to save one's own? The fact that compensation must be paid and that such compensation often seems an acceptable social accommodation because much property is either fungible or readily translatable into a monetary equivalent does not mean that one has a broad privilege to destroy someone else's property to save one's own. How can private individuals so cavalierly be granted the power of eminent domain?

The *Restatement (Second)* declares that the act must not only be necessary but also reasonable,[131] so that one "whose chattel of small value is threatened with serious harm or even with complete destruction *may not* be privileged to destroy a far more valuable chattel of another in order to protect it."[132] By its use of the word "may," the *Restatement (Second)* possibly seems to recognize that it is not a matter of mere economic calculation. That money is not everything is a proposition with which I would agree, but, in the context of the *Restatement (Second)*'s recognition of a privilege to destroy someone else's property to save one's own property or that of another, can one destroy a Van Gogh painting to preserve a family Bible that has been handed

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[127] I will discuss the so-called privilege to use or consume the property of others later in Part VI, B, *infra*.
[128] *See* McKeesport Sawmill Co. v. Pennsylvania Co., 122 F. 184, 187 (W.D. Pa. 1903) (holding that where a "defendant could not pass [plaintiff's coal boat, which was obstructing navigation] without seriously endangering the safety of his own property, he had the right to remove such obstruction"); Commercial Union Assurance Co. v. Pacific Gas & Elec. Co., 31 P.2d 793 (Cal. 1934) (holding that there was no liability for negligence where the defendant broke partitions in a burning warehouse to save its copper and the plaintiffs claimed this enabled the fire to spread and destroy their goods); *cf*. Owen v. Cook, 81 N.W. 285 (N.D. 1899) (holding that the defendant, who started a back fire which burned the plaintiff's property in order to protect his own property from a prairie fire, was not liable for negligence; it was conceded that the main fire would eventually have reached the plaintiff's property). *Corpus Juris Secundum* also states that "[o]ne who acts with reasonable prudence, and with respect for the rights of others, in endeavoring to rescue or protect his property in an emergency is not liable for resulting injury to the property of another." 65 C.J.S. *Negligence* § 17(c) (1966).
[129] *See supra* text accompanying note 81 (quoting RESTATEMENT (SECOND) APP., Reporter's note to § 263).
[130] For example, Foot and Thomson, who are both strongly supportive of the notion that it is sometimes permissible to kill an innocent person to save the lives of a greater number of innocent lives, suggest absolutely nothing of the kind with respect to taking a single individual's life to preserve one's own life.
[131] *See* RESTATEMENT (SECOND), § 263(1).
[132] *Id.* § 263 cmt. d (emphasis added).

down in the same family for 350 years? And what about destroying the 350-year-old family Bible or other irreplaceable heirloom to save the Van Gogh painting?[133]

Not only is there no authority to support the *Restatement (Second)*'s position, other than an excessively broad interpretation of *Vincent*, but several of the other cases cited in general support of *Restatement (Second)* section 197, the provision upon which *Restatement (Second)* section 263 is expressly based,[134] flatly hold that there is *no* privilege to destroy an innocent person's property to preserve one's own property.[135] One of these cases expressly declares that a rule permitting such conduct by he "whose property is the more valuable, would lead to great injustice."[136] If such comparisons were to be made, the Louisiana Supreme Court continued, "it would be proper to consider . . . the question of the comparative ability of the sufferers to sustain the loss."[137] The *Restatement (Second)* nevertheless ignores the thrust of these cases, and contains a privilege to destroy the property of innocent people, even when that property poses no threat to one's own property.[138] By recognizing such a privilege, is the *Restatement (Second)* seriously suggesting that if two people are interested in saving their own property the so-called

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[133] That property is destroyed that otherwise would not be harmed distinguishes this case from the "general average" situation in Admiralty, *see supra* note 72and accompanying text. In the general average situation, it is assumed that the ship and all the cargo, including the cargo sacrificed, would be lost if some cargo were not jettisoned. *See* ROBINSON, *supra* note 72, at 764. That is why the person whose cargo is jettisoned is compensated by the owners of the ship and of the cargo that is saved. The owner of the jettisoned cargo must, of course, absorb his own proportionate share of the loss as well. *Id.* In the situation I am positing in the text, the owner of the Van Gogh might wish to use the heirloom family Bible to stuff up a crack in the wall to prevent water damage to the painting or the owner of the Bible might want to use the canvas on which the Van Gogh is painted to protect the Bible from damage by torrential rain.

[134] *See* RESTATEMENT, § 263 cmt. b ("The statement in this Subsection is analogous in part to the privilege to enter land in the possession of another for the protection of person or property as stated in § 197."); RESTATEMENT (SECOND), § 263 cmt. b (same); RESTATEMENT (SECOND) APP., Reporter's notes to § 263 ("[T]he principle stated in this Section . . . must rest largely upon the analogy to the corresponding privilege to interfere with the exclusive possession of land, stated in § 197."). Note, however, that unlike trespass to land, there is no liability for trespass to chattels when no damage is done. *See* RESTATEMENT, § 263 cmt. b ("Since one is not liable in any event for a harmless intermeddling with chattels in the possession of another . . . the principle of the incomplete privilege to enter land stated in § 197 is of no significance with respect to the actor's liability to the possessor of chattels."); RESTATEMENT (SECOND), § 263 cmt. b (same).

[135] *See* RESTATEMENT, § 263 cmt. b ("The statement in this Subsection is analogous in part to the privilege to enter land in the possession of another for the protection of person or property as stated in § 197."); RESTATEMENT (SECOND), § 263 cmt. b (same); RESTATEMENT (SECOND) APP., Reporter's notes to § 263 ("[T]he principle stated in this Section . . . must rest largely upon the analogy to the corresponding privilege to interfere with the exclusive possession of land, stated in § 197."). Note, however, that unlike trespass to land, there is no liability for trespass to chattels when no damage is done. *See* RESTATEMENT, § 263 cmt. b ("Since one is not liable in any event for a harmless intermeddling with chattels in the possession of another . . . the principle of the incomplete privilege to enter land stated in § 197 is of no significance with respect to the actor's liability to the possessor of chattels."); RESTATEMENT (SECOND), § 263 cmt. b (same).

[136] *Latta*, 59 So. at 254.

[137] *Id.*

[138] *See* RESTATEMENT (SECOND), § 263(1). Section 904 of the German Civil Code states that, provided one pays compensation for the harm done, property may be destroyed if "the interference is necessary for the avoidance of a present danger and the damage threatened is disproportionally great compared to the damage caused to the owner" of the property destroyed. BGB, *supra* note 73, § 904. How this provision would be applied in a concrete situation is hard to ascertain. George Fletcher, for example, cites a commentator on section 904 who rejects out of hand the idea that it could be used to justify the actions of someone who seizes another's raincoat in order to save his own suede coat from destruction in an unexpected rainstorm. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 777 (1978) (citing H.H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL (2d ed. 1972)).

privilege accrues to the one who lays hold of his neighbor's property first? I ask this since we can conceive of instances where the guidance provided by the *Restatement (Second)* might justify either actor in taking the other's property (such as the example given above of the family Bible and the Van Gogh painting). This is an important matter because, as we shall soon discuss in greater detail, there remains the question of whether the owner of the property about to be taken and destroyed can take reasonable steps to protect his property. Despite the *Restatement (Second)*, most people would surely believe that he could.

As we have already noted, the *Restatement (Second)* relies on *Vincent* as support for its view of the privilege to destroy property.[139] If the key element in *Vincent* was the reattaching of the lines so that the case did not involve a variant of storm damage, which seems to be the how the majority viewed it,[140] I would submit that the case is not an instance of the exercise of a privilege at all. It is simply a case of intentionally damaging the property of another in the civil sense of "intention," that is, of engaging in conduct that one knows, with substantial certainty, will lead to that result.[141] At the very least, it would amount to negligent or reckless behavior. That compensation should be paid in such circumstances is not at all surprising or controversial. It is the attempt to read more into the *Vincent* case than the actual facts of the case will readily permit that has encouraged some to conclude that, if one must pay compensation for property destroyed in order to save other property, then one must also pay compensation whenever property is destroyed to save human life.

VI. Special Problems Created by the Recognition of a Right of Entry by Force into the Dwellings of Others and the Taking and Use of the Property of Others in Emergency Situations

A. Entry into Dwellings

Although it is often difficult, if not impossible, to separate the two situations, the main thrust of the paradigm created by Feinberg and Coleman on the basis of *Vincent* is not the simple *destruction* of property but the *taking and consumption* of property. Feinberg's backpacker, for example, enters an unoccupied vacation cabin.[142] According to *Restatement (Second)* section 197, he is legally privileged to do so when necessary to avert serious harm to himself.[143] That the cabin is unoccupied avoids some of the more difficult problems. For example, what if the cabin reasonably appears to be unoccupied but in fact is actually occupied? Should this circumstance, which could not reasonably be known by the backpacker, make a difference with regard to his legal or moral rights? What about the more extreme case in which the cabin is the principal residence of a family and is *known* to be occupied?

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[139] *See supra* note 74and accompanying text.
[140] *See supra* note 29and accompanying text.
[141] *See* Restatement (Second), § 8A ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").
[142] *See* Feinberg, *supra* note 2, at 102.
[143] *See* Restatement (Second), § 197(1)(a) ("One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to (a) the actor . . . .").

In the comments to section 197, the *Restatement (Second)* states that, when necessary to prevent serious harm, a person is privileged "to break and enter or to destroy a fence or other enclosure and indeed a building, including a dwelling."[144] However, "more may be required to justify [entering a dwelling] than . . . entry upon other premises" and this is "a fact to be taken into account in determining the reasonableness of the defendant's action[s]."[145] This was a departure from the first *Restatement* in which the privilege was described as extending to buildings "other than a dwelling."[146] Furthermore, according to the same comment in the *Restatement (Second)*, "the privilege . . . carries with it the subsidiary privilege to use reasonable force to the person of the possessor or any third person."[147] The Reporter's notes recognized that "[d]irect authority is lacking as to the subsidiary privilege to use force against the person, or to break or enter an enclosure or a building,"[148] but argued that "[t]o render the privilege of entry effective the subsidiary privilege is obviously necessary."[149] I am skeptical that the *Restatement (Second)* accurately states the law on this subject. It is hard for me to conceive that courts would sanction the use of force against an objecting homeowner by a private person who, in order to protect his own life, seeks to enter the homeowner's dwelling.

The Reporter's notes recognize that *Ploof v. Putnam*[150] only held that the possessor could not use force to prevent the plaintiff and his wife and children from entering on his land.[151] The only case remotely involving a breaking and entry cited by the *Restatement (Second)* is *People v. Roberts*,[152] in which a conviction was upheld when critical evidence was obtained as a result of the police getting the manager to let them into an apartment when no one answered their knock and after the police heard "several moans or groans that sounded as if a person in the apartment were in distress."[153] The trial court found that the officers reasonably believed that someone inside the apartment was in distress and in need of help, and that the police had entered for the purpose of rendering assistance.[154] It is a long way from this situation to one in which there is an entry against the wishes of the possessor and even further to a case in which the intruder meets resistance from the possessor and resorts to force to gain entry.

B. *The Taking and Consumption of Others' Property*

The more important aspects of the paradigm we have been discussing involve not just unauthorized entry and the simple destruction of property but also, and more importantly, the taking and consumption of someone else's property. In Feinberg's example, the desperate

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[144] *Id*. § 197 cmt. g; *cf. id*. cmt. h ("[I]t may be reasonable for the actor to break through a fence in order to rescue his dog who is drowning in the plaintiff's pond, where it would not be reasonable for him to break into the plaintiff's dwelling in order to release the same dog from temporary confinement.").
[145] *Id*. cmt. h.
[146] RESTATEMENT, § 197(1).
[147] RESTATEMENT (SECOND), § 197 cmt. g.
[148] RESTATEMENT (SECOND) APP., Reporter's notes to § 197 cmt. g.
[149] *Id.*
[150] 71 A. 188 (Vt. 1908).
[151] *See id.* at 189, *discussed in* RESTATEMENT (SECOND) APP., Reporter's notes to § 197 cmt. g.
[152] 303 P.2d 721 (Cal. 1956), *cited in* RESTATEMENT (SECOND) APP., Reporter's notes to § 197 cmt. h.
[153] *Roberts*, 303 P.2d at 722.
[154] *See id.* at 724.

backpacker eats his unknown host's food and burns his host's furniture in order to keep warm.[155] In Coleman's less complex example, Hal injects (or possibly ingests) Carla's insulin into his body to prevent himself from lapsing into a coma.[156]

To focus for the moment on the latter example, Coleman concludes that Hal is justified in taking and using the insulin since he needs it to preserve his life, but that Carla is entitled to compensation since her rights have been infringed (although not violated).[157] Legal support for this doctrine and its application in the situation posed is supposedly derived from *Vincent v. Lake Erie Transportation Co.*[158] But, as we have seen, the *Vincent* case has nothing to say about this situation. At the time *Vincent* was decided in 1910, Hal's taking of Carla's insulin would almost certainly have been considered theft, and the entry into her house or apartment in order to obtain the insulin (we are not told how Hal gained entry) probably amounted to an additional crime (either breaking and entering or some form of common law or statutory burglary).[159]

Admittedly, since 1910, and more specifically in the last thirty years, a number of states have incorporated "lesser evil" defenses into their criminal codes.[160] Admittedly also, as we have already seen, both the *Restatement* and the *Restatement (Second)* grant a privilege not only to *destroy* the chattels of another in cases of necessity but also the privilege to *use* the chattels of another, if necessary, always subject to an obligation to pay compensation for any harm that might be caused by the exercise of the privilege.[161] This is, of course, the position espoused by Coleman and Feinberg. But, as we have noted, the Reporter's notes to the *Restatement (Second)* candidly admit that "[t]here is scarcely any authority to support the principle stated in this Section."[162]

That the so-called privilege not only to destroy but also to use the chattels of another, first recognized in 1934 by *Restatement* section 263, was never adequately thought out is shown by

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[155] Feinberg, *supra* note 2, at 102. I am prepared to accept that it is possible that there might be some local custom that might bear on these sorts of situations. For example, John McPhee writes of a custom in the most sparsely populated regions of Alaska to leave remote cabins unlocked and stocked with food for the use of people in need, such as the survivors of a plane crash. JOHN MCPHEE, COMING INTO THE COUNTRY 248-57 (1976). Notice, however, that the cabins are *unlocked*. I have no idea whether this custom still persists. The actual example that McPhee gives took place in 1943.

[156] *See* COLEMAN, *supra* note 5, at 282.

[157] *Id.* at 282-83.

[158] 124 N.W. 221 (Minn. 1910), *cited in* COLEMAN, *supra* note 5, at 293.

[159] In *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273, 286 (1884), the court accepted Sir Matthew Hale's declaration that it was not the law of England that a starving man could steal bread. This statement was accepted as stating the law in several American textbooks. *See, e.g.*, WILLIAM L. CLARK, JR., HANDBOOK OF CRIMINAL LAW 96-97 (Francis B. Tiffany ed., 2d ed. 1902); JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW 169 (1934). Modern law seems to be the same. *See, e.g.*, State v. Moe, 24 P.2d 638, 640 (Wash. 1933) (rejecting poverty as a defense to theft of groceries); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 5.4, at 444 (2d ed. 1986) (stating that "'economic necessity' is no defense to crime").

[160] *See* OFFICIAL MODEL PENAL CODE at § 305, cmt.5.

[161] *See* RESTATEMENT, § 263(2); RESTATEMENT (SECOND), § 263(2).

[162] RESTATEMENT (SECOND) APP., Reporter's notes to § 263. It is ironic given the paucity of authority for section 197, which discusses the privilege to enter the land of others in emergency situations, that the *Model Penal Code* refers to the general acceptance of the principle of necessity in tort law as one of the bases for recognizing a "lesser evil" defense in the criminal law. *See* OFFICIAL MODEL PENAL CODE § 3.02, cmt. 3, n. 11 (Official Draft and Revised Comments, 1985).

the second of the two examples offered as illustrations: "A is seriously hurt in an automobile accident. He requires B, against his will, to drive him in B's automobile to a hospital. A is liable to B for harm to the upholstery of the automobile caused by the blood dripping from his wounds."[163] Provided only that A is prepared to pay some sort of compensation, the *Restatement* would thus allow the injured A to kidnap B and force B to drive him to the hospital![164] If B were to resist, A could then, to make his privilege effective, force B at gunpoint to serve as an unwilling chauffeur and, if necessary, presumably shoot B and commandeer B's car. Fortunately, the *Restatement (Second)* omits this ridiculous illustration. It presents instead a new illustration in which "A is seriously hurt in an automobile accident. While waiting for an ambulance, he uses B's scarf, over B's objection, as a tourniquet. A is privileged to use the scarf, but is subject to liability to B for the harm caused to it by the blood."[165] Those unlucky enough to be standing near the scene of an accident are thereby subject to having their clothing forcibly removed to make bandages for the injured. Their only consolation is that they will be compensated for the damage to their clothing. How about the loss of their time if they must return home to put on fresh clothes to look presentable at a business meeting? I am not suggesting that one might not wish to volunteer his clothing in these circumstances, but that it may lawfully be taken away from him by force strains credulity.

The other two illustrations in the *Restatement (Second)* involve the taking of medicine from a pharmacist who refuses to sell it -- first by a patient attempting to save his own life and second by the patient's doctor.[166] Again, although there is no discussion of the issue, one may presume that the medicine may be taken from the pharmacist by force if necessary to make the privilege effective.[167] As might be expected, I have been unable to find a case in which the defense of necessity has been raised, much less upheld, in a prosecution for theft.[168] This is not surprising, since the law has, if anything, always taken a dimmer view of the taking and consumption of property than it has of its mere destruction.[169]

C. The Right to Resist a Taking

In his attempt to describe the appropriate legal regime to govern this subject, Coleman, like the drafters of the *Restatement*, does not consider what would happen if Carla were suddenly to appear and refuse to allow Hal to use any of her insulin. She may not believe that Hal has accurately assessed how much insulin to leave her, or she may be apprehensive about her ability to replace the insulin taken, or doubtful about how soon Hal will be able to pay her, or perhaps simply outraged that Hal wants to take *her* insulin. Despite Hal's promise to pay her -- even on

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[163] RESTATEMENT, § 263 cmt. f., illus. 2.
[164] *See* RESTATEMENT (SECOND), § 263 cmt. e ("[T]he actor . . . is not entitled to commandeer the use of the other's goods for his own protection, or that of a third person, without making good any loss thus caused.").
[165] *Id.* § 263 cmt. e, illus. 1.
[166] *See id*. § 263 cmt. e, illus. 2-3.
[167] The fact that a superficially appealing general principle can have bizarre consequences when we try to give concrete examples shows the inherent limitations of trying to decide concrete cases by resort to principle.
[168] *See* sources listed *supra* note 159 and *infra* note 174 (confirming the general rule that economic necessity is no defense to a criminal charge).
[169] For example, even though the doctrine of public necessity allows governments to destroy private property in emergency situations without having to pay compensation to the owner, it does not permit them to take and consume private property without compensating its owners. *See supra* notes 115 and 116.

the spot -- for the insulin, may she legally tell him to leave her insulin alone? With due respect to Coleman and the drafters of the Restatements, I believe she may. May she legally defend, with physical force, her insulin? Again, I believe she may. Admittedly, she may not use deadly force to defend her insulin -- unless she reasonably thought Hal might take all of it -- but if she interposed her body between Hal and the insulin and he tried to push her aside, she could use all force reasonably necessary to protect her person.[170]

If all of this is hornbook law, how is it possible to maintain that Hal is legally justified in taking the insulin? Admittedly, if Hal succeeds in taking the insulin, he will be under an obligation to compensate Carla for the taking -- in legal parlance, for converting it -- but that does not show that his taking of her insulin by force was legally justified. Sometimes all the law can do is to impose a monetary remedy, which is why, from a realist's perspective, it is difficult to distinguish between a fine and a tax. Indeed, for a person sufficiently rich so that parking fines are meaningless expenses, the public streets are one big parking lot -- at least in the absence of towing or booting. But, in the situation we have been discussing, I would submit that Hal is subject to criminal prosecution for criminal assault and theft,[171] even if the prosecutor might be reluctant to charge him; and Carla, in most jurisdictions, is in theory entitled to punitive damages,[172] even if juries might be reluctant to impose them. This hardly seems the stuff that legal justification is made of.

D. The Moral Implications of a Supposed Privilege to Take and Use the Property of Others

We may accept, without hesitation, that both the owner of the vacation cabin in Feinberg's example and Carla, the owner of the insulin in Coleman's example, have some moral obligation to help the backpacker and Hal, respectively. Do the property owners' moral obligations give either the backpacker or Hal the moral right to take the property? If they do, what would be the nature of the moral obligations that the backpacker and Hal would assume by

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[170] For a discussion of the privilege to defend one's person when one is physically attacked while protecting one's property, see KEETON ET AL., *supra* note 108, at 132-4. It might be said, of course, that since Hal's taking of the insulin is privileged, Carla has no privilege to act in defense of her property and, subsequently, of her person when Hal tries to overcome her efforts. *See id*. at 131-32; *see also* RESTATEMENT (SECOND), § 197(2) ("Where [a privileged] entry is for the benefit of the actor . . . he is subject to liability for any harm done in the exercise of the privilege . . . *except* where the threat of harm . . . is caused by the tortious conduct . . . of the possessor.") (emphasis added). The only two cases cited by Professor Keeton and his colleagues-*Arlowski v. Foglio*, 135 A. 397 (Conn. 1926), and *Stuyvesant v. Wilcox*, 52 N.W. 465 (Mich. 1892)- are not helpful. *See* KEETON ET AL., *supra* note 108, at 132, n.5 (citing *Arlowski* and *Stuyvesant* in support of the proposition that "an erroneous belief, however reasonable, that the intruder did not have a privilege will not justify the use of force against the intruder"). The plaintiff in one case entered the defendant's property to recover *his own* personal property, *see Stuyvesant*, 52 N.W. at 465, and in the other the plaintiff sought to recover *his own* livestock, *see Arlowski*, 135 A. at 398. It takes greater imagination than I possess to believe that these cases, which involve the attempt to reclaim unlawfully detained property, are authority for denying Carla the right to defend what everyone agrees is *her own* property.

[171] *Cf., e.g.*, LAFAVE & SCOTT, *supra* note 159, § 5.4, at 444 ("'[E]conomic necessity' is no defense to crime . . . .").

[172] In most jurisdictions, the availability of punitive damages would depend on the degree to which the defendant's acts could be demonstrated to be "outrageous" or the product of "reckless indifference." *See* RESTATEMENT (SECOND), § 908(2):

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

exercising their supposed rights? Whatever moral obligation they might assume by exercising the supposed right to take and consume property, it cannot be the simplistic and legalistic obligation to pay for the goods taken and consumed. Surely morality does not insist that, assuming Hal is justified in taking and consuming Carla's insulin, Hal thereby becomes unequivocally morally obliged to pay Carla its fair market value. What if Hal is penniless? What if Carla is a billionaire? Morality is more subtle than that.

Coleman nevertheless argues that Hal is only justified in taking Carla's insulin if he is prepared to compensate her. He characterizes the taking of the insulin as an "ex post contract" in which compensation is a condition of its "justifiability."[173] From a moral perspective, I am not so sure that compensation makes a great deal of difference, particularly if Carla is well off. I do, of course, accept that if Hal were rich and the value of the property taken were great, this might give rise to a new moral obligation to compensate or better still to help Carla if she has fallen on hard times.

I am unconvinced, however, that either the backpacker or Hal has a moral right to take and consume the goods in question. Suppose Carla suddenly appears and refuses -- let us presume wrongfully from a moral perspective -- to let Hal have some insulin. We have just suggested that Hal would not be *legally* justified in taking the insulin from Carla by force. Is Hal nevertheless *morally* justified in taking the insulin from her by force? The backpacker and the insulin examples excite our sympathy because they are unlikely to occur -- certainly they are outside the experience of most of us -- and therefore the example they set is unlikely to have major repercussions. In almost every urban area, however, there are people on the brink of starvation, often through no fault of their own, and many homeless people desperately in need of shelter. I do not think that society could tolerate their taking and consuming the food or goods of others.[174] In cases of general public disorder, the authorities never tolerate looting -- a similar situation on a larger scale -- if they can help it.

The problem of squatters is perhaps more troublesome, but certainly there is no general public recognition of the moral legitimacy of squatting, that is, the entry of homeless and needy persons into vacant dwellings. In short, although our society recognizes a moral obligation on the part of those who have to help those who have not, it is not at all clear to me that the way our morality enforces this obligation is by giving the destitute a privilege to take and consume.[175] It is significant that, in our literature and our folklore, the refusal of people to discharge their moral obligations is met with curses or a spate of bad luck, not with outright aggression by those in

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[173] COLEMAN, *supra* note 5, at 295.

[174] For example, during the Great Depression, the convictions of several members of a crowd of rioters who were convicted of stealing groceries were affirmed over their objection that they were denied the right to present the defense of economic necessity. *See* State v. Moe, 24 P.2d 638, 639-40 (Wash. 1933).

[175] St. Thomas Aquinas, in *Summa Theologiae*, opined that the natural law requires whatever material things a person possesses in superabundance be used to help the poor, and further stated that such goods may be taken by a needy person in a time of imminent danger. *See* ST. THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS, q. 66, a. 7, at 186 (William P. Baumgarth & Richard J. Regan eds., Hackett Publishing Co. 1988) (1274). John Locke similarly declared that, in the state of nature, the needy have a right to the "[s]urplusage" of their fellows. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 170 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). "*Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise . . . ." *Id.* Whether this right carried over to civil society is another matter.

need of assistance.[176] This seems to me to be an implicit, but nevertheless clear, recognition of the point I have been making.

[176] A classic illustration is the fairy tale *The Golden Goose*, in which two brothers who refuse to share their food and drink with a hungry and thirsty old man are met with bad luck and the third brother, who does share his food and drink with the old man, is blessed with extraordinary good fortune. *See* THE COMPLETE BROTHERS GRIMM FAIRY TALES 274-77 (Lily Owens ed., 1981); *see also Matthew* 25:31-40 (New King James):

> When the son of man comes in His glory . . . then He will sit on the throne of His glory. All the nations will be gathered before Him, and He will separate them one from another, as a shepherd divides *his* sheep from the goats. And He will set the sheep on His right hand, but the goats on the left. Then the King will say to those on His right hand, "Come, you blessed of My Father, inherit the kingdom prepared for you from the foundation of the world: for I was hungry and you gave Me food; I was thirsty and you gave Me drink; I was a stranger and you took Me in; I *was* naked and you clothed Me; I was sick and you visited Me; I was in prison and you came to Me." Then the righteous will answer Him, saying, "Lord, when did we see You hungry and feed *You*, or thirsty and give *You* drink? When did we see You a stranger and take *You* in, or naked and clothe *You?* Or when did we see You sick, or in prison, and come to You?" And the King will answer and say to them, "Assuredly, I say to you, inasmuch as you did *it* to one of the least of these My brethren, you did *it* to Me."