Duties and Their Direction*

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Consider the following passage from Wesley Hohfeld's celebrated contribution to jurisprudence:

> As said in *Lake Shore & M.S.R. Co. v. Kurtz*: "A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated."
>
> In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove best.[1]

One of the points Hohfeld makes here, perhaps the most important one, is that a person's possession of a [claim-]right is equivalent to someone else's possession of a duty—a duty, moreover, with the same content.[2] This is the first of four jural equivalences or correlatives that Hohfeld affirms. Another point he makes is that the sense of "[a] right" defined by this equivalence needs to be marked as a limited sense of

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1. W. N. Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning*, ed. W. W. Cook (New Haven, CT: Yale University Press, 1919), 38. Footnotes omitted. Hohfeld quotes (1894) 10 Ind. App., 60; 37 N.E., 303, 304.

2. In his example, the [claim-]right and the duty share the content "that Y stay off X's land." To preserve idiom, we could also say, alternatively, that they share a content that is satisfied by "Y's staying off X's land."

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the term, albeit the proper one.[3] Hohfeld therefore proposes the term "claim" to mark the implied contrast with the use of "rights" in a broader sense, a use he elsewhere deplores as "indiscriminate" and "loose."

These are familiar points. There is, however, a final point illustrated by Hohfeld's passage, even if we probably cannot say that he makes it. Notice that when he glosses the quoted judicial pronouncement, Hohfeld does more than supply us with some sample content for the right and duty to be displayed. That he might have done by simply saying:

> In other words, if X has a right that Y stay off X's land, the correlative (and equivalent) is that Y is under a duty to stay off the place.

But that is not what he actually says. What he says, rather, is that "if X has a right *against Y*" that Y stay off X's land, then the correlative is that "Y is under a duty *toward X*" to stay off X's land. We might put the point illustrated by Hohfeld's interpolations as follows: The duty that correlates with a claim-right is a duty that is *owed to* the claim-right holder; and a claim-right is always something *held against* the bearer of the correlative duty.

I refrain from saying that Hohfeld makes this final point only because he nowhere remarks upon his own interpolations. Indeed, he scarcely seems to notice them, passing from the "right" and "duty" of the quoted *dicta* to the "right against Y" and "duty toward X" of his own gloss, aided by no more than a blithe "in other words." Still, there is no doubt that Hohfeld affirms the point; and it may also be fairly regarded as standard, if somewhat technical, practice to do so. It is perfectly standard, that is, to accept definitions with exactly the structure to which I have drawn attention. To wit,

> X has a claim-right *against* Y that Y stay off X's land if and only if Y is under a duty *toward* X to stay off X's land.[4]

3. We should actually distinguish two points here. One point is that a limitation in the sense of "a right" is required to assert without qualification that a right is the equivalent of someone else's duty. It is a further point that this sense of "a right" is its proper meaning. Few dispute that "a right" centrally has the sense Hohfeld specifies and which he labels "a claim." But it is not uncommon to dispute Hohfeld's further point—the point, as he also puts it, that claims are rights "in the strictest sense" (*Fundamental Legal Conceptions*, 36). See, e.g., L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon, 1987), chap. 2. Without taking a position on whether "a right" has *a* strictest sense, I shall follow Hohfeld's suggested use of "claim[-right]."

4. For some examples, see J. Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973), chap. 4; J. Waldron, "Introduction," to his *Theories of Rights* (Oxford: Oxford University Press, 1984), 8; Sumner, *Moral Foundation of Rights*, 25–27; J. Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 41–43; M. Kramer, N. Simmonds, and H. Steiner, *A Debate over Rights* (Oxford: Clarendon, 1998).

Now there would be nothing remarkable in Hohfeld's gloss, of course, if every duty were owed to someone or other. It may help to introduce a piece of terminology here. Let us say that a duty is a *directed duty* if there is someone to whom it is owed; and that it is a *nondirected duty* if there is no one to whom it is owed.[5] So, to repeat, if directed duties were the only kind of duties there were, Hohfeld's interpolations would merely be making explicit something that was necessarily implicit in any unadorned use of the term "duty." His "in other words" would have been just right. One can therefore see why Sumner charges him with having assumed that all duties are directed duties.[6]

Suppose, however, that not all duties are directed duties. Suppose, that is, that some duties are nondirected. In that case, the question arises of what distinguishes the two kinds of duties. What does it mean for a duty to be owed to a person? What accounts for the direction in a directed duty—for its existence, as well as for its terminus?[7] Let us set aside the matter of whether Hohfeld himself needed to answer this question. Hohfeld's role here was simply to set our stage. How should *we* answer? That is my subject.

Surprisingly, the question is a neglected one, to say the least. On the whole, scholars have been content to follow Hohfeld in ignoring it altogether.[8] Yet this neglect actually belies an important problem, or so I shall argue. To begin with, I shall distinguish clearly between directed duties and nondirected duties. I shall then argue, in Sections II and III, that failure to observe this distinction leads to serious difficulties. Al-

5. I adapt this expression from Wayne Sumner, who speaks of "directional" duties (*Moral Foundation of Rights*, 24). Others speak of "relative" or "relational" duties. Judith Thomson has objected that to speak of claims as relations makes it obscure how to preserve entailments between ascriptions of claims (*Realm of Rights*, 41n.). She distinguishes instead between "two-hat concepts" and "one-hat concepts" and suggests that "duty" can express both a two-hat concept and a one-hat concept (62–63). My "directed duty" corresponds to the use of "duty" that expresses Thomson's two-hat concept; and my "nondirected duty" corresponds to the use that expresses her one-hat concept.

6. Sumner, *Moral Foundation of Rights*, 24–25. Jeremy Waldron suggests, more charitably, that Hohfeld's attention was simply confined to a particular normative system—notably, the system of private law—in which that assumption does, in fact, hold. Waldron, "A Right to Do Wrong," *Ethics* 92 (1981): 21–39, 24.

7. It does not help to answer "the correlative claim-right." If not all duties correlate with claim-rights, we can as well ask: What accounts for the correlation, when there is one? What accounts for the identity of the correlative claim-right holder? I discuss the question in these alternative terms in a companion essay, "A Hybrid Theory of Claim-Rights," *Oxford Journal of Legal Studies* 25 (2005): 257–74.

8. It is not uncommon to go beyond Hohfeld in observing explicitly that the duties that correlate with claims are owed to someone, i.e., are directed duties. But almost no one goes on to raise the question of what accounts for the direction in these duties. I know of only three exceptions: Waldron, *Theories of Rights*; Sumner, *Moral Foundation of Rights*; and Thomson, *Realm of Rights*.

though we therefore need an account of the direction in directed duties, I shall argue in Sections IV and V that we lack a satisfactory one. Finally, in Sections VI and VII, I propose my own account and defend it.

I

I should make clear at the outset that my interest lies primarily in morality, rather than the law. Despite this, most of what I shall say also applies to the law—indeed, a certain amount will be straightforwardly about the law. One need not go as far as Bentham, I think, in order to acknowledge that our understanding of rights generally is squarely based upon our acquaintance with legal practice.[9] I take it, more specifically, that our clearest paradigms of a claim-right, and so of a directed duty, are those provided by the claim-rights and correlative directed duties recognized by the law of property and contract. The task of a theory of moral claim-rights is therefore, among other things, to develop a suitable generalization from these paradigms. In this respect, it has a lot in common with the task of a theory of legal claim-rights, which has to generalize from the same paradigms. Something similar can be said about theories of directed duties, moral and legal. It is because I shall be concentrating, in the end, on the conditions of adequacy for any such generalization that much of what I say applies to the legal case, even if it is the moral case I have in mind. For the same reason, I shall pay less attention than one otherwise might to the various important differences between legal rights and moral rights.

To introduce the question of what accounts for the direction in a directed duty, I relied on the assumption that not all duties are directed duties.[10] Let me now discharge that assumption. A useful place to begin is with part of Thomson's discussion in the *Realm of Rights*, since she is one of the few scholars to have taken something like our question seriously. Thomson distinguishes between "duty" and "ought."[11] By "ought," she means what morality requires someone, all things considered, to do. To forestall confusion, I shall write this as "ought, all things considered" or "ought ATC." By "duty," she means the counterpart in

9. "Right is with me the child of law: . . . a natural right is a son that never had a father." J. Bentham, "Supply Without Burthern," quoted in Waldron, *Theories of Rights*, 4.

10. Of course, as a matter of simple theoretical curiosity, we could ask this question even if all duties had a direction. If only some duties have a direction, however, and if these are the duties that correlate with claim-rights, the possibility arises that the significance of a claim-right has as much to do with the directedness of its correlative duty as it does with anything else. In that case, understanding the significance of a claim-right would require an understanding of this directedness. Our question thereby stands to acquire some of the practical importance attached to understanding the nature of claim-rights.

11. Thomson, *Realm of Rights*, 61–64.

morality of that which Hohfeld classified as the correlative of a claim-right. That is, she means a directed moral duty. In slightly different language, then, Thomson distinguishes between a directed duty and the all things considered ought.

In fact, there are two dimensions, as we might put it, along which Thomson draws this distinction; and they are worth separating. The first is the dimension of directedness. As Thomson observes, while every directed duty attaches to two people—the agent who owes it and another to whom it is owed—the all things considered ought only attaches to one person, the agent. This observation is what motivates Thomson's hat terminology: the concept of a directed duty is, as she says, a "two-hat concept," whereas the concept of the ATC ought is a "one-hat concept." In effect, Thomson simply announces that "ought ATC" is not owed to anyone. Yet it seems to me that she is plainly right about that. In our terms, "ought ATC" has no direction in it.

It is almost always false, for example, to say that someone has a claim-right against you "*that* you do what you ought ATC to do."[12] This is not to deny that someone's claim-right against you will often coincide with what you ought ATC to do. For instance, someone may have a claim-right against you that you do what you promised last Friday; and it may also be that you ought ATC to fulfill that promise. Nor will such coincidences be mere coincidence. They arise because and whenever an agent's directed duty is not defeated by competing moral considerations. But it is one thing for the ATC ought to coincide in content with an undefeated directed duty (and, hence, with a claim-right) and quite another for it to appear *inside* the content of an undefeated directed duty. Even in cases of coincidence, moreover, the correlative of the claim-right is the undefeated directed duty and not the ATC ought.[13] In itself, the ATC ought has no correlative: What an agent "ought ATC" to do is not, as such, something that figures in the content of anyone's claim-right against her.

To see the second dimension along which Thomson distinguishes

12. In a suitably artificial context, I might be able to promise someone *that* I will do "what I ought ATC to do." Thus, what an agent ought ATC to do can perhaps be made to figure in the content of a claim-right. But if so, that is only because the content of a promise can be *made to coincide* with what someone ought ATC to do. Moreover, that this is so is due to a special feature of promises, rather than of the ATC ought.

13. Consider what follows, e.g., when the promisee from last Friday (i.e., the correlative claim-right holder) releases you from your promise to φ. It follows immediately that your (undefeated) directed duty to the promisee to φ is dissolved. However, it does not follow immediately that you no longer ought ATC to φ. If it follows at all, it only follows from the release together with some further moral fact(s)—e.g., that it is otherwise morally irrelevant whether you φ.

a directed duty from the ATC ought, it will help to introduce a further bit of terminology. Call any moral consideration that counts in favor of (or against) the conclusion that an agent ought, all things considered, to φ a *contributory ought*; and call the ATC ought itself, and any moral consideration that always entails an ATC ought, a *conclusive ought*. Thomson argues that a directed duty does not suffice to determine what the agent who owes it ought ATC to do. That one has a directed duty to φ does not entail that one ought ATC to φ. It only entails that, other things equal, one ought ATC to φ. But other things might not be equal. In the terms I have just introduced, this is to say that a directed duty is merely a contributory ought and not also a conclusive ought. By contrast, the ATC ought is a conclusive ought.

It is instructive to consider Thomson's most direct argument on this point, at least in outline. Among other reasons, the conclusion that a directed duty is not a conclusive ought contradicts one of the most popular and enduring ideas about claim-rights—the idea, as Thomson puts it, that "all claims are absolute." Her argument operates under the stipulation that there can be no genuine moral dilemmas. It begins with an apparent conflict of claim-rights: For example, you promised two people one banana each, but then find that there is only one banana available. If we assume that all claim-rights are absolute,[14] then a dilemma appears to be generated. Hence, we must either deny that the apparent conflict of claim-rights is real or deny that all claim-rights are absolute. Thomson canvasses and rejects various general strategies for denying the appearance of conflict; and concludes, on that basis, that not all claim-rights are absolute.

Since I know of no good argument against the possibility of moral dilemmas, it is also worth explaining that Thomson's stipulated exclusion of dilemmas is not essential to her argument. To yield its *reductio*, all the argument needs is for a contradiction to be produced by the conclusion that the case at hand—for example, Thomson's banana case—is a genuine moral dilemma. It therefore suffices to assume that the case at hand is not a genuine moral dilemma. While this trivially follows from the much stronger assumption that there are no moral dilemmas, the stronger assumption is hardly necessary. After all, even those who believe that genuine moral dilemmas are possible do not maintain that every apparent conflict instantiates one.

A directed duty is therefore distinguished from the ATC ought along two dimensions—along the dimension of "conclusiveness," as well as that of directedness. Say we extend the language of "direction" from

14. In other words, we assume that, for every claim-right, the correlative directed duty to φ entails that its bearer ought ATC to φ.

duties to "oughts," so that an ought that the agent owes to someone is a *directed ought*; and an ought that the agent does not owe to anyone is a *nondirected ought*. Then we can represent Thomson's pair of distinctions orthogonally (see fig. 1).[15]

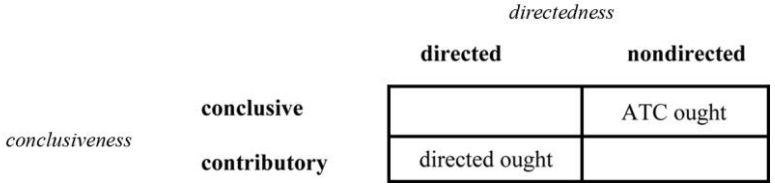

FIG. 1

There is no such thing as a conclusive and directed ought.[16] This is made very plausible by the previously established facts that the ATC ought has no direction in it and that directed duties are not conclusive oughts. But is there such a thing as a contributory and nondirected ought?

An affirmative answer is suggested by a commonplace of the extensive literature on the correlativity of claim-rights and duties, which developed in response to the first point Hohfeld makes in our opening passage. In that literature, it is common to distinguish the thesis that every duty has a correlative claim-right from the thesis that every claim-right has a correlative duty and then to offer various duties without a correlative claim-right as counterexamples to the former thesis (which Hohfeld did not hold).[17] If any of these counterexamples succeed, it follows that there are nondirected oughts.

15. Note that fig. 1 is a map of conceptual, rather than ontological, space. As an associate editor of *Ethics* has reminded me, some philosophers advocate a purely formal analysis of "ought ATC," according to which the ATC ought is not itself a further ontological entity. In representing the ATC ought on the same page as directed oughts, I am not excluding the possibility of a purely formal analysis of the ATC ought—or, indeed, making any ontological claims at all. I am simply representing the independence of a pair of conceptual distinctions from each other.

16. Recall that an *undefeated* directed ought is not, on that account, "conclusive." As I have defined it, a given kind of moral consideration is "conclusive" only if it always entails an ATC ought. But, by themselves, directed oughts never entail an ATC ought (since not all claim-rights are absolute), even if they often remain undefeated (and so, generate an ATC ought on the occasion).

17. See, e.g., J. Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), 170 and 210–16; and O. O'Neill, "The Great Maxims of Justice and Charity," in her *Constructions of Reason* (Cambridge: Cambridge University Press, 1989), 224–33. For a catalog of kinds of duty, some of which are held to correlate with claim-rights and others not to, see J. Feinberg, "Duties, Rights, and Claims," *American Philosophical Quarterly* 3 (1966): 137–42. See also Feinberg, *Social Philosophy*, 62–64; and Waldron, "A Right to Do Wrong," 24–25.

To illustrate the point, as well as explicitly to confirm the contributory aspect of these oughts, consider this nice example of Thomson's:

> Here are Alfred and Bert, sitting at a lecture, taking notes. Alfred's pencil breaks, and he has no other. Bert has plenty of pencils. Bert has no need of all those pencils and ought [ATC] to lend one to Alfred. But Alfred has no claim against Bert that Bert lend Alfred a pencil; nor does anyone else have a claim against Bert that Bert lend Alfred a pencil.[18]

In the context of Bert's plentiful supply, Alfred's need for a pencil makes it the case that Bert ought to lend him one—that is, his need counts in favor of the conclusion that Bert ought ATC to lend him a pencil.[19] The first ought is contributory; and given that it does not correlate with anyone's claim-right against Bert, it is also nondirected.

In fact, a whole fund of examples is made available by the assumption that, as we might put it, claim-rights are not the only moral considerations there are.[20] Like any other applicable moral consideration, a moral consideration that is neither a claim-right nor its correlative can give rise on its own to an all-things-considered ought—as long as it is not defeated by competing moral considerations. But this is just to say that such considerations are contributory oughts. Moreover, since these contributory oughts fail, by hypothesis, to coincide with anyone's claim-right against the agent, it follows that they are also nondirected. Thomson declares that Bert's case is of this kind. I agree, but you may not. However, provided that claim-rights are not the only moral considerations there are, it does not matter. A substitute example is guaranteed to be available.

Our goal, recall, was to discharge the assumption that not all duties are directed duties. There is a short and contentious way to reach that goal from here. This is to observe that, at least in loose usage, "ought" and "duty" are practically interchangeable. The first line that Hohfeld quotes from *Lake Shore & M.S.R. Co. v. Kurtz* in our opening passage is a perfect example: "A duty or a legal obligation is that which one ought or ought not to do." Many others could be given. Following this usage,

18. Thomson, *Realm of Rights*, 117.

19. As described, this also winds up *being* what Bert ought to do, all things considered, since nothing defeats the consideration of Alfred's need.

20. Compare Thomson: "There are endless things we ought to do though others have no claim against us that we do them. . . . The realm of rights is squarely within the morality of action, but it is not identical with it" (*Realm of Rights*, 117). It may be that Thomson prefers to see this as a conclusion of her argument, rather than a premise. In any case, the proposition itself is very plausible.

we could just reproduce the contents of our little matrix in the language of "duty" (see fig. 2).

		directedness	
		directed	**nondirected**
conclusiveness	**conclusive**	null	ATC ought
	contributory	directed duty	duty of generosity

FIG. 2

Here the lower right box contains exactly what we were looking for, namely, nondirected duties. I have taken the liberty of labeling Bert's provision of a pencil to Alfred as an act of generosity. More generally, we might say that this box contains duties of virtue. Various writers are, quite reasonably, happy to grant both that there are (imperfect) *duties* of virtue and that these duties are nondirected.[21] (Others, as we saw, were always happy to recognize some kind of nondirected duty or other [see n. 17].)

There is another standard candidate to fill the lower right box, a specifically legal one: the duties of the criminal law. No one, I think, wishes to deny that there are duties imposed by the criminal law. But it remains controversial whether these duties are directed or not, that is, whether they correlate with claim-rights or not.[22] Even if we retreat to the duty of generosity, though, controversy will not be avoided. Let me consider two objections. In effect, the first objection targets the proposition that claim-rights are not the only moral considerations there are.

If one takes the unadorned term "duty" to be defined as the correlative of a claim-right, then one may view the assertion that duties of generosity are nondirected duties as a challenge to Hohfeld's equivalence. Rather than reject this equivalence, one may then prefer to accept that there is a claim-right to generosity.[23] Similar reasoning will convert all moral considerations into claim-rights. Against this objection, one

21. Notably, J. S. Mill, *Utilitarianism* (1863), chap. 5. Compare O'Neill, "The Great Maxims of Justice and Charity," 224–25; and Thomson, *Realm of Rights*, 117. Joseph Raz is happy to distinguish the considerations in favor of virtue from the correlatives of claim-rights, but he prefers not to put those considerations in the language of "duty" (*Morality of Freedom*, 195–96). We shall see below that, in fact, nothing turns on this language.

22. See H. L. A. Hart, "Legal Rights," in his *Essays on Bentham* (Oxford: Clarendon, 1982); D. N. MacCormick, "Rights in Legislation," in *Law, Morality, and Society*, ed. P. Hacker and J. Raz (Oxford: Clarendon, 1977); and M. Kramer, "Rights without Trimmings," in Kramer, Simmonds, and Steiner, *A Debate over Rights*. See further Sec. VI below.

23. For something like this dialectic, see Kramer, "Rights without Trimmings," 24–25. Kramer would prefer not to classify the considerations in favor of virtue as "duties" at all.

might simply stand fast on the eminent plausibility of the proposition that claim-rights are not the only moral considerations there are. Granted the incontrovertible distinction between contributory and conclusive oughts, this proposition suffices to fill the lower right box of our matrix and thereby to force recognition of nondirected duties. Moreover, this conclusion is perfectly consistent with Hohfeld's equivalence, since that equivalence can (and should) be explicitly formulated as holding specifically between claim-rights and directed duties, as distinguished from nondirected duties.[24] There is much to recommend in this reply.

But there is another, less insistent, reply. It is to observe that, as long as "ought" and "duty" are being treated interchangeably, the ATC ought itself counts as a nondirected duty.[25] After all, the relevant division in the matrix here is between left and right. So, for that matter, the upper right box also suffices to establish that there are nondirected duties, and this without relying on the proposition that claim-rights are not the only moral considerations there are. In reproducing the matrix, I did not label the ATC ought as a "duty" only because that is rather less idiomatic.

No doubt this will invite the second objection, which is that treating "ought" and "duty" as interchangeable is barbaric, even if commonplace. I agree that it rides somewhat roughshod over various ordinary language distinctions, particularly when applied to the ATC ought. But I do not think it makes any important difference. I framed the assumption to be discharged in the language of "duty" because that is how the correlative of a claim-right is traditionally labeled. I could as well have framed it in the language of "ought," in which case the first version of our matrix would have done the trick. To show that the labels are irrelevant, let us take a page from Thomson's book and speak instead of "moral constraints" on behavior.[26] All of the boxes in our matrix represent moral constraints. Yet, as the empty upper left box indicates,

24. It can be so formulated without presupposing that there are any nondirected duties.

25. Again, this is not to deny the possibility of a purely formal analysis of the ATC ought (cf. n. 15). It is rather to observe that, even if we (falsely) assume that claim-rights are the only moral considerations there are, there nevertheless remains at least one conceptually distinct kind of moral requirement, namely, the ATC ought itself. In other words, even if, ontologically, the ATC ought is merely the vector that results from the joint application of such claim-rights as are in force on the occasion, the summary moral requirement thereby imposed is still conceptually distinct in various respects—including, notably, that it lacks a direction.

26. Thomson begins by remarking upon how unusual Hohfeld's notion of a [directed] duty is, and she fixes on its having a direction as an important part of its peculiarity. But she soon concludes that no familiar moral terminology corresponds to Hohfeld's notion and thereafter regards his "duty" simply as the name for the constraint on behavior that a claim-right imposes on the person against whom the claim-right is held.

only one box has a "direction" in it—the lower left box, the one that correlates with a claim-right. In this respect, the correlative of a claim-right is distinguished from at least one box that is uncontroversially filled—the upper right box, with the ATC ought in it. It is thereby distinguished from every other sort of moral constraint.[27] That is the conclusion I wished to establish. Our question is, What accounts for this distinction?[28]

II

Up to a point, it may be hoped that this question has acquired a certain interest of its own. However, before proceeding to answer it, I should also like briefly to illustrate its significance by examining some important mistakes to which one can fall prey by ignoring the distinction between directed and nondirected duties. To begin with, I shall outline the mistakes in general terms; and then I shall consider an exemplary instance.

The first mistake is to obscure a critical distinction between two different concepts of moral claim-rights. They may be provisionally distinguished as follows. On the one hand, a moral claim-right may be defined, following Hohfeld, as the correlative of a directed moral duty. This is the concept we have been discussing so far. Let me call it the *Hohfeldian* concept of a moral claim-right. On the other hand, a moral claim-right may also be defined as a "side-constraint" or, alternatively, as a "trump."[29] But to articulate this definition more precisely, we need to take a brief step back.

In certain contexts, the important feature of moral rights generally is that they function, by definition, as some kind of barrier to aggregative or consequentialist reasoning. On this conception, rights function to shield the individual right-holder. To borrow a striking image from Nozick, a "line (or hyper-plane) circumscribes an area in moral space" around the individual right-holder.[30] But while this line

27. This contrast class is yet more numerous if one also recognizes the contributory and nondirected moral constraints.

28. In the process of honing in on the "direction" in a directed duty, we have bleached our original explanandum of all but two features, namely, having a direction and being a moral constraint. But, arguably, there is additional content in the notion of a directed duty—corresponding, e.g., to the subtle distinction(s) between "duty" and "ought." I am not especially interested in this additional content, but I do not (want or need to) deny that it is there. To accommodate this point, I shall therefore revert to speaking of directed *duties*, specifically, where this should be understood as reintroducing (albeit, unexplained) whatever content our original explanandum had in addition to "directed moral constraint."

29. For the former, see R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 29–31; and for the latter, see R. Dworkin, "Rights as Trumps," in Waldron, *Theories of Rights*, 153.

30. Nozick, *Anarchy*, 57.

always shields the right-holder, the threat from which it shields him or her varies with the particular kind of right. That is because the relation between the "right-holder" and the agent guided by morality likewise varies with the kind of right held. In the case of a claim-right, the actions being regulated belong to someone other than the right-holder. Hence, the line a *claim-right* circumscribes in moral space serves to shield the right-holder from other agents—notably, from those guided by consequentialism. Since this concept of a moral claim-right is primarily familiar from debates between deontology and consequentialism, let me call it the *deontological* concept of a moral claim-right.

I contend that a Hohfeldian moral claim-right is clearly and importantly distinct from a deontological moral claim-right. Specifically, the former is neither necessary nor sufficient for the latter. While a Hohfeldian moral claim-right is defined as the correlative of a directed moral duty, a deontological moral claim-right has nothing in particular to do with directed moral duties. For its part, a deontological moral claim-right has to be defined by some special relation to the ATC ought. Otherwise, it cannot discharge its function of shielding the right-holder from agents guided by (consequentialist) morality, since the requirements of morality are expressed in terms of the ATC ought. By contrast, a Hohfeldian moral claim-right has no special relation to the ATC ought.

In itself, therefore, a Hohfeldian claim-right has the wrong logical shape to play the role that a deontological claim-right is required, by definition, to play. Consider a bystander with a Hohfeldian moral claim-right (against a surgeon) not to be operated upon. How well is he or she shielded from the prospect of a morally compulsory operation? It all depends. In particular, it depends on how the ATC ought weighs the surgeon's correlative directed duty not to operate on the (unconsenting) bystander against the lives of the proverbial five others who stand to be saved by the operation. But then things have already gone wrong, since a deontological claim-right is meant precisely to block or preempt this kind of trade-off, rather than to depend upon its outcome.

Of course, it may be objected that this mismatch in logical shape is easy to rectify. To outfit the Hohfeldian concept to play the role of the deontological concept, it may be said, all we have to do is to affirm that all Hohfeldian moral claim-rights are "absolute." Logically speaking, this is correct. If the directed moral duty to φ that correlates with a Hohfeldian moral claim-right *entails* that its bearer ought ATC to φ, then the Hohfeldian concept will be suitably, albeit indirectly, defined in relation to the ATC ought; and the trick will have been turned. The trouble is simply that, as we have already seen, the proposition we are thereby required to affirm is false. Hohfeldian claim-rights are not all absolute. Moreover, and quite significantly, the argument we rehearsed

to that conclusion was completely independent of the debate between consequentialism and deontology.[31]

Now it may be further objected that deontological claim-rights need not be absolute either. If some moderate version of deontology is correct, then while a bystander's moral claim-right not to be operated upon fails to entail that the surgeon ought ATC not to operate, the bystander's claim-right still *blocks* the ATC ought from permitting the surgeon to trade the bystander's life off against the lives of the proverbial five others. The moderation of such a deontology lies in its acknowledgment that the bystander's moral claim-right is consistent with the surgeon's being permitted ATC to operate. For example, to take one of Thomson's formulations, the surgeon might be permitted ATC to infringe the bystander's moral claim-right if and only if "sufficiently much more good" would come of operating than would come of not operating.[32] For all its moderation, this position nevertheless remains recognizably deontological insofar as it insists that four lives is not a sufficient increment of good to justify infringing the bystander's moral claim-right.[33] If that is how the role of a deontological claim-right is defined, one may wonder what prevents Hohfeldian moral claim-rights from playing it.

I do not deny any of this. Nothing prevents a Hohfeldian moral claim-right from playing the role of its deontological counterpart. My contention, recall, is not that the two concepts of a moral claim-right are incompatible, but rather that they are logically independent. To grasp the distinction between them anew, let us return to the shielding metaphor. Deontological claim-rights shield the right-holder from other agents and they do so by presenting "some kind of barrier" to consequentialist reasoning. Absolute and moderate versions of deontology disagree about how much resistance that barrier offers, but this disagreement does not actually matter here. A deontological claim-right can be ecumenically defined by the role of circumscribing the right-holder with a barrier of just the right weight: one that shields the individual by blocking the ATC ought from permitting any action against her that fails to produce a sufficient increment of good, whatever that increment might be.

31. In this connection, it may be worth identifying the substantive considerations on which Thomson draws to fill in the argument sketched in Sec. I. They concern the need to seek a release from the claim-right holder in advance and the need to compensate him afterward if one fails to accord his claim-right. See Thomson, *Realm of Rights*, chap. 3.

32. Ibid., 123.

33. Naturally, it is a separate question whether there is some number of persons to be saved that would produce a sufficient increment of good and, if so, what that number is. Different versions of moderate deontology subdivide according to their answer(s) on this score.

So let a deontological claim-right be defined by having the "right weight." That is its "special" relation to the ATC ought. A Hohfeldian moral claim-right is still defined, as we know, as the correlative of a directed moral duty. Yet no directed moral duty suffices to provide its correlative right-holder with a deontological claim-right, since a moral duty's having a direction does not entail its having any particular weight. A fortiori, it does not entail that duty's having just the right weight. Of course, we can always stipulate that a given directed moral duty also has just the right weight. Its correlative will thereby be enabled to play the role of a deontological claim-right. In this way, it is possible to turn a Hohfeldian moral claim-right into a deontological one. That much I readily concede.

But the important point is that our stipulation would be doing all the work. By that method, a deontological claim-right can be built from any moral constraint. For example, suppose that everyone has a nondirected moral duty not to operate on our bystander. If we add just the right weight to this duty, we thereby provide her with an equally serviceable deontological claim-right not to be operated upon. Hence, a moral duty's having a direction is not necessary to its having the right weight either. As I contended, an individual's having a Hohfeldian moral claim-right (e.g., not to be operated upon) is neither necessary nor sufficient for her having a deontological claim-right (not to be operated upon).

III

The second mistake is related to the first, although it can be classified as a mistake without denying that Hohfeldian claim-rights are all absolute (or, more generally, without troubling about the weight of directed duties). In that sense, it is even more fundamental. The mistake is to obscure a critical distinction between two different concepts of moral *liberty*-rights. Once more, we may provisionally distinguish a Hohfeldian concept from a deontological concept. In this case, however, the former concept is better labeled by reverting to Hohfeld's original terminology of "privilege." Like Hohfeldian claim[-right]s, privileges are defined in relation to a directed moral duty: X has a *privilege* against Y to φ if and only if X has no duty to Y not to φ.[34] By contrast, again, deontological liberty-rights are defined in relation to the ATC ought. But a straightforward definition is trickier to formulate.

A first approximation might be: X has a liberty-right to φ if and only if it is not the case that X ought ATC not to φ. However, this reads more like a definition of ordinary permission (i.e., of when X is ATC

34. When it is also true that X has no duty to Y *to* φ (i.e., when X has no duty to Y either to φ or not to φ), then X has what Hart calls a *bilateral* [privilege] against Y to φ. Hart, "Legal Rights," 166–67.

permitted to φ). Specifically "deontological" permission requires that X be ATC permitted to φ, *despite the fact* that, on a strict consequentialist assessment, X ought ATC not to φ. For example, suppose that on a strict consequentialist assessment I ought ATC not to spend $500 a month on leisure activities for my family—instead, I ought ATC to give the money to Oxfam, say. Now if a (deontological) case can be made that, despite this assessment, morality actually permits me ATC to spend the money on my family, I would then have a deontological liberty-right to spend it on them.

Deontological liberty-rights also function to shield the individual right-holder. But to identify the relevant threat, one has to bear in mind that the actions a liberty-right regulates are the right-holder's own: the "right-holder" here *is* the agent guided by morality. Thus, rather than shielding the right-holder from herself, the line a deontological liberty-right circumscribes in moral space serves to shield her instead from the requirements of (consequentialist) morality itself. Deontological liberty-rights offer the agent relief from the demands of morality. Hence the variant terminology of "prerogative" or "discretion."[35]

I contend that Hohfeldian privileges cannot play the role that deontological liberty-rights are required, by definition, to play—again, because they have the wrong logical shape. A Hohfeldian privilege to φ does not entail that its possessor is ATC permitted to φ. It does not convey ordinary permission. A fortiori, it does not convey a deontological liberty-right, since whatever tweak on ordinary permission is required to produce a deontological liberty-right (out of ordinary permission), deontological liberty-rights at least entail ordinary permissions.

Consider Hohfeld's charming example of his privilege against various alphabetical owners of a shrimp salad to eat the salad. Hohfeld's privilege entails that he does not owe any of the owners a duty not to eat the salad. But does it entail that Hohfeld is ATC permitted to eat the salad? No, it does not. There might be many reasons why he nevertheless lacks permission ATC to eat the salad. For concreteness, let us say that morality forbids the eating of shrimp. We do not even have to decide whether what gives rise to this prohibition merits the label "nondirected duty," as opposed to being some more generic form of moral consideration. We require only that the underlying moral consideration not have the form of a directed duty not to eat shrimp, which is very plausible. (If you disagree, kindly change the example.)

Notice that it does not matter whether Hohfeld's initial privilege is bilateral. Adding a privilege against the owners not to eat the salad

35. For the former, see S. Scheffler, *The Rejection of Consequentialism* (Oxford: Clarendon, 1982); and for the latter, see, e.g., T. Scanlon, "Rights, Goals, and Fairness" [1977], in Waldron, *Theories of Rights*, 137–52.

merely excludes the possibility that Hohfeld owes (one of) them a duty *to eat* the salad. But this evidently leaves in place the moral prohibition against eating shrimp. So a bilateral privilege does not entail ordinary permission any more than a unilateral one does.[36] Notice, further, that it also does not matter whether all Hohfeldian claim-rights are absolute. If they were, that would only make the following difference: any duty that Hohfeld did owe to the owners not to eat the salad would entail that Hohfeld ought ATC not to eat the salad. But since he owes them no such duty, this makes no difference here at all.

Finally, and most importantly, notice that it does not even matter whether Hohfeld's initial privilege is ad rem.[37] A privilege ad rem is held "against the world." If Hohfeld has a privilege ad rem to eat the salad, it follows that he does not owe anyone a duty not to eat the salad. This excludes a rather wider range of possibilities—for example, that Hohfeld promised someone that he would not eat the salad or that he subcontracted with a caterer to deliver a volume of uneaten shrimp salad that he cannot supply without including this salad. Indeed, it excludes Hohfeld's having any directed duty whatever not to eat the salad. But it does not exclude his having a nondirected duty not to eat the salad. Still less does it exclude the possibility that he ought ATC not to eat the salad, for the prohibition on eating shrimp remains intact, utterly unscathed. So even a bilateral privilege ad rem to eat a shrimp salad does not entail ordinary permission to eat it. Neither, then, can it entail a deontological liberty-right to eat the salad. Far from circumscribing the right-holder, the line Hohfeldian privileges inscribe in moral space is at best a Maginot Line.

As I have suggested, the two mistakes identified here are commonly made.[38] But I shall let just one example stand in for many. The example comes from Scanlon's well-known paper, "Rights, Goals, and Fairness," which I choose because it makes the perfect brief illustration. Among other things, Scanlon is interested in the role that rights can play in a

36. The alternative terminology Feinberg employs to mark Hart's distinction is therefore highly misleading. Feinberg distinguishes between "full" and "half," rather than bilateral and unilateral, liberty-rights. But it would be very odd to say, as we would then have to say, that a full privilege or liberty-right does not entail ordinary permission. See J. Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980), 157. Compare Sumner, *Moral Foundation of Rights*, 26–27.

37. *Pace* Sumner, *Moral Foundation of Rights*, 26.

38. Once the two basic mistakes are in hand, others are easy to proliferate. For example, if X has a Hohfeldian claim-right against Y that Y φ, it follows that Y lacks the privilege against X not to φ. But it does not follow that Y lacks the deontological liberty-right not to φ. It may well be that the ATC ought treats Y's duty to X not to φ as defeated by some other moral consideration, with the result that Y is permitted ATC to φ. So here is another context in which one must be careful to distinguish Hohfeldian concepts from deontological ones. I shall stop there.

broadly consequentialist framework. As he says explicitly, he understands "rights" here in Hohfeldian terms—as claim-rights, liberty-rights, and so on.[39] He is particularly interested in a two-tier theory, where rights play a role analogous to the rules in traditional rule utilitarianism.

Scanlon's idea is that standard objections to rule utilitarianism can be avoided by justifying rights in terms of the contribution their assignment makes to an equitable distribution of control over outcomes—as opposed to justifying them in terms of their utility as "mechanisms of coordination" or "hedges against individual errors in judgement." He develops this idea in relation to the case of Dudley, whose community is observing a one bucket a day per household restriction on water consumption during a drought. Dudley knows that everyone else's compliance pattern will leave some surplus water; and he wonders whether he may exceed his quota to water the flowers in the public garden.

As his discussion of the example makes clear, Scanlon takes the control being distributed to include *discretion*, in the specific sense of deontological permission that we have already identified. Unfortunately for Dudley, Scanlon's argument is that allowing him to water the flowers will upset the distribution of discretion, and so he must still observe the restriction. I leave aside the question of whether Scanlon's justificatory strategy is otherwise sound. What is relevant to our purposes is that his strategy plainly presupposes that an assignment of Hohfeldian privileges or moral liberty-rights constitutes an assignment of discretion.[40] But this is to commit the second mistake, since Hohfeldian privileges simply do not convey discretion,[41] not even if everyone behaves morally.

Now what follows from recognizing these mistakes as mistakes? Certainly not that there is anything defective with either the Hohfeldian concepts or the deontological concepts in themselves. I conclude only that the philosophical significance of Hohfeldian moral claim-rights cannot lie in their playing the familiar role of deontological moral claim-

39. Scanlon, "Rights, Goals, and Fairness," 139. An associate editor of *Ethics* has suggested an alternative interpretation of Scanlon to me. On this interpretation, the explicitly Hohfeldian character of Scanlon's understanding of rights here is *exhausted* by the division of rights into claim-rights, liberty-rights, and so on. In other words, it does not also include the specifically Hohfeldian definitions in terms of directed duties on which we have concentrated throughout. If this alternative interpretation is correct, then Scanlon does not commit the mistake I proceed to impute to him in the text. However well the alternative describes Scanlon, there are some serious scholars of Hohfeld who do explicitly ignore his specific definitions in terms of directed duties. See, e.g., L. Wenar, "The Nature of Rights," *Philosophy and Public Affairs* 33 (2005): 223–53.

40. Constitutes one, that is, on the assumption that everyone behaves morally.

41. For that matter, an assignment of Hohfeldian moral *claim*-rights is not straightforwardly related to an assignment of discretion either. See n. 38.

rights.[42] Nor can it lie in their bridging the terrain between legal claim-rights (which are Hohfeldian in structure) and deontology. I suggest that it lies instead in their distinctive structure, which consists in the correlation with directed moral duties. To understand this significance, we must therefore have an account of the direction in a directed duty.

IV

Waldron and, more explicitly, Sumner suggest that the will theory of rights and the interest theory of rights can each be read as accounts of the direction in a directed duty.[43] This is a useful proposal. We should bear in mind that it involves an adaptation from their original purpose. But I think we shall see that even the original dispute about rights is better addressed once we have first settled the narrower question about directed duties (cf. n. 59).

Let me begin with a brief adaptation of the will theory as a theory of the direction in a directed duty. The following rough statement will serve our purposes:

> (WT) Suppose X has a duty to φ. X *owes* his duty to φ *to Y* just in case Y has some measure of control over X's duty.

To explain what is meant by a "measure of control" over a duty, we should turn to H. L. A. Hart, one of the foremost proponents of the will theory. According to Hart, the full measure of control over X's duty comprises three powers:

1. the power to waive X's duty or not;
2. the power to enforce X's duty or not, given that X has breached it;
3. the power to waive X's duty to compensate, which is consequent upon his original breach.[44]

Note that the second power (to enforce X's duty) includes both the power to sue X for compensation and the power to sue for an injunction against X.

I said earlier that our clearest paradigms of a directed duty are the duties correlative to the claim-rights recognized in property and contract law. (From here on, unless otherwise indicated, "claim-right" means

42. It follows that investigations of the extent to which Hohfeldian moral claim-rights can be accommodated within a consequentialist framework do not really do anything to establish an accommodation between consequentialism and deontology. (The best example of this kind of investigation is Sumner's *Moral Foundation of Rights*.) Parallel conclusions can be drawn for moral liberty-rights.

43. Waldron, *Theories of Rights*, 8–9; and Sumner, *Moral Foundation of Rights*, 24 and 39–45.

44. Hart, "Legal Rights," 183–84.

Hohfeldian claim-right.) The will theory bases itself closely on these paradigms. Indeed, it holds, in effect, that they present the necessary and sufficient conditions for claim-right holding—or, in our case, for a duty's having a direction. It therefore stands to reason that, in property and contracts, the duties that correlate with claim-rights are duties over which the claim-right holder typically has the full measure of control encompassed by the powers 1–3.

It is the signal advantage of (WT) that Y's having the full measure of control over X's duty to φ gives a readily comprehensible sense to the statement that X's duty is owed to Y. Lesser measures of control can be accommodated as approximations to the case of full control. Thus, as Hart says, "duties with correlative rights are a species of normative property belonging to the right holder, and this figure becomes intelligible by reference to the special form of control over a correlative duty which a person with such a right is given by the law."[45]

But (WT) confronts two serious objections. One concerns inalienable rights.[46] Sometimes a claim-right holder is disabled from waiving the duties that correlate with his claim-right. Typically this is done for the right-holder's own good and protection. Moreover, as Neil MacCormick observes, the protective disability is typically also seen as *strengthening* the claim-right. A dramatic example is the claim-right not to be enslaved. Less dramatic examples include the claim-right not to be operated upon without informed consent; and the claim-right not to be employed in unsafe working conditions. (In some ways, the less dramatic examples are actually more important, since they exhibit the fact that inalienable claim-rights need not be correlated with extremely weighty duties. Hence, the strength added by a protective disability is distinct from the weight, in that sense, of the original claim-right.[47]) In any case, we likely do not wish to deny that X's duties not to enslave Y and not to employ Y in unsafe working conditions are owed to Y. It is worth emphasizing that the crucial question here concerns the possibility, rather than the fact, of inalienable claim-rights. (WT) makes inalienable claim-rights incoherent in principle.

A second criticism concerns incompetent adults.[48] Say Y is incompetent to exercise any of—and therefore lacks, in the relevant sense—the powers 1–3 because, for example, Y is in a coma. Do we wish to say that X no longer owes Y duties not to assault Y or not to steal from Y?

45. Ibid., 185.

46. See MacCormick, "Rights in Legislation," 195–99.

47. The second of the less dramatic examples also makes it clear that what the protective disability protects need not be the autonomy, specifically, of the claim-right holder.

48. A better-known variant of this objection concerns children. But I think this variant is liable, with reason, to greater controversy.

Presumably not. But (WT) implies that a duty cannot be owed to someone with no measure of control over it.

In the paradigm cases of a directed duty, the interests of the person to whom the duty is owed are advanced, on balance, by the fact that he or she is empowered to waive the duty. One way to regard these objections is this: they present cases in which the interests of the person in question are not advanced, on balance, by being so empowered. Indeed, they present cases in which the person's interests are advanced, on balance, either by not having the power to waive the relevant duty (first objection) or by someone else's having that power (second objection). Yet it seems intuitive to regard the relevant duties as still being owed to the person disabled from waiving them.

The fundamental difficulty with (WT), then, is that it prevents us from generalizing the notion of a directed duty from the paradigm cases to cases of inalienability and incompetence, cases to which we clearly should be able to generalize it. It seems to me that this difficulty cannot be overcome.[49]

V

Let me now briefly adapt the interest theory as a theory of the direction in a directed duty. The following rough statement will serve our purposes:

> (IT) Suppose X has a duty to φ. X *owes* his duty to φ *to Y* just in case Y stands in a sanctioned relation to benefiting from X's φing.

This formulation is slightly odd. But it allows (IT) to cover a number of subtle variations in the basic structure of the interest theory. We can think of "standing to benefit from X's φing" and "being intended to benefit from X's φing" as the sanctioned relations. (IT) also gives a comprehensible sense to the statement that X's duty is owed to Y: namely, the duty is for Y's benefit.

(IT) is more general than (WT) in two important respects. First, it extends the notion of a directed duty to a wider range of cases than (WT) does. In particular, (IT) extends the notion to the cases of inalienability and incompetence that motivated the objections to (WT). On the plausible assumption that X's enslaving Y or employing Y in unsafe working conditions or assaulting a comatose Y sets Y's interests back, (IT) yields the verdict that X's duties not to perform any of these actions are still owed to Y.

49. I discuss and criticize some recent attempts to overcome the difficulty in my "A Hybrid Theory of Claim-Rights," sec. 2. For further discussion, see also my "In Defence of the Hybrid Theory," in *Law: Metaphysics, Meaning, and Objectivity*, ed. E. Villanueva (Amsterdam: Rodopi, 2007), sec. 2.

Second, (IT) is associated with a more general account of the justification of the direction in a directed duty. On the account associated with (WT), the justification for empowering Y to waive the duty correlative to her claim-right lies in the fact that so doing serves Y's interest in autonomous choice.[50] In the paradigm cases, empowering Y to waive this duty also advances her interests on balance. By contrast, on the account associated with (IT), the justification for the structure of Y's normative standing, as we might put it, lies in the more general fact of what advances Y's interests on balance. It is not tied to the more specific fact of what advances Y's interest in autonomous choice.[51] When these facts coincide, as they do in the paradigm cases, (IT) yields the same results as (WT). But when they diverge, as they do in the cases motivating the objections, (IT) classifies duties that advance Y's interests as owed to Y, even if Y has no measure of control over them, as long as Y's disability with respect to these duties advances her interests on balance.[52]

At least one serious objection can be raised against (IT). This concerns the problem of third-party beneficiaries.[53] In simple form, the problem is as follows. Suppose you promise your brother to pay your sister $100. Ordinarily, we would say that you now owe a duty to your brother to pay your sister $100. Hart questions whether (IT) yields this verdict.[54] However that may be, (IT) certainly yields the verdict that your duty to pay your sister is (also) owed to your sister, since she benefits

50. Hart, "Legal Rights," 188–89. On some versions of the will theory, it would be objectionable to characterize the justification of Y's power to waive in terms of her *interest in* autonomous choice. But nothing turns on this formulation, at least not for my purposes. I could as well describe the justification associated with (WT) as "appealing in some fashion" to the value of (individual) autonomy. The formulation in the text makes the greater generality of the justification associated with (IT) explicit on the surface of the two accounts. However, the facts about which account is more general hold independently of this formulation (see the following note).

51. The justification associated with (IT) can let whatever it is about the value of (individual) autonomy that grounds the justification associated with (WT) weigh in favor of empowering Y to waive X's duty to φ. Its greater generality consists in the fact that it also allows other factors—to wit, aspects of Y's well being that are independent of her autonomy—to weigh against empowering Y to waive this duty. It is irrelevant to this claim whether advocates of (WT) would assign justificatory weight to these other factors, so long as you and I do.

52. Compare MacCormick, "Rights in Legislation," 207–8.

53. See, notably, H. L. A. Hart, "Are There Any Natural Rights?" [1955], in Waldron, *Theories of Rights*, 81–82, and "Legal Rights," 187–88.

54. See previous note. Some interest theorists reply by affirming that your brother has an interest in your fulfilling your promise to him, in which case (IT) will vest him with a claim-right against you. See, e.g., D. Lyons, "Rights, Claimants, and Beneficiaries" [1969], reprinted in his *Rights, Welfare, and Mill's Moral Theory* (New York: Oxford University Press, 1994), 42–44; and Kramer, "Rights without Trimmings," 79–80.

from the $100. Hart also maintains that this verdict is incorrect.[55] However that may be, it would certainly be the wrong verdict if your duty to pay your sister were also owed to your sister's child, on whom—let us say—she will spend the $100. But (IT) clearly appears to yield that verdict as well.

More generally, the objection is that, intuitively, there is a limit to the number of people to whom duties are owed under a third-party promise or contract. Indeed, for many duties, there is an intuitive limit to the number of people to whom the duty is owed. It is therefore a condition of adequacy on (IT) that its generalization of the notion of a directed duty suitably limit the number of people it classifies as being owed a given duty. For the most part, however, this condition of adequacy has not been met.[56]

VI

It seems to me, then, that we lack a satisfactory solution to the debate between the will theory and the interest theory. We therefore lack a satisfactory account of the direction in a directed duty.[57] The account I wish to propose is a hybrid of the will theory and the interest theory.[58] I shall first present a rather crude hybrid, which is nevertheless adequate to meet the objections faced by (WT) and (IT).

Consider a *simple hybrid* model of when a duty is owed to someone.

> (SH) Suppose X has a duty to φ. X *owes* his duty to φ *to Y* just in case *either* Y has the power to waive X's duty to φ *or* Y has no power to waive X's duty, but (that is because) Y's disability advances Y's interests on balance.

This model has various advantages over (WT). First, (SH) can handle classical inalienable rights. In these cases, Y's disability to waive the relevant duties—for example, X's duty not to enslave Y or not to subject

55. See n. 53; cf. H. Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), 61–62. Kramer protests that it begs the question to deny that your sister has a claim-right against you ("Rights without Trimmings," 66–68). Compare Lyons, "Rights, Claimants, and Beneficiaries," 37–41.

56. In "A Hybrid Theory of Claim-Rights" (secs. 3–4), I criticize a recent attempt to meet this condition. I also discuss Raz's version of the interest theory, which I think does meet the condition. However, as I explain there, Raz's theory succeeds only at the cost of inviting another equally troublesome objection.

57. A final alternative might be to appeal to the fact that infringements of directed duties trigger further duties to compensate the person to whom the infringed duty is owed. Here I shall only note an impressive obstacle: normally, duties of compensation are themselves treated as directed duties. But the direction in a duty of compensation does not explain itself, as a comparison with the third-party beneficiary controversy indicates.

58. In addition to accounting for the direction in a directed duty, it can also be read as a contribution to the original debate between the two theories.

Y to unsafe working conditions—is imposed to secure Y's own position on balance and is standardly taken to strengthen Y's claim-right. Y therefore qualifies as the person to whom the duty is owed under the second disjunct. Second, (SH) can handle various forms of incompetence to waive a duty without having to deny that the duty is owed to the incompetent individual. But here the crude model's solution, while serviceable, is inferior to one made available by a refined version of the hybrid theory. Let me therefore postpone discussion of the incompetence objection until the next section, where I introduce the refined model.

The simple hybrid model also has an important advantage over (IT). (SH)'s advantage is that it solves the infamous third-party beneficiary problem. Say that B promises A to do something that explicitly favors C and implicitly favors D (whom C will favor, as it happens, if B performs). On (SH), A qualifies under the first disjunct as someone to whom B's duty is owed, since we may assume that A has the power to waive B's duty. D does not qualify as someone to whom B's duty is owed, since D fails both disjuncts. Ordinarily, the same holds of C.

It is natural to see the merit of the interest theory as being that it is more general than the will theory. At the same time, however, it is possible to see its demerit as being precisely that it overgeneralizes from the will theory. The correct theory clearly has to be more general than the will theory because there are important cases of directed duties that the will theory mishandles. One way of approaching the problem of a theory of directed duties, then, is to look for a way of generalizing from the will theory's treatment of the paradigm cases of contractual and property rights that manages not to overdo it. The interest theory fails at this because it creates too many directed duties. I contend that (SH) succeeds, by generalizing the will theory but only within clear limits.

There is also a generic advantage to (SH), that is, an advantage with respect to both the will and the interest theories. (SH) gives us some independent purchase on the question of whether there are individual claim-rights under the criminal law. This question is standardly treated as a matter of bare judgment.[59] Those who think there obviously are claim-rights under the criminal law treat their judgment as a basis for criticizing the will theory,[60] whereas those who think there plainly are not claim-rights under the criminal law, at least not for the most part, treat their judgment as a basis for criticizing the interest theory.[61]

59. This is one of the places where the debate about rights profits from having first settled the question of the direction in duties. A theory of directed duties will, via Hohfeld's equivalence, answer the question about claim-rights under the criminal law without having simply to trade in intuitions about claim-rights.

60. For example, MacCormick in "Rights in Legislation" and Kramer in "Rights without Trimmings."

61. For example, Hart in "Legal Rights."

On (SH), the answer turns on the character of the justification for vesting control over criminal law duties in the public prosecution service. If the justification is that so vesting it best secures the interest of individual members of the public, then criminal law duties are owed to those individuals, and so do correlate with individual claim-rights. But if the justification for vesting control with a public prosecutor is, for example, to secure consistency in the administration of justice, then criminal law duties are not owed to individuals and so do not correlate with individual claim-rights.

What if both justifications apply? Then it depends on whether a given justification would itself be sufficient to overturn an opposite verdict from the other. Say, for example, that individuals' interests in security are best advanced by vesting individuals with the power to control criminal law duties, but the administration of justice is best advanced by vesting that power in the public prosecutor instead. In this case, which justification would prevail? If the latter would prevail, then even if individuals' security and the administration of justice are both advanced by vesting control in the prosecution service, the latter justification is what settles the question. According to (SH), therefore, criminal law duties are not owed to individuals, since individuals are not disabled from controlling those duties *because* it advances their interests on balance (rather, they are disabled because that is required to secure the administration of justice).

VII

Elsewhere I explain how the *complex hybrid* model emerges from a process of refining various defects in (SH) (see n. 7). Here I shall simply state the complex model:

> (CH) Suppose X is duty-bound to φ. X *owes* a duty to φ *to Y* just in case Y's measure (and, if Y has a surrogate Z, Z's measure) of control over a duty of X's to φ matches (by design) the measure of control that advances Y's interests on balance.

As I suggested earlier, this refined version of the hybrid theory enables us satisfactorily to explain how a duty can be owed to someone who is incompetent to exercise any measure of control over it.[62] Cases of this kind constitute the second serious objection to (WT), which wrongly implies that there is no such fact to explain. To grasp (CH)'s solution, it will help to begin with *legal* claim-rights and their correlative directed duties. Suppose Y is in a coma and that X is a surgeon. Y is therefore

62. My position here developed in response to some probing questions from Leif Wenar. I am grateful to him for an extended and very helpful correspondence about these issues.

incompetent to exercise any measure of control over X's duty not to operate on him, but intuitively X still owes her duty to Y. How is this to be explained?

Consider first the case in which Y has a legal surrogate, Z.[63] For concreteness, suppose that Z has the full measure of control over X's duty not to operate on Y. According to (CH), X's duty is still owed to Y, notwithstanding Y's lack of control over it, if and only if the following pair of conditions is satisfied: First, Y's interests are advanced on balance by Z's having the full measure of control over X's duty not to operate on Y. Second, this match between Z's actual measure of control (i.e., full) and the measure Z requires to advance Y's interests on balance (i.e., also full) is not an accidental match. Let me discuss these conditions in turn.

The crucial aspect of the first condition (the "matching" condition) is its requirement that Y's interests be advanced on balance by vesting some third party with control over X's duty not to operate on Y.[64] I take it that, with respect to a wide range of legal duties, the interests of an incompetent person *are* advanced on balance when provision is made for the duty to be legally waived (or otherwise controlled) on his or her behalf;[65] and this requires the appointment of a legal surrogate. Certainly, it is very plausible that X's duty not to operate on Y is a case in point, since Y may come to need surgery and X will not legally be able to provide it unless her duty not to operate is legally waived.

The second condition (the "design" condition) is meant to exclude cases in which the matching condition is satisfied, but simply by coincidence. It excludes cases, that is, in which the advancement of Y's interests on balance is not what justifies Z's actual measure of control

63. For simplicity, I assume that Y can have at most one surrogate. Cases of more than one surrogate could be handled by analogy to the case of a single surrogate. But this would require various complications in the analysis that are irrelevant to our present concern. For helpful discussion of this and other complexities of real-life surrogate decision making, see A. Buchanan and D. Brock, *Deciding for Others* (Cambridge: Cambridge University Press, 1990).

64. As the first condition is stated in the text, its remaining requirements are that Y's interests be advanced on balance when the third party *is Z* and when the measure of control over X's duty is *full* control. But these aspects of the first condition are not crucial because, as we shall see, they are anyhow covered by the second condition.

65. What it takes to control a duty "on someone else's behalf" is a question on which there is a large literature. For an overview, see Buchanan and Brock, *Deciding for Others*, chap. 2. In very general terms, one must exercise the control so as to advance that person's interests on balance. While this does little more than restate the question, the restatement helpfully underlines the point of contact with (CH).

over X's duty.[66] To exclude them, the design condition requires that the matching condition remain satisfied over a range of relevant counterfactual scenarios. For example, it requires that Z would be vested with *less* than the full measure of control over X's duty, were Y's interests better advanced on balance by Z's having a lesser measure of control instead of the full measure. Similarly, it requires that *W* would be vested with control over X's duty and not Z, were Y's interests better advanced on balance by having W as a surrogate instead of Z. In this way, the design condition requires the actual assignment of control over X's duty (not to operate on Y) to *track* the assignment that advances Y's interests on balance, rather than simply to coincide with it.

On the plausible assumption that the case at hand also satisfies its design condition, (CH) yields the intuitively correct results that X's duty not to operate is owed to Y and is not owed to Z. X owes her duty to Y because Y's interests are what govern the assignment of control over it, even if Y herself winds up without any of this control. Y's interests *govern* the assignment of control over X's duty in the sense that their advancement on balance is what defines the target this assignment is required to track. In addition, on (CH), X does not owe her duty to Z, despite the fact that Z has the full measure of control over it.[67] This holds true even if having this full measure of control advances Z's own interests on balance. For while Z then satisfies the matching condition (by coincidence), Z still fails the design condition: recall the counterfactual scenario in which Z has no control because Y's interests are better advanced on balance by having W as his surrogate.[68]

66. The "by design" clause in (CH) thus preserves the sensitivity to justification introduced by (SH)'s "because" clause. Compare the discussion in Sec. VI of the justification(s) for disabling individuals from controlling criminal law duties. Matthew Kramer and Hillel Steiner read (CH)'s "by design" clause as privileging subjective forms of justification over objective ones. See Matthew Kramer and Hillel Steiner, "Theories of Rights: Is There a Third Way?" *Oxford Journal of Legal Studies* 27 (2007): 299–300. While this is not an unreasonable interpretation, it is not what I mean. I do not have anything particular to say about the special case(s) when objective and subjective justifications come apart. The function of the "by design" clause is rather, as I specify in the text, to exclude cases in which the matching condition is only satisfied by coincidence.

67. (CH) improves here on (WT) and (SH), which both imply that X's duty is owed to Z.

68. The same point explains the failure of the putative counterexample to (CH) offered by Kramer and Steiner. Their example does not involve surrogates or incompetents, but nevertheless has a similar structure. In their example, John owes Ken £100 and Tony is a third party with no control over John's duty. Tony's lack of control is stipulated to advance Tony's interests on balance (because Ken would beat Tony up if Tony ever waived John's duty). However, while Tony therefore satisfies the matching condition by coincidence, he fails the design condition. Hence, on (CH), John does not owe his duty to Tony. Tony fails the design condition because the assignment of control over John's duty does not track the assignment that advances Tony's interests on balance. Indeed, as Kramer

Now consider the case in which Y has no surrogate. Here the first parenthetical clause in (CH) drops out. According to the remainder of (CH), X's duty not to operate on Y is again owed to Y if and only if a matching condition and a design condition are satisfied. The matching condition requires that Y's actual measure of control over X's duty (i.e., zero) matches the measure that advances Y's interests on balance. Strictly speaking, there is a sense in which Y's having zero control over X's duty advances his interests on balance: namely, Y's interests cannot require—because nothing can require—that *he* have any more control than this. (After all, it is not possible for Y to have any control over X's duty.) Furthermore, as this match occurs by necessity, there is also a sense in which it is "not an accidental match." However, that is not enough to satisfy (CH)'s design condition. For recall that there is a different assignment of control over X's duty not to operate on Y (i.e., to a surrogate) that would advance Y's interests on balance better than simply assigning no control to Y. As a result, the actual assignment of control over X's duty (none, either to Y or to a surrogate) clearly fails to track the assignment that advances Y's interests on balance. Hence, when Y has no surrogate, the design condition fails, and (CH) implies that X's legal duty not to operate on Y is not owed to Y.

I should add that (CH) does not have the stronger entailment that an incompetent person without a surrogate can never be the terminus of a duty. The foregoing analysis holds for a wide range of duties (including our example, X's duty not to operate on Y): specifically, for any duty where the incompetent person's interests are advanced on balance by vesting some third party with control over the duty. But that is not true of all duties. With some duties, the interests of an incompetent person are advanced on balance when no third party is empowered to control the duty on his or her behalf. The best examples are the duties that correlate with (completely) inalienable claim-rights.[69] In these cases, even a competent person's interests are advanced on balance when he or she has no control over the duty in question. Unlike with our previous example, then, when X's duty is (say) not to enslave Y, Y's interests cannot be advanced on balance by vesting *anyone* with control over it (neither a competent Y nor any surrogate for an incompetent Y).

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and Steiner tell the story, it seems there is no one whose interests on balance are tracked by that assignment. See their "Theories of Rights: Is There a Third Way?" 309–10.

69. I actually think that these are the only examples. This follows from the assumption that an incompetent person's interests require a third party to be vested with some measure of control over a given duty just in case that person's interests would require her to have some measure of control over the duty herself, were she competent to exercise it. While this assumption strikes me as correct, I have no argument for it. Even if it is incorrect, the basic idea behind (CH) would not be imperiled. But the formulation of (CH) itself would then need adjustment.

Hence, when Y is incompetent and has no surrogate, there is no assignment of control over X's duty not to enslave Y differing from the actual assignment (none, either to Y or to a surrogate) that would advance Y's interests better on balance. This special feature of the duties correlative to (completely) inalienable claim-rights makes it plausible to count (CH)'s design condition as satisfied for incompetent persons without a surrogate: plausible, that is, to count the match between the incompetent Y's actual measure of control over X's duty not to enslave him (i.e., zero) and the measure that advances Y's interests on balance (i.e., also zero) as belonging to an assignment of control that tracks the assignment that advances Y's interests on balance, despite the fact that this match occurs by necessity. On (CH), X's duty not to enslave Y is therefore owed to Y even when Y is incompetent and has no surrogate.[70]

I began with legal duties because the legal apparatus of surrogacy is already reasonably well defined. To apply (CH)'s solution to the incompetence objection in the moral realm, we need some explanation of what it means for an incompetent person (e.g., someone in a coma) to have a moral surrogate. This brings us to the edge of what is actually a rather complicated problem. But, for the sake of illustration, let us simply say that an incompetent person has a *moral surrogate* (in relation to a given moral duty) just in case, all things considered, morality sanctions making provision for some third party to control the duty on the incompetent's behalf.[71]

Suppose, then, that Y is in a coma and has a moral surrogate in relation to X's moral duty not to operate on Y. According to (CH), X owes her duty to Y if and only if a matching condition and a design condition are satisfied. The matching condition requires that *Y's interests* also be advanced on balance by providing for some third party to control X's duty on Y's behalf. In other words, it requires the balance of all moral considerations to be aligned with the balance of Y's own interests regarding the merit of so providing for third-party control.[72] The design condition excludes the case where this alignment holds by coincidence: that is, it excludes the case where providing for a third party to control X's duty on Y's behalf would still be sanctioned by morality, ATC, even if it did not advance Y's interests on balance. In summary: on (CH), X owes her moral duty (not to operate on Y) to an incompetent Y if and only if morality's ATC sanction for the provision of third-party control

70. Some cases of incompetence can thus be assimilated to cases of inalienability. (SH)'s mistake is to try to handle all cases of incompetence in this manner.

71. (CH)'s solution to the incompetence objection does not depend on the details of this analysis of moral surrogacy, to which I have no particular commitment.

72. For some discussion relevant to identifying the conditions under which this alignment can hold, see my "A Hybrid Theory of Claim-Rights," sec. 6, and "In Defence of the Hybrid Theory," sec. 3.

on Y's behalf tracks the sanction given to that provision by the balance of Y's own interests.

VIII

What accounts for the direction in a directed duty? I have argued that only the complex hybrid theory offers a satisfactory answer to this question. We can usefully distill the gist of its answer from our preceding discussion of duties that are owed to incompetent persons. On the complex hybrid theory, to be a terminus of another person's duty to φ (i.e., someone to whom that person owes the duty) is to be someone whose interests govern the assignment of (a full unit of) control over that person's duty to φ. If we pretend that someone can only owe her duty to φ to one person, we can distill an even pithier gist: to be the terminus of someone's duty to φ is to be the person whose interests govern the assignment of control over her duty to φ.

I have also argued that the distinctions between various pairs of Hohfeldian and deontological concepts need to be taken more seriously. A central case in point is the distinction between Hohfeldian and deontological moral claim-rights. Let me close by recapitulating this distinction in the terms made available by the complex hybrid theory. To reprise the stock example, surgeons have a duty not to operate on individuals without their consent. A bystander has a deontological moral claim-right not to be operated upon just in case the surgeon's duty shields the bystander (adequately) from a morally compulsory operation. That is to say, just in case the surgeon's duty not to operate has enough weight to block the ATC ought from permitting her to operate on the unwilling bystander (whenever the "increment of good" that will come from her operating on him is "insufficient"). By contrast, the bystander has a Hohfeldian moral claim-right (against the surgeon) not to be operated upon just in case the bystander is a terminus of the surgeon's duty not to operate. That is to say, just in case the balance of the bystander's own interests governs the assignment of a full unit of control over the surgeon's duty.

However, even when the bystander's interests do govern the relevant assignment of control, nothing follows about the adequacy of the duty *over which* this control is assigned (i.e., of the surgeon's duty) to shield the bystander from a morally compulsory operation. That is because the bystander's interests concerning the assignment of control over the surgeon's duty entail nothing about how much weight that duty must have to override every insufficient increment of good that might come from the surgeon's operating on him, let alone anything about whether her duty actually has the required weight. Hence, the bystander's having a Hohfeldian moral claim-right (against the surgeon) not to be operated

upon does not suffice to provide him with a deontological moral claim-right not to be operated upon.

Likewise, the surgeon's duty not to operate on the bystander can easily have the weight it requires to block ATC permission (for any nonconsensual operation by the surgeon that will not produce a sufficient increment of good) *without* the assignment of control over her duty's being consistent with the bystander's interests on balance. For example, the bystander may have less than a full unit of control over the surgeon's duty, despite the fact that it is in his interest on balance to have a full unit—in which case, the bystander's interests plainly do not govern the assignment of a full unit of control over the surgeon's duty. Hence, the bystander's having a Hohfeldian moral claim-right (against the surgeon) not to be operated upon is not necessary to provide him with a deontological moral claim-right not to be operated upon.

A person's having a Hohfeldian moral claim-right (against the surgeon) not to be operated upon is therefore neither necessary nor sufficient for his having a deontological moral claim-right not to be operated upon. What is philosophically significant about Hohfeldian moral claim-rights is rather their distinctive structure, which consists in their correlation with directed moral duties.