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RESEARCH ARTICLE

Rights, Abstraction, and Correlativity

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Abstract

I survey several counterexamples (by Raz and MacCormick) to Hohfeld's conjecture that a claim-right is correlative to a directed duty and (by Cornell and Frick) to Bentham's suggestion that a claim-right is correlative to a wronging. We can vindicate these claims of correlativity if we acknowledge that entitlements like claim-rights and directed duties admit of degrees of abstraction: that they may be general rather than specific, unspecified rather than specified, or indefinite rather than definite. I provide an error theory consisting in linguistic and practical reasons for why we articulate normative incidents in ways that threaten correlativity. And I deny that abstraction imposes a heavy metaphysical cost on rights theory, though I leave open whether abstraction excludes certain explanatory accounts of rights such as the interest theory or will theory.

Legal theory has explored two dimensions of claim-rights (I'll abbreviate "claim-right" as "right"). The *explanatory dimension* concerns what generally explains or grounds particular rights—that is, what kind (or kinds) of facts determine the incidence of particular rights. Facts about interests and powers are the most prominent candidates for such facts, and are proposed as the exclusive candidates by (respectively) the interest theory and will theory. The *taxonomical dimension* concerns how rights relate to other normative phenomena. Hohfeld's table of entitlements, which includes the claim that certain entitlements are correlative, is a paradigmatic exploration of this dimension. In what follows I will focus on the taxonomical dimension of rights, and in particular on vindicating two distinct forms of correlativity that have been at the center of taxonomical attention. At the end I will consider whether the defense of these taxonomical claims has any import for the explanatory dimension of rights.

The two forms of correlativity I aim to defend are:

(i) **Hohfeld's Correlativity ("Hohfeld")** of rights and duties, i.e., claim-rights and directed duties are correlative in the sense that S has a claim-right against T that T ϕ iff T owes S a duty to ϕ.

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(ii) **Bentham's Correlativity ("Bentham")** of rights and wrongings, i.e., rights and wrongings are correlative in the sense that S has a right against T that T ϕ iff T wrongs S when T inappropriately fails to ϕ.

Hohfeld has been attacked in various ways during the twentieth century by Raz and MacCormick, but these attacks have proved unsuccessful. **Bentham** has been attacked more recently by Nico Cornell, but the defenses of **Hohfeld** show us how to resist his attacks. The various defenses of correlativity have a unified strategy: they insist that the correlative normative incidents or *entitlements* (*right* and *duty*, or *right* and *wronging*) and their relata be properly calibrated. Consider S's right against T that T ϕ—label S the *subject*, ϕing the *direct object*, and T the *indirect object*. *Calibration* requires that each of the subjects, direct objects, and indirect objects of the right/duty or right/wronging pair are also correlative. I argue that calibration is possible only if we allow *abstraction*, i.e., that the subjects, direct objects, and indirect objects of entitlements may consist in abstract objects—in particular, indefinite persons described by wh-clauses and other indefinite phrases.

This requirement of abstraction may have salience beyond saving the taxonomical claims of **Hohfeld** and **Bentham**. Perhaps it impacts the relation between the explanatory and taxonomical dimensions of rights theory, insofar as only certain kinds of explanatory fact are compatible with the abstract entities required by calibration. I present these questions in the final section, but leave them open. My modest aim here is to show how we might save correlativity, and what the cost is.

I. Rights and Duties

Consider (the first-order fragment of) Hohfeld's Table, in which solid lines indicate *correlative* entitlements, and dotted lines indicate *logical duals* (e.g., if J owes S a duty to ϕ, then S lacks a liberty against J to not ϕ).

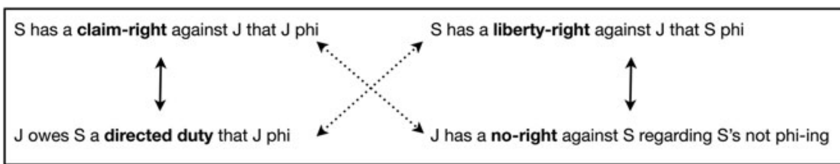

Figure 1. Hohfeld's Table (adapted from Hohfeld, 1913).[1]

While there are two relations of correlativity in this fragment, I'll be concerned only with the correlativity of claim-rights and directed duties.

Why is **Hohfeld** appealing at all? An initial reason is conceptual elegance. Consider Kramer's description of rights and duties: "... each is the other from a different perspective, in much the same way that an upward slope viewed from below is

[1] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal 16–59 (1913), at 30.

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a downward slope viewed from above."[2] If this turns out to be correct, then the number of normative phenomena that require definition and justification is reduced, and such reduction is an explanatory virtue in a theory. But that is hardly a conclusive reason to think it is correct, especially if it is true that *right* is a human artifact rather than a natural kind.[3] So our hopes for conceptual elegance must be weighed against the threat of counterexamples to correlativity. I assume at least that if the present counterexamples can be rejected, the convenience of conceptual parsimony will shift the burden back onto the critic of correlativity.

I'll consider four kinds of potential concern about **Hohfeld**, though the first does not lead us to the kind of abstraction that is my main topic. It does, however, help to clarify the target of arguments against **Hohfeld**.

A. The Argument from Intrinsic Duties

Consider the following argument by Raz:[4]

(1-P1) There are "intrinsic duties," i.e., duties not derived from rights.
(1-P2) These duties are not correlated with any rights.
(1-C) There are duties that are not correlated with any rights.

I'll show now that this argument fails as an argument against **Hohfeld**, since it is not valid once we restrict our attention to claim-rights (rather than rights) and directed duties (rather than duties).

In support of 1-P1, Raz claims that there are duties to express respect for value, e.g., the value of art. Such a duty would be derived from the value of art. Yet, Raz suggests, there are no rights correlative to such duties: art does not have any rights, and the duty to respect art does not obviously derive from anyone's right. But the immediate problem for this as an argument against correlativity is that the duty to respect art is not owed to anyone, certainly insofar as it is a duty not derived from anyone's right. Since this is not a directed duty, it lends support to the argument only insofar as 1-P1's mention of "duties" does not include directed duties. Substitute "duties" with "directed duties" and there is no longer good evidence for 1-P1.

Requiring that the argument refer to "directed duties" rather than "duties" is clarifying rather than question begging. It would be question begging against Raz if **Hohfeld** equivocated on whether it is duties or directed duties that are correlative to rights. But (this is the clarification) the Hohfeldian claim I am defending is that *directed* duties are correlative to rights. And this is not the tautologous claim that duties correlative to rights are correlative to rights. So **Hohfeld** is not itself question begging, since it must be defended against the evidence that there are directed duties that are not correlative to rights.

[2] Matthew H. Kramer, *Rights without Trimmings*, *in* A DEBATE OVER RIGHTS 24 (Matthew H. Kramer, N.E. Simmonds & Hillel Steiner eds., 1998).

[3] Visa A.J. Kurki, *Rights, Harming and Wronging: A Restatement of the Interest Theory*, 38 OXFORD J. LEGAL THEORY 430, 431 (2018).

[4] Joseph Raz, *Right-Based Moralities*, *in* THEORIES OF RIGHTS 193, 195–197 (Jeremy Waldron ed., 1984).

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Raz presents another bit of evidence for the argument: that there are duties of friendship, i.e., duties that are constitutive of friendship. Perhaps an example of these is the duty to listen to a friend vent about a bad day. It does not sound strange to say that you owe it to your friend to listen to them, i.e., that the duty is directed. Yet, Raz suggests, your friend does not exactly have a right against you to listen to them. So perhaps this provides a more pressing counterexample to correlativity.

But it's not at all clear that 1-P2 is in fact satisfied. Part of the strangeness of saying that your friend has a right that you listen may come from a tendency to associate rights with enforceability. Certainly your friend should not force you to listen, or use force in some other way to ensure you satisfy your duty. That would be so heavy-handed as to destroy any basis for the friendship, and appears in conflict with the supposed constitutive aspect of the duty. Of course, the argument need not insist that the duty is constitutive, just that it is a duty that arises with friendship. More to the point, once we clarify that the right in dispute is a claim-right, one that confers standing to claim the direct object of the right, then it seems altogether more ordinary to think that your friend does in fact have such a right. If your attention is caught between your friend and an inane TV advert, it seems quite ordinary to say that your friend is the one who gets to say which you should listen to. Many everyday tiffs between friends ("Hey, I'm talking to you!") presuppose just this sort of standing.

Raz may have something more subtle in mind, namely that the duty to listen to your friend really does constitute your relationship as a friendship, but that your friend's standing to claim your attention and complain about its absence does not. The idea here might be that friendship is a normative phenomenon involving a special kind of *ought*, the ought of friendship, and recognizing these oughts makes friendship the kind of relationship it is. If one does not recognize this kind of ought, then one is not properly in a friendship. But the friend's standing to complain is not constitutive of friendship in quite the same way, so the *constitutive* duty of friendship is not correlative to a right that is similarly constitutive. Now, I suspect that insofar as there are norms constitutive of friendship, they are the relational kind that import the idea of standing to claim. But setting my suspicion aside, if the interpretation of Raz I am proposing here is right, he should be understood as saying that the constitutive duties of friendship are not directed. This would disqualify the argument as an argument against **Hohfeld**. So what we do not yet have is an argument that there are duties constitutive of friendship that are *directed*, and thus import the idea of standing, and yet cannot be understood as correlative to rights in the sense described in the previous paragraph.

The next three arguments are more clearly targeted at directed duties in particular, and are more pressing for correlativity. They each proceed by arguing that for some intuitive example of an entitlement, the relevant correlative right or duty would be implausible. But each counterexample can be rejected by making sure that we describe the correlative right or duty at the same level of abstraction as the intuitive incident with which we begin. For each counterexample we will need to acknowledge a dimension of abstraction along which entitlements may vary in their description. By the end, we'll see that entitlements can exhibit these various forms of abstraction in their subject, direct object, and indirect object. The first two dimensions of abstraction are not novel in the literature, though I will employ distinctive terminology in order to keep each apart.

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B. The Argument from Dynamic Rights

The second argument is also due to Raz, who notes that

> Many rights . . . may ground many duties not one. A right to personal security does not require others to protect a person from all accidents or injury. The right is, however, the foundation of several duties, such as the duty not to assault, rape, or imprison the right-holder.[5]

The form of the argument is as follows:

(2-P1) Some rights generate duties.
(2-P2) Such a right is not correlated with the duties it generates.
(2-C) So there are rights that are not correlated with duties.

In favor of 2-P1, Raz thinks that there is a right to security that generates lots of particular duties (such as a duty not to assault, a duty not to rape, etc.). However, in favor of 2-P2, none of these particular duties is correlative to the right to security. And that appears to be a problem for correlativity, which we imagine to be a one-to-one relation. Here we have one right, but many duties.

As Kramer notes, this argument suffers from ignoring the degrees of particularity of the relevant rights and duties. That is, Hohfeldian Correlativity concerns

> one-on-one correlations between rights and duties of the *same* degree of [particularity]. It does not point to such correlations between rights and duties of *differing* degrees of [particularity], and indeed it rules such alignments out—because it insists that a right must have the same content and hence the same degree of [particularity] as the duty with which the right is correlated.[6]

Kramer's first thought is that entitlements vary along a dimension of generality versus particularity. A claim-right can be more or less particular in the sense that it includes more or fewer actions in the scope of its direct object; for example, S's right against T to security requires that T abstain in a variety of ways that guarantee S's security, whereas S's right against T to not be assaulted requires that T only abstain in those ways that guarantee S's not being assaulted. But the same is true of directed duties. T's duty not to assault S requires that T abstain from doing those things that amount to assaulting T, whereas T's duty to guarantee S's security requires that T abstain from doing those things that undermine S's security.

The further thought is that **Hohfeld** should be precisified as the claim that rights and duties *of the same generality* (or *particularity*) are correlative. Now there seems to be no barrier to saying that there is a duty to guarantee S's security correlative with S's right to security. That is consistent with thinking the right to security does generate

[5]Joseph Raz, *On the Nature of Rights*, 93 Mind 199 (1984).

[6]Kramer, *supra* note 1, at 42. I have replaced his terminology of "specificity" (which I use differently) with my "particularity."

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more particular duties, such as the duty not to assault; but here again there is no barrier to thinking that there is a more particular correlative right not to be assaulted.

The reasons we might not think in these terms immediately are practical. The terminology of "right" has been useful for various movements that advocate for protections against the state and other individuals. This advocacy naturally frames the claimed protection in general terms, corresponding to the ambition of the advocates—it is usually left to policymakers who do not lean on the language of rights to refine the claimed protection. Similarly, the soaring language of a Bill of Rights will tend to invoke protections of a very general kind. It will also seek to state the rights as pithily as possible, and this will mean using an abstract noun (e.g., "security") as the direct object of the claimed right. But an abstract noun is likely to cover a wide range of particular actions. Meanwhile, a countervailing pressure arises in our talk of duties, which turns our attention toward thoughts about what we and others must *do*. When we think in this way, we tend to want to know exactly what the duty-bearer is supposed to do. Furthermore, syntax does not allow us to put an abstract object in the direct object place of a statement of duty.

So there is rhetorical and syntactic pressure to frame rights in general terms and duties in particular terms, and this will make examples like Raz's seem familiar. But there is no conceptual reason we are limited to using an abstract object in the direct object place of a statement of rights; and indeed it would serve conceptual clarity if we did not do so in our philosophical discussion of rights. That is, the reasons for framing rights generally are rhetorical, and so we should discount our tendency to do so when doing rights theory. So there is no barrier due to rights theory or normative theory that prevents us from articulating rights and duties with the same degree of generality or particularity, and finding them correlative.

C. Specified vs. Unspecified Entitlements

A different problem for **Hohfeld** is exemplified by a second example that Raz uses to support 2-P2 of the Argument from Dynamic Rights:

> The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. . . . The right to political participation is not new, but only in modern states with their enormously complex bureaucracies does this right justify, as I think it does, a duty on the government to make public its plans and proposals before a decision on them is reached.[7]

Raz's point seems to be that the right to political participation is abstract not in the sense that it does generate a variety of more particular duties, but in the sense that it could generate more particular duties depending on the social context. To use my terminology, the right is not just general rather than particular, but *unspecified* rather than *specified*. Specification involves interpreting a general right in light of the social context in order to produce one particular duty (rather than many). But this means

[7]Raz, *supra* note 4, at 200.

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that we cannot defend **Hohfeld** by producing a similarly particular right that is the duty's correlative, since the unspecified right has its own existence. The problem for **Hohfeld** is that this unspecified right seems to lack a correlative.

MacCormick also points to this sort of problem when he discusses Scotland's Succession Act of 1964:

> s. 2(1)(a) where an intestate is survived by children, they shall have the right to the whole of the intestate estate.

MacCormick argues that the right of the survivors to the intestate estate lacks a correlative duty since the right vests in them before the appointment of an executor. At that point, nobody has a duty to pass the estate on to the children, since there is no administrator and the intestate is deceased. So there can be no correlative duty. MacCormick also points out that the children's pre-appointment right is a genuine right with ramifications, since "one who has a right in a solvent estate is preferred to other candidates when it comes to being confirmed as executor."[8]

The response to this problem rests on my earlier distinction between specified and unspecified entitlements, which has also been remarked upon by Kramer.[9] Add to this a further precisification of **Hohfeld**: that only rights and duties *of the same level of specificity* and generality are correlative. Raz and MacCormick's apparent counterexamples can now be understood as evidence for the claim that the precisified version of **Hohfeld** isn't true of an important set of claim-rights, i.e., the unspecified ones. What completes the response to their objection is the claim that there are correlative unspecified duties. But does that make sense?

Consider first Raz's case. Correlative to the right to political participation is a duty to *do what secures (or enables) political participation*. Perhaps this is specified in the twentieth century by a duty to respond to a request under the Freedom of Information Act, and in the twenty-first century by a duty to allow access to the President's social media feed, though neither of these duties could make sense in ages and places that lack the apparatus of social media feeds and FOIA requests. Still, we might abstract from these particular duties and point to a duty to whatever secures political participation, i.e., a duty that is unspecified in its direct object.

Here again we can point to an error theory to explain away the apparent failure of correlativity. Duties concern what particular people are to do, and so we are practically inclined to talk of duties with specified direct objects. But we often refer to a right in order to describe a sphere of benefit that is secured for a person, or a sphere of activity that is protected against interference. So here we are much more

[8]Neil MacCormick, *Rights in Legislation*, in LAW, MORALITY, AND SOCIETY 189, 200–203 (P.M.S. Hacker & Joseph Raz eds., 1977).

[9]Kramer, *supra* note 1, at 46. Kramer calls an unspecified right an "inchoate right." He also presents a different response to MacCormick, namely that the survivors have a right in rem against everyone that they not interfere with distribution of the estate, a right that has the correlative duty not to interfere with distribution. But I suspect that it is an available interpretation of the statute that the content of the survivor's right is not exhausted by a right against interference, since it includes a positive claim that the estate be distributed. And even if successful, this way of responding to MacCormick will not help us with Raz's right to political participation.

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comfortable describing the right in terms that leave the direct object of the right unspecified. But these practical inclinations do not imply any conceptual constraint on describing a right with an unspecified direct object as correlative to a duty with a similarly unspecified direct object.

The question that remains is whether we can extend this response to MacCormick's example, which concerns a right that is unspecified in its indirect object rather than its direct object. I turn to this concern next.

D. The Non-Instantiation Argument

In MacCormick's case, we observe that the survivor child's right needn't be entirely unspecified insofar as it consists in a negative and in rem right against everyone that the child inherit. But if it goes beyond this to include a positive and in personam right that someone take steps to distribute the estate with respect to the child's share, then it is unspecified in a further way: it is unspecified in its indirect object, i.e., the person *against whom* the child has a right that the estate be properly distributed. After appointment the person with this responsibility will be the particular person who has been appointed executor, whoever that is. This last sentence shows us how to say who has the responsibility before appointment: *whoever* will be appointed as executor. The wh-word here is an unspecified indirect object of the right, and it can take the subject place in a correlative duty: *whoever will be appointed executor* has the duty to distribute the estate with respect to the surviving child's share.

MacCormick's counterexample thus differs from Raz's in that it presents a right with an unspecified indirect object, whereas Raz's right has an unspecified direct object. MacCormick's case points to a more general *Non-Instantiation Argument*:

> (P1) There is some directed duty owed to v, where $\ulcorner v \urcorner$ is an indefinite description rather than a name; and the duty matters, i.e., it makes a difference in deliberation, even though nobody yet satisfies $\ulcorner v \urcorner$.
> (P2) Because nobody fits the indefinite description $\ulcorner v \urcorner$, nobody has the correlative claim-right.
> (C) There is some directed duty that is not correlated with any claim-right.

Note that there is a correlative version of this argument on which there is some right held against someone under an indefinite description, and that MacCormick's apparent counterexample is an instance of this correlative argument. But I frame the Non-Instantiation Argument in terms of directed duties owed to indefinitely described indirect objects because it can be used to generate further apparent counterexamples to **Hohfeld**, such as:

> *Wrongful Life*. S knows that failing to use birth control will result in a child who experiences a lifetime of agony. S has a duty not to bring such agony upon *any child she might give birth to*. Suppose S fails to use birth control, and gives birth to T, who experiences a lifetime of agony. Seemingly T lacks a right that S use birth control, since T was not around to hold this right at the relevant time, and after his birth he has no right that she prevent others' agonizing births.

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Wrongful Life is an instance of the Non-Instantiation Argument only if S's duty is in fact directed. But if one agrees that T lacks a right because T was not around at the time of S's decision, then one may resist the thought that S's duty is owed to the child or anyone else. This way of resisting the Non-Instantiation Argument is suggested by Kamm:

> Suppose duties owed to *C* were based not on characteristics of *C* but rather on characteristics of the dutyholder *D*. For example, suppose *D* is a criminal and his punishment is to obey the next perfect stranger who appears (not his victim). Hence, if *C* were the next person to exist, he would have a right against *D* that stems from *D*'s characteristics that give him a directed duty. . . . In the world without *C*, does *D* have a duty? I do not think so.[10]

Kamm's claim relies on the thought that the duty to C is based on characteristics of D. Yet it is unclear whether it makes sense to think that a duty owed to C can be justified in a way that makes no reference to characteristics of C.

Whether Kamm's solution works or not for the case of D, the mother's duty in *Wrongful Life* does not seem to be of the same sort as D's duty. Perhaps the mother has reason to use birth control because of the impersonal value of refraining from increasing the amount of suffering in the world, and this sort of reason does not underwrite a directed duty. But she also has reason to use birth control because of the suffering she would impose on her future child, whoever that might be. That sort of reason, which is unlike the reason for D's duty, does underwrite a directed duty, since it accompanies the special standing of the child (whoever she might be) to blame and claim moral repair from the mother. Here again our syntactic apparatus of wh-words seems more than capable of bearing the weight of this thought, and it makes perfect sense to say that the mother's duty to use birth control is owed to *whoever would otherwise be born*. Moreover, the wh-word makes syntactic and semantic sense in the subject place of a correlative right: *whoever would otherwise be born* has a right that the mother use birth control. If this locution is at all awkward it is only because we do not ordinarily need to be so precise in articulating the normative relation, and not because we are contorting our language.

Now consider the following objection: if child T were never born, then T could not enjoy the benefits of having the right, so T's having a right is pointless, so we should accept that S has a duty without a correlative right. This objection mistakes the proposal I have made. On my view, if T were not born, then T would never have a right. The unspecified person *whoever would otherwise be born* is the right-holder, and that unspecified person would enjoy the benefits of having the right (were they born), such as having standing to blame and claim repair.

Here's a stronger form of the objection: if no child were ever born, then no child could enjoy the benefits of having the right, so the unspecified right is pointless, so we should accept that S has a duty without a correlative right. But the inference from nobody enjoying the benefits of the right to the right being pointless is bad. By

[10] F.M. Kamm, *Rights*, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 476, 480 (Jules Coleman & Scott S. Shapiro eds., 2002).

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this I don't mean to resist the thought that the point of a right is that it benefits someone. Rather, I want to resist the thought that the point of a right is that it benefits some specified person. The unspecified right, i.e., the right held by *whoever would otherwise be born* does the work of focusing S's mind on why she should take her duty seriously. It does this in the same way that S's directed duty does—by pointing to someone to whom S will be accountable if she violates the duty. We may think that the language of rights is awkward here because of its reference to an unspecified person, but the same would be true for using the language of directed duties.[11] So the thought that there is a claim-right here stands or falls together with the thought that there is a directed duty—which is all that we need for Hohfeldian correlativity.

The difficulty with the proposal, insofar as there is one, is metaphysical rather than conceptual. Does it really make sense to think that a merely counterfactually existing person, i.e., someone who would have been born were the mother to violate her duty can (a) have a right, and (b) be referred to in the justification of the right? This may appear to rest on a controversial modal realism. But whether a right-holder exists, as counterpart or as some other kind of entity, is really beside the point. An entity's existence is needed neither for its having some trait (Santa Claus has a beard), nor for its usefulness in justification (we lock our doors to protect ourselves from thieves who never come). What matters for correlativity is not whether the right-holder exists, but whether we can attribute and make sense of the right. In fact, we do so routinely in altogether more ordinary contexts. We might sensibly say, for example, that everyone has a right to a clean environment, that this right extends to those who are not yet born, and that this right is the basis for apportioning part of the current budget to ensuring that we leave a clean environment behind. I don't mean to deny that there is something puzzling about right-holders who can only be specified counterfactually. But my guiding assumption is that our normative practice should determine how we think about this metaphysical puzzle and not the other way around.

To be fair, the statement that our budget should be determined by the rights of those not yet born might also raise normative challenges. In particular, it might raise the non-identity problem insofar as balancing rights depends on their justification, and the justification for the right of future people to a clean environment rests on a comparison of the harms that would be inflicted by various courses of action.

[11]In particular, it may seem ungrammatical to say: (i) whoever would have been born has a right not to be harmed. Certainly, it is grammatical to say: (ii) whoever would have been born would have had a right not to be harmed. So the grammaticality of (ii) may seem to count against that of (i). Note that (i) and (ii) are not semantically equivalent. Sentence (i) says that counterfactually existing people have a certain right. Sentence (ii) says that counterfactually existing people would have had a right if they became actual. My proposal rests on sentence (i) making sense, since I claim that it makes sense to talk about the rights of counterfactually existing people in the absence of their becoming actual. I think the fact that the semantic difference between (i) and (ii) can be made plain leans in favor of the grammaticality of sentence (i). Further evidence of grammaticality is the grammaticality of similar sentences, such as (iii) the child who would have been born is the focus of my grief. Compare this with (iv) the child who would have been born has red hair. Sentence (iv) is ungrammatical because a nonexistent child does not have any hair. But a nonexistent child can be the focus of my grief (or puzzlement or attention, etc.). Sentence (i) is more like (iii) than (iv). That is all I need to say here, though I can't help pointing to how suggestive this analogy is: it suggests that a claim about rights is more about our relation to the right-holder than it is about the intrinsic properties of a right-holder. That is unsurprising for the advocate of correlativity.

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But we should not jettison unspecified rights just because they lead us downstream toward a type of comparative thinking that we in any case encounter elsewhere in normative deliberation. We should be concerned only if the non-instantiation problem turns out to be another guise for the non-identity problem, since then positing unspecified rights would in itself involve us in an apparent contradiction.

But the non-instantiation problem for rights is not the non-identity problem. The non-identity problem arises because we (apparently illicitly) rely in justification on a comparison of the outcomes for two different sets of people—those who would exist if we do the right thing, and those who would exist if we don't do the right thing—but we do not include the disvalue of nonexistence for the second set in the comparison. The non-instantiation problem arises because our deliberation is guided by the rights of people who would not exist if we do the right thing. But since rights act as side constraints there is no illicit comparison between the value of states of affairs in which the right-holders do and don't exist, and no disregard for the disvalue of existence. We are simply guided by the thought that if we did the wrong thing, then we would violate the rights of those who would in that case exist.

That we are not here dealing with the non-identity problem is illustrated by another instance of the Non-Instantiation Argument:

> *Immigration Trap*. X lives in a country that does not give those outside its borders legal standing to sue for harm or death. X sets up a trap right on the border for anyone who crosses. Y crosses the border and is injured by the trap. Since he is within the border, he can sue X. But before this he did not have a legal right not to be injured, not even a conditional one, since he had no legal rights in X's country. But X surely had a legal duty to refrain from injuring *anyone who crosses the border*.

This case is a challenge for **Hohfeld** because it appears that X has a duty to refrain from injuring anyone who crosses the border, but Y lacks a correlative right insofar as he does not cross the border. And since we are dealing with a case involving positive law, we are free to stipulate that Y lacks rights in advance of crossing the border. The solution I have been suggesting is that it is not Y who has the correlative right, but *whoever crosses the border*, i.e., an unspecified person. Now the value of this illustration of my solution is that it shows why we need to talk about unspecified right-holders even in cases in which the people specifiable as right-holders do exist—and their existence means that there is no place for the non-identity problem.[12]

[12]Is there something like a *legal* non-identity problem in the vicinity? Suppose that Y will only cross the border if X sets the trap, and that our justification for X's duty is that (i) X would cause legal harm to whoever crosses the border if he sets the trap, and (ii) this legal harm would be worse than the legal harms caused by refraining from setting the trap. Perhaps there is a worry that this justification is involved in an error by not including the legal harm to those who would have crossed the border that they are not part of the legal system. But this last thought is odd. If only those who cross the border are part of the legal system, then only they can be subjects of legal harm. So one who would have crossed the border but does not is not subject to legal harm. So our justification does not leave out anything important. Even if this response is wrong and we can work up something like a legal non-identity problem from the aforementioned justificatory materials, it's plain that the justification for the duty could simply have been that a legitimate authority ordered it so. Here we surely have the non-instantiation problem without

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The case is also helpful because it helps to bring some alternative attempts to rescue correlativity into focus:

(i) Nonrelational strategy, i.e., X has a duty not to harm whoever crosses the border, but does not owe it to whoever crosses the border, or to anyone, to refrain from harming them. This saves correlativity because we need not say that Y has a right in advance of crossing the border. Maybe this strategy is persuasive for cases involving duties of public law. But we could easily assume that X's duty in *Immigration Trap* is a duty of private law, and the duty in *Wrongful Life* seems to be a moral duty—and these duties are accompanied by duties to apologize and compensate particular people, and so should be thought of as directed.
(iii) Triggered rights strategy, i.e., X has a class of conditional duties of the form {for all people *i* who could possible cross the border: X owes it to *i* to [if *i* crosses the border, not trap *i*]}. This could not save correlativity, since X owes Y a duty even before Y crosses the border. But Y cannot have a correlative right, since we have stipulated that Y cannot have rights. Perhaps if we were forced to think X must have this sort of duty, then we could make this understanding of the case into an argument against correlativity. But we are not forced to do so.
(iv) Constituted rights strategy, i.e., X is subject to class of conditional norms of the form {for all people *i* who could possibly cross the border: if *i* crosses the border, X owes it to *i* not to set a trap}? In advance of Y crossing the border, X owes nothing to Y (though perhaps he may be said to have duties). When Y crosses the border, a duty owed to Y and a correlative right of Y's are born. So correlativity is saved, and without positing indefinite right-holders. Moreover, X can be guided in deliberation by the conditional norms much as he would be by unconditional directed duties. As he thinks about setting the trap he may wonder why he shouldn't, and the norms would focus his mind on the interests or agency of the various people who might cross the border.

I think it is odd that the constituted rights strategy would have to say that X has no duty in circumstances where nobody has crossed the border—for we can reasonably stipulate that X's reasons not to set a trap have deontic force. But the constituted rights strategist could say X potentially has duties, or even that he has potential duties (and, correlatively, Y has potential rights). But heading in this direction, the difference between abstraction and the constituted rights strategy becomes faint. Perhaps we should concede that the two strategies are notational variants. That would be so if the indefinite assertion *whoever is F, is G* can be translated as $(\forall i)Fi \rightarrow Gi$. For an instance of this schema is: *whoever crosses the border has a right against harm* can be translated as *for all i who could cross the border, if i crossed the border then i has a right*.[13] (Similar translations could be given for properties of the relevant rights

the non-identity problem. And in any case, the assumption that Y will only cross the border if X sets the trap is plainly contrived and unnecessary for the case being an example of non-instantiation.

[13]The proposed translation attends to logical form alone, and not the different compositional properties of the sentences. For example, *whoever is F* can be detached and embedded in other sentences, and it can be referred to anaphorically. For example, I might say "I owe it to whoever crosses the border not to set a trap," to which you might respond: "Yes, and whoever crosses the border might have a family too"; and a third

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and duties, and second-order normative incidents such as powers.) The difference, if there is one, is supposed to be one of ontological commitment. Above, I denied that we need to commit to the existence of an unspecified right-holder in order to pursue the strategy of abstraction. But the strategy does commit to the existence of a right in advance of anyone crossing the border, one that is ascribed to an unspecified right-holder; while the constituted rights strategy seems to commit only to the conditional existence of the right.

Which should we prefer? My suggestion at the beginning of the previous paragraph was that we want to be able to take into account the properties of duties when describing the particular way in which X's deliberation should be shaped by consideration of the harms his behavior would cause to whoever crosses the border. For example, the fact that X owes someone particular a duty should shape his thoughts about whether he would owe justification or apology and repair to someone in particular. The conditional rights strategist can say that X's thought about his potential duty is enough to do this work. But at this point it is not clear that the idea of a potential duty is any less ontologically committed than the idea of a duty with an unspecified indirect object. For just as an unspecified duty has an unspecified indirect object, a potential duty has a potential indirect object. I will assume then that these strategies are equal in costs and benefits, and stick to the strategy of abstraction because of its usefulness for understanding the problems raised in Section III.

E. Indefinite vs. Definite Entitlements

Entitlements (both rights and duties) that are unspecified in their subject or indirect object are sufficiently distinctive that they deserve their own terminology—call these "indefinite" rather than "definite" entitlements. When characterized objectively (i.e., independent of anyone's epistemic perspective), a definite entitlement takes names or definite descriptions as arguments in the subject and indirect object place, e.g., "I owe it to the university to pay my library fine," or "Minh has a right of privacy against Nick." An indefinite entitlement, when characterized objectively, takes indefinite descriptions in these argument places, e.g., "the first person across the line has a right to the trophy" or "I have a legal duty to anyone who crosses the border not to injure them." I'll contrast this distinction with the related *de re/de dicto* distinction, and then explain why it is necessary to highlight the idea of an indefinite entitlement.

1. Indefinite vs. De Dicto Entitlements

It is tempting to describe indefinite entitlement as *de dicto*, after Visa Kurki's use of the term in his defense of the interest theory. I'll say something about why this

person might add: "do you really owe a duty to such a person, or only if they justifiably cross the border?" I think we could translate this conversation and others like it into logically equivalent quantified conditionals, at the cost of convenience. The constituted rights strategist must say that this logical form is all that matters. Note that there may also be pragmatic differences. For example, the wh-clause can also be given an "unconditional" reading, as in *whoever crosses the border, X has a duty not to set a trap*. But I'm unsure how much this pragmatic feature matters, for while the italicized sentence appears to have the form of an nonconditional assertion, the wh-clause restricts the scope of the assertion in a way that is related to the conditional form of *whoever is F is G*. *See* Kyle Rawlins, *(Un)conditionals*, 40 Natural Language Semantics 111 (2013).

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temptation should be resisted, though it requires delving into difficult but unrelated territory. So this section can be safely skipped by readers who do not need convincing.

Kurki's defense rests on Bentham's Test (unrelated to **Bentham**), which he deploys as a definition of rights in the following way:

> **Bentham's Test**: X has a right *R* against Y iff (1) X has the capacity to hold rights, and (2) the set of facts that are minimally sufficient for establishing a contravention of the duty correlative to *R* includes a fact that affects X in a way that is typically detrimental for beings like X. (Where facts F1,…,Fn are minimally sufficient for F iff F1,…,Fn are jointly sufficient for F and each Fi is necessary element of F1,…,Fn for the set's joint sufficiency.[14]

Kurki immediately points out that the test needs to be "amplified" in order to give the right results in certain cases. To make things concrete, suppose that one has a duty not to burn down another's house, and Sari burns down Ted's house, but nobody knows the house belongs to Ted. Then when we try to specify all the sets of facts minimally sufficient for justifying Sari's duty, none of these sets will mention Ted. Instead they will mention "the owner of the house." Kurki's amplification is as follows:

> Even when the party detrimentally affected by the breach of duty cannot be identified *de re* on the basis of every set of facts minimally sufficient to establish that the duty has been breached, that party can be identified *de dicto* (for example, as 'the owner(s) of the asset that was damaged by fire'). We can then proceed to identify the owner(s) of the asset that was damaged by fire, using further facts.[15]

Kurki returns to this idea in a later paper in which he defends the interest theory against a thorny version of a third party beneficiary objection. Suppose that Y promises X that she will pay Z some money, and that intuitively X has a right to the money but Z does not. Traditionally the third party beneficiary objection is that the interest theory cannot explain why Z (or, say, Z's granny) doesn't have a right to the payment given their interest in receiving it. Bentham's Test helps to deflect this objection, but at an apparent cost: we can present a set of facts minimally sufficient for X's duty that makes no mention of Y, i.e., F_1: X didn't pay Z. That would mean that Bentham's Test excludes Y as a right-holder, counterintuitively. Kurki responds:

[14]The test is ambiguous: it is unclear whether (2) should read "every set of facts" or "some set of facts." I won't try to resolve the ambiguity, though it seems to play a critical role in the debate between Kurki and Mark McBride. *See* Mark McBride, *The Unavoidability of Evaluation for Interest Theories of Rights*, 33 Can. J. L. & Juris. 293 (2020); Visa A.J. Kurki, *The Interest Theory of Rights*, 27 Legal Theory 352 (2021).

[15]Kurki, *supra* note 2, at 441.

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> Y's duty to pay Z can also be given various descriptions. The description used in the debate here has focused on Y's duty to pay Z. However, the same duty can also be characterized as Y's duty to fulfill his promise. Under this description, both the [direct object] of the promise and X figure in the content of the duty, though merely *de dicto* as "whatever Y has promised" and "the party to whom Y has made the promise, whoever that may be."[16]

Taking these statements together, the idea seems to be aimed at capturing rights whose formulation is opaque because of our epistemic position. In the case involving Sari's burning down Ted's house, we need to use a *de dicto* formulation only because we don't know that it is Ted's house. But there is in principle a (*de re*) formulation of the right as Ted's, available to one who stands in the position of an omniscient observer. It's a little unclear why the *de dicto* formulation is required in the case involving Y's promise to X to pay Z, since what seems essential to Kurki's response is that Y's duty to pay can be redescribed as a promise.[17] But perhaps Kurki's thought is that given the description of the duty as a duty to pay, we do not have enough information to redescribe the duty as a promise made to X in particular. That again suggests that we need to use the *de dicto* formulation for epistemic reasons.

The fact that a *de dicto* formulation of a right is used for epistemic reasons is important because in these cases there is some right-holder, *de re*, who has the right but the *de re* formulation is unavailable to us, or to the person whose epistemic perspective we are describing. But given that there is such a *de re* formulation to be had, it may well describe a definite entitlement. For example, in Sari and Ted's case, the owner of the house turns out to be Ted, and even if we are forced to say, *de dicto*, that it is whoever owns the house who has a right against Sari, our formulation is a way of characterizing a definite right (one that is actually held by Ted). But the cases I have been describing are cases in which the right is fundamentally indefinite, and an objective description of the right-holder would still be given in metaphysically *de dicto* terms. For example, in advance of anyone crossing the border, X owes a duty to whoever crosses the border. Even the omniscient observer cannot attribute this right to any definite person. Perhaps then the definite/indefinite distinction replicates a distinction between rights that are metaphysically *de re*/*de dicto*. Still, I avoid the terminology because of possible confusion given Kurki's aims.

2. Why Indefiniteness Matters

There are two reasons to single out indefinite entitlements. One is to prevent confusion when considering a remark by Kramer about the distinction between general and unspecified entitlements, namely that general entitlements can entail particular entitlement, while unspecified entitlements "can never strictly entail" any other entitlements.[18] I don't wish to investigate the plausibility of this remark. Certainly it is true that the S's general duty to use birth control entails S's particular duty to use

[16]Kurki, *supra* note 13, at 360–361.

[17]This is the point at which the abovementioned ambiguity in the formulation of Bentham's Test seems crucial. Kurki's response suggests that he thinks clause (2) of the test is existentially quantified.

[18]Kramer, *supra* note 1, at 47.

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birth control during May, and that X's unspecified right to political participation does not strictly entail any specified right about FOIA requests and the like (since we would need to know more about X's context). But the claim about entailments is implausible when it comes to entitlements with unspecified subjects or indirect objects. X's duty not to injure whoever crosses the border entails a duty not to injure whoever crosses at the second border checkpoint, as well as a duty not to injure anyone named "Mary" who crosses the border at any point. So, just in case Kramer is right about the distinction between general and unspecified entitlements, it seems prudent to use our terminology to mark off indefinite entitlements as something altogether different.

A second reason to distinguish indefinite entitlements arises within discussion of imperfect duties. Consider Wallace's argument that imperfect duties such as duties of gratitude and mutual aid be regarded as directed duties even though we are reluctant to describe them in terms of correlative rights.[19] Suppose I have a duty of mutual aid to give 10 percent of my income to those most in need. It strikes Wallace as potentially unpalatable that we describe this duty as owed to any one of those who are among the most needy, and this partly in light of the fact that no one such person has any right to 10 percent of my income. But Wallace is prepared to endorse the directedness of such duties once they are reframed as duties owed to all of the members of the relevant class. Of course, once we do this, we need to reframe what is owed: it is surely not that I owe it to each class member to give 10 percent of my income, but rather to do something toward alleviating the need of the class.[20]

Wallace's suggestion seems to me to be just one of two ways of understanding the imperfect duty of mutual aid as a directed duty, and the difference between these two ways can be marked terminologically as the difference between unspecified and indefinite entitlements. On the one hand, we can think of the duty, as Wallace does, as one that is definite in its indirect object (owed to each of the class members) but unspecified in its content (to do something within the duty-bearer's discretion to alleviate the need of the class). On the other hand, we can think of the duty as one that is indefinite in its indirect object (owed to some members within the class, perhaps to be specified at the duty-bearer's discretion) but specified in its content (to give a fair share of their income).

Which one of these interpretations of the duty of mutual aid is correct is a matter for further moral inquiry, and will make an important difference both to how a duty-bearer should think about their duty, and what others may demand of the duty-bearer. Other imperfect duties won't raise this interpretive duty. For example, it is relatively clear that my duty of gratitude to one who has benefited me is definite in its indirect object (it is owed to my beneficiary) but unspecified in its content (it is for me, given the context, to determine what it demands). And some duties may be both indefinite and unspecified, so that it is open to further determine both to which particular individuals it is owed and what it requires of the duty-bearer. But in each of these cases it is clear that the problems posed for correlativity arise only when we

[19]R. Jay Wallace, The Moral Nexus (2019), at 201ff.

[20]As Wallace puts it, "[a]ffluent agents owe it to each of the individuals in the class of potential beneficiaries to do their fair share to provide needed assistance." *Id.* at 207.

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ignore the relevant dimension of abstraction of the duty. A duty of gratitude may seem to be without a correlative right insofar as we think that right must be specified in its content (e.g., a right to being thanked); but if we are careful to calibrate the direct object of the duty and the right (e.g., a duty to do whatever appropriately expresses gratitude paired with a right to whatever is an appropriate expression of gratitude) then correlativity no longer appears to be in jeopardy.

II. Rights and Wrongings

We have so far been trying to vindicate the Hohfeldian correlativity of claim-rights and directed duties by restricting its scope to rights and duties that have the same degree of abstraction, and arguing that even for very abstract rights (or duties) there is no conceptual barrier to there being correlative duties (or rights) at the same level of abstraction. I turn now to the correlativity of rights and wrongings, which I call "Bentham's Correlativity" because of Bentham's claim that

> the violation of a right is an offence: nor is there any thing else but the violation of a right that is an offence. In other words, by whatever act an offence is committed, a right is violated: and vice versa by whatever act a right (meaning always a legal right) is violated an offence is committed. Whatever judgment then has relation to [an] offence has thereby also relation to a right.[21]

I don't mean to claim that Bentham is the source of this thought, or even that it is well developed by Bentham, who explicitly (here and elsewhere) limits talk of rights to the law. But it will be useful to have a label for this sort of correlativity, especially one that indicates a provenance before the recent surge of interest in relational normativity.

In the first sentence of the quote, Bentham seems to have in mind that the concepts of right and offense are equivalent, bringing to mind Kramer's argument that rights just are duties as "an upward slope viewed from below is a downward slope viewed from above." But I don't mean to defend equivalence, or to conflate correlativity with it. The second sentence suggests this less demanding sense of correlativity as coextension. But—and here I am indeed influenced by current discussions about relational normativity—what we are interested in outside of the scope of the law is not offense but *wronging*. So setting aside Bentham's actual intentions, I will use his name as a label:

> **Bentham.** S has a right against T that T ϕ just in case T wrongs S by inappropriately not ϕing.

A. Appropriate Nonconformity

The word "inappropriately" does a lot of work in the above formulation. But this sort of qualification is necessary, for there are clearly justifiable forms of nonconformity with a right. Consider the following example, presented by Joel Feinberg:

[21] Jeremy Bentham, Of Laws in General XVIII (H.L.A. Hart ed., 1970), at 220–221.

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Cabin. You are trapped in a snowstorm and risk freezing to death when you come across a cabin that is unoccupied but locked and clearly someone's property. You break a window in order to gain entry, and over the next few days burn some of the furniture to save yourself from freezing.[22]

It is plausible that your behavior infringes the rights of the owner of the cabin, in the sense that it does not conform with what the rights require. One might think that the owner's property rights do not extend to circumstances like these—that they grant control over the property to an extent circumscribed by clauses such as "except when someone's life is at stake." But Feinberg resists this thought by insisting that you would later have a duty to compensate the owner for the loss of furniture. Nonetheless he thinks that this is a case in which you have justifiably infringed the owner's rights. This makes sense if we distinguish violating a right from merely infringing it.[23] We can then say that violating a right—and, correlatively, wronging the right-holder—involves *inappropriately* (perhaps: impermissibly) infringing the right.

In an as yet unpublished manuscript, Johann Frick argues that wronging involves infringing a right in a way that causes a moral injury to the right-holder that impairs the agent's relationship with the right-holder.[24] The argument rests on the following case:

Threshold Trolley. There is some threshold number n such that it is permissible to kill one man if it will save n people. A runaway trolley will kill $n+1$ people unless you push a large man in front of it (in which case the man will die).

Frick judges that in this case you act permissibly by pushing the man, but that you nonetheless wrong him. This threatens correlativity if we maintain that violating a right requires permissibly infringing it, and that correlativity means that wronging requires violating a right. But all I have committed to in defending correlativity is that it establishes a necessary connection between rights and wrongings such that wronging requires inappropriate infringement in some sense. And in *Threshold Trolley* the fact that you have wronged the large man entails that you have inappropriately infringed a correlative right of his.

What is potentially more troubling for **Bentham** is Frick's thought that there are two different "faces of morality": an agent-focused question whether the agent acted permissibly, and a patient-focused question whether the agent injured the patient in a relationship-impairing manner.[25] This would be troubling insofar as rights and wrongings appear on different sides of this divide, since that would threaten to sever **Bentham**'s necessary connection between rights and wronging. But in fact Frick seems to allow both rights and wrongings

[22]Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFFS. 93, 102 (1978).

[23]JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (1990), at 122.

[24]Johann Frick, Dilemmas, Luck, and Two Faces of Morality (unpublished paper) (on file with the author), at 21.

[25]*Id.* at 23.

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to appear on the same side of the divide, since he defines wronging in the following way:

> X wrongs Y by ϕing if (i) Y has a right that X not ϕ, and (ii) Y could have permissibly (and rationally) denied her assent to X's ϕing.[26]

This definition suggests that the patient-focused language of wronging is to be understood in terms of whether the patient had a right and exercised it—a suggestion that contrasts with the view that rights present guideposts for agent deliberation. Perhaps there is a way to define wronging so as to maintain our judgments about cases like *Threshold Trolley* while also attributing our concepts of *wronging* and *right* to different faces of morality. But this is not Frick's argument, and I don't see how to provide it.

B. Cornell Cases

A prominent critic of **Bentham** is Nico Cornell, who in a provocative article sets out three kinds of cases that seem to involve someone being wronged without their rights being violated. The argument is based not just on counterexamples, but on an affinity with pluralism in moral explanation:

> These cases arise because we have important commitments and practices associated with having a right and with being wronged—commitments and practices that do not always line up with one another. Only by recognizing that rights and wrongings can come apart, I argue, can we preserve the roles that both moral phenomena play in our lives.[27]

Cornell uses each of the examples to press a *proliferation complaint*, i.e., each case involves a wronging, but if we posit a right to explain the wrong we end up multiplying rights unnaturally.[28]

Consider a first example, *Overheard Lie*:

> Suppose that you overhear your coworker talking to a customer at work. Your coworker tells the customer that the South Bridge has been fixed and is now operational. You do not think anything of it at the time. Later that day, you are suffering from an asthma attack and need to rush to the hospital. You try to take the South Bridge only to find it closed, and you end up in a great deal of distress. The next day, you ask your coworker why he said the South Bridge was fixed. Your coworker responds by saying that he was lying because he does not like the customer and wanted to play a prank on him.[29]

[26] *Id.* at 25.
[27] Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 Phil. & Pub. Affs. 109 (2015).
[28] *Id.* at 122.
[29] *Id.* at 119–120.

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Cornell's judgment about this case is that you have been wronged by your coworker, but that he did not infringe any right of yours. The latter claim is supported by a judgment that it would not just be overly demanding to insist that you have a right, but that doing so would result in an unnatural proliferation of rights. That is because *anyone* who overheard your coworker would be in the same position, and would have a similar right. To emphasize how unnatural this might sound, consider what the right would have to be. It is true that you have not been lied to, so it is not a right against being lied to that has been infringed. You are wronged, instead, because you have suffered harm by relying on defective information disseminated as part of lie. And that does seem wrong, since one who lies should take into account the further effects that disseminating the information contained in the lie might produce. But the correlative right would appear to consist in a right against harm produced by relying on disinformation disseminated as part of a lie. Now it seems demanding to insist that everyone has such a right. After all, anyone could enter the workplace at the time your coworker tells the lie, and so overhear and rely on the disinformation it contains. So it seems that everyone must have a right against the coworker that he not spread disinformation, if you do. But, Cornell suggests, it is unnatural to think that everyone has a right against your coworker.

I find that my own judgment about the case wavers between two thoughts. On the one hand, it does seem that there is a case to be made for your coworker doing something wrong, even though I'm not sure that the lie itself need be wrong. But your coworker may very well have a duty to ensure that she not spread disinformation to someone who might reasonably rely on it, and who she foresees would be in a position to do so. So it seems to me no accident that Cornell sets the case up as he does, as involving two coworkers between whom there may well be a relationship of relative trust such that one reasonably relies on the words of another. On the other hand, it does seem implausible to think that everyone—even everyone who might enter the workplace—has a right against your coworker that they tell the truth. So if there is no plausible way to limit the scope of the coworker's duty, then we will have to admit that correlativity involves an unnatural enlargement of the number of rights that lie against the coworker.

Cornell's proliferation complaint is grounded in two more basic concerns, and these help to explain why we should avoid positing a right on the part of everyone who might overhear the coworker.[30] There is first of all an *allocative concern*, i.e., that a proliferation of rights undermines their allocative function. The concern assumes that a function of rights is to entitle the right-holder to normative control over some sphere of activity of the correlative duty-bearer, e.g., if A has a right that B speak the truth, then A has normative control over what B says in the sense that it is up to A whether B does wrong by speaking the truth. But if there are multiple right-holders that have a right with the same direct object with respect to a duty-bearer, then this undermines their ability to control the duty-bearer's action. The second basic concern is a *guidance concern*, i.e., that a proliferation of rights undermines their action-guiding function. The concern assumes that a function of rights is to provide the correlative duty-bearer with guidance in moral deliberation, e.g., if A has a

[30]These are suggested in *id.* at 133–134.

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right that B speak the truth then the right guides B in deliberating about whether to speak the truth or not.

Supposing a right on the part of everyone who might overhear the coworker in *Overheard Lie* runs into the allocative concern because it seems to allow that very many people have control over what the coworker says. Perhaps it's not troubling insofar as we think most people would want the coworker to speak the truth. But this needn't be the case. Perhaps other coworkers within earshot would be happy to waive their rights because they enjoy the prank. Or perhaps the coworker's prank involves saying something false that would strike certain hearers as obviously implausible, but not others. The likelihood of disagreement as we increase the number of right-holders undermines the allocative function of each right-holder's right.

This last point raises the worry about the guidance function of rights. Who should the coworker have in mind when deciding whether to play the prank on the customer or not? The problem here is not strictly one that arises from the possibility of disagreement among the many people who might come to overhear him. For even if there is no disagreement, the fact that there are very many right-holders makes it very difficult for the coworker to determine that there is in fact no disagreement, and therefore to decide what weight to put on possible disagreement in his deliberation. In short, the problem is that the wide availability of a right does not so much guide the duty-bearer's deliberation as confuse it.

In case *Overheard Lie* does not seem a particularly compelling example of this dynamic, consider two cases that Cornell uses to emphasize the role of the allocative and guidance concerns.

First, *Lottery*:

> [Donor] wants to perform a random act of kindness by giving away most of his fortune. He assembles a list of thousands of people who have somehow contributed to the community—schoolteachers, nurses, veterans, and so on. At an event for these people, one person's name will be randomly drawn and a large cash prize will be awarded. There will be one of those oversized checks and confetti and whatnot. X has been hired to arrange everything. When the name is finally drawn, it turns out to be you! But, in a Hollywood plot twist, X is a skillful con man who has absconded with the money.[31]

Second, *Fireworks*:

> Suppose that as a hobby you engage in recreational pyrotechnics. . . . One day, you go out to the park and set up an elaborate explosive display. For some reason, today it slips your mind to broadcast the [obligatory] warning signal. After you have walked away and are looking back, you see that two familiar local children have approached the device. One is a girl who has no family and no one who cares for her. The other is a boy with extremely loving parents who would be absolutely heartbroken if he is injured or killed. You have enough time to get one child away from the device, but probably not both.[32]

[31] *Id.* at 118.
[32] *Id.* at 129.

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In *Lottery*, it appears that you have been wronged by X, but that you have no right against X that he not take the money. Cornell works through several theories as to why you might have a right against X. Property cannot be the basis of the right since ownership of the prize has not vested in you at the point at which X absconds with it. Reliance cannot be the basis of the right since you can hardly rely on winning the money at the point of X's theft. A special relationship with Donor cannot be the basis of the right, since whatever special relationship you have with Donor is shared by all the other lottery entrants who end up losing.

Perhaps the most compelling theory on offer is that you are the intended beneficiary of the prize money. In a typical third party beneficiary case, such as where X promises Y to give something to Z, Z is intended as the beneficiary of the promise and may even be thought to have a right against X (though perhaps one that is different in kind and weight to Y's right). If there is such a right, it is because X knows very well that Z is to benefit and can be guided in deliberation by this consideration. For example, if X promises to give food for Z's benefit, it should be food that Z can actually eat rather than something that irritates Z's known allergies. But Cornell finds the idea that you are intended as the beneficiary in *Lottery* in this way implausible. As he puts it, Donor "did not really intend *you* as his beneficiary as much as he intended *whoever it was* whose name got pulled out of the lottery."[33]

We can again frame the problem in terms of the allocative and guidance concerns, regardless of the proposed basis of the right. Suppose that at the moment of the theft, a persuasive Representative appears on the scene. Representative is powerless to stop X or alert anyone else, but can reason with X. In particular, Representative has the power to persuasively represent the interests of each of the lottery entrants to X, and can on that basis persuade X to part with the lottery money because of how it will eliminate the pressing needs of the winner and help them to accomplish great things. But Representative can only represent one lottery entrant at a time. Of course Representative could work her way through the entire list, but in each case X might want to know why he should care about that entrant, given that she is very likely not the winner. The intuitive problem here is that there is no one entrant yet who has been allocated control over X's activity, and so there is no one entrant's situation that should guide X's deliberation about what to do. The natural response is that X's deliberation should be guided by the interests of *all* the entrants, but now we are faced with the problem of multiplicity. There seem to be too many people who have an equal interest in the money, and the balance is not yet tipped in favor of any one of them on the basis that the lottery has been decided in *their* favor.

The guidance concern plays an especially important role in *Fireworks*. Here Cornell's judgment is that you wrong either child if you do not save them, and that each child has an equal right to be saved. But in addition—and this is where wrongings and rights come apart—the boy's parents would be wronged if you don't save him. But it cannot be the case, according to Cornell, that the parents have a right that the boy be saved, for this would tip the balance in favor of saving the boy, and so undermine the intuitive judgment that each child has an equal right to be saved. This can be put in terms of the allocative constraint in the sense

[33] *Id.* at 119.

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that the parents' rights and the girl's right come into conflict when determining what you should do. But it is even more vividly a concern about guidance, for if we posit rights on the part of the parents then they seem to play a role in your deliberation that distorts how you should really think about the case, that is, as one in which you are torn between the equal importance of saving the girl and the boy.

While I have been trying to lend credence to Cornell's judgments as much as possible, I have already been suggesting a way of framing the relevant rights that avoids the proliferation complaint. In *Overheard Lie* it is not so much that everyone, or everyone who comes into earshot, has a right that the coworker not spread harmful disinformation, but rather that *whoever might reasonably foreseeably rely on the disinformation* has such a right. That should lessen our worry that there are guidance and allocative concerns since there are not a large number of people who have the right, but simply one indefinite person. Deliberation may of course struggle in light of the fact that this person and their interests are unspecified, but this is a reason for thinking in a generic way about the concerns of someone who might overhear, rather than being put to the task of resolving conflicts between the interests of all those who might overhear. And in *Lottery* it is not the case that you, or any one of the other lottery entrants, has a right to the prize money at the point at which X absconds with it, but rather that *whoever ends up winning* has that right. That means that the right can play an allocative role, in the sense that the money is allocated to whoever fits the indefinite description *whoever ends up winning*.

Can we say something similar about *Fireworks*? Here we do not face a problem defining who the primary right-holders are. Both the boy and the girl have a right that you not have set the fireworks without warning, and each has a right (possibly derived from the first) that you do what you can to rescue them. The question is whether there are further rights held by the boy's parents that serve to tip the balance in favor of saving him. Cornell's thought is that there could not be, since intuitively you should treat them as equals when deciding whom to save. But equally intuitively, you wrong the boy's parents if he dies because of the accident. We make the case easy for ourselves if we stipulate that you do not know which of the children has parents. In that case, for each child you wrong *whoever loves the child* (supposing that the loving relationship is the ground of the wrong—if it is something else, we can reformulate the previous wh-clause in the relevant way). This indefinite right-holder stands in the same place in your deliberation, regardless of who fills it. It just so turns out that, if you kill the girl, nobody satisfies the wh-clause.

How should we think about the harder case—the case in which you know that the boy has loving parents and the girl has none? Here the epistemic formulation of the previous paragraph should be understood as an attempt to articulate the considerations of generality that really bear on contractualist deliberation. In thinking about whether to undertake some risky course of action, what weighs on deliberation, apart from the complaints of those who are directly hurt by the action, are the complaints of whoever stands in the appropriate loving relation to those who are directly hurt. These complaints are held by indefinite people in the case of both boy and girl, so that their positions in deliberation are equal—even though ex post it turns out that there are two people who satisfy the indefinite description in the boy's case, and none in the girl's.

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The question is why we should think deliberation should take this general form in a case like this in which you know exactly who stands to be harmed. The main reason, I think, is egalitarian: the generality of this way of thinking is demanded of moral deliberation precisely because it is a way of maintaining the equal standing of the potential victims of your action. For certainly it could have been the case that the girl had more loving parents than the boy does, and it seems unfair to treat the girl worse just because of an accident of her history. Doesn't this mean that we don't really think that the parents are right-holders, since we are not giving them a determinative place in deliberation? No—it is a familiar feature of rights that they sometimes stand in relations of lexical priority, and it should be unsurprising that the parents' rights are of a lower priority than those of the children. What should be more surprising is Cornell's assumption that the parents' rights should play a tiebreaking role, for this threatens to collapse our thinking about rights into a kind of aggregative thinking that is incompatible with the priority of rights.

What we are doing here should be familiar from the defense of **Hohfeld**: using the strategy of abstraction to show that correlativity can be preserved once we calibrate rights and wrongings by formulating them with the requisite degree of generality. Doing so requires in the case of Cornell's cases requires an extra move. While rights and directed duties are correlative normative instances at a particular moment in time, rights and wrongings are often formulated at different moments: a right can be ascribed in advance of it being violated. A wronging is typically ascribed only after violation of a correlative right. Cornell's cases involve ascription of wrongings in definite terms, which seems to require a correlative definite right, running into the problems he mentions. But we could just as well formulate them in indefinite terms. In *Overheard Lie*, *you* are the one who is wronged, but really it is in virtue of fitting the indefinite description *whoever was reasonably foreseeably wronged by the lie*. And so on for the other cases.

What I am proposing is that each of Cornell's examples can be squared with **Bentham** once we acknowledge that they involve indefinite entitlements. That is, each case involves a right on the part of an unspecified person. Given our practical bias against thinking in terms of unspecified persons, it is fairly easy to go along with Cornell's thought that there either is nobody who could be the right-bearer, in a case like *Lottery*, or that there would have to be a large number of people, indeed too many people, who would have the right in cases like *Overheard Lie* and *Fireworks*. But that thought can and should be resisted. It can be resisted because in each case the unspecified right is available to explain the grounds of the wrong, and it does not result in an unnatural proliferation of rights. And Cornell's judgments should be resisted not just because they disturb the pleasing conceptual elegance of **Bentham**, but because they leave us without a way to explain why there is not just a wrong but a directed wronging in each of the cases.

My judgments about each of Cornell's three cases are shared by Jay Wallace in his discussion of Cornell's view.[34] As he points out, in each case "the details that would make it plausible that a third party is wronged through the agent's action would also provide a basis for an antecedent claim or right that is assignable to

[34]Wallace, *supra* note 18, at 192–200.

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that individual."[35] Yet Wallace also allows that there may be cases in which Cornell is correct that there are wrongings without correlative rights—though he does not specify which cases these are. Perhaps this is because Wallace's aim is to defend the idea that all interpersonal morality can be understood within the relational framework, so that it is more important to him that we not deny that some duties are directed than that we save correlativity (since, as we saw in the previous section, Hohfeldian correlativity may come at the cost of denying that duties of friendship are correlative).

In conceding the possibility of some Cornell cases, Wallace suggests a way to understand them within a relational framework, though he explicitly withholds judgment about whether it is correct. Cornell himself thinks that wronging requires that someone's right has been violated, though not a right of the one who has been wronged. Wallace understands this structure in terms of the idea of a *secondary claim*: someone who is wronged by a right violation has a secondary claim not to be harmed by the rights violation of another. This, he further suggests, can be understood in contractualist terms. One who stands to be harmed by an action that is morally wrong has personal reasons to complain about the action. This complaint, if it can be the basis for reasonably rejecting the action, is a secondary claim in virtue of which the complainant would be wronged by the action. But the agent of the action cannot counterpose their own reasons for acting against such a complaint, since the action is already (as stipulated) morally wrong. So the secondary claim stands and is the basis of a wronging.[36]

Why should we not think that the secondary claim is itself a right? Wallace points to two ways in which secondary claims differ from rights: (i) they do not serve to indicate to whom the wrongdoer is ex ante accountable, since they are not ex ante identifiable; (ii) they do not serve to indicate what the claim-holder is in a position to ex ante demand from the wrongdoer, since it is unclear whether a particular claim-holder would in fact be harmed by the agent's wrong. To illustrate these points, consider again *Overheard Lie*. It is, presumably, unclear in advance that *you* will need to cross the South Bridge, so that at the time that your coworker tells the lie, it is unclear first of all that he is accountable to *you* in terms of a secondary claim. And it is unclear that *you* could demand that your coworker not tell the lie, since we cannot know in advance that you will be harmed by overhearing it.

Notice that if these points about *Overheard Lie* are correct, they tell against not only your having a right, but also against your having a secondary claim against your coworker's lying in public. For the secondary claim is grounded in your complaint against the harm to you that is caused by the overheard lie, but we cannot know in advance of the lie that you will in fact be harmed by it. I've put this in epistemic terms—whether we know you will be harmed—though I doubt this is the correct way to understand the contractualist formula. But the epistemic formulation is the most convenient way to put what is really a consideration about generality. When thinking about whether your coworker may lie or not in public, we should consider the generic reasons that ground complaints against the lie. This means considering not whether *you* have personal reasons to complain about being harmed, but

[35] *Id.* at 196.

[36] *Id.* at 197–198. I think there's an interesting question about whether there is some double counting involved in this line of argument.

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whether someone in the relevant position, i.e., someone who is reasonably foreseeably harmed by the lie, has reason to complain. The indefinite person *whoever overhears the lie and is reasonably foreseeably harmed by it* does have such a reason. But now it seems that their complaint is no longer secondary in the way that Wallace has in mind. In particular, it does not differ from a right in failing to identify to whom the wrongdoer is accountable ex ante, and what the claim-holder may ex ante demand. The wrongdoer, your colleague, is accountable to whoever overhears the lie and is reasonably foreseeably harmed by it, and that person may demand that he not tell the lie. So we should simply say that this indefinite person is the holder of an indefinite right. This line of thinking seems to me replicable in all cases with the structure of Cornell's cases, making Wallace's concession too quick.

III. Abstraction and Explanation

We have considered three degrees of abstraction when it comes to rights and other entitlements: general (as opposed to particular) entitlements, unspecified (as opposed to specified) entitlements, and indefinite (as opposed to definite) entitlements. These suggested an error theory for apparent counterexamples to **Hohfeld**: whereas we find it relatively easy to make abstract statements of right, since we can often put an abstract noun in the subject place, we have a practical inclination against doing the same with respect to statements of duty, since statements of duty are statements about what one ought do. The idea of an abstract entitlement also helps vindicate **Bentham**, since the apparent counterexamples generated by Cornell all rely on the thought that there are either too many or too few people available to qualify as right-holders. But the idea of an indefinite entitlement helps avoid this apparent problem. Often enough the holder of a right is not some number of definite individuals, but an indefinite individual, which is to say someone whose particular identity goes unspecified.

General and unspecified entitlements typically require abstraction in the direct object of the entitlement, and this is easy enough to grasp. But indefinite entitlements require abstraction in one of the argument places reserved for individuals, and this may seem more troubling. In particular, it may seem metaphysically troubling insofar as it requires that we furnish the world with not just individual people, but indefinite people. I have not spent much time responding to this sort of worry, partly because I am not sure whether there is a problem with being metaphysically expansive on this count, but mostly because I did not at any point existentially quantify over indefinite people, but only over indefinite rights. In a case like *Immigration Trap*, I said that X has a duty not to injure whoever crosses the border (and that whoever crosses the border has the correlative right) even if nobody crosses the border.

I mention this metaphysical point in concluding because it points toward an open question: does the strategy of abstraction tell us anything about the explanatory dimension of rights theory? The interest and will theories of rights can be understood as explanatory theories in the following way. The interest theory seeks to explain that S has a right against T that T ϕ by showing that S's right protects some interest of S (perhaps by showing that the interest is enough to justify T's correlative duty).[37] And

[37] *E.g.*, Raz, *supra* note 4, at 195.

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the will theory seeks to explain S's right by showing that it is an aspect of her agential powers (perhaps by showing that giving S certain powers to demand satisfaction of, or waive, a correlative duty on the part of T is justified by the value of S's agency).[38] Understood in this way the theories are more ambitious than definitions giving the extension of attributions of rights, since they also make claims about what explains or grounds the rights. Abstraction may cause trouble for this sort of explanatory project if it does not make sense to think that indefinite right-holders have interests of the kind that feature in the interest theory, or that they cannot hold or exercise agential powers of the kind that feature in the will theory. I suspect that both interest and will theories will have plausible responses to this sort of concern. But I will leave off trying to articulate those responses because they will rest on complicated arguments about whether grounding a right in an aspect of an indefinite person requires existentially quantifying over indefinite persons, and whether existentially quantifying over indefinite persons is problematic.

What, then, have we achieved in defending correlativity by introducing the strategy of abstraction? Defending correlativity is itself desirable because it provides a conceptual framework for understanding rights. If normative theory is to be helpful to our normative decision-making, then it will surely be because our normative concepts are not irredeemably fragmented and incomprehensible, so that normative theory can provide a logically rigorous way of deploying normative concepts. Perhaps then Hohfeld's table and Bentham's correlativity, insofar as they can be defended, should be seen as the first glimpse of a periodic table of such a normative theory. But perhaps this entire project is misguided, reducing the messiness of our normative lives to a theoretical project that does not accommodate it. I don't really know which is more plausible. But finding out whether correlativity is defensible is an important step toward finding out what sort of conceptual rigor we can expect from rights talk. The open question I point to above suggests that the defense will rest not only on the logic and semantics of rights ascriptions, but also on metaphysical issues that I have not fully explored here.

There is a second implication of abstraction for the normative project of explaining what rights and duties there are. This implication is easiest to articulate if we suppose that the interest theory is the correct explanatory account of rights, though the implication seems to me to have wider scope. The implication is that the justification of rights and duties is sometimes to be given in fairly general terms, i.e., referring not to a particular context and a particular person, but to some general set of circumstances in which the identity of the relevant parties is somewhat unspecified. This idea might seem to be in tension with the line of thought that views rights and directed duties as distinctively relational normative incidents, and distinctively relational in the sense that they put individuals in some normative relation as if "current is passing between opposed practical poles."[39] We see this thought reflected in claims

[38]That would explain why rights are "spheres of practical choice within which the choices made by designated individuals . . . must not be subjected to interferences." Hillel Steiner, *Working Rights*, *in* A Debate over Rights 233, 238 (Matthew H. Kramer, N.E. Simmonds & Hillel Steiner eds., 1998).

[39]Michael Thompson, *What Is It to Wrong Someone? A Puzzle About Justice*, *in* Reason and Value: Themes from the Moral Philosophy of Joseph Raz 333, 346–347 (R.J. Wallace, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004).

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that what it is to owe a duty to someone is for that someone to appear "on [one's] moral radar."[40] I don't think this line of thought is mistaken, but rather that it is easily misleading insofar as it suggests that the relational normative incidents put us in relations that are personal in the way that friendship and romantic relationships are.

Indeed, the generality of some rights justifications is an important part of deontological theory. Without it, we face a puzzle about what David Owens has called "bare wrongings."[41] Suppose that the owner of a house has a right against trespass, and that the right is justified by various considerations of the owner's privacy, autonomy, and wellbeing. For example, the owner may well object to a burglar who enters the house not just on the grounds that they have a right, but on the grounds that justify the right: the burglar intrudes on the owner's privacy, restricts her freedom to use it as she wishes, and makes her worse off by removing or destroying parts of the property. But now consider Owen's example of a trespasser who walks with plimsolls across the owner's lawn at 3 a.m., without intruding on her privacy, or restricting her autonomy, or making her worse off.[42] Intuitively she violates the owner's property right and so wrongs her—but it is a bare wronging insofar it does not set back any of the interests that justify the right.

It is because of cases like this that Scanlon introduces the idea of a generic reason into his contractualist theory.[43] Summarily put (and a little too crudely), contractualist deliberation compares the reasons that various people have to object against one's alternative courses of action. But some of these reasons are generic, which is to say that in the case of the 3am trespasser, these are not reasons that the particular owner has, but the reasons had by some generic owner—the representative person with the relevant interests in a generally described version of the case. Similarly, the duty to keep one's promise rests on the promisee's interest in being assured that one will do what one says, but the actual promisee's interest in assurance will not be set back in many cases of promising. Yet the duty to keep one's promise is stable across many such cases because it is justified not by the particular promisee's interest in assurance, but the interest of a generic promisee.[44]

Scanlon does not give us a full explanation of the genericity of contractualist reasons, but the basic idea is one that is clearly consistent with the strategy of abstraction. We can think of rights either as inputs into deliberation, or outputs.[45] In both cases, abstractly formulated rights seem to have a close connection with generic reasons. Suppose that the right of whoever crosses the border against being harmed is an input into a deliberative line of thought that results in the conclusion on the part of X that he should not set a trap. Here we can cast the indefinite right as a kind of generic reason, since it is not a reason of any particular person but rather of the relevant position in some generically described scenario. That would mean that X should focus not on particular features of actual people who cross the border (who

[40] Adam Kadlac, *Does It Matter Whether We Do Wrong?*, 172 Phil. Stud. 2279, 2282 (2015).

[41] David Owens, Shaping the Normative Landscape (2012).

[42] David Owens, *Property and Authority*, 27 J. Pol. Phil. 271, 279 (2019).

[43] T.M. Scanlon, What We Owe to Each Other (1998), at 189ff, esp. 204–205.

[44] I have tried to reconstruct this argument in more detail in my *Contractualism and the Direction of a Duty*, 25 Legal Theory 200 (2019).

[45] Kurki, *supra* note 2, at 435.

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might vary in whether they have family, are more or less vulnerable to pain, more or less quick witted in escaping traps), but rather the abstractly described person who is simply in the position of crossing the border and all of their generic features. Suppose on the other hand that the right of whoever crosses the border against being harmed is to be understood as an output of deliberative thought. Then we should ask what sorts of reasons could possibly justify it. Not the reasons of particular people who cross the border—there may be none. Rather, the generic reasons of those who could conceivably cross the border. This justifies the right in roughly the Scanlonian contractualist fashion—we think about the kind of situation in which the right might be relevant, describe the potential right-holder in generic terms, and then consider the generic reasons that there might be in favor of thinking there is such a right.

Questions about this abstract form of deliberation loom. How generic are the reasons to be considered in contractualist deliberation? Correspondingly, how abstract are the rights that are the output of such deliberation? Surely the degree of appropriate abstraction will vary with circumstances and will be a product of normative thought, i.e., of considering whether particular or general reasons matter for deliberating in a particular context. Perhaps when we think about property and promises we should think in relatively generic terms because the kinds of interests that are protected demand a kind of "opacity respect,"[46] or because they are aspects of the private and internal life of the right-holder that present epistemic challenges for more particular deliberation, or because the interests only make sense in the context of general practices. Perhaps when we think about reasons to benefit we should think in relatively more particular terms because it is an important part of the moral value of beneficence that it is guided by the features of the particular benefactor. I don't know. My point is only that the strategy of abstraction, and therefore the project of defending correlativity, give rise not only to metaphysical questions, but also to substantive questions in normative theory. Perhaps this fruitfulness is a sign that defenders of correlativity are headed in the right direction.

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[46]Ian Carter, *Respect and the Basis of Equality*, 121 Ethics 538 (2011).

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